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Case No: CR-2016-006102

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT ENGLAND & WALES
COMPANIES COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29/05/2019

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

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Between:

ANDREW MICHEL	**Petitioner**
- and -	
(1) BENJAMIN MICHEL **(2) RICHARD MICHEL** **(3) L KAHN MANUFACTURING COMPANY LIMITED**	**Respondents**

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- -

ALASTAIR TOMSON (instructed by **CHARLES RUSSELL SPEECHLYS LLP**) for the **PETITIONER**
JUSTINA STEWART (instructed by **HUGHMANS SOLICITORS LLP**) for the **RESPONDENTS**
Hearing dates: 3 July-11 July 2018

ALASTAIR TOMSON (instructed by **CHARLES RUSSELL SPEECHLYS LLP**) for the **PETITIONER**
STUART ADAIR (instructed by **SBP LAW SOLICITORS LLP**) for the **RESPONDENTS**

Hearing dates: 8-16 May 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

Chief Insolvency and Companies Court Judge Briggs:

Introduction

1. On 28 September 2016 Andrew Michel ("Andrew") presented a petition pursuant to section 994 of the Companies Act 2006, claiming that the affairs of a private manufacturing company had and continue to be conducted in a way that is unfairly prejudicial to him. Andrew seeks an order that his shares be purchased by the Respondents at fair value alternatively he seeks a winding up order on just and equitable grounds. He claims that a fair value should be determined on a non-discounted basis at £3,931,407.30. The Respondents deny the allegations of unfair prejudice but in any event say the shares are worth half this value.

2. L Kahn Manufacturing Company (the Company) operates from a property it owns in Hatfield and it owns (subject to a dispute raised by Andrew) the entire beneficial interest in CKC Manufacturing Holdings Ltd (CKC Holdings), which in turn owns 100% of a Chinese company, CKC Manufacturing (AH) Co Ltd (CKC). In addition, the Company owns a 30% shareholding in Caressa Kemas (Shanghai) Industrial Co. Ltd, a Chinese company (Muyazi), with which it has a joint venture. The Company employs 70 people in Hatfield, and approximately 60 employees work for CKC.

The Family

3. In or around 1932 Helmut Michel founded a business in London that manufactured cosmetic applicator products. Helmut is Andrew's father. In his witness statement in support of the petition Andrew explains the family tree:

   "My parents are Helmut Michel (who passed away in 1986) and Juliet Rudolph (who passed away in 1991). I was born in 1950. I have 3 older siblings: Benjamin ("Benny") Michel (born in 1945) Caressa ("Wendy") Michel (born in 1942) and who passed away in December 1998 and Aubrey Michel (born in 1943). I also have a half-brother, John. John is the son of my mother from her first marriage. After the war, my father adopted John officially and John took the Michel name. John went on to marry and have two sons, Richard (the Second Respondent) and Philip".

4. Caressa was also known as Wendy and Aubrey was also known as Bobby or Robert. I shall refer to the family members by their first names.

The Company

5. Richard, whose version of the family history does not differ dramatically from Andrew's, explains that the Company has a rich history. Helmut was born in Germany to Jewish parents. When he was 16 his father died, and as the eldest child he was expected to leave school and work to support his family. Fulfilling the expectation, he went to work for his uncle, Leopold Kahn, who owned a factory in Mannheim called Caressa. He developed a close relationship with his uncle. In 1931 when aged 26, his uncle advised that given the prevailing political situation and the state of the German economy he should seek employment outside of Germany. He borrowed £400 from Leopold and travelled to London where he took a small shop premises. Before long he began manufacturing. The factory was situated in Kilburn, London and called L Kahn (after his uncle) but the business also traded under the

name of 'Caressa'. In 1937 Juliet Rudolph, a Swiss national, travelled to England in search of employment and worked for Helmut. In around 1939, concerned about what was happening in Europe, Helmut brought his younger brother, also called Leopold, who was working in Palestine, to London with the rest of his immediate family. Leopold was conscripted into the British Army when war was declared against Germany. Leopold survived the war and returned to work with Helmut.

6. The business started to grow, and towards the end of the Second World War Helmut purchased a site at 527-539 Harrow Road and transferred the factory from Kilburn to the new site. The house in which the family lived had been bombed during the war and so the family moved to live in the factory that continued to manufacture. Although the business was manufacturing cosmetic products, Helmut turned his skills to manufacture, parachutes and developed the "Michel lip". Andrew says that the "Michel lip" design saved many soldiers' lives.

7. After the war, the business worked on fashion items, such as handbags. Leopold was made responsible for the production facility at the Harrow Road site. In his evidence Andrew says that the handbag business was carried on under the name L. Kahn. The Company also traded in cosmetics such as powder puffs, but in the early post-war years the handbag business comprised the greater part of the turnover. In 1950, the business was incorporated under the name of L Kahn Manufacturing Company Limited. Helmut and his brother Leopold, were the original shareholders, subscribing for 1 share each. By August 1976, the share capital of the Company had been increased to 70,000 shares of £1 each, which were held by various family members. In or around 1956, the Company opened another factory, in Hatfield, where the main factory premises remain today. Mrs White ran production in Hatfield.

8. Helmut split his time between Hatfield and the Harrow Road site (sometimes referred to as the London site in evidence). Helmut was highly motivated with high energy, had a taste for invention and continually developed new products. When it became hard to compete in the handbag industry he turned to weaving, installed looms in the Hatfield factory and pioneered colour nylon watch straps. He was also a great observer. Andrew tells the story of Helmut visiting America in the early 1960s. He observed flocked products and immediately perceived the advantage that flocking could have in the powder puff industry, which until then had used velour or swan's down. His American experience inspired him to design and create the flocking machine which Andrew believes was the first of its type in the UK and possibly Europe.

9. His high energy and ideas made him an obvious leader in the Company, assuming control of sales, dealing with the finances and business strategy. Andrew described him as a visionary. Richard said he was motivated by hard work, a desire to treat employees fairly and family. It is clear from the evidence of Aubrey, Richard and Andrew that Helmut was held in the highest regard as a parent, grandparent, entrepreneur and worker. Each witness gave evidence in a manner that made it clear that Helmut was an inspiration and role-model. I had the distinct impression that by measuring themselves against Helmut each family member felt they fell short.

10. Aubrey joined the business from school, and soon found his niche in sales. Andrew describes him as a "natural salesman". Mr Dunkley, the CEO of Synlatex Limited

(SLG) a manufacturing competitor described Aubrey as "a very charismatic chap, incredibly knowledgeable". A separate partnership formed in the 1970s to act as a sales arm for European sales for the Company. The members of the partnership included Aubrey, Benny, Andrew and Wendy.

11. Helmut and Aubrey formed a relationship with Yukigaya, Kemas, Keumi, and the Thai puff company. The relationship spawned a new set of products which were to be sold in Europe: cosmetic sponges and brushes. A new chapter for the Company was opening and an agreement was reached whereby the velour puffs would be produced off-shore to take advantage of less expensive labour costs. Aubrey grew in prominence and influence in the Company. It was not inevitable that Andrew would work for the Company since when younger he tried to make a success of his own enterprise. The success was not forthcoming, and Andrew was placed in the accounts department at the Company. He was not an accountant but held a Maths and Business Studies degree.

12. Aubrey's rise was perhaps timely as Helmut died in 1986. Aubrey assumed control. Aubrey could not do all that Helmut had done. He says in his witness statement that he ran the Company together with Benny and Wendy. I have no doubt that Benny played a role, but it was Wendy to whom Aubrey looked. He relied on her heavily calling her his "loyal confidante", his "business partner" and the "rock of the business". Wendy was, by all accounts, calm, thoughtful, providing measured business decisions and added balance to Aubrey's sales flair. It was around this time that Richard joined the business and soon after Theresa Pattenden joined. Theresa would later play an important role in the Company. Richard brought a new dynamic. He is an unassuming man with an engineering background. He had worked in the business on and off, as nearly the whole family had, as a child and young adult, but it was during this period that he joined on a full-time basis. Helmut left the Company in good shape. Its customers included major cosmetic industry players such as Max Factor, YSL and Chanel.

13. Tensions were strained between Aubrey and Andrew by the early 1990s. Perhaps they were always strained. Meetings were called by Aubrey "to discuss irregularities" in the accounts department as a result of a theft by one of the employees. Aubrey announced that the accounts department should be reorganised and relocated to Hatfield where the only two directors (Aubrey and Benny) were located. Andrew was not a director. Richard was in the same position as Andrew and was not a director. A move would have meant that Andrew would have to travel from London each day to Hatfield. Aubrey said that there would be better communications between the accounts department if it were relocated. Andrew explained that all the records would have to be moved and it would be wise to move the bank to a local branch. Andrew was not keen on moving. Aubrey accused Andrew of "totally unacceptable management performance" such as failing to prevent theft and playing a radio in his office. A follow up letter warned Andrew that he may be made redundant if he did not move within a three-week period. Soon after Andrew was suspended.

14. On a separate occasion Aubrey and Wendy reorganised the workspaces and forbade Andrew from having his own desk in the office (they did not want to treat him differently from all other staff). This led Andrew to write to Benny asking why he did

not support him against Aubrey and speak out against "pettiness and vindictiveness". Andrew conceded, moved to Hatfield and lost his desk.

15. Aubrey could be viewed as abusing his position by forcing the issue and acting in a confrontational and unreasonable manner. On the other-hand Aubrey had identified that there were difficulties in the accounts department that led to day to day errors and Andrew was failing to take instructions. This affair represents a microcosm of the petition and its defence. Each family member had strongly held views as to who was responsible for the mistakes, whether Andrew should be held to account for long term planning and financial control, and where fault lay in respect of the accountancy package having not been updated for a number of years.

16. Sadly, Wendy suffered from cancer and died in 1998. Having seen Aubrey in the witness box many years after the event, it is easy to see that her death had a devastating effect on him. He said that he found it hard without her and, that he was not at his best in the period that followed her death. She was clearly a highly regarded work colleague and attracted great affection from those who knew her. The accounting information suggests that Wendy may also have been important to the prosperity of the Company as her time in management coincides with a period of financial stability. In her Will Wendy left the majority of her shares to Richard. This came as a surprise to Richard as well as to the other members of the family. Given her character as explained to me, it was no accident that Richard received the lion share of her shares: she left 10,000 to Richard and 2,501 to each of Benny, Andrew, and Robert (Richard's brother).

17. A shareholder meeting was held in late October 1999. By this time Wendy's shareholding had been redistributed in accordance with her Will. Andrew's note of the meeting records that Wendy "always had a strong say in the way the Company was run. Believing in an opposite approach to the Company's managing director which I feel gave the company quite a balanced approach to the marketplace, the general economic situation and the motivation of the company's staff." His note continued that it "had become obvious now that something has to be done to rescue the Company and limit the damage that is being caused to it." His note was aimed at undermining Aubrey.

18. At a shareholder meeting held on 8 November 1999, Richard and Andrew were appointed directors of the Company and Aubrey resigned as chairman and managing director. The outcome of this meeting had repercussions for many years. I shall deal with it and the repercussions in more detail later.

19. In 2001 Barbara Hunt joined the Company. She has played an important role in the Company since and is now a director. The written evidence of Andrew is that for the first few years after Aubrey's departure he and Richard worked closely to save the Company from going into an insolvent position. The Company introduced invoice factoring for the first time and refinanced loans. On Andrew's version of events he was essential to the Company at a time when he says Richard struggled with depression. The fact of Richard's struggle with depression was contested. Richard accepted that he found stress debilitating at times, but that Andrew exaggerated the illness for his own purposes. Andrew says that Richard left it to him to travel abroad attending marketing events and seeking out opportunities.

20. By 2004 the Company was still manufacturing flock foam in the UK and continued its association with the Korean company to manufacture brushes. Eyeshadow applicators were produced in the Far East. The Company also began an affiliation with a businesswoman known as Mrs Mu in China. Theresa was heavily involved in this process and travelled to China with Andrew to consider the viability of working with Mrs Mu. Her first-hand evidence, which was not undermined during the course of the trial, is that the idea was to invest in China and to do so by way of a joint venture between the Company, Mrs Mu (or a Chinese company she controlled) and an Indonesian company called Kemas (controlled by Ladjuar Dinata). This came to fruition and the various partners of the joint venture incorporated and invested in a company known as MYZ.

21. MYZ established a factory in China. It was to manufacture the products in which the Company specialised but at less cost. Theresa's evidence is that the intention was that each of the three partners to the joint venture was to bring specific regional expertise and order products from MYZ to be sold in their region. Mrs Mu's expertise was in China and it was expected that she would be able to generate sales from, and orders in relation to, the domestic Chinese market: "the same was expected to happen in relation to Kemas/Ladjuar, who was to target the Japanese market. The Company's role was to target the western world".

22. The MYZ venture did not reap the anticipated benefits that had been hoped for. Schisms began to open up due to issues that the Company could not ignore, such as failing to use an agreed list of suppliers and a communication break-down. This led to distrust. In or around 2010 the Company decided upon a different sort of Chinese relationship, separate from Mrs Mu. The aim was to safeguard the Company's position and customer orders. Controlling its own manufacturing plant would help to achieve these aims. The Company had to obtain an entity that could hold the plant and employ people. This led to the incorporation of a separate the Chinese registered company, CKC.

23. Incorporation of the manufacturing company was not straight forward because the Company had concerns about Mrs Mu and her ability to disrupt the Company's business if she thought it was working against her. Accordingly, CKC needed to be established without it being obvious that it was associated with the Company and without fanfare. The Company employed outside consultants to assist. One idea was to incorporate a company in Hong Kong which would then hold CKC. HW Fisher produced a report in September 2010 and floated the idea of an English holding company, the shares of which were to be owned in law by Barbara and Theresa. The Company's financial controller at the time, Mukesh Raja, sent an e-mail "Self explanatory! In essence CKC UK holds shares directly in CKC China! No HK company". The shares in CKC UK were to be held by Barbara and Theresa on trust for the Company and CKC UK would hold the entire share capital of CKC. Richard's evidence is that this structure was deliberate and everyone acting in the management of the Company knew about it at the time. Barbara and Theresa gave evidence to say the same. Andrew was not informed because of a concern that he may leak the information to Mrs Mu. It is the undisputed evidence of Richard and Barbara that the Company took advice about the structure from Mukesh Raja (the in-house accountant), Mandarin Consultant, Grant Thornton, and HW Fisher & Company (accountants) and all agreed.

Benny and Andrew depart

24. Benny did not attend trial to give evidence but there is no dispute that he stepped down from his day to day role in the Company in early 2004. He continued as a de jure director and the evidence supports the view that he continued to work for the Company after 2004 on an ad-hoc basis. The Company agreed to pay him a salary until he reached the age of 65 albeit that his salary was reduced, and he lost the benefit of a company car.

25. About a year later Andrew also agreed to step back from the Company. Andrew's position, however, was very different to Benny's. One of the main issues to be resolved is the terms upon which Andrew agreed not to participate in the Company. Andrew claims that there was an oral agreement with Richard, that was approved by Benny in late December 2005, before the Company shut down for Christmas. The terms of the oral agreement, according to Andrew, were based upon his agreement to physically stay away from the Company's premises. Andrew would continue to work for the Company on certain projects but importantly be director in control of the Company's finances. The Company would be further obliged to provide Andrew with a full-time director remuneration package. In addition, it was agreed that the Company would be restrained from exercising its powers to remove Andrew as director for as long as he remained a shareholder. Richard and Benny argue that the only agreement made in late December 2005 was that Andrew would not return to work in January 2006.

26. Andrew's case is that by March 2006 Richard and Benny reneged on the 2005 agreement (the Agreement) by refusing to hold monthly meetings, ousted him from the post of officer in charge of finance, and refused to permit him to see any of the Company's financial documents.

27. Andrew remained a de jure director of the Company, but it is accepted that he carried out no work in the period 2006 to 2015. In late 2014 Barbara informed Andrew that the Company wished to change its bank to Lloyds. Lloyds offered better rates. Andrew believed that he had discovered a cover up; that the Company was seeking to borrow a substantial sum secured against the Company's property thereby reducing the value of its assets. He instructed a solicitor to write to the Company seeking further information. At first the Company refused but relented at the end of March. The purpose of the loan remained, he says, obscure. It is apparent from the evidence taken as a whole that the Company was looking to pay down debt owed to creditors and save money by borrowing at lower rates. The Respondents' position is that Andrew was more concerned about his own position than that of the Company's and was trying to be difficult.

28. A board meeting was called on 18 February 2015. Andrew was invited but due to a timing issue missed the meeting. At the meeting it was resolved that the Company would move its banking facilities to Lloyds bank and enter into a facility to borrow £1m; Andrew's employment would be terminated from his 65th birthday on 18 March 2015; Andrew would be invited to resign as director, and if he declined he would be removed. Consideration was given to other benefits he received.

29. Andrew did not accept the invitation to resign as a director. An extraordinary meeting was called on 2 April 2015 and Andrew was removed.

The witnesses

30. I heard evidence from Andrew, Brett Lamont, Miles Dunkley, Aubrey, Philip Michel, Richard, Barbara Hunt, Teresa Pattenden. Benny and John Rochman provided witness statements. Benny was not well enough to attend trial. John Rochman (who I shall also refer to as Mr Rochman) did not attend. The night before he was to be called to give oral evidence his written evidence was accepted as read.

31. Andrew knew the papers well. In my view Andrew is a complicated character who displayed many contradictions. At times he gave the impression that he was choosing not to elaborate to ensure that his answer did not disclose the whole picture. On numerous occasions he would answer a question put by Miss Stewart (then acting for the Respondents) by repeating the body of the question: "you were in charge of finance"? "I was in charge of finance", and evading the essence of the question: "And this was but one example of the day-to-day problems that Aubrey was experiencing with you in the accounts department, in your role as running the accounts department?" Answer: "Aubrey worked in Hatfield, I worked in London, there was not a day-to-day communication about the accounts department." He has been described as manipulative by a number of witnesses and someone who would "twist the truth". His performance in the witness box did little to displace the descriptions. I will find his recollection of some facts mistaken and wrong.

32. Initially he came across as careful and cautious in the witness box, no doubt an impression that he wished to give. He expressed concern to ensure that the Company operated within its means, he did not like the Company to borrow money or make sudden outlays of money without justification. Yet this impression soon gave way to a different impression of Andrew when it became apparent that he failed to comply with Company procedures such as properly completing invoices for L'Oréal based in Little Rock. This carelessness directly led to non-payment of the invoices jeopardising the Company's cash flow.

33. He stands accused of under-pricing some products that led to years of the Company making little or no profit on those articles. The evidence against him is that he was an explosive and unpredictable character who managed to distance those who worked with him and jeopardised a critical business deal. His brother characterised him as "lazy and manipulative". Brett Lamont was Andrew's only ally in these proceedings. His evidence was that Andrew was not lazy and had the best interests of the Company at heart. His evidence contradicted the evidence of his brother Aubrey. There was disagreement as to what was in the best interests of the Company at any particular time. However, even his ally admitted that Andrew would prefer to "jump through hoops" and avoid process "Unlike Andrew, I am a more structural man. I do not like to jump hoops."

34. The accusation of his manipulative personality can, in part, be borne out by the correspondence. When Andrew "stepped-back" (a phrase often used) from the Company he wrote to Richard suggesting that he would not communicate in writing again. Richard gave evidence in cross-examination that he thought it important to get

Andrew to put things in writing "so he couldn't change his story as and when it suited him". Yet Andrew did make demands following his memo and communicated those demands in writing; the demands were premised on conversations had with Richard and purported to reflect an agreement made between them. Contrary to the cautious impression Andrew gave, such an agreement was not reduced to writing; and the evidence taken as a whole mostly contradicts Andrew's version of events.

35. Letters sent by Andrew after a meeting stated that an agreement had been reached to the advantage of Andrew where in fact no such agreement had been reached. He sought to express in terms a purported agreement made with the Company regarding such things as his benefits and retirement age for the period after he stepped back from acting in the role of director. An example of Andrew's manipulation comes in the form of an e-mail sent to Richard on 2 February 2006 "You have my backing because there is no alternative, but I am extremely concerned because you are financial inept…(sic)". Yet the e-mail written by Andrew did not represent the truth. The unchallenged evidence of John Rochman is that he had advised Andrew that he did have an alternative, and that it was open to Andrew not to back Richard. According to Mr Rochman, Andrew never explained why he had "no alternative". Richard did give Andrew an alternative: that Andrew take over as managing director. It is no answer that Andrew wanted the "next generation" to run the business: the evidence is that he thought himself not up to the task. If Andrew had really thought Richard incompetent and capable of undermining the Company's finances, he could have taken the reins, or simply asked for his shares to be purchased in 2006. I infer that by the e-mail I have mentioned above Andrew was seeking to undermine Richard with the two negatives he expressed, namely that Richard was the only option (if a better option had been available that would have been preferable), and that Richard was financially inept. In my judgment his style of answering questions was deliberately deployed to shut out the whole truth, and his attempts to manipulate lead me to conclude that his evidence should be treated with caution.

36. Brett Lamont gave robust evidence. He agreed that he had had many disagreements with Andrew but batted them away. He explained that Andrew could be difficult to work with because he never shied away from asking "the hard questions" and would not be bowed by pressure or afraid to speak out. He gave strong evidence about his relationship with Richard emphasising that if he disagreed with Richard as to a particular course, Richard would not like it, and he refuted the accusations Richard had made about his laziness. His written evidence is that Andrew is a "likable and charismatic man", that he is "highly competent, passionate about his role in the Company and excellent on the sales and marketing side and with customers." In his oral evidence he thought that Andrew and Richard clashed about the direction of the Company and that Richard would not listen. From his perspective Richard and Andrew both wanted the best for the Company but had different ideas. Much of Brett's evidence was based on his opinion of Andrew and memory alone. His evidence was mostly consistent (within his range of knowledge) with the written evidence given by Andrew. He could not give evidence about the Agreement. As the distance in time between the events in question and trial is great, I shall prefer the documentary evidence. His view of the dynamic between Richard and Andrew has a kernel of truth.

37. Qin Feng gave evidence on the fourth day of trial. He is the general manager of CKC in China. His evidence is that CKC is owned by the Company and the Company is CKC's sole customer. Andrew had put in issue whether CKC was owned by the Company. His evidence was not undermined in cross-examination.

38. Philip Michel is the brother of Richard and nephew of Andrew, Benny and Aubrey. He currently works as a personal trainer but has worked for the Company on and off over many years, never fulfilling a specific role. In his written evidence he says that he has worked one day a week for the Company since 2006 and does whatever Richard asks of him. He said in oral evidence that he was aware that Richard was having some stress related therapy and that he worried about his health. Having seen Philip in the witness box I have little doubt that he cares deeply for his brother and wishes to protect him where possible. He said that he did not know Andrew well, but was aware that Andrew and Richard had fallen out. He e-mailed Andrew in 2007 and facilitated a meeting. His motivation was to heal wounds. There is a letter written by Richard soon after the meeting which was held in February 2008. Philip remembers Andrew expressing his view that Richard had ousted him from the Company and that he was concerned about his income. Philip recalls that Andrew had told the meeting that he wanted to be paid until he was 70. Philip says that he and Benny were not happy with the proposal: Benny was not happy as he was in a similar position, having "stepped back" from the day to day work at the Company only a year before Andrew. He had agreed to a reduced income; Philip was not happy because he thought Andrew was asking for something and giving nothing. If he was not working for the Company, he should not receive the financial benefits of a full-time worker. Richard wrote to Mr Rochman towards the end of February 2008 informing him of the meeting and saying that he and Benny had decided to mull over Andrew's proposal, and had decided to "try a direct negotiated route first to get some idea of what is acceptable to all parties." In cross-examination Philip thought that the meeting ended on the basis that Richard and Benny would think about whether to give Andrew an income until he reached the age of 65. He thought that the meeting did not include any agreement about Andrew's future role in the Company. Philip's evidence was straight forward and reliable.

39. Andrew and Benny's brother Aubrey gave evidence, but he was not exposed to long cross-examination. His written evidence is that Andrew is a "disruptive and troubled man". He said that Andrew was incapable of following instructions and gave a historic example of his father asking Andrew to collect the post and leave it on his desk. Aubrey said that his father was in "despair" of Andrew due to his inability to follow instructions. Aubrey's evidence was emotional in that he frequently referred to Andrew having greater wealth but that his lifestyle meant that he was not "better off". In evidence he came across as if he was in constant competition with Andrew. He was keen to inform the Court that he could remember two gifts that his sister had left him in her last Will, whereas Andrew could not recall the gifts she had left him. He thought it was a mark of Andrew's relationship with his sister that he could not remember. When asked why he was giving evidence he responded that he was doing it for his father, mother and his deceased sister with whom he had a particularly close relationship. I have little doubt that Aubrey found Andrew difficult. In his evidence he refused to concede anything of substance and blamed Andrew for spending too much time following his passion for cricket. Andrew had asked Aubrey for assistance with updating the accounting procedures when he was managing director. Aubrey at first

disputed the proposition but when taken to documentary evidence in cross-examination he simply responded that "if Andrew would have spent less time with his wine interests and his cricket club and various other social events during working hours, he would be managing extremely well". Mr Tomson observed that he sounded "very resentful of Andrew" and Aubrey responded that he was "not resentful of Andrew at all. I'm trying to run a business". He was oblivious to his previous complaint that Andrew had not been running the accounts department efficiently and his position that it was for Andrew to approach him if the procedures required updating.

40. Aubrey's version of events is that he left the Company after Andrew became a director because he could not work with him. Mr Tomson asked Aubrey if he was giving evidence against Andrew because he had a score to settle against him. The notion was denied. I did not understand Aubrey to be vindictive. He was visibly taken back when Mr Tomson demonstrated to him that Andrew had fought his corner after he had left the Company to make sure he was receiving some funds. My impression, having seen Aubrey giving evidence in the witness box, is that he wrongly holds Andrew responsible for his loss of office in the Company. His loss of office was due to an amalgam of events, including Andrew persuading Benny to back him at a meeting of members so that he could become a director; it was Aubrey who chose to resign. Aubrey gave evidence with genuine passion and forthrightness, but his evidence was not central to the task of resolving the issues before the Court.

41. Richard began his evidence at the beginning of the second week of the trial in July 2018. There was a hiatus in proceedings for a combination of reasons. The time estimate for the trial was badly wrong. I sought to bring the parties back to finish the trial during the Summer vacation of 2018 but one or both counsel were not available. There were also difficulties with the availability of witnesses. I directed that the parties liaise with the listing officer so that the trial could come back before the Court as soon as reasonably practicable. It is unsatisfactory that the adjourned hearing could not be heard earlier. The hiatus had consequences for Richard as he had been subjected to several days of cross-examination in July 2018 followed by further cross-examination on 8, 9 and 10 May 2019. My assessment of Richard's evidence will take account of this large time gap. I shall refer to the evidence given by Richard in July 2018 as the first period. I also take into account of Richard's disabilities. He suffers from stress related illnesses, and dyslexia. As a result of these disabilities Richard found it hard to follow the detail of written documents put to him in cross-examination. Mr Tomson read many documents aloud to Richard to try and speed up matters. Although this may have assisted in some respects, in my view Richard displayed signs of not fully understanding questions put to him. At times during his cross-examination he would start his answer, and part-way through ask what the question was that had been put to him. This appeared to happen more frequently after long passages, or more than one document had been read to him. In my view the approach taken to cross-examination hindered Richard's ability to provide full and clear evidence. His ability to give clear evidence became apparent in re-examination when he was asked to read, in his own time, a few documents or a short extract of a document. A question was then put to him and he was able to give a clear answer.

42. Having made those observations, the first period of evidence given by Richard may best be described as mixed but honest. He seemed to be able to recall some things

with a degree of certainty, but when faced with an opposing view or a document he was quick to concede. This demonstrated that he was unsure of his ground, and in my view, not confident that he had always understood the question. For example, he answered confidently that he was a shareholder of the Company and Caressa Kahn (Holdings) Limited only but had to change his mind when Mr Tomson reminded him of another company in which he was a shareholder. Another example of a retreat occurred towards the end of the second day of cross-examination. At this stage Richard was tiring but he maintained that he had never shouted or screamed at Andrew. He was then faced with a contemporaneous document where he admitted to doing just that. Taking account of the evidence given by Theresa I conclude that his shouting was at the mild end of the spectrum. But he was quick to concede, and his acceptance that he could not recall or was wrong on occasions demonstrated candour when answering questions. There were other occasions during the first period when Richard accepted outright that he simply did not know the answer. He was cross-examined about a financial controller who spent some time at the Company, Mr Harrison. Richard was taken to some documents and asked what he thought Mr Harrison was complaining about. Richard's response was "I don't really know what he's talking about there…I have no recollection of a profit share that he wanted to put in place…".

43. In the second period Richard's overall evidence was convincing. He could not recall all the detail of the period in which he was being asked, and at times was vague about why he was recorded as saying certain things in meetings. That is unsurprising. A long time has elapsed since the events in question and the trial; he was put under pressure during cross-examination which I observe he found uncomfortable; and his dyslexia would have caused some difficulty in any attempt to refresh his memory by reading in advance of the trial, the many thousands of documents prepared for trial. He provided reasonable explanations that made commercial sense to questions about the accounts and dealings with HSBC and Lloyds bank, but professed he was no expert. He was asked detailed questions about his memory of events by reference to minutes of meetings in 2011. I accept his explanation that the minutes did not necessarily reflect the actual position at the time: some of the language used was intended to motivate the salesmen. He could not recall the detail or why he said things in meetings about the supplies to Avon (a large customer) and the dealings with Mrs Mu in China. In relation to the former I accept his evidence that the Company had not lost all its trade with Avon and he convincingly informed the Court that Andrew was not told about the Company opening a factory in China because he was concerned (as was Barbara) that Andrew may inform Mrs Mu, and she had the ability to cause great harm to the Company. It was clear that Richard did not trust Andrew with sensitive information. He did not want to risk damage to trade.

44. In general, where there was a conflict in evidence between Richard and Andrew, I prefer Richard's evidence. I shall take one example of such a conflict that took some time in Court. Andrew claimed that Richard suffered from depression, became increasingly withdrawn "and his behaviour became erratic to the point that I found it very difficult to work with him". Richard denied that he suffered from depression, or that he had ever been clinically diagnosed with depression but accepted that periodically he suffered from panic attacks and stress. He was taken to some medical notes that used the term "depression" and cross-examined on the subject for a sustained period. Observing Richard in the witness box and hearing his responses I

find that he gave convincing evidence that he was not suffering from depression as claimed by Andrew. The term "depression" was used loosely to describe a condition that was more difficult to put into words.

45. Mukesh Raja is a chartered accountant who joined the Company as a consultant in 2008, after Andrew had stepped back from the Company. He left the Company in 2011 for greater financial reward but returned as consultant in 2018 after the Company had acquired SLG. He said in cross-examination that his recent role was to help integrate SLG into the Company. In the period 2008 to 2011 he reported to Richard who he describes as "very determined, intelligent…. and (an) intense person who obviously had the welfare of the Company at heart." He also gave positive evidence about his working relationship with Barbara and Theresa. In terms of the stock he said that when he first joined the Company stock was recorded manually in stock books. This method lacked the ability to instantly update stock movements and was a draw back. Mr Raja viewed his job at the time as seeking to computerise the stock movements using the existing SAGE system. He explains in his written evidence that it took a while to train staff and implement the system which was only as good as the people who operated it. In cross-examination he explained that sales invoices purchase orders, and the stock system "was all handwritten".

46. The allegation made by Andrew that there had been stock manipulation to swell the balance sheet, he thought unfounded. Mr Raja "saw no evidence whatsoever that stock values were inflated". He said manipulation of stock was unknown to him and in any event highly unlikely as there were two external layers of scrutiny: first the employment by the Company of Michael Filiou & Co, a firm of chartered accountants paid to have oversight, and produce the management accounts, and second the Company's auditors. The auditors would conduct a physical stock take at the end of each year. His evidence was that the stock figures were not massaged. He was asked about the reasons for incorporating CKC and the arrangement that it be held on trust for the Company by Theresa and Barbara. He provided answers consistent with the evidence given by Richard, Theresa and Barbara.

47. He gave evidence about the 2011 HSBC loan and how he had provided the bank with the Company's financial information. He also provided Benny and Andrew with financial information prior to a meeting held on 28 April 2011 where the registered directors met to consider the merits of the HSBC loan. His written evidence is that he could not recall the detail of the meeting of directors but does recall going through the figures with Andrew, Benny and Richard, and in particular working through the figures to demonstrate that the loan was affordable for the Company and could be repaid.

48. Mr Raja produced a second witness statement. An agreement for finance was needed to acquire SLG. Initially this was obtained from SLG or SLG's parent company. He confirmed that the initial borrowing had been repaid and explained that refinancing had been obtained from a third party known as KSI. The KSI loan included an arrangement fee, and up-front interest for 6 months. He knew of a loan made to the Company from Brian Mansbridge. It was made in order to repay HSBC who withdrew the Company's overdraft facility in 2018. The KSI loan was also used in part to repay Mr Mansbridge's secured loan. The balance of the finance was used for

the Company's cashflow. Mr Raja thought that Richard had struck a good deal and that there was sufficient cash flow to service the bridging finance.

49. Mr Raja gave credible evidence. He had a clear memory of events during the period he worked as a consultant for the Company and was its financial controller. I have no doubt that he knew the detail of the Company's financial position including the Company loans and the finance required for the SLG acquisition. He was able to provide an informed financial opinion as to whether the acquisition was positive for the Company and would improve its cashflow. He also commented on the personalities that he came across while at the Company. His memory of the period 2008-2011 is that Richard was very much in control of the Company. He recalled that Richard would "keep an overview of everything" and "what would happen is I produced a monthly management account which I copied to Richard and Michael- and Michael [Filiou] would come in and discuss the accounts with Richard." He provided evidence that any criticisms of how the finances operated was to be set in the context of human error and a dynamic trading company that operated in more than one jurisdiction. He credibly denied that he was ever instructed to produce two separate accounting figures: one for internal purposes and another for the bank. In this respect his evidence denying figure manipulation was consistent with that of Barbara. In my judgment his evidence was straight forward, was not undermined and can be relied upon.

50. Alan Lathan is a chartered management accountant with many years of experience. He is an independent consultant and began working for the Company after Andrew had left. He had been "acting as Finance Director" of the Company since 2013. At that time, he recalls, the Company was being monitored closely by the bank, HSBC. Before he left the Company, it exited intensive monitoring by the bank. His evidence was that in this period it was critical to introduce working capital to resolve creditor issues. The proposed loan by Lloyds was, considered Mr Lathan, advantageous to the Company as its sales were strong enough to sustain profit.

51. In 2013 he found that the finances were "in chaos". He put this down to two matters. First, the migration between two accounting systems and the lack of accurate management accounts. The migration took three months. The second was process. He identified a need to gain control of the finances quickly during this period. This would be achieved partly by introducing a financial reconciliation system. The stock ledger needed to be entered into the nominal ledger, and monthly stock takes were required to ensure that the management accounts were accurate. This required a physical stock count. To achieve accuracy the price for each stock item needed to be entered against each stock item held. A calculation could then be made to reach an actual value rather than an estimated value.

52. In oral examination Mr Latham confirmed his knowledge during his time at the Company that "Barbara and Theresa held the shares in CKC on trust for the Company". He also said that there was no policy that he was aware of, to withhold the Company's books and records from Andrew. He confirmed that Andrew was given an opportunity to review the details of the Company's assets at a meeting at which he was present on 31 March 2015 but Andrew chose not to do so. In June 2018 he left the employment of the Company. He was not being paid by the Company because it experienced cash-flow problems.

53. Mr Latham gave straight forward evidence. He was careful to understand the questions put to him and careful when responding. He was able to recall in detail some of the accounting methods, records and dates. It is said against him that he sought to blame Mr Chiew (a previous financial controller of the Company) whereas his witness statement did not descend into the detail of Mr Chiew's shortcomings. I do not consider this a fair criticism, none of his evidence was identified as evidentially incorrect.

54. Howard Reuben is also a chartered accountant, a partner at Montpelier Professional (West End) Limited. He became the relationship partner for the Company in the early 2000s. He gave evidence about the Chinese operations and the treatment of CKC in the Company's accounts. He explained that CKC was set up for the purpose of producing in China and making a break from the existing joint venture with Mrs Mu who he described as very difficult. He had knowledge from conversations with the directors of the Company that the Company was concerned about the break-down of the relationship with Mrs Mu and her ability to damage the Company's trade. In cross-examination he said that he knew that Barbara and Theresa held CKC shares on trust for the Company. He described the incorporation of CKC in a similar way to Mr Raja: "commercial subterfuge". He accepted that the accounts of the Company should have included reference to CKC being a subsidiary, but it had not. He explained that there were accounting issues with verifying Chinese operations and that the institute of chartered accountants recommended he should visit China. As a matter of proportionality, he thought it better to refer to CKC in the accounts but not to refer to it as a subsidiary. The Company accepted his advice.

55. In relation to HSBC he had not informed the bank that CKC was a subsidiary. In his witness statement he states that he could not recall any details about the loan. He was taken to e-mail correspondence from Mr Chiew where he was informed that HSBC invoice Finance wanted the Chinese subsidiary to guarantee the Company's debts to HSBC. It was suggested that the operating subsidiary was a stand-alone company and therefore should not guarantee the Company's debts. Mr Reuben was asked to confirm the status of the subsidiary. Unfortunately, Mr Reuben could not recall what he did in response to the e-mail.

56. He thought that the quality of the Company's accounting personnel was not as good as it should have been, and were sales focussed. He recalled the names Mukesh Raja and Mr Filou but not any specific dealings with them. He commented that throughout the whole period of his relationship with the Company there had been general financial control incompetence. That included the period when Andrew was in control of the finance department. In respect of CKC, he thought that the director was "out of his depth" and that his messages failed to "accurately reflect what was going on in a very difficult period" and that he "couldn't rely on what was being said" by him. An audit team had to verify what Mr Chiew was reporting. His written evidence, that he would be "surprised if Richard and Benny had been able to manipulate stock figures", was not undermined in cross examination. Nor was his evidence that Richard and Benny found the financial details of the Company opaque. This is relevant to Andrew's concern that the stock was not being accurately recorded. He had written on a number of occasions to Mr Reuben asking for an explanation as to a write-down of stock.

57. In his written evidence Mr Reuben said that Andrew continued to be difficult and "a thorn in the Company's side". He was asked why he characterised Andrew in this way. He responded that Andrew "had prevented the Company from making changes" to its business and refinancing which was unreasonable. He had acted in an unreasonable manner preventing it from progressing. He gave examples such as Andrew standing in the way of the Company obtaining new bank loans.

58. Mr Reuben demonstrated care in answering questions, and when he could not remember something he would say so. He said that he could "not genuinely remember why" there was a delay in sending the accounts for the year end 2011 to Andrew. That said, he demonstrated some detailed knowledge of the Company which is reflected by his role as client partner. As an example, he recalled that the SAGE accounting system used by the Company was not working well and was over complicated. This led to accounting issues. He recalled that a new accounting system called Iris Exchequer was introduced in about 2012. He was aware that there had been or was in 2012 problems with the shareholder and director relationships: "there was always difficulties with this Company and this client". And he recalled that there was an ongoing problem with "handling cashflow". In my judgment although he was called to give evidence for the Respondents, his evidence was professional and impartial. His evidence can be relied upon and I accept his impartial view that Andrew had been a "thorn" preventing the Company from progressing at key times.

59. Barbara was first employed by the Company in 2001 and now is the director of systems. Barbara gave evidence in respect of Andrew's competence at work until he left in 2005, her direct knowledge of his involvement since 2005, the HSBC loan in 2011, the Lloyds refinancing offer in 2014, accounts issues and the establishment of CKC Holdings and CKC.

60. In her written evidence she explained that if she demanded immediate repayment of a loan she had made to the Company, the repayment would "bring the Company down". In oral examination she said that her choice of words was a "figure of speech" and an exaggeration. In my view she did not mean that a demand from her would lead to the Company being wound up but was seeking to explain that she was committed to the Company and would not wish to do anything that undermined it. She said that she did not think that the Company would fail if she made such a demand. She was asked if she would lie to benefit the Company and was taken to a record of a board meeting in 2011. The record shows that she advised Richard that he did not need to inform a creditor (who was also a debtor) that they had received a bank loan. She described this as a "white lie", admitted that the Company had received a loan but explained that the loan was (i) not for the purpose of repaying creditors and (ii) the Company had been treated badly by the particular debtor/creditor. I do not regard this "white lie" as indicative of her character or personality and was not representative of her evidence as a whole.

61. She informed the court during cross-examination that she took the oath seriously, she was quick to answer questions, clear and gave little hint of doubt when giving evidence. She was also prepared to admit when she was wrong (such as exaggerating the effect of making a demand on the Company). She was the person responsible for dealing with the litigation for the Company and had been involved in disclosure and inspection. In evidence she explained that it had taken her nearly two years to deal

with disclosure. This work and involvement in the litigation may have assisted her to recall the documents and the detail behind the documents. She had a clear grasp of the facts, recall of documents which she had authored and an understanding of the business and its finance.

62. She had several different roles. She described herself as "doing HR" but she was also involved in stock taking, quality assurance and producing a budget to ascertain whether or not the acquisition of SLG would provide an advantage to the Company. She said of Andrew that he had short comings in a professional capacity that she found difficult to deal with. She convincingly maintained that Andrew was incompetent and lazy under cross-examination.

63. In cross examination Mr Tomson seized on her position in the Company and asked "you would lose a lot including your career" if the Company failed. She responded that she was 69 and losing her career was not a concern for her. I accept her evidence on key issues.

64. Theresa has had a long history in the Company having joined the Company in 1987. She was appointed director of operations in 2016. In cross-examination she was taken to passages in her witness statement and it was put to her that she was committed to the Company. She agreed that those around her at the Company were like family. She was asked if she had been offered shares but denied that an offer of shares had ever been made. She gave evidence that working with Andrew was not a positive experience. She considered that his "humour" was distasteful as it was made at the expense of others; he was disruptive, disorganised, and failed to pay suppliers on time. The failure to pay suppliers on time caused difficulties for the Company and caused extra work for her.

65. After the attempt to acquire SLG failed in November 2005 Theresa sent a memo to the Company seeking a pay increase and raising a number of complaints. Her evidence is that Andrew had undermined or attempted to undermine Richard during this period. His behaviour meant that there was fighting among the "management" that resulted in a lack of direction from the "senior management". She said that the failure to acquire SLG in 2005 was very disappointing as the Company had invested time (the warehouses had been reorganised) and money in the deal; if SLG had been acquired, the Company would have been put on a more positive path. She had heard of the falling out between Miles Dunkley and Andrew, and thought Andrew was generally to blame for the failure.

66. The memo led to a meeting on 11 November 2005 in which she, Barbara, Richard and Andrew were present. At the meeting she expressed her concern that Andrew had let his department get "out of control". After Andrew left "the atmosphere in the Company improved dramatically". In cross-examination she denied that the "thrust" of the memo was to obtain a pay rise saying that she was disappointed with the "the direction of the company was going in" and the failure of the SLG deal. She explained that Richard was resigned to the position short-term and was encouraging the employees to think of new income streams and to develop the Company, whereas Andrew was telling the employees that the Company should be hostile towards SLG and "go after" its business. In cross-examination it was "suggested ….that given your connection and commitment to the company, that you might be motivated to give

evidence about Andrew that doesn't give a true, full or fair picture of him and his involvement in the company?" She convincingly disagreed with the proposition.

67. She emphasised in cross-examination that Andrew and Brett Lamont were seeking to sell things that were difficult to manufacture and at a price that was not economic to produce. She denied that there were factions within the Company (Andrew and Richard camps). She said there were no such divisions and that everyone worked together.

68. As regards Richard in a leadership role, she compared him with Aubrey saying that Aubrey led the Company, but Richard was far more involved in the management and had a clear vision for the Company. She said she could not recall a time when Richard had shouted at her. But she did not claim Richard was perfect, she recalls him shouting at Andrew at the end of a meeting "I don't believe it" in response to Andrew who had raised the issue of hostile competition with SLG.

69. Mr Tomson sought to undermine her evidence by suggesting that she had or was prepared to lie to "buy time" for the Company and she had not told the truth about a "partnership". Neither of these lines of cross-examination were fruitful for Mr Tomson. She listened carefully to the questions put to her and answered with care. Her evidence was open, honest and credible.

70. Mr Rochman of Collyer Bristow LLP was to be the last to give evidence. The night before he was to be called Andrew decided not to cross-examine him. His evidence therefore stands as read. He qualified as a solicitor in 1968 and is now head of Collyer Bristow's real estate team. He has extensive experience in commercial and residential property transactions. He began acting as the Company's solicitor in 1998 after Caressa Michel died. He describes himself as the "go-to solicitor for legal advice the Company required" but as the contemporaneous documents demonstrate he also advised on non-legal matters: he appears to have fulfilled a legal as well as a general advisory role. His written evidence is testimony to his involvement with the Company. He gives evidence about the Company's buy-back of Aubrey's shares; the basis upon which Benny stepped away from the day to day management of the Company in 2004; Andrew's loan to the Company of £75,000; his involvement in issues relating to Andrew's departure from the Company from late 2005 to July 2008; his involvement with the HSBC banking issues in 2013; his involvement in the removal of Andrew as director; his knowledge of the Lloyds loan in 2015; and his involvement in the provision of financial information to Andrew in March 2015.

71. In respect of Benny he explains that he "stepped-down" six years prior to his 65th birthday. As regards Andrew he understood from Richard and Benny that Andrew's behaviour had been "disruptive and unsettling" but that Andrew "seemed content to stay away [from the Company] as long as he was on full pay". His experience of Andrew was that he "had a complete disregard of corporate procedures and wanted to deal with matters in his own way, and in a way which severely undermined the proper governance of the Company, its members and indirectly, its employees". He thought that Andrew had failed to comply with the "clear pre-emption provisions set out in the Articles" by seeking to sell his shares in the Company to a competitor (SLG) after the negotiations broke down. Mr Rochman states that "while Richard and Benny made

extensive attempts to encourage Andrew to sell his shares [back to the Company], Andrew repeatedly changed his mind".

72. Mr Rochman had "no doubt" that it was agreed that Andrew would not interfere with the Company's affairs in any way unless requested by Benny and Richard and/or other senior management. The payment to Andrew of his salary and benefits was the price the Company was prepared to pay in order to allow it to continue without his interference. Those payments would cease upon his retirement as director at the age of 65. As far as Mr Rochman is concerned Andrew adhered to the agreement and had "no meaningful" involvement in the Company "save for perhaps one meeting".

Legal principles

73. Section 994 of the Companies Act 2006 provides so far as material:

"(1) A member of a company may apply to the court by petition for an order under this Part on the ground-

(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or

(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

74. In *Re Unisoft Group Ltd (No. 3)* [1994] BCLC 609 at 611, Harman J. explained that the words "act" and "omission":

"…..are wide and anything that the company does or fails to do can be relied upon. But wide as the category of acts may be it is necessary that the act or omission is done or left undone by the company itself or on its behalf. Thus, voting at a general meeting, whether annual or extraordinary, may result in a resolution being passed or defeated. The resolution is, obviously, an act of the company notwithstanding that the votes which pass or defeat it are the votes of members which are their private rights which…can be exercised as they choose. The acts of the members themselves are not acts of the company and cannot found a petition under [section 994]."

75. To satisfy the test of unfair prejudice the acts or omissions have to be unfair and prejudicial. Unfairness is a notion. In *Grace v. Biagioli* [2006] 2 BCLC 70 at [61], the Court of Appeal highlighted the following principles from the speech of Lord Hoffmann in *O'Neill v. Phillips* [1999] 2 BCC 1:

"(1) The concept of unfairness, although objective in its focus, is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. This will usually take the form of the articles of association and any collateral agreements between shareholders which identify their rights and obligations as members of the company. Both are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable.

(2) It follows that it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use Lord Hoffmann's words, "consist in a breach of the rules or in using rules in a manner which equity would regard as contrary to good faith"…; the conduct need not therefore be unlawful, but it must be inequitable."

76. The authorities show that prejudice is not a narrow concept. In *O'Neill v. Phillips* [1999] 1 BCLC 1 at 15, Lord Hoffmann said that "the requirement that prejudice must be suffered as a member should not be too narrowly or technically construed". Prejudice may found in the form of an economic and non-economic act or omission. More recently Lady Justice Arden explained in *Re Tobian Properties Limited* [2012] 2 BCLC 567 that fairness is contextual, and it is "also flexible and open-textured. It is capable of application to a large number of different situations."

77. In *Re Coroin Ltd (No. 2)* [2012] EWHC 2343 at 630 David Richards J took this further and considered prejudice from the point of view of economic loss and non-economic loss:

"Prejudice will certainly encompass damage to the financial position of a member. The prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is bound up with his position as a member. So for example, removal from participation in the management of a company and the resulting loss of income or profits from the company in the form of remuneration will constitute prejudice in those cases where the members have rights recognised in equity if not law, to participate in that way. Similarly, damage to the financial position of a member in relation to a debt due to him from the company can in the appropriate circumstances amount to prejudice. The prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to damage to the value of his shareholding. Moreover, prejudice need not be financial in character. A disregard of the rights of the member as such, without any financial consequences, may amount to prejudice falling within the section. Where acts complained of have no adverse financial consequences, it may be more difficult to establish relevant prejudice"

78. The learned Judge in *Re Coroin* sounded a warning: "if the management had been in breach of duty to the company but no loss to the company resulted, the company would not have a claim against those directors". Taking that principle and applying the test of unfair prejudice he considered that it would be "difficult for a shareholder to show that nonetheless as a member he has suffered prejudice."

79. Where a quasi-partnership is found to exist equitable considerations may play a part. In *O'Neill v Phillips*, Lord Hoffman observed that if a quasi-partnership exists it would "almost always" be unfair for the minority shareholder to be excluded without an offer to buy his shares or make some other fair arrangement. The unfairness may also be explained by reason of an act that prejudices the minority.

80. In *Re A Company (No 004377 of 1986)* [1986] BCLC 376 Hoffmann J (as he then was) was concerned in a case where there were no allegations in the petition of any

wrongful conduct by the board or majority shareholders. There was no suggestion they were paying themselves excessive salaries or diverted business to other companies. The petitioner claimed relief because he became a shareholder on the basis of a legitimate expectation that he would participate in the management of the company and would be employed on a long-term basis. He had been excluded. Hoffmann J cited from *Posgate & Denby (Agencies) Ltd* (1986) B.C.C. 99:

"But the concept of unfair prejudice which forms the basis of the jurisdiction under section 459 enables the court to take into account not only the rights of members under the company's constitution but also their legitimate expectations arising from the agreements or understandings of the members inter se. There is an analogy in Lord Wilberforce's analysis of the concept of what is 'just and equitable' in *In re Westbourne Galleries Ltd* [1973] A.C.360, 379. The common case of such expectations being superimposed upon a member's rights under the articles is the quasi-partnership, in which members frequently have expectations of participating in the management and profits of the company, which arise from the understandings upon which the company was formed and which it may be unfair to other members to ignore…. Although the answer to the question "of whether such a legitimate expectation exists" must in each case depends upon the particular facts, it is well to recall that *In re Westbourne Galleries Ltd*, Lord Wilberforce said that in most cases the basis of the Association would be "adequately and exhaustively" laid down in the articles. The "super imposition of equitable considerations" requires, he said, something more. This was said in the context of the "just and equitable" ground for winding up, but in my judgment it is equally necessary for a shareholder who claims that it is "unfair" within the meaning of section 459 for the board to exercise powers conferred by the articles to demonstrate some special circumstances which create the legitimate expectation that the board would not do so. Section 459 enables the court to give full effect to the terms and understandings upon which the members of the company return associated but not to rewrite them."

81. In *Re Saul D Harrison & Sons plc*, [1995] 1 BCLC 14 at 19, Hoffmann L.J. stated:

"How can it be unfair to act in accordance with what the parties have agreed? As a general rule, it is not. But there are cases in which the letter of the articles does not fully reflect the understandings upon which the shareholders are associated. Lord Wilberforce drew attention to such cases in a celebrated passage of his judgement in *Ebrahimi v. Westbourne Galleries Ltd* [1973] AC 360 at 379, which discusses what seems to me to be the identical concept of injustice or unfairness which can form the basis of a just and equitable winding up…Thus the personal relationship between a shareholder and those who control the company may entitle him to say that it would in certain circumstances be unfair for them to exercise a power conferred by the articles upon the board or the company general meeting…"

82. Returning to *O'Neill v Phillips* [1999] 1WLR 1092 Lord Hoffman affirmed the role of equity in shareholder disputes governed by the Companies Act 2006, and explained that equity, as a separate jurisdiction, restrained the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. Fairness intervenes to prevent the strict use of legal rights. In this case it is argued that Andrew was excluded. Mr Justice Roth in the case *Shah v Shah* [2010] EWHC 313 (Ch) explained by reference to *Westbourne Galleries* [1973] AC 360:

"Once a company has the character of a quasi-partnership, the exclusion of one of the "quasi-partners" will engage the equitable considerations to which Lord Wilberforce referred. In the *Westbourne Galleries* case, two of the three directors (a father and son) used their combined majority shareholding to remove the third shareholder from his directorship. On the facts, it was made clear to the latter that he was no longer regarded as a partner but only as an employee. Although removed as a director in accordance with the articles, the conduct of the majority was held to be unjust and inequitable. And Lord Wilberforce made clear that the just and equitable provision is not confined to a case where the exclusion was made in bad faith, nor did it matter that the majority genuinely considered that the interests of the company were better served without the director who was excluded."

83. In my judgment the authors of *Minority Shareholders Law, Practice, and Procedure* (sixth edition, 6.97-6.104) accurately state that it is the relationship between the shareholders that must be the focus of inquiry; a relationship is not static. A relationship that attracts equitable considerations may arise before or after incorporation: "Thus the relationship which gives rise to the equitable considerations can be in existence prior to the formation of the company; but it is only once the parties to the relationship agree to and do conduct their business through a company that equitable considerations will arise…..it may come into existence subsequently as a result of their words or conduct….conversely a relationship which starts out as a quasi-partnership may, due to supervening events, cease to be based on personal relationships and no longer qualify as a quasi-partnership".

84. In *Fisher v. Cadman* [2006] 1 B.C.L.C. 499 Sales J, (as he then was) determined a petition concerning a family company run on an informal basis. The petitioner and her two brothers were effectively equal shareholders in the company which was concerned in property development. They had obtained their shares by reason of their parents' death. The petitioner's brothers were directors but until their father's death they worked for no remuneration. The Court found as a matter of fact that directors would not be paid emoluments in respect of the management of the family company and that the properties were intended to be held until the value of the properties had increased to a point at which it was worth selling. The petitioner played no active role in the company. When their parents died the directors made provision within the accounts for remuneration and the repayment of debt owed to a company owned and controlled by the brothers, with interest. The petitioner objected and demanded that an annual general meeting was held. The Court found that there was a quasi-partnership, the articles of association were not a complete code for how the family company was governed and that there was an expectation that the business would be carried on under the same terms as it had before unless there was agreement by the shareholders to the contrary. The Judge observed (para 90):

> "it is my view that, in considering whether the conduct of the controllers amounts to conduct unfairly prejudicial to the interests of a member, it is also relevant to take into account any agreement, understanding or clearly established pattern of acquiescence on the part of that member which may have led the controllers to act or continue to act in a particular way, even if their action may have involved a departure from a strict adherence to the terms of the Articles. In such a case, in the light of their common understanding as to what conduct will be regarded as acceptable between

themselves despite the terms of the Articles of Association, it would not be correct to characterise the action of the controllers as unfair within the context of the whole relationship between them and the member. In my view, this is a corollary of the approach to the test of unfairness adopted in the authorities to which I have referred above, whereby the agreement between the members as set out in the Articles of Association may be subject to equitable considerations and obligations arising out of the particular circumstances of their relationship overall. There is no good reason why such equitable considerations should not qualify, as well as add to, the expectations about how the controllers of the company ought to behave to be derived from a simple reading of the Articles of Association. In *Anderson v Hogg* 2000 SLT 634, a decision of the Outer House of the Court of Session (Lord Reed) on s. 459 , provides an example of this approach being applied. In that case, there was a finding that the petitioner had acquiesced in a departure by the controller of the company from strict adherence to the articles (see p. 639D–K). Lord Reed held (p. 640B–D) that the parties:

> "agreed, by their words and conduct, to conduct the affairs of the company on an informal basis which allowed the respondent to exercise powers of management more freely than the articles may have envisaged or permitted. In these circumstances, unfairness has to be assessed against what the members actually agreed rather than against the articles."

85. A distinction is to be drawn between a petitioner who is unfairly excluded by the conduct of the management, and a petitioner who leaves of his own volition: Blackburne J in *Larvin v Phoenix Offices Supplies* [2003] B.C.C. 11, paragraphs 57 to 80.

86. The age of the complaint may also be relevant. The further the purported behaviour is away in time, the less likely it is that the behaviour relied upon will demonstrate that the exclusion will be unfairly prejudicial. An example can be seen from the facts in *In Re Woven Rugs Ltd* [2010] EWHC 230 where the Court refused a petition as the complaint occurred 5 years prior to petition. But the inquiry is fact sensitive, so past conduct may be relevant if the breach is ongoing and if the facts demonstrate acquiescence in prejudicial conduct, the acquiescence will also be taken into account: *Re Southern Counties Fresh Foods Ltd* [2008] EWHC 2810

87. In *Re Tobian Properties Limited* Arden LJ observed that the "courts are also given wide powers to fashion relief to meet the circumstances of a particular case. Parliament clearly intended the courts to adopt a flexible approach to proceedings under section 994, and to be flexible in the exercise of their powers in relation to these proceedings."

88. Accordingly, the relief the Court may award if unfair prejudice is found to exist, is wide and a matter of discretion.

The allegations summarised

89. In the petition Andrew articulates many grounds to support the claim that the affairs of the Company are being conducted in a way that are unfairly prejudicial to him but

the foremost allegation is that he has been excluded from the management of the Company by reason of his removal as director in March/April 2015. A board meeting was convened for 18 February 2015 at 10:00. Andrew was invited. The directors waited until 10:30 and then began. It was resolved that the Company would move its bank account to Lloyds Bank and obtain a £1m facility; that the employment benefits received by Andrew would end when he reached the age of 65. This meant that the Company would stop paying his salary on 31 March 2015. It was resolved at the meeting that Andrew would be asked to resign, and if he refused, he would be removed. Andrew attended late but the meeting had ended, and the resolutions passed. Andrew refused to resign. The Company passed a resolution on 2 April 2015 to remove Andrew. His position is that his removal as a director prevented him from having the right to obtain information about the Company and precluded him from having any influence over its direction. He argues that his removal was contrary to the Agreement.

90. The Agreement is said to include the following terms: (i) Andrew would cease to have a close involvement in the day to day running of the Company but would instead focus on specific projects and be based at home; (ii) he would remain in overall charge of the Company's financial function mainly from home; (iii) Andrew and Richard would hold monthly meetings; (iv) the Company would pay Andrew's salary, pension contributions, car allowance, and health and travel insurance; (v) the Company would continue to pay the monthly mortgage repayments in relation to the loan he made to the Company in 2004; and (vi) Andrew would remain a director for so long as he remained a shareholder unless he wished to retire. In respect of (vi) Andrew states, in his reply to the defence, that there was no agreement to retire at any age.

91. Andrew claims that in breach of the Agreement Richard refused to hold monthly meetings, did not involve him in the business and refused access to any accounting material.

92. He claims that the Company's affairs have been mismanaged. The mismanagement allegation has numerous strands. First the 2012 accounts show that there was a trade debt of £184,920 owed by Muyazi Cosmetic Accessories Co Ltd. As the Company had a 30% stake in Muyazi it received dividends, but the accounts showed that a provision had been set against its investment in Muyazi. Secondly, there are allegations about a failure of the Company's dealings with CKC Holdings and CKC as I have mentioned. Thirdly, Andrew alleges that the Company's financial position was misrepresented to Andrew and to HSBC bank in 2011 in order to obtain the HSBC Loan. There are several parts to this allegation including (i) a misrepresentation that there had been a significant order from Avon and (ii) a failure to disclose properly the levels of stock in the 2009, 2010 and 2011 accounts, financial statements and management accounts. Andrew argues that by obtaining the HSBC Loan by misrepresentation the Company's debts increased.

93. Richard argues the Agreement as pleaded is mostly fiction. It was never the case that there was a meeting of minds about monthly meetings. It was never discussed. It is said that Andrew received the end of year accounts and sometimes raised questions of Barbara who responded. In any event there was no quasi-partnership or if there was a

quasi-partnership it came to an end when Andrew undermined any trust and confidence by seeking to sell his shares to a competitor.

Agreed list of issues

94. The parties agree that the following issues require determining. First whether there was a quasi-partnership in which Andrew participated? The skeleton argument produced for the hearing in May 2018 for Andrew argues that the relevant question is whether the Company was a quasi-partnership at the time the unfairly prejudicial conduct is alleged to have occurred. The petition pleads that as (i) the Company was family-owned; (ii) the Company was family run (iii) Andrew, Richard and Benny regarded themselves as continuing a partnership through their interests of the Company. The partners in the Caressa London Partnership (CLP) were Andrew, Aubrey, and Benny; and (iv) the parties regarded the Company as a quasi-partnership from 2002, the date when the CLP was dissolved.

    "At all material time since the Company's incorporation, a partnership comprised of the shareholders of the Company at the relevant times had acted as the sales arm for European sales of the Company, which represented about 40% of sales overall, and all such sales revenue in relation to the items manufactured by the Company's business was generated by and paid to the partnership which then paid a certain percentage over to the Company sufficient to cover the Company's manufacturing and overheads."

95. Secondly what were the terms of the Agreement? Thirdly, was Andrew unfairly prejudiced by his removal as director in 2015?

Do equitable considerations apply?

96. In his written evidence Andrew explains that CLP was only a small part of the operation concerned with sales in Europe. The Company operated throughout the world and manufactured products. The relationship between the Company and CLP was commercial insofar as the Partnership was invoiced for manufacturing. Any profits made by CLP were distributed to the partners. He explains that the partnership profits were "separate to the shareholdings in the Company and the Partnership profits were not designed to reflect….the respective shareholdings in the Company."

97. This narrative describes how the partnership between Andrew, Aubrey, Wendy and Benny operated side by side with the Company. The operation of the partnership and the Company at the same time indicates that CLP was not incorporated by the Company and there is no evidence to support incorporation of the CLP business save the assertion that the European sales handled by CLP were taken over by the Company. Andrew did not become a director of the Company until 1999 and Richard did not become a shareholder until after Wendy died. When Richard became a shareholder, he had a different holding (in number) to Andrew and Aubrey. Prior to Andrew's appointment as director he was a shareholder but not concerned in the management of the Company. After Andrew's appointment Aubrey was a shareholder for a while but did not act as a director.

98. At trial it was argued by Andrew that a quasi-partnership always existed. In his evidence Andrew says that "generally the family members' salaries were not

excessively high" and that in the early days some of the members were paid more than others to compensate for not living at home. It is not clear whether salaries paid by the Company to family members (or other employees) were calculated on the same basis as profit distribution in CLP. Andrew uses the same or materially similar language when addressing the distribution of profits in CLP and salaries paid by the Company. The accounts and notes to the accounts do not support this and there is no documentary evidence to support higher salaries paid in order to meet Andrew's mortgage commitments. The documentary evidence does, however, support his contention that the Company did not pay salaries that can be described as "excessively high". He says that every family member had private health insurance; that other employees did not receive this benefit; a "company car" was allocated to Aubrey, Benny and Andrew even though it was only Aubrey who needed a car for work purposes; Andrew's mother was on the payroll even though she had no role in the Company and, he claims Benny was on the pay roll even though he spent a considerable amount of time at home looking after family members. The last of these contentions is disputed in part. Mr Tomson says these are important factors to take account of as they set the basis for the operation of the Company. He submits that it is an important indicator that no one other than a family member was or is a shareholder. However, he accepts that not all family run companies with family only members are quasi-partnerships. I agree that the benefits provided to family members are factors to be taken into account because it provides evidence of how the shareholders treated one another. In addition, the articles of association contain a restriction on the transferability of shares. Mr Adair submits that the benefits can be viewed as acts of charity. Given the long history of the Company, that during that history some family members were directors, others were shareholders, some were both directors and shareholders, some were neither shareholders nor directors, the picture is complex. In my view there does not need to be a particular theme to director appointment and being a member: sometimes being a director and member may be haphazard. However, the make-up of the Company and its directors is part of the factual matrix that has to be taken into account.

99. Benny, Aubrey and Wendy were directors and shareholders of the Company when it was incorporated. Andrew did not become a director until 1999 when he was appointed after a vote at a meeting held in accordance with the articles of association. The documentary evidence supports the view that Andrew did not have a say in the direction of the Company until after he became a director: he was not a de facto director. The same or similar comments can be made in respect of Richard who was not a shareholder or director until 1999. The only parties in the period 1986 to 1999 who may have had a relationship of trust and confidence were Wendy, Benny and Aubrey. It is not contended by Andrew the relationship between the members in the period 1986 to 1999 was founded on any understanding or promise. On the death of Wendy, the only directors were Benny and Aubrey.

100. In my judgment it is valuable to look not only at the period of time when the family members were working together to discover whether there was a relationship of trust and confidence but how the members dealt with each other when disputes arose and how members of the family left the Company. Aubrey left the Company in 1999 and the Company purchased his shareholding in 2003. I note that the sale agreement was professionally drawn by solicitors which included a restrictive covenant. Andrew was

the key person negotiating the share buy-back. Aubrey sold his shares to the Company on the basis that he was a minority shareholder and a discount applied.

101. Mr Tomson accepted that this may be an indicator but that it should be read in light of what was happening at the time of the buy-back. At the time the Company had brought in outside accountants (Cook & Partners) to review the accounting processes and systems Andrew was controlling. In oral evidence Andrew explained why Cook & Partners had been invited to assist with the accounts: "Benny had told me that Aubrey had gone to him and told him that I was stealing from the company, and that is why they brought in the auditors behind my back without me knowing about it, Cook & Partners…"

102. When Cook & Partners did produce a report it found that much could be improved. Aubrey wrote to Andrew on 18 August 1999 "clearly in order for the company to avoid even more serious financial problems, we need – as a matter of extreme urgency- to change our working practices in the accounts department". Andrew did not accept all the external accountants' findings and sought to undermine their suitability, refusing to pay part of their invoice. Aubrey sent chasing letters to Andrew asking for up to date accounts. On 3 September 1999 he wrote "you are aware of our grave concern regarding the financial stability of this Company and yet only excuses are received after complaints are sent and even today, June 1999 is not complete. Benny and I have still not received copies of accounts of May 1999…….the additional worry regarding your lack of knowledge in respect of Sage is that the Accounts Department cannot have been correctly managed……" Soon after, on 6 September, Andrew met Benny for dinner. The next day he wrote to Benny:

"In order for things to work, to discuss things in a civilised way, to have a more open working relationship, to make everyone accountable to everyone else, to put an end to inane discussions and bullying we need to have a more democratic environment. At the moment you and Bobby are the only directors. Any decision he makes cannot be stopped because even if you disagree then his voting power as Managing Director gives him the casting vote. At the moment he has no need to sit down and talk to anybody. I propose and wish you to consider it very carefully, the following. I have managed to convene for the first time in 12 years even though by law they should happen annually, a shareholders meeting. It is due to take place on Monday the 13th when I will be in Elba. I have asked for a postponement and Bobby has said he sees no problem with that. At the meeting the Directors of the Company have to be voted back in. As you know, being a director has no remunerative advantage. Remember you and I outvote Bobby. I propose that we vote to create two new Directors, Richard and myself. This would make the Board who make the decisions consist of four……it would be a Democracy and everyone would have to sit down and talk to everyone else in spite of personality clashes…..To put this into action would take real courage from you, and Bobby would not be kind as a result. I believe that it is the best hope we have to keep the company and what consider to be equally important, the family together."

103. The memo has significance for several reasons. First it is evidence that neither Andrew or Richard were entitled, as of right, to be a director of the Company. Andrew was asking Benny for his assistance to vote him onto the board. Secondly it provides evidence of that there was a general acceptance, that the articles of

association governed: (i) election of directors, (ii) remuneration rights of directors and (iii) the convening of meetings. Thirdly that Andrew wished for the directors to be more accountable in accordance with the articles of association (by convening meetings and reporting). Fourthly there were personality clashes. Lastly that Andrew saw the Company and the family as separate.

104. In his written evidence Richard says "looking back, I fear that I may have been manipulated by Andrew. Family gossip (which I have always tried to avoid) is that Helmut adamantly opposed and would not entertain Andrew becoming a director in or having a role of any substance within the Company as he thought Andrew was lazy and incompetent. So maybe Andrew saw this as an ideal opportunity to become a director. It may also be the case that Andrew saw this as an opportunity to marginalise Bobby in some way." He was tested on this in cross-examination and agreed that the idea of transparency was not objectionable. In my view Richard had taken the view that Andrew had ulterior motives and that he was able to disguise them by dressing them up with unobjectionable aims.

105. Relations between Aubrey and Andrew did not improve. By November 1999 Aubrey wrote to Benny stating that:

"every effort has been made over the year to persuade Andrew Michel to perform to an acceptable standard. These efforts have failed. Earlier this year Andrew Michel announced that the Company was in trouble and had cash flow problems. Three meetings took place without any accounting information being produced. No progress was being made. Benny Michel and myself (the two Directors) were becoming extremely concerned. After lengthy discussions we agreed to find a firm of chartered accountants in order to have an independent objective report on the company - Cook and Partners were appointed. Andrew Michel throughout this period was extremely aggressive towards Cook and Partners and questioned their ability. For the first time complete accounts were presented with a management report. The work that Cook and Partners carried out also brought to light Andrew Michel's shortcomings. I was becoming desperate with Andrew Michel's lack of co-operation my health was suffering and I could only see potential disaster for the company if Andrew Michel's attitude did not change immediately. There is no change and I discussed my concerns with Pam. I informed her that I would rather leave than see the company destroyed as all my efforts have made no impact. Unbeknown to me she discussed this conversation with Benny Michel and Richard Michel who were greatly concerned. Neither Benny Michel nor Richard Michel made any effort to talk to me on the subject. On the contrary Benny Michel informed me at a later date that I was responsible for the company's problems. On Monday 8 November there was a shareholders meeting for the trading period to June 1998. Richard Michel, who is not a shareholder, was present. Andrew Michel came with a tape recorder as he had done at a previous meeting. He ridiculed me by wanting me to describe the accounts and asking me to explain the meaning of "directors emoluments" ……. After the conclusion of the shareholders meeting Benny Michel said that Andrew Michel and Richard Michel should become directors. Neither Andrew Michel nor Richard Michel made any statement outlining the contributions or commitments that they would be making for the benefit of the company. I do not own sufficient shares to change this. I resigned as managing director to show my strong disapproval that this conduct was an attack on me personally and my position in the company….."

106. The letter was also copied to Richard and Andrew. Richard was subsequently appointed managing director by the board of directors.

107. A meeting was convened on 2 March 2001 to discuss the purchase of Aubrey's shares. All directors and Aubrey were at the meeting. Aubrey wanted to convey his concern that he had been accused of taking company property and refuted the suggestion pointing out that he had not "been near the factory". He wanted to know about the share buy-out as it had been agreed in principle in August 2000. He thought the Company was dragging its heals and wanted it to provide a timetable for purchase. He threatened that if he did not have a timetable he would have to "take steps to ensure that his family could live". The context of the meeting makes it clear that Aubrey would go into competition with the Company if he did not receive money for his shares. The meeting notes states:

"we said that we did not understand how the shares were to be valued or even at what date and that our representatives would sort all this out. He repeated several times that the date today the shares had been agreed and that it was the date of his leaving…… We said that we were unaware of any dates. He said that there were no management accounts for the end of Jan 2000 and he did not want excessive delay because of this. He kept repeating he wanted a letter from us and not Geoffrey Lent giving a "critical path". He said that he had no faith in our representatives and that John Rochman had not been able to sort out Wendy's will after three years and now he was saying that the will cannot be finalised……"

108. The meeting closed. The minute of the meeting records: "I, Andrew, believe that we should write to him urging him to meet Geoffrey to work out the basis for a share valuation and when that is agreed then a "critical path" or time–table could be given, after all he can delay the purchase by disagreeing with everything. We should also write and remind him of his duty to the company as a shareholder. We agreed that his shares should be bought as soon as possible."

109. A meeting took place in December 2001 between Jeffrey (who has a different spelling to that set out in the note), John Rochman and Aubrey whereupon an agreement was reached to purchase Aubrey's shares at £150,000. The agreement was reported to Benny and Andrew by letter dated 17 December 2001. It was in early 2003 that Andrew suspected that Aubrey was working in competition with the Company. This is some period after the buy-out agreement had been made. In the meantime, Geoff Harrison, of the internal accounting team at the Company, raised some serious concerns about Andrew and his treatment of employees to Richard. The buy-out agreement was signed and eventually completed in September 2003 on materially the same terms as had been agreed in December 2001.

110. The only evidence given by Andrew on the matter is that "My recollection is that his shares were valued at £800,000, and with minority shareholder discount a sum of £650,000 was agreed upon". This suggests that the directors and the Company members, and Andrew in particular, did not consider a pro-rata valuation appropriate; that the Company was not a quasi-partnership. Although the negotiations had been chiefly done through the Company's solicitor with the aid of an accountant there is no evidence that the negotiation was influenced by any accusations of wrongdoing on the part of Aubrey. Andrew accepts that a minority discount was applicable. The general

rule is that a minority discount should be applied in the valuation of non-quasi-partnership: "a minority shareholding is to be valued for what it is, a minority shareholding unless there is some good reason to attribute to it a pro rata share of the overall value of the company. Short of a quasi-partnership or some other exceptional circumstance, there is no reason to accord to it a quality which it lacks": per Blackburne J *Irvine v Irvine (No 2)* [2007] 1 BCLC 445. I am mindful that there is dictum from Deputy High Court Judge Hollington QC to the contrary: *Re Blue Index Ltd* [2014] EWHC 2680 (Ch) albeit it has been subjected to some valid criticism: see *Minority Shareholders Law, Practice and Procedure (sixth edition- 7.95-7.101); Estera Trust (Jersey) Ltd v Singh* [2018] EWHC 1715 (Ch). I accept the evidence of Aubrey, which was not undermined in cross-examination, that "as I was a minority shareholder there was clearly a discount to be had." I infer that Aubrey and Andrew (who was put in charge of the buy-back) thought and acted on the basis that Aubrey's minority shareholding was to be valued for what it was, and that his minority shareholding held no special quality that could have demanded a pro-rata valuation. I do not infer that Andrew wished to punish Aubrey by failing to offer a pro-rata valuation on the basis that his shareholding held a special quality.

111. Later, John Rochman was involved in the valuation of Andrew's shareholding. He had been in discussion with Howard Reuben (the Company accountant at the time). Their discussion, I lend less evidential weight to, as the account of the conversation is short. Nevertheless, they thought a discount appropriate. John Rochman's accepted evidence is "we had discussions about the value of Andrew's shares, which Howard put at around £1.2m without a discount. Howard was of the view that a 50% discount was justifiable, leading to a value of around £600,000."

112. In my judgment the treatment given by the parties to the buy-back of Aubrey's shares is an indicator (but not the sole indicator) that the relationship did not have the character of a quasi-partnership.

113. There are other contra indicators. First the Company was not born of a pre-existing trading partnership. Secondly, the petitioner has not suggested that he had any right to be a director. Thirdly, the documentary and oral evidence, when taken as a whole, leads me to conclude that the period 1999 to the retirement of Benny in 2004 was peppered with disagreement, relationship break downs and a lack of mutual trust and confidence.

114. I have mentioned the meeting where Andrew was elected director in November 1999. In my judgment this demonstrates that directorship was not as a right attached to a member. The only way to be a director of the Company was to follow the Company's articles of association: an application of corporate democracy.

115. As for trust and confidence, a note of a meeting held on 28 October 1999 records that the "redistribution of the company's shares [which had been owned by Wendy] has no doubt aggravated a situation where, looking back now, the managing director assumed that he could now have absolute control over the company. Questions have been raised concerning the direction of the company over the last 10 months which have been met with nothing but contradicting answers and lies. Campaigns have been put in place by the managing director against shareholders, directors and employees….. There has also been a growing amount of discussion that has taken

place between the MD and some employees about the MD resigning and setting up his own company, most of the recent appointments and travel arrangements points to this same conclusion" (sic). This note evinces considerable distrust and lack of confidence.

116. In cross-examination Andrew said "at that point in time [November/December 1999] we were all very close and we decided that [Richard] should be the managing director". The opposite is true. The appointment of Andrew and Richard was, if not the main reason, a material reason why Aubrey resigned as managing director. Aubrey wrote on 25 November 1999 "Andrew, Benny and Richard you have so compromised my position in the company that I now give you formal notice of my resignation."

117. From Andrew's perspective, there was suspicion that Aubrey had taken Company property, which Aubrey vehemently denied, and a concern by Richard that he may compete against the Company. Richard said in evidence that Aubrey could be dangerous in the early days after his departure because of his detailed knowledge of the Company.

118. In my judgment Andrew found it difficult to build bridges with his work colleagues. He has never been reconciled with Aubrey. An example comes from a note Andrew wrote to Richard about a call he had with Aubrey:

"I have had a long and boring and frankly irritating phone call with Bobby. At one stage I lost it when for the ninth time he went on about him being "thrown out of the company" and I told him that he and I knew this was all crap and I was fucking fed up with him fucking repeating the same old crap that I was not prepared to listen to any more….. At one stage he told me that I just call him a liar all the time because according to me everything he said wasn't true. I told him that indeed everything he said wasn't true……. His new line was that CK looked after Benny, Kangy, Mother and so it should look after him. Also irritating…"

119. In his written evidence Andrew describes his relationship with Benny as "a very strange one. We have never really been close. We have "rubbed along"". He explains "unfortunately, I perceive Benny to be a man who is easily influenced by those around him and who was pushed around by Wendy and Aubrey. Also, I feel that when he got the opportunity to bully and be nasty to me, he took it." The language Andrew uses to describe Benny's working practices and personal traits is not typical of that used to describe someone who reposes trust and confidence in another. He thought that Benny would not look out for his interests as "Benny connived with Aubrey" and "Richard uses and manipulates Benny, as and when he needs him". A letter written by Benny to Andrew in late 2000 is revealing:

"I am sorry to have to say this, but your behaviour is becoming increasingly rude, obnoxious and sarcastic. I do not appreciate this behaviour and to say that you are under extreme pressure is unacceptable to say the least. Your present conduct is regrettably no more than a rather unpleasant aspect of your personality. I will no longer accept this and give fair warning that if you do not pull yourself together Bobby's prophecy will be proved correct."

120. Benny wrote another missive on the same day "I suggest that when you can prove that you are able and capable of doing your work then I will gladly accept your comments." In cross examination Andrew said that he was working in Hatfield and Benny was working in London and "I didn't have that much to do with him, and from memory it was only this sign business that caused the problem between us".

121. The first letter speaks of Andrew's behaviour being "increasingly" rude, obnoxious and sarcastic suggesting that this was not a once only incident. The second missive does not demonstrate mutual confidence in each other. Andrew's written evidence is that Benny spent a considerable amount of time at home looking after first his mother then his sister, Wendy. In my judgment Andrew was seeking to play-down Benny's role in the hope that he would marginalise him. I find that in the period 1999 to 2004 Benny was concerned in the corporate governance of the Company. He was the Company secretary. He was critical to the outcome of votes at the meeting in November 1999 when Andrew became a director. Soon after Aubrey's resignation Benny was involved in the election of a new managing director. Even after Benny had "stepped-back" from day to day operations he would attend and play his part in board meetings. He was present at a meeting in March 2004 when a discussion was made about investing in a joint venture with Mrs Mu in China. In oral examination Andrew states "Benny and I, [decided] that Richard should be the managing director", and that Benny had "an active involvement in the business" from 1999. Andrew accepts that he never really worked with Benny but: "on a few occasions he would help me to perform the manual year-end stock take. He did come with me to Thailand, for the opening of the Yukigaya factory; and then to China, to meet Mrs Mu".

122. At the end of 2003 Benny expressed a wish to retire (or as John Rochman put it, to step-back). On 19 January 2004 he wrote to Richard referring to discussions in 2003 and a meeting with John Rochman whereby some terms were agreed. His evidence is that it was agreed that Benny would retire from the Company at the end of 2003 but would remain a director in a non-executive capacity. He would still go into work and deal with matters on a project-by-project basis. His unchallenged evidence is:

"I was tasked with dealing with the terms of Benny's stepping-down. The issue was this. Benny did not reach his retirement age of 65 until 2010, and sought at least some income and various benefits - including payment of his pension contributions-until his pension started. Advice was sought from accountants. Ultimately, and for various tax-related reasons, it was decided that Benny would remain an employee. As such, it was agreed that he would remain a director and employee until he reached 65 (whereupon his pension would commence). It was further decided that his annual salary of around £30,000 would be reduced to £20,000 and he would lose his annual car allowance of £4,800. I recall that Benny fairly willingly accepted that his package needed to be reduced, on the basis that he was spending less time at the Company and did not want to be a drain on the Company's resources.

I recall that I heard from Benny (I think this was during the course of the summer of 2004) that he found it too stressful working with Andrew".

123. The evidence of John Rochman was confirmed by Andrew in cross-examination as he accepted that by 2003 he and Benny could not work together.

124. If Andrew was "close" to the others in 1999 (excluding Aubrey) any trust and confidence quickly evaporated. The evidence demonstrates that he had little confidence in Richard's abilities and doubted his financial acumen. Having lent Richard some money any trust he had was lost due to a failure to repay the debt. Andrew explains "my concerns generally were with regard to Richard's ability to run the Company, particularly because he lacks the financial background. I worried that the hard work Brett and I had put into sales would go to waste. In his personal life, Richard always spent every last penny he had, and I was concerned that he had stopped trying to repay the money he'd borrowed from me to buy his house". Andrew did play a role in the Company in the years 2003 to 2005. Theresa and Andrew visited China to investigate a joint venture with Mrs Mu, who could provide a plant to produce flocked foam, and he liaised with John Rochman about the terms of the joint venture agreement on the instruction of Richard. The documentary evidence demonstrates that tensions, a lack of confidence and distrust were, however, never far from the surface. Andrew refused to sign the minutes of the meeting concerning the joint venture with Mrs Mu. It was signed by all other directors. He embarked upon an exhibition that would cost the Company money but told employees that "there was not much point of doing it as no customers will come and visit".

125. Andrew gave evidence that he was so concerned about Richard's health that he suggested the business be sold. The reason why Andrew may have suggested the business be sold, may not have been confined to a concern about Richard's health. Andrew was worried about the Company's debt. In 2004 the Company received an offer to purchase the factory site for £5 million. Andrew was of the view that the site should be sold but Richard was not. There was a disagreement about the way forward. Richard was keen to develop the business and accused Andrew of "feathering his own nest". Andrew says that the Company was sinking under a heavy debt burden and the offer to sell the site appeared to be a solution. Whether the disagreement about the sale of the site triggered a complete breakdown in relations or whether there was a general deterioration over the period, both agree that by the end of 2004 their working relationship had become so difficult that Andrew was considering not returning to work.

126. In early 2005 the Company was forced to make some staff redundant. One employee responded by taking a claim in the Employment Tribunal. Barbara explained that the Company's turnover had been reducing over the previous few years, and profit margins "squeezed". This combination led to redundancies and the market continued to be difficult. In July 2005 the Company won a contract to supply L'Oreal Maybelline. Winning the contract was a small triumph for the Company but it also allowed in the door other financial pressures. Goods would have to be sent to North Little Rock and a three month "call off" period would be allowed for L'Oreal to ensure that its stock was not too great. In the three-month period the goods would have to be stored and it was agreed that the Company would meet those costs as well as the costs of de-palletising, although the cost of transportation from the warehouse in North Little Rock to L'Oreal would be met by L'Oreal. In all this time the Company would not be paid by L'Oreal. Andrew was concerned about the Company's cash flow and communicated his concerns to Richard. Richard responded in writing explaining that he was spending a lot of time controlling cash flow and trying to minimise outlay.

127. A taste of the relationship can be had from a memo written on 23 September 2005 from Richard to Andrew relating to the cashflow concern expressed by Andrew:

“I am surprised if you think that I am not worried about the cash flow of the company. I spend most of my time trying to minimise the outlay in most areas of the company whilst still maintaining a level of customer service which is by far the companies (sic) weakest point. As it was pointed out to you on the phone the other day by a competitor that manufacturing wise we are superior we are let down by our sales and marketing (basically customer service) which includes:- shipping, costings, accounts, sales itself and development. Most of which you control.”

128. Around this time Brett Lamont tendered his resignation. Andrew informed Richard that he did not “trust Brett an inch”.

129. In November 2005 Mrs Mu contacted Andrew to ask whether he was happy about Richard’s consent that the Company’s American distributor (Penthouse) join the Chinese manufacturing collaboration. Andrew was not happy and expressed shock that consent was given without his consent while he was on holiday. There is little evidence of a relationship of trust and confidence in this period. The relationship is better described as one of irritation and suspicion but more importantly of distrust. Between the many cracks in the relationship some trust may have remained, and sufficient trust to allow Andrew to negotiate an acquisition for the Company, reporting to Richard. Confidence was, if anything low. It would take one more incident for the relationship between Richard and Andrew to break down completely and for any trust remaining to dissipate.

SLG

130. The incident that gave rise to a complete breakdown in relations between Richard and Andrew concerned an attempted acquisition of a competitor manufacturing company of cosmetic applicators SLG. Andrew’s evidence is that 2005 was a year when he had to fulfil many different roles. He was in charge of the accounts, travelling to marketing events, took control of order processing, and did the invoicing and shipping. The CEO of SLG Miles Dunkley, gave evidence at trial. Richard considers that Andrew, without good reason, hijacked the negotiations between the company and SLG, in such a way that any takeover of SLG became impossible. Richard suspects that Andrew deliberately hijacked the negotiations to ensure that the Company would not acquire SLG. Andrew was never fully behind the acquisition. The method used to undermine negotiations was first to change the terms of the offer made on several occasions and then cause the Company embarrassment at a meeting with Miles Dunkley to such an extent that Miles was no longer prepared to deal with the Company.

131. Andrew’s version of events is that SLG had not been transparent about their sales activity in the due diligence process and Andrew harboured a concern regarding the supply of cosmetic sponges from a company called Taiki. The Company had agreed in principle to purchase SLG’s order book, machinery and other materials for approximately £1 million. Negotiations continued and in New York where Miles and Andrew met during an exhibition. Miles suggested that the payment be structured so that 80% be paid up front and the remainder be paid according to post purchase

performance. Andrew took advice from the Company's accountant who advised that the less up-front payment the less risk. Andrew was concerned that the Company would be exposed after the purchase as there were no guarantees that the Company could make a success of the acquisition. It became apparent that Andrew was not keen to subject the Company to more debt in order to acquire SLG. Andrew therefore thought it more appropriate that there be a lower upfront figure paid and then the remainder being based on an achieved turnover.

132. Richard says that he put Andrew nominally in charge of "taking the deal through to completion" although many were concerned about his steer on the acquisition, including Barbara and Theresa. Richard's recollection is that Miles had been offered 100% upfront and so he was surprised that on 7 October 2005 he would agree to an 80% upfront. Richard agrees that the Company's accountant advised to pay as little upfront as possible. But Richard wanted the deal "very much". A memo written on 9 November 2005 to Andrew by Richard demonstrates Richard's disappointment at the failure to agree terms with Miles:

"[A]s you are aware, I am very angry and depressed regarding the outcome of the SLG acquisition. I left you in sole charge of the negotiations as I cannot manage to be in charge of every project at the same time. I feel now the way I felt when you left to visit Maybelline that you have let both me and the Company down badly by trying to be smart and thinking that you could push the offer to Miles down substantially. What you have managed to do is insult Miles's intelligence by a long drawn out unacceptable offers and now he has walked away from the table……. Now I feel that you have damaged the company's chances of progressing, we will just continue to have losses month on month and, unless a miracle happens, I can see that the Company will possibly fold in the near future."

133. A meeting was convened on 11 November 2005. Present was Kalok Man, Barbara, Theresa, Andrew and Richard. The purpose of the meeting was to consider a memo written by Theresa to the directors, Andrew, Richard and Benny " it saddens me to have to write this to you all as we should be in a position where I should not have to ask for a pay rise, the company should be in profit, I have never asked before as I was willing to wait until we were profitable, but over the last few years it has become apparent to me that unless we all work as a team this is never going to happen…." (sic). In her view the Company lacked a coherent strategy and the directors were not agreed as to the direction of the Company. Theresa expressed her view that there was no direction and no control. That the sales manager (Brett Lamont) was not challenged about his working hours and that Andrew was not monitoring his work close enough. Barbara agreed and complained that budgets had not been given to the managers by another employee called Dave Tarrant. Other complaints were made. A note of the meeting records the management's view that the "office is divided into two: Andrew managing sales and finance, and the other side the rest. Communications between the directors are extremely important. We find it difficult to work when interests are divided." Barbara expressed concern that there were two factions in the Company and that the "directors must sort out their issues and show a united front even though in private their views may differ." These factions were temporary as Andrew's tenure was coming to an end.

134. On the same day Richard sent a memo to Andrew blaming him for the failed acquisition of SLG "you have mishandled the SLG acquisition from the beginning, thinking wrongly that the Victoria Vogue acquisition was a better bet, but you would not take my point of view on board over that. You then proceeded to use the tactic of dragging out the purchase against my wishes, stating that I did not know how these things should be done and all I wanted to do was waste the companies (sic) money…...You have lost the trust of Synlatex by verbally agreeing on a deal then rescinding on it." Turning to the earlier meeting on 11 November Richard said "all the way through the meeting you said things were going to change in the future. The staff said they had heard it all before. Then to my absolute amazement you went on to explain to them what the company's position was and what would be done if certain scenarios arose. This was with absolutely no discussion or consent from me. So I had to interrupt and yet again prove to the staff that there is no agreement between us. I will make it clear now that while I am a director of the company we will not attack Synlatex's business".

135. The memo is important as it provides contemporaneous evidence of the relationship between Richard and Andrew as at November 2005. Andrew has suggested that since the SLG acquisition had not proceeded the Company could target the SLG business. As the Company had entered into a non-disclosure agreement an "attack" would inevitably mean either using some of the confidential information provided for due diligence or exposing the Company to the risk of litigation with SLG, if SLG thought that the Company was acting contrary to the terms of the non-disclosure agreement and using information gained from the due diligence. Richard believed the mere suggestion of an "attack" was underhand. The memo provides evidence that Richard no longer (if he had before) trusted Andrew and that he had no confidence in Andrew. Richard wrote: "I am also aware that many times were (sic) you have not told me the truth to questions I have asked you." And "I have now got to the point were (sic) I realise that we cannot work together anymore".

136. Andrew responded immediately accepting that their relations were poor and that he was not perfect "I have many faults which I admit but I also have some good points." He did not agree that the failure to acquire SLG was his fault stating that he tried to get the best deal possible and minimise the risk. He said that Miles had "gone over the top" and that Miles "knows he has behaved badly". He said that "I have not told you untruths. I do not see the point in lying to you". And "I understand that you are not well but you also need to look into your heart. You have and continue to treat me and speak to me like shit. This is not fair. You scream and shout like a sixteen-year-old at me, Barbara and Theresa and you think this is acceptable behaviour." He then suggested that if they went to a board meeting Richard and Andrew "don't even need to speak". Richard responded on 23 November refuting some of Andrew's allegations and informing him that SLG had confirmed that it was not interested in reaching an agreement with the Company. However, Andrew had already written to the Company's solicitor on 18 November 2005 "SLG have pulled out of the deal. Reasons unclear. I am somewhat……off". This was an extraordinary note to write given the prevailing circumstances. If there was a relationship of trust and confidence at this point, it was well hidden.

137. The memo from Richard may have sparked a reaction in Andrew as the next day he wrote to Miles "one of the reasons I was disappointed that our deal did not go through

was that I had hoped that you would be a long term partner of Richard. It had been my intention to offer to sell you my shares 33% in LK. However, it occurred to me last night that you still might fancy this vision or maybe not. Let me know if you see a potential in this." This was an extraordinary offer to make given the Company's articles of association, that SLG was a competitor and that the Company was seeking to acquire SLG's order book rather than SLG itself. Andrew's explanation was that he was testing the reason for SLG withdrawing from the sale. He says that at "no time did I ever formally offer to sell my shares or have any intention of doing so. Had I intended to do so, I would have raised it with Benny and Richard. With hindsight, I recognise my approach could be viewed differently and I should have discussed it with Richard first. I did attempt to talk to Richard about it beforehand, but by this stage he wasn't engaging with me, so I took the decision on myself".

138. In a memo to Andrew dated 25 November 2005 Richard, not knowing of the offer Andrew had made to Miles the day before, returned to the theme of the completion meeting "[D]uring the meeting you pulled out an agreement that SLG had sent you some days before not only had you failed to mention this to me, even as we drove together to Oxford, more insulting was the fact that you had discussed the document with Brett and his hand written notes were all over the document. Can you imagine how unprofessional that made us look to SLG especially as it stopped the meeting for nearly an hour whilst I tried to read the document for the first time. I believe this did not help SLG's opinion of us along with the way that you attacked Pat at the next meeting, in a way very similar to Bobby would have done, thus causing concern over our working together on future projects. It is my belief that this effectively ended the negotiations" (sic)

139. When Andrew informed him that he would try for a 70% upfront payment Richard "strongly disagreed". Richard considered that such an offer would likely "scupper the chances of a deal".

140. Richard describes the meeting in Oxford, held in a lounge off the reception area of a hotel, as "terrible". Richard's evidence about how he "attacked Pat" is that Andrew "erupted, shouting at, leaning towards and poking his finger at Miles's colleague Pat". At the time of the meeting Pat Topping was the joint managing director of SLG. Andrew denies that he "attacked Pat".

141. The evidence given by Richard and Andrew about the completion meeting conflict. Miles' version of the completion meeting in Oxford aligns more with the version provided by Richard. In his written evidence he explains:

"The Company and SLG entered into a non-disclosure/confidentiality agreement. This was of the utmost importance to SLG. The Company and SLG were direct competitors, and the due diligence phase would require the disclosure by SLG of highly commercially sensitive information and our most intimate commercial secrets. If the acquisition did not proceed, and if the Company then used the information it obtained during due diligence to attack and undercut SLG, the impact on SLG is likely to have been extremely serious.

The Company (by Andrew) and SLG (by me) agreed heads of terms for a straightforward deal -£1,040,000 plus stock, with full payment on completion. I

would emphasise that full payment on completion was a fundamental term as far as I was concerned…. At one stage during this time, I became concerned that Andrew was playing games. I was not impressed and I made it clear to him that SLG was not going to change the terms.

I should make clear that but for Andrew's disturbing behaviour at the meeting in Oxford, we may still have sold the business. I was unimpressed by Andrew's attempts to keep changing the terms. His conduct at the meeting really was the end of any chance whatsoever of selling our business as long as Andrew was in any way involved with the Company."

142. Miles made clear in cross examination (and I paraphrase) that he was not the sort of businessman to play business games. His written evidence is that at the completion meeting "Andrew quite suddenly lost his temper with Pat. I remember him leaning towards her and jabbing his finger towards her. His voice was raised in such a way that I am sure anyone in the vicinity would have been able to hear. I recall him using the "f word". He looked unhinged. I have never in my career experienced anything like this. It is a stand-out meeting in my business experience and one I am unlikely to forget. Andrew's behaviour was shocking on a number of levels - because he had flipped …. his behaviour was so extreme, he was aggressive and unprofessional, and in particular, he had directed his anger at a woman. His behaviour was also illogical- it was the Company that had changed the terms, not SLG. As such, Andrew's anger was simply unjustified."

143. I prefer the evidence given by Miles and Richard over that of Andrew. Miles gave evidence of how Andrew changed the terms of the deal at the last moment, and how when they met at the New York exhibition they had agreed the terms for the acquisition of SLG. He viewed Andrew's attempt at renegotiating what had already been agreed as poor behaviour and led him to distrust Andrew. Tested in cross-examination, Miles's responses were convincing. He said it was "not my suggestion of 80/20, but his suggestion of 80/20, and a firm handshake which I can remember very clearly, at the back of a hall on the last day, I think it was the last day of the show, and it felt like that was it, okay, I've conceded, you want some help, we'll help, and that's it, and it was a sort of, you know, an effort to be compliant and help. I didn't like it, because I didn't think that the deal needed to be adjusted in that way, I really didn't. I think it was fine and it was fair". He described Andrew as "very crafty and very cunning" and was not undermined when tested on whether Andrew lost his temper at the completion meeting. He called Andrew's unfortunate outburst as a "red mist" moment.

144. In cross-examination Barbara explained the devastating effect of the failed SLG acquisition on the Company. She explained (and I accept her evidence) that the Company experienced difficulties following the completion meeting as "SLG were particularly angry with Andrew and we spent a lot of money trying to get the deal going through …. Also, the management team in the company were distressed by Andrew's behaviour." She informed the Court that warehouses had been cleared in preparation for the stock that was to be purchased and that the Company had invested time and money in preparing for the purchase of SLG. Time and money had been wasted.

145. I have outlined above a conflict of evidence regarding Andrew's e-mail of 24 November 2005 where he offered his shares to Miles. In cross-examination Andrew denied that he had an intention to sell his shares. He accepted he knew about the articles and the restriction on selling shares. In resolving the conflict, I find that the documentary evidence is against Andrew's version of events. There is no evidence of Andrew attempting to discuss his approach to Miles with Richard before he sent the e-mail despite his written evidence. The terms of his e-mail to Miles (it had been my intention to sell you my shares) was never been discussed with Richard during the negotiations and the timing of the e-mail left little scope to discuss his offer to sell his shares (it occurred to me last night). I find it is more likely than not that his statement that he tried to discuss the sale prior to the e-mail to Miles is untrue.

146. I also find that he did intend to sell his shares and would have done so if Richard had agreed and Miles had made an offer that was acceptable to him. I am bolstered in this finding by events that took place after the offer was made.

147. In December 2005 Andrew approached Richard about the potential sale of his shares to Miles. He needed Richard's consent. An attendance note made by John Rochman records that Richard had told him that Andrew was putting pressure on him to reach a decision about the sale of his shares. John Rochman suggested to Richard "he should say to Andrew that he does not agree to the sale of the shares that he holds to Synlatex at the present time. Indeed, that he is surprised that he should consider selling them." There is no reason to doubt the accuracy of John Rochman's note. Following the call with John Rochman, Richard wrote to Andrew "I am absolutely amazed that you have raised the idea of you selling your shares to the SLG Group who after all are a competitor of ours." In a latter e-mail Richard described being "flabbergasted at your idea and will need to think about the proposal. I have highlighted to you in writing over the recent weeks that I was not happy with you going behind my back I was very disappointed by our meeting were (sic) you said that you offered your share in the Company to Synlatex." John Rochman was to comment later that the offer of shares to SLG was "a clear breach of implied trust and duty". In a latter e-mail Richard wrote to Andrew "I believe that you like the idea of selling your shares to SLG because it is the easy way out. You need to consider the effect it will have on the staff who have worked very hard for very little gain when we tell them that SLG, who you have done nothing but slate, is buying into our company." These memos suggest that the Company's articles would not have been a large bar to selling the shares to SLG but more importantly they demonstrate that Andrew did not inform Richard that the offer to sell the shares to SLG was a mere ruse, even after the e-mail to Miles was sent. He persisted with the idea and sought Richard's approval for the sale. Andrew's explanation that he was merely testing a suspicion he held is inconsistent with the evidence and I find, a lie. These events concerning SLG are strong negative indicators that the relationship between the parties had the character of a quasi-partnership at the time Mr Tomson contends it did. They do not reflect a relationship of trust and confidence.

Andrew's departure from the Company

148. On 2 December 2005 Richard attended the Company's solicitor, John Rochman. Mr Rochman's contemporaneous attendance note records that Richard had brought to the meeting various copies of memoranda and a copy e-mail taken from Andrew's

computer. John Rochman records that Richard was keen to get a very good team around him and develop the Company, that Aubrey is no longer a threat and Benny although not often involved with the Company was "sympathetic to Richard's position." Mr Rochman "suggested that Richard should have a meeting with Andrew and state quite clearly that it is not possible for him to work with Andrew anymore. I suggested that a way forward should be found whereby he should either acquire Andrew's shares and/or acquire a greater shareholding in the company to give him an incentive. He should suggest to Andrew that he become a consultant-possibly with effect from now."

149. A few days later on 6 December Richard e-mailed Andrew saying that the time had come to review the Company strategic plans. The e-mail contained in the trial bundle is in draft. It has not been suggested that the e-mail was not sent. In his e-mail he explained that "direction will need to come from myself only, to get motivation back to a desirable level although no reflection on yourself we need to clarify direction by you taking a decreased role in the day to day running of the Company. This will not affect your remuneration. In certain areas you excel at what you do and you should be seen as a consultant to the Company in these areas. As time progresses and the Company stabilises you can reduce your hours remaining on as a consultant for the areas you enjoy and work well in."

150. On 9 December 2005 Andrew sent Richard a memorandum "you have requested that I step back from the day to day running of the company and stick to Klocke and Colorpose projects. I accept this. From January 1st this is what I will do. As I will only need to come in to run these it will mean that I do not have to come to Hatfield that often so you can have my car allowance and use it to reward the others or save money. You should put your ideas to the management team and see how they take it. It is important that you run with your ideas because they are correct and you must prove that they are. Please remember that although the team are loyal and good they are not infallible." He ended by reminding Richard that the finances of the Company were not good and that in the event that the Company were to close he and Benny should be paid out at value as at 31 December 2005. Richard's reaction was to send the letter to John Rochman, asking "what do you think?"

151. Benny and Richard met Mr Rochman at his office on 12 December to discuss "Andrew's position". The attendance note contains a typographical error but it was agreed that Andrew would be asked to meet Mr Rochman who would discuss a consultancy agreement and suggest that he sell his shares to Benny and Richard or the Company. Richard and Benny remained concerned at the prospect of Andrew selling his shares to SLG or Miles Dunkley. Andrew had also been discussing his position with Mr Rochman who in turn wrote to Richard on 16 December 2005 to say that Andrew was keen to have a face to face discussion with Richard. Mr Rochman warned that any agreement not reduced to writing could lead to "further misunderstandings and uncertainties". Mr Rochman suggested that "the fairest way to move forward would be to get the auditors to agree a fair price having regard to all factors concerning the company. At that point of time. You and Benny can decide whether it would be more appropriate for the company to purchase the shares or whether they should be purchased by the two of you (as remaining shareholders)…"

152. Mr Rochman attended Richard by phone on 21 December 2005. His attendance note records that Richard was to have a meeting with Andrew and Benny at 10:30 that day. Mr Rochman noted "I helped him amend the memo that he had prepared to Andrew since I thought that it should highlight the lack of trust between the two of them now that Andrew had behind (sic) the back of Benny and Richard offered to sell his shares to SLG- a competitor". On the same day Richard sent Andrew the memorandum, "not only have you jeopardised the chance of the deal going through it has affected my confidence in you and your involvement in the Company……I agree that you should not come into work from January but work from home."

153. There is a note of the meeting held between Andrew, Benny and Richard on 22 December 2005. The authorship of the note is not known. Andrew said in oral evidence that he can recall the meeting was very short. The note records that Andrew said that the real flaws were with the management team and Richard agreed. There was a short discussion about the various departments. Andrew said that he had already agreed not to return to work in January 2006, explained, when asked, that the offer to sell his shares to SLG was not done behind anyone's back and that the SLG acquisition was not beneficial. He informed the meeting that the Company was "in a bad financial position and needed £200,000 to keep trading." He was arranging a loan with HSBC secured against the Hatfield property. On the same day Richard phoned Mr Rochman to report on the meeting and informed him that Andrew should have some reduced role in the Company.

154. It is common ground that Andrew did not return to work in January 2006.

The Agreement

155. In his witness statement Andrew says that "Richard and I found it increasingly difficult to work together, leading to what is known as the Late 2005 Agreement in the statement of case". The statement of case states: "[T]he Petitioner and the Second Respondent agreed in principle that the Petitioner would from the beginning of 2006 onwards work mainly from home and be responsible for new projects, and would step back from day-to-day management of the Company (except in relation to overall management of the finance function which, given there was an accountant in-house who could provide him with the necessary information, he could do from home)". The pleaded case is that "in these circumstances, during late 2005 the Petitioner and the Second Respondent…reached the following oral agreement…" The 2005 Agreement I have already summarised. It is pleaded that after reaching the Agreement Richard and Andrew met to inform Benny. In his written evidence Andrew says that the meeting took place in Hatfield: "We then met in the front office at Hatfield shortly before Christmas in 2005 to discuss this. The meeting was short. We shook hands on it and that was that".

156. In his oral evidence he accepted that the last day before the Company shut down was 22 December 2005. An attendance note produced by John Rochman of the same date records that Richard had called to inform him that he had met Andrew. Richard reported that Andrew had accepted that he should have reduced role and that Andrew had agreed to meet with Mr Rochman. The note ends "I also asked Richard to do a full note of his meeting and send me a copy so that it was not forgotten. He promised he would do this." Further Mr Rochman asked for a copy of the letter "which I had

drafted with him which he gave to Andrew" There is a note of the meeting which shows that Andrew, Richard and Benny were present.

157. Andrew was taken to the note of the meeting and asked about it. First, he said it was not an accurate note of the meeting and then agreed with part of it.

Q. It was just before, it was 22 December.

A. Yes, and I think we closed that day.

Q. This is the meeting that you say the late 2005 agreement was made.

A. Yes, that's right, but these aren't accurate meeting notes from the meeting.

Q. What happened in this meeting was that you said that you'd already pointed out in your memo of 9 December that you weren't going to come back to work in January, and again you referred to the ring-fencing idea, but the company has to be valued as of now, and Benny and you were not to lose out if the company devalued?

A. Yes, it says that, it says that, yes.

158. Richard's evidence in re-examination was as follows:

Q. Now, how would you describe then, at the conclusion of this meeting, the state of the negotiations between you and Andrew, between Benny and Andrew?

A. It was still open. It was that -- we ended this meeting, which wasn't a particularly pleasant meeting, and we ended the meeting by saying: okay, fine, we'll talk to John Rochman about it in the New Year and formalise this -- the way forward.

Q. Had anything been agreed between you at this meeting?

A. The only thing that Andrew kept saying was he won't be coming back in January. That was the only thing that was agreed.

159. Richard's evidence I accept as true. It was clear and consistent with the documents. The minute of the meeting ends "the meeting ended with all the parties agreeing to move ahead as discussed next year". A letter head "FOA John Rochman" enclosed the minute of the meeting and the letter. On the face of the letter "Have a good Christmas John. Thanks." I find the letter and the minute of the meeting contradicts Andrew's evidence and is on the balance of probabilities an accurate record of the meeting held on 22 December 2005. This finding is supported by evidence of events in 2006.

160. Benny and Richard attended Mr Rochman on 13 January 2006. Mr Rochman's attendance note records that there was a discussion about paying Andrew a consultancy fee and "I asked Benny what he wanted. He said that he would like to sit down with Andrew." It is apparent from this note that Andrew and Richard had not made an agreement other than that Andrew would not be concerned in the day to day management of the Company and would not go to work in January. These two matters are as stated in the letter Richard handed to Andrew on 22 December. The attendance note of 13 January 2006 supports the position as set out in the minute of meeting sent

to John Rochman prior to Christmas. The note also records that as Andrew was 56 years of age it would be proposed that he could act as a consultant "for a year or two".

161. On 15 January 2006 Andrew e-mailed Benny copying-in Richard "here is my simple idea". He estimated that the Company had a value of £7 million and "if the company fails under Richards stewardship then Benny and my share of 7 million would be guaranteed. Should the value of the company fall below the guarantee then Richard must make up as much as the difference as possible from his personal assets." (sic). He added that (i) "Benny and I must be indemnified from any liability for mismanagement or dishonest dealings of the company" (ii) "my salary must be guaranteed and any increase in Richard's salary must be reflected in mine" (iii) the company may not borrow any money against the assets of the company without written approval of the shareholders." It is self-evident that this e-mail although presented as "my simple idea" was neither simple nor a single idea. To add to his list of demands he sent a further e-mail "I am to be supplied with monthly accounts".

162. This contradicts Andrew's position that an agreement had been reached in late 2005 that he would remain in overall charge of the Company's finances. If he were to remain in overall charge of the Company's accounts it would have been implicit that he would have full access to all the financial information of the Company at all times to undertake the task. It makes it less likely that there was an agreement that there would be monthly meetings as that would be a forum to receive company financial information. He went on to specify why he wanted the accounts "If by June 30 2007 the company is still losing money then we must decide again what steps need to be taken." There followed a meeting with John Rochman on 20 January where all the actors were present. The attendance note produced by John Rochman I accept as an accurate summary of the meeting as his evidence has been accepted and he referred to it in his witness statement. It is also a note produced by a third party. It has importance not for what it records as having been said, but for what was not said. I find it more likely than not that, when together with the evidence contained in the note of the Company solicitor, Andrew would have raised the alleged Agreement and its terms if an agreement had been reached. Furthermore it was Mr Rochman who suggested that if Andrew was to remain involved in the Company he should ask for "quarterly meetings with shareholders to review progress of the business plan coupled with a supply of quarterly management figures or some other similar arrangement" when speaking alone to Andrew on 27 January 2006. It is clear from Mr Rochman's attendance note of this date that there could have been no agreement in the terms pleaded by Andrew in late December 2005.

163. This conclusion is supported by a memo written by Richard to Andrew on 21 February 2006 responding to a complaint Andrew had made on 19 February concerning his desk clearance. In his memo Richard wrote "As for the shareholder meeting this is the first time you have indicated that you wish to have one". The conversation at this time was about Andrew staying at home, not participating in the Company save for a few matters, seeking to buy out his shares and clearing Andrew's desk at the Hatfield premises. Andrew's response on 21 February that Richard had agreed to ring-fence "Benny and my value in the Company" is an example of Andrew not telling the whole truth. It is unlikely that he was merely mistaken, having discussed the issue with John Rochman in very recent days before the communication.

164. A meeting was held with the three Michels on 1 March 2006 and was recorded. They agreed "John Rochman to value the company as at December 2005. Andrew agreed to this if it was at Benjamin Michel's expense." If Andrew were right about the Agreement, I find it incredible that he did not raise it during the course of this meeting. In another meeting with John Rochman he informed him that an agreement had been reached between him and the Company that he would continue to receive a salary as long as he "would not interfere in any way". Mr Rochman asked Andrew for how long should be paid, to which Andrew said "it would be implicit that it would be until 65". In other words, there had been no express agreement as to how long he should be paid. This is contrary to Andrew's pleaded case.

165. John Rochman wrote to Andrew on 9 March 2006 stating that Benny and Richard wished him to be a consultant "for an agreed period of time" and if Andrew wished to sell his shares then there is a mechanism to do so contained in the articles of association. His letter states:

"Whilst it would be intended that you resign as a director of the company, I understand that it would be the wish of Benny and Richard that the company enters into a consultancy arrangement with you….for an agreed period of time….You will know from conversations and meetings you have had with Benny and Richard that I would be writing to you following the unhappy events which occurred during the course of last year and the situation which now pertains with regard to the company. The position has become untenable in that, following your approach to one of the company's main competitors (S.L.G) to sell your shareholding, the trust and confidence that it is necessary for directors and shareholders to have to work together in the best interests of the company has, unfortunately, evaporated. You have effectively not worked in the company's premises from December last and certain meetings and discussions have taken place with a view to trying to resolve matters."

166. In any event Andrew did "interfere" with the business by unilaterally approaching the Company's bank regarding further facilities. The overall picture during this time is that Andrew was changing his demands, and giving inconsistent positions to Richard, Benny and Mr Rochman.

167. Mr Rochman, viewed as a third party by Richard, Benny and Andrew, was able to makes suggestions about their future relationship without repercussions. He suggested to Andrew in late November 2006 that there would be a two-year consultancy agreement between Andrew and the Company. Andrew responded that in December 2006 (almost a year after the purported Agreement) "last December, Benny, Richard and I agreed that I would take a back seat and leave the day-to-day running of the factory to Richard; I would deal with Colorpose and the development of new products. In return, it was agreed that Richard would ring-fence the value of the company and that I would continue to be paid a salary. This is the reason that we came to see you in January…..I have read your proposal concerning consultancy etc. However, at present I have no idea of the value of the company, nor do I know what percentage holding is mine, so I hope you understand that, until I know the sums involved I do not feel that I should agree to anything. As I have stated before, I am 56 years old." It is notable that he did not protest that the terms of his departure had been agreed and comprised the Agreement. The purported agreement to ring-fence is a lie, as is apparent from the exchanges I have set out above. As Richard said in re-

examination if he was speaking with Andrew "he tends to put a spin or a twist on it". The issue of the "simple idea" and "ring-fencing" is an example.

168. Richard's evidence is that in the period March 2006 to February 2008 Andrew did not visit Hatfield, or develop any projects, and did not attend meetings of directors or ask to attend or ask why he had not been invited to such meetings.

169. A further meeting between Richard, Andrew and Benny took place on 27 February 2008 at which, Richard says, it was agreed that the Company would continue to pay Andrew as an employee until his 65th birthday. Richard's position is supported by an attendance note made by John Rochman after Richard reported the outcome of the meeting to him on 28 February 2008:

"As a result of Richard's brother's efforts he got them all together and they have now taken some time to talk and see what happens. The upshot of the meeting was that Andrew would be paid his salary until he was 65 (he wanted 70 but they hit on 65 as being appropriate).

I questioned Richard whether he was suggesting whether Andrew, who had already been paid two years' salary, should be paid another seven years? He said that was what was agreed."

170. During the call Richard accepted that there may be resentment in the Company due to the fact that there has been an agreement to keep paying Andrew. There is no suggestion that the agreement was made because Andrew was a member of the family, merely that there had been an agreement. Richard said that "he is between a rock and a hard place".

Conclusions

171. In my judgment there was no relationship between Benny, Richard, Aubrey and Andrew that went beyond the terms of the Company's articles or other express agreements. To adopt Lord Reed's phraseology in *Anderson v Hogg* there was no agreement, understanding or clearly established pattern of acquiescence on the part of Andrew which may have led Richard or Benny or them both to act or continue to act in any particular way towards Andrew so that it can be said that it gave rise to an equitable constraint preventing a departure from the Articles.

172. The shareholders did not treat their shareholding as providing a right to be a director. There is no evidence of a common understanding that Andrew could continue as director for as long as he remained a shareholder or act in the management of the Company.

173. There is little evidence of trust and confidence between the shareholders in the period 1999 to 2004. During this period Richard and Andrew were appointed directors and Aubrey and Benny retired from the Company's management. The relationships were peppered with disagreement and confidence was undermined by Andrew's failure to trust Richard's ability to manage the finances of the Company and Richard to trust Andrew's competence in carryout his functions. Aubrey felt that his position had been so undermined that he left the Company. Benny retired from the Company because he

found Andrew too difficult to work with. Andrew voted for Richard to take Aubrey's position but ensured that he knew that he had little confidence in him.

174. Aubrey asked for his shares to be purchased. It was agreed that his shares be purchased applying a minority discount. I infer that the minority discount was applied because there was no special quality attached to the shareholding that would have deemed a pro-rata valuation applicable.

175. In the period 2004 to the end of 2005 relations between Richard, Benny and Andrew did not improve. Benny generally co-operated with Richard and tended to agree with his management methods. He would attend important meetings. Towards the end of the period their relations became hostile. Any trust and confidence had vanished after Andrew upset the acquisition of SLG and sought to sell his shares to a competitor. I find that Andrew's explanation for seeking to sell his shares to a competitor and suggest that the Company act aggressively towards SLG after negotiations broke down, unconvincing and untruthful.

176. I find that Andrew and Richard's mutual hostility culminated in a choice for Andrew. Richard was prepared to walk away from the Company if Andrew remained. Andrew agreed to leave and play no further role its management from 1 January 2006. The intervention of the Company's solicitor was frequent during this period. If the personal relationship could be characterised as one of trust and confidence it would be difficult to explain why John Rochman was consulted so frequently and tried at times to act as the middle-man.

177. Although some members of the Michel family were given benefits which cannot be explained on the basis of their employment at the Company, neither can they be explained on the basis of a personal relationship of the type required to colour the Company as a quasi-partnership. The bestowing of generous financial packages on members of the family was not confined to shareholders (Andrew says his mother benefited). The benefits provided by the Company may best be explained on the basis that those managing the Company at various times did not wish to see family members suffer financially. They were carrying on a tradition initiated by Helmut. As regards Andrew, he was a beneficiary of a generous negotiated leaving package once his employment ended by agreement in January 2006.

178. I have found that Andrew had no right to be a director in 1999. He became a director by reason of the rules pertaining to corporate democracy. As Andrew had no right to be a director, and the members were not constrained by equitable considerations, his removal in accordance with the Company's constitution was neither unfair nor prejudicial.

179. It is inconsistent with a quasi-partnership that Andrew had to negotiate an agreement that he could remain as a director and receive a salary. It is also inconsistent with the position taken by Andrew that he sought to agree (and on his version of events, did agree) that the Company would be restrained from exercising its powers to remove Andrew as director for as long as he remained a shareholder. Andrew's case is that there was a negotiated outcome. That negotiated outcome is consistent with there being no legitimate expectation that he could remain a director for as long as he held

shares, or receive a salary for as long as he remained a director and is inconsistent with a quasi-partnership.

180. In my judgment Andrew has failed to make out the terms of the Agreement. There was no agreement in late 2005 other than that Richard would remain as managing director and Andrew would no longer be concerned in the management of the Company. He would stay at home. That is what transpired. Andrew agreed to be a director in name only while negotiating a leaving package. The negotiations included interventions from John Rochman who first suggested resignation as a director and appointment as a consultant for a short period of time, and directly discussed a share sale with Andrew. The positions taken by Andrew changed over time, but he responded to Mr Rochman in a courteous and professional manner.

181. Andrew has not discharged the burden of proof that the Agreement included the terms he has said it did. The evidence heavily supports Richard and the respondents to the petition. Agreement was reached in February 2008 that the Company would continue to pay Andrew a salary until he reached the age of 65. The Company honoured the February 2008 accord.

182. The failure of Andrew to discharge the burden of proof in respect of the Agreement, for the sake of clarity, extends to the other terms he said had been agreed in late December 2005 namely: (i) that he would remain in charge of the Company's finances when at home after 2006, (ii) that he would receive regular financial information in that capacity, and (iii) that he would be kept in touch with the Company's affairs by attending monthly meetings with Richard.

183. In any event I prefer the evidence of Barbara to Andrew. Andrew showed no interest in the Company and was happy to merely sign-off accounts as he was a signatory and named as a director. And I accept the evidence of Mr Reuben that he communicated with Andrew in the years 2006 to 2010 providing information when requested.

184. These conclusions are sufficient, as was conceded by Mr Tomson, to dispose of the petition. I deal briefly with two further areas of complaint for the sake of completeness.

185. In the petition Andrew asserts that "it is….. to be inferred that the beneficial owners of CKC Holdings" are Andrew and/or Benny. It was not clear by the end of the trial if this was being pursued as a ground of unfair prejudice. It appeared not but in any event, I accept the evidence of Mr Latham, Richard, Barbara, Theresa and Mr Raja. Mr Raja explains that "we decided on a model of an English Company owning the shares in the Chinese company and Barbara and Theresa holding the shares in the English company on trust for the Company…the idea of structuring that way was discussed at length with various professional advisors". Mr Latham's evidence is that "it was made clear to me that Barbara and Theresa hold the shares on trust for the Company." In cross-examination he did not see that there was an issue of non-disclosure in the year end accounts and gave compelling reasons for his lack of concern. Mr Latham accepts that "there is a slightly unusual accounting treatment/legal relationship in relation to CKC" but that was because the Company owns "most of the machines…" and the stock. I accept his evidence that "CKC is a bit of a shell because all the assets it uses belong to the Company and remain on the

Company's balance sheet. Basically, CKC is paid enough so that it can run itself and pay for labour to operate the Company's machines on the Company's raw materials to make the Company's goods." It was not explained how this course was prejudicial to Andrew as a member. The directors were doing their best to protect the business of the Company and act in what they subjectively thought was its best interests. There is nothing in this point.

186. As regards the HSBC loan, the unfair prejudice is said to arise due to an allegation that it was obtained on false pretences. The money borrowed was not borrowed for the reasons given and was not used for the reasons given. The petition reads "the Petitioner believes that the Company's financial position may have been misrepresented to the Petitioner and to HSBC in 2011 in order to obtain the HSBC Loan". During the course of the trial the allegation shifted to one of unjustifiably increasing the Company's debts. No amendment was sought.

187. I accept the evidence that the Company needed to refinance as HSBC were in the process of withdrawing its overdraft facility and wanted it replaced with a loan. Mr Raja gave the bank the information it asked for and says that it was thoroughly scrutinised. The bank has not claimed that it was misled. I have seen no evidence to support that the bank or Andrew were misled. There is no evidence that the directors acted in breach of their duty of care. The burden of proof rests with Andrew to make out his claim for breach of directors' duties and he failed to do so.

188. I accept the submission of Mr Adair that the case was not put or amended in such a way that it was clear how the respondents were to meet a claim for breach of fiduciary duty. I accept the evidence that the Avon order was real and could have come to fruition. It did not on this occasion, but a large order was subsequently made. I accept that the faux leather machine was bought not to use immediately but to use in the event that there was a break in the supply chain due to events beyond the Company's control. I also accept that the loan was for ordinary commercial purposes. The pleaded allegation could not be made out. No unfair prejudice arises due to the loan.

189. In summary the evidence in my view is overwhelming against a finding that it would be correct to characterise the removal of Andrew as director as unfair and prejudicial. I find that there was no Agreement as contended for by Andrew. There were two agreements. The first made in December 2005 that he would not return to work in January 2006. The second made in February 2008 that he would continue to receive financial benefits until he reached the age of 65.

190. The petition shall stand dismissed.