Neutral Citation Number: [2019] EWHC 1664 (Ch)

Case No: CR-2016-002904

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Business and Property Courts of England & Wales
7 Rolls Buildings, Fetter Lane
London, EC4A 1NL

Date: 28 June 2019

Before:

ADAM JOHNSON QC SITTING AS A DEPUTY HIGH COURT JUDGE

IN THE MATTER OF DINGLIS PROPERTIES LIMITED AND IN THE MATTER OF THE INSOLVENCY ACT 1986

- -

Between :

Paul Dinglis	**Petitioner**
- and -	
(1) Andreas Dinglis	**Respondents**
(2) Master Holdings Group Limited (A company incorporated under the laws of the British Virgin Islands)	
(3) Dinglis Properties Limited	

- -
- -

David Peters (instructed by **Ingram Winter Green LLP**) for the **Petitioner**
Daniel Lightman QC, Mark Hubbard and Kristina Lukacova (instructed by **Bircham Dyson Bell LLP**) for the **Respondents**

Hearing dates: 22 March, 25-29 March and 1-5 April 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.

.....

MR ADAM JOHNSON QC

Adam Johnson QC :

A. Introduction

1. This is the hearing of a Petition under section 994 of the Companies Act 2006 (the "*Companies Act*" or "*CA*"). The Petitioner is Paul Dinglis ("*Paul*"). He has a 12% shareholding in Dinglis Properties Limited ("*DPL*"), the Third Respondent. At various times Paul's mother, Iris, and his sister, Cheryl, have also held (directly or indirectly) minority shareholdings in DPL.

2. The First Respondent to the Petition is Paul's father, Andreas Dinglis ("*Andreas*"). Although the size of his shareholding has fluctuated, at all material times Andreas has owned or controlled a majority shareholding in DPL. Until 2009 Andreas' shareholding was held in his own name. In 2009, however, it was transferred to the Second Respondent, Master Holdings Group Limited ("*MHGL*"), a company incorporated in the British Virgin Islands. It is common ground that Andreas exercises ultimate control over MHGL.

3. The background to the Petition is a catastrophic falling out between the members of the Dinglis family. Since 2013, this has resulted in extensive and complex litigation between the family members, in which (largely) Paul and Cheryl have sided with Iris against Andreas. This has included divorce proceedings initiated by Iris against Andreas in July 2013, which resulted in a final Order dated June 2015 (the "*Matrimonial Proceedings"*); and proceedings in the Chancery Division by DPL and a related company, against a number of Defendants including Paul and Cheryl, which were initiated by Andreas on 11 June 2015 and eventually resulted in a decision of the Court of Appeal dated 8 February 2019, shortly before the start of this trial (the "*Chancery Action"*).

4. As a result of the Matrimonial Proceedings, Iris' then 12% shareholding in DPL, held via her vehicle Warner Shareholdings Limited ("*Warner*"), was transferred to MHGL in October 2015. More recently, there has been a reconciliation between Cheryl and Andreas. At an earlier stage in the present action, Cheryl's corporate vehicle, Eagle Shareholdings Limited ("*Eagle"*), was a Petitioner alongside Paul, but that claim was settled in August 2018 and Eagle's 12% shareholding in DPL was transferred Dinglis Investments Ltd ("*DIL*"), a further company controlled by Andreas, for a consideration of £1,414,459.09 (equivalent to £117.89 per share). The upshot is that MHGL presently owns 76% of the issued share capital of DPL, DIL 12%, and Paul 12%.

5. Paul's allegations focus on (1) his exclusion from the management of DPL by Andreas from June 2012 onwards, including Andreas having denied him access to financial and other information concerning DPL; and (2) certain payments from DPL initiated by Andreas from March 2015 onwards, said to give rise either to breaches of fiduciary duty by Andreas in his capacity as a director of DPL, or alternatively to breach of an understanding binding on Andreas in equity as to how the business of DPL was to be conducted.

6. At the heart of Paul's case in relation to his exclusion from management, and featuring also as part of his case on Andreas' later conduct, is the contention that DPL was a

quasi-partnership company, of the type famously described by Lord Wilberforce in *Ebrahimi v Westbourne Galleries* [1973] AC 360. Paul argues that Andreas' strict legal rights as majority shareholder were subject to certain equitable constraints, arising from what he describes in his Petition as "*Understandings*", to the effect that:

i) Each of Paul, Cheryl and Andreas would be entitled to be involved in the business and management of DPL ("*Understanding 1*").

ii) Each of them would be entitled to have access to all of DPL's financial records ("*Understanding 2*").

iii) DPL's business would be operated for the general benefit of what Paul describes as the "*Family Members*" – i.e., Andreas, Iris, Paul and Cheryl ("*Understanding 3*").

7. Andreas' position (in broad outline) is that:

i) DPL is not and never has been a quasi-partnership. In any event, there has never been any understanding or other equitable constraint which limited his entitlement as shareholder to remove Paul from management. Even if there were, he was entitled to do so in June 2012 in light of Paul's misconduct.

ii) He was not in breach of fiduciary or any other duty in authorising the contested payments made by DPL from 2015 onwards, and in any event no prejudice has flowed from such payments because the relevant funds have all (or substantially all) been paid back.

iii) In fact, DPL has prospered greatly under Andreas' direction since he took back control in 2012. It would be unfair to Andreas for any Order to be made requiring him to purchase Paul's shares at a value which gives Paul the benefit of Andreas' industry and DPL's success from June 2012 onwards, to which Paul has contributed nothing and which in fact he has actively impeded.

8. An Order for Directions was made on 29 January 2018, which included the following at paragraph 3:

> *"There be a first trial limited to the following issues:*
>
> *(1) whether the Petitioner [Paul] has been unfairly prejudiced in his capacity as a minority shareholder in the 3rd Respondent [DPL] by the actions of either the 1st and 2nd Respondents [i.e., Andreas and MHGL]; and*
>
> *(2) whether an order should be made requiring the 1st and/or 2nd Respondents to purchase the Petitioner's shares and, if so, whether any such order should involve a discount for those shares representing a minority holding (but not the extent of that discount)*
>
> *(together, the 'First Issues')."*

9. Thus, the hearing before me was intended to be confined to the "*First Issues*". Unfortunately, as matters developed, there was some disagreement as to the intended scope of the First Issues, and specifically whether they should include a determination, if a share purchase Order is to be made, of the date of valuation of the shares covered by that Order. Andreas argues that I should determine the date of valuation, and Paul argues that I should not.

10. Additionally, an issue arose at the hearing as to whether the allegations of breach of fiduciary duty made by Paul were adequately pleaded in his Petition. Andreas argued that they were not; Paul argued that they were.

11. In broad terms, therefore, the issues I have to resolve are as follows:

    i) Has Paul made out a case of unfair prejudice arising from his exclusion from management, and lack of access to financial and other information of DPL, from June 2012 onwards?

    ii) Has Paul adequately pleaded a case on breach of fiduciary duty by Andreas from March 2015 onwards, and if so is a case of unfair prejudice arising from such breaches (alternatively a case of unfair prejudice arising from a breach of Understanding 3) made out?

    iii) In the event that unfair prejudice is shown, then is the appropriate remedy an Order for the purchase of Paul's shares, and if so:

        i) Should that Order include a direction as to the date of valuation, and if so, what date should it be?

        ii) Against whom should the Order be made – Andreas, or MHGL, or both of them?

        iii) Should that Order include a direction that Paul's shares be valued at a discount, to reflect the fact that they are a minority shareholding?

B. The Witnesses and Evidence

12. I heard live evidence at trial from Paul and from Andreas, who had both served Witness Statements. Additionally, the Trial Bundles contained copies of Witness Statements and other documents served in both the Matrimonial Proceedings and the Chancery Action, including an agreed joint statement from the parties' accounting experts in the Chancery Action, which I will return to below.

13. As to the proper approach to evaluation of the evidence, Mr Peters in his Written Opening referred me to the guidance in a number of recent cases as to the caution required in forming judgments about the reliability of witness testimony, including the following statement of Bryan J. in *JSC BM Bank* v *Kekhman & Others* [2018] EWHC 791 (Comm) at [67-68]:

> " … *it is now widely accepted that memories are fallible, people can convince themselves of the veracity of false recollections of events and retain confidence in their false recollection, and a judge's ability to evaluate honesty and reliability merely from*

> *a witness's demeanour is also fallible, and therefore where possible a court should rely on documentary evidence and any other objectively provable facts: see for example the comments of Lord Pearce in Onassis v Vergottis [1968] 2 Lloyd's Rep (HL) at 432 column 2, Robert Goff LJ in The Ocean Frost [1985] 1 Lloyds Rep 1 (CA) at 57, and Leggatt J in Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) at paras 15-22.*
>
> *In such circumstances, as Robert Goff LJ stated in The Ocean Frost (at page 57):*
>
> > *'Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.'"*

14. I have borne those observations very much in mind, and it seems to me they have particular force in this case because the factual background stretches back over very many years, and there are few contemporaneous documents available. In such a case, the relative importance of identifying areas of common ground, and of looking at the inherent probabilities where matters are disputed, is obviously increased.

15. Overall, I have come to the view that I must treat Paul as an unreliable witness. I say that principally because of the account he gave, both before me and earlier in the course of the Matrimonial Proceedings and the Chancery Action, regarding the treatment of cash rental income received by the Dinglis family businesses. My analysis of his evidence is set out below, in particular at [164] and [231]. To my mind Paul's story on this topic was inconsistent with the inherent probabilities, and with his likely motives, and I reject it. I note in passing that HHJ Barker QC in the Chancery Action ([2017] EWHC 2099 (Ch)) reached a similar view as to Paul's reliability. That Judgment was later overturned, but not on a basis that casts any doubt on the Judge's assessment of Paul's evidence. I therefore treat Paul's evidence generally with caution.

16. Some caution is also required in relation to Andreas' evidence, but I think to a more limited extent. As Mr Peters pointed out, Andreas also has a record of behaviour in previous proceedings which calls into question his reliability. This included specifically his having procured the bringing of an application for a freezing Order in the Chancery Action, which was subsequently set aside for material non-disclosure (see *Dinglis Properties Limited* v. *Dinglis Management Limited* [2016] 4 WLR 72), and also his support for certain claims advanced in the Chancery Action involving allegedly false invoices, which in the event were rejected in their entirety by HH Judge Barker.

17. I agree with Mr Peters that Andreas has a particular issue in assessing Paul's behaviour objectively, given the history between them and the remaining animosity. This is illustrated by my assessment of Andreas' evidence as to the reasons for his exclusion of

Paul from DPL's business in June 2012 (see [104]-[110] below). In other respects, though, I found Andreas to be both lucid in his evidence (he generally had an impressive grasp of matters of detail relating to his various businesses), and candid. I say candid in particular because of the evidence he gave regarding his use of DPL's funds in the period from 2015 onwards, which in some respects was against his own interests, and which struck me overall as both coherent and consistent with the inherent probabilities.

C. Factual Background

18. I set out below an outline of the factual background as I find it. Although some issues were heavily contested at the hearing, much of what follows is common ground.

(i) Andreas' background and early days in business in England

19. Andreas was born in 1939 in Famagusta, Cyprus. He is now 80 years old. He describes himself as having had a poor but happy childhood. When he was about 6 years old, his family left the village he was born in and moved to a town. His evidence is that he has worked since he was 10 years old, initially after school and during the school holidays, beginning by working in building sites and in restaurants. He left school when he was 18 and took various office jobs.

20. In 1959, at the age of 20, Andreas decided to come to England to study. He came with very little money. He had to work in order to support himself during his studies. Eventually he had to give up his education as he could not earn enough to support his father in Cyprus who was aged and unwell. In his early years in England, he took many jobs in order to support his family, including waiting on tables, carpentry and working as a driver.

21. It seems to me this early history is important, because it tells us something about Andreas' character. He is plainly a driven and ambitious man. He has strong entrepreneurial instincts. There is no doubting his considerable energy. It also seems clear to me that he regarded it very much as part of his responsibility to provide for his family, meaning to begin with his family in Cyprus, but later Iris and their children.

22. Andreas married Iris in 1960. Cheryl was born in 1964, and Paul in 1966.

23. In 1968, Andreas started his first full-time business. This was in the "*rag trade*", hiring machinists to make up garments for clothing companies in London. Since 1968, he has been in business for himself. In the late 1970's he started a factory business manufacturing ladies' blouses and shirts, which he eventually sold in about 1983. From then on, he shifted his focus to property management and (later) property investment.

24. In 1982, Andreas purchased a dilapidated property at 100 Stroud Green Road, Finsbury Park, which he converted into a bed and breakfast hotel. This finally opened in 1988 and had twelve rooms which were rented out to local authorities to provide accommodation for the homeless.

25. In the meantime, in 1986, Andreas had established two companies through which he intended to run his developing property business. The first, Abacourt Hotels and

Catering Limited ("*Abacourt*") was incorporated in October 1986, and the second, Abaxeon Hotels Limited ("*Abaxeon*") in December 1986. Andreas was sole director of each company, and in each case held 99 of the 100 issued shares. Iris held the remaining shares.

26. By the late 1980's, Andreas was running two related businesses. One was the bed and breakfast hotel at the Stroud Green Road property, which was run through Abaxeon and known as the Abaxeon Hotel. The second was a lettings and property management business, run from office space in the same property, trading through Abacourt. Both involved arranging temporary accommodation for homeless people on behalf of the London Borough of Hackney and the London Borough of Haringey, in the case of Abaxeon at the Abaxeon Hotel itself, and in the case of Abacourt, at properties owned by third parties which Abacourt managed. The model was very successful.

(ii) DPL is established

27. In the late-1980's, the opportunity arose to develop the existing businesses, and to move more extensively into the area of property ownership. The property crash in 1989 created an environment which was attractive for buyers. The Abacourt business involved managing properties on behalf of third party owners; the idea now was to acquire a portfolio of properties for letting which were owned within the Dinglis family itself. This provides the context for the establishment of DPL.

28. As to how Paul came to be involved, his evidence in his Statement is that he and Andreas talked, and Andreas told him that he wanted to involve his family more in his ventures. Andreas said to him: "C*ome and learn the business*". I do not understand that general sentiment to be disputed by Andreas. This led Paul to go to work with Andreas in September 1989.

29. Specifically as to the incorporation of DPL, there is a difference of emphasis between Paul's account and that given by Andreas. Paul's Statement suggests that he and Andreas agreed together that the new venture should be run through a company. Andreas says that he was solely responsible for the decision to incorporate DPL, which was essentially his vehicle, which he established to take over the existing property lettings business (until then run through Abacourt), and to be the owner of the properties he intended to buy from then on.

30. Insofar as there is a difference of emphasis between Paul and Andreas, I prefer Andreas' evidence on this point. It seems to me entirely logical to suppose that, at the time, and given the history of his businesses up until then, Andreas would have regarded himself as the person in charge, and ultimately responsible for any important decision making.

31. Andreas' status as the individual in charge of DPL at this stage is emphasised by the fact that he retained 99 of the 100 issued shares, with the remaining share going to Iris; and by the fact that he appointed himself sole director, a position which was maintained thereafter for a period of about 9 years.

32. Article 6 of DPL's Articles of Association provides as follows:

> "*TRANSFER OF SHARES*

> *6. Any share may be transferred by a member to his or her spouse or lineal descendant and any share of a deceased member may be transferred to any such relation as aforesaid of the deceased member. Save as aforesaid the Directors, in their absolute discretion and without assigning any reason therefor, may decline to register the transfer of any share whether or not it is a fully paid share. The first sentence of Regulation 24 shall not apply to the company.*"

33. As regards access to information by members, the Articles incorporate the regulations contained in the then Table A, clause 109, which provides that:

> "*No member shall (as such) have any right of inspecting any accounting records or other book or document of the company except as conferred by statute or authorised by the directors or by ordinary resolution of the company*."

34. At some point in 1990, Cheryl also came to join Andreas in his businesses, and worked for DPL. I did not have the benefit of evidence from Cheryl as to her role, but Andreas in his Witness Statement says that her main job at this time was issuing invoices to local authorities, although she probably also helped cross-checking bank statements in relation to monthly payments due to landlords whose properties DPL was letting at the time.

35. Paul's role in the business naturally developed over time, but one of his first steps was to attend an auction and bid for a property which had been identified for acquisition. This was a property at 94 Balls Pond Road, London N1. It was purchased for £28,000. Paul in his evidence attached some significance to his involvement in this purchase, as evidence of his independence and, effectively, status as a business partner. I accept it is evidence of him exercising a degree of independence, in the sense that he was being trusted to undertake an important task for the business. At the same time, it is clear that he was doing so within parameters (as to the property to be targeted, and the price to offer) which had been agreed with Andreas in advance, Andreas himself being out of the country at the time of the auction.

36. Thereafter, in the period between 1989 and about 1994, Paul's role involved matters such as meeting prospective client landlords interested in DPL, renting out their properties for them, and explaining DPL's leasing arrangements. He would also take officers from the local authority housing departments to inspect and approve new accommodation. After accommodation was booked, he would ensure that keys were made available to new tenants, and ensure that landlords were paid promptly.

(iii) Andreas' gifts of shares in DPL

37. In the following important passage in his Witness Statement, Andreas describes the motivations which led him to make gifts of shares in DPL to Iris, Paul and Cheryl in 1991:

> "*It had always been my plan and hope to involve my children in my businesses, and it was always my intention that one day the businesses would pass to them. For that reason, I wanted them to be actively involved in the business and to know the companies inside out. Eventually I hoped that they would acquire the*

> *skills which would allow them to run the businesses themselves after I was gone. Giving them shares in DPL seemed to me to be a good way to get them to feel that they were involved. At this time, I had not made a will and so I wanted to provide my children with some security. I also decided to give Iris a substantial interest in DPL at the time, so that she would also have some financial security, and because I was making gifts to our children. I thought this over for some time and wanted to make gifts which were not too much or too little*."

38. In the event, in September 1991, Andreas transferred from his holding of 99 shares in DPL, 11 shares to Iris, 12 to Paul and 12 to Cheryl. The net effect was to leave Andreas with a 64% shareholding, and Iris, Paul and Cheryl with 12% each. Paul in his oral evidence was unclear about whether he was made aware of this transfer of shares at the time. In any event, what is clear is that the allocation of shares between the family members was Andreas' decision, which he made as part of his overall plan for making provision for his family.

39. At the trial, Andreas went into some more detail as to the rationale for his approach. He said he wanted Iris, Paul and Cheryl to "*benefit from the business to the extent of their shareholding, each one*", and went on:

> *"Because in my mind was that maybe Paul will have two children, maybe Cheryl will have two children, so that's why I gave them 12% each, and if they had another two children each, then the grandchildren, my grandchildren, would receive more shares from the ones I had".*

40. There then followed this exchange with Paul's counsel, Mr Peters:

> *"MR PETERS: A couple of follow-up questions from that. First of all, so you said that the idea was that 12% would go to each of Paul, Cheryl and Iris, and then other shareholdings could go to other descendants in due course. Is it right, therefore, that you kept a 64% shareholding so that you had enough shares to hand out additional shareholdings to additional family members as time went on?*
>
> *A. Yes, yes. I looked at myself as being the trustee for descendants that were to come."*

(iv) The 1990's: DPL, DEL, the Cyprianos Companies and DPSL

41. At about the same time, or at any rate at some point in 1991, Andreas wished to purchase further properties, but could not convince DPL's bankers, Bank of Cyprus, to lend any more money. Paul in his Witness Statement describes Andreas as becoming impatient. The solution identified was for Paul, Cheryl and Andreas to raise mortgages in their own names, but with the deposits and purchase costs being funded by DPL.

42. As Paul expresses it in his Witness Statement, "*Andreas told me that he had found two properties that he thought I should buy, being 15a Eversholt Road, London N4 and 29b Heathville Road, London N19*". Cheryl acquired 29C Heathville Road in her name and

on the same basis, and Andreas acquired another flat at 29 Heathville Road as well as several other properties.

43. The arrangement was that DPL then leased these properties to the London Borough of Hackney. DPL collected the rent, and transferred enough to Paul, Cheryl and Andreas each month to allow them to cover the relevant mortgage payments, but retained the balance of the rent received. Much later, in 1997 when the lending climate had improved, DPL was able to refinance the existing mortgages and the properties were transferred from the individuals to DPL itself. The effect of this arrangement in financial terms was thus that DPL (rather than the individual owners) benefited both from the profit generated from rental income on the properties, and from the increase in the capital value of the properties between 1991 and 1997 (because it acquired them in 1997 effectively at cost, not at current market value). I will return below to the significance of this in the context of Paul's case on the quasi-partnership status of DPL.

44. By early 1994, Cheryl was married and became pregnant with her first child. She stopped working in the family businesses and did not return until sometime in 2002, although in the meantime she continued to receive a salary.

45. By late 1994, plans had developed for a new company. The reason for incorporating a new vehicle was to take advantage of finance offered by Allied Irish Bank ("*AIB*"). As part of the financing arrangements, AIB required security over the assets of the relevant borrower, and Bank of Cyprus, the existing lender to DPL, was not content that DPL itself should give such security. Consequently, a new entity was required. Dinglis Estates Limited ("*DEL*") was incorporated on 30 September 1994.

46. Andreas decided to make a gift to Paul and Cheryl of shares in DEL. Consequently, on 9 February 1995, Paul and Cheryl were each allotted 24% of the issued shares in DEL, and Andreas was allotted 52%. As with DPL, Andreas had no discussions with Paul and Cheryl at the time about making these gifts. In cross-examination, Paul accepted that he was not aware of the shareholding allotted to him until after the allotment took place, and that there was no discussion about what the percentage allocations would be (although he says, and I accept, that he had discussions with Andreas beforehand about incorporating a new company to take advantage of the AIB financing offer).

47. Andreas was appointed director of DEL on incorporation. Neither Paul nor Cheryl at that stage had directorships. Indeed, Cheryl by this stage had no active involvement in the family businesses at all.

48. On 1 August 1995, DPL's nominal share capital was increased from £100 to £1m, and on 4 August 99,800 ordinary shares were allotted to DPL's shareholders in proportion to their existing shareholdings by way of capitalisation of profits. Thus, the position remained that Andreas had a 64% shareholding, and Iris, Paul and Cheryl a 12% shareholding each.

49. By 1997, Andreas had decided that it would be better to separate the property letting and management activities of DPL from the property investment and development activity being run through both DPL and DEL. The idea was to have a "*buffer company*" to deal with the property lettings business, and so provide protection to DPL and DEL who would be insulated against claims by third parties. Although there may have been discussions between the family members about this, I accept Andreas'

evidence that ultimately the decision to proceed with this arrangement was his decision. Accordingly, a new company was incorporated on 5 August 1997 known as Dinglis Property Services Limited ("*DPSL*"). Andreas held 51% of the shares and he gave Paul the remaining 49%, thus retaining overall control of DPSL. Andreas was appointed director of DPSL on 14 January 1998. (I note in parenthesis that DPL, the Third Respondent in these proceedings, was in fact called Dinglis Property Services Limited from incorporation until 14 April 1998. The new company referred to immediately above was known on incorporation as Dinglis Properties Limited. On 14 April 1998, the two companies in effect changed names, to reflect their intended activities, with the property *owning* company thereafter known as *DPL*, and the property *management* company known as *DPSL*).

50. Under this new structure, DPSL dealt with third party landlords, whose properties the business was managing; it was also responsible for renting out, where possible in its own name, properties owned by DPL and DEL. In such cases, it would collect rent, and then pass it on to DPL and DEL.

51. By November 1997, Cheryl's marriage was in trouble. There were concerns over the possible division of matrimonial property on divorce, and so as a precaution, on 18 November 1997, Cheryl's shares in DPL were transferred to Iris. This meant that the shareholdings were: Andreas 64%; Iris 24%; and Paul 12%. Only Andreas was a director, but that was shortly to change.

52. Another important development occurred in 1997, although it was not known to Andreas' English family at the time: Andreas had a child (also called Andreas) with another woman with whom he had a relationship. In due course, Andreas' relationship with young Andreas' mother would become a point of real concern for the family in England, and would contribute to the decision in 2013 to commence the Matrimonial Proceedings.

53. From about 1998 onwards, Andreas started spending more time in Cyprus. His reasons included long-term tax planning for the benefit of his children, and also his health, as he was suffering from chronic arthritis. Andreas' desire for some while had been to relocate to Cyprus, and he had discussed this with Iris, but she did not want to leave the UK. In due course, from about 2002 onwards, Andreas' plans would come to fruition, and this would lead to him and Iris leading largely separate (but amicable) lives. In the meantime, as Paul expresses it in his Witness Statement, in a passage which it seems to me is consistent with Andreas' evidence:

> *"[Andreas] was upset and concerned about inheritance tax and the possibility that his personal wealth, bound up in the family companies, might not be wholly capable of being passed on to his family. The question of succession and financial planning came to dominate much of Andreas' attention and was a regular feature of discussions within the family for a significant period of time."*

54. The year 1998 saw an extension in the level of Paul's responsibilities in the family business. On 1 April 1998, Paul was appointed a director of both DPL and DPSL, in addition to Andreas. At some point during the year, Paul was also appointed a director of DEL. Paul also gave a personal guarantee in 1998 to Bank of Cyprus, DPL's bankers. This was an unlimited personal guarantee for DPL's liabilities. Andreas in his Witness Statement ties the giving of this guarantee (and indeed later guarantees) to Paul's new

status as a director; Paul in his Witness Statement indicates that there may have been a guarantee or guarantees given earlier, before 1998. In any event, it is common ground that from 1998 onwards Paul gave a number of guarantees to secure borrowing by DPL. As Andreas accepts, a number of such guarantees remained in place until June 2016, when they were finally released. The giving of such guarantees is relied on by Paul as part of his case, since he says the practice of him doing so is incompatible with the idea that his involvement in the management of DPL could be terminated at will by Andreas. I will return to this point below.

55. Again in 1998, an opportunity arose to acquire an entire block of 9 flats at 20 Crescent Road, London N8. Much of the funding was provided by a new lender, Bank of Ireland ("*BoI*"). In order to limit the amount of stamp duty payable, it was determined to make the acquisition via a series of companies. Andreas had already incorporated a company called Dinglis Investments Limited in 1995. In 1998, he incorporated three new companies. Again I accept Andreas' evidence that he was the driving force behind the acquisition, and the structure of the acquisition, at this stage. The three new companies were Dinglis Cyprianos Limited, Dinglis Cyprianos Investments Limited and Dinglis Estates (London) Limited. These three new companies, together with Dinglis Investments Limited, became known as the *Cyprianos Companies*. Together they acquired all the flats in the 20 Crescent Road property, using funds from DPL, from BoI and from another third party lender (probably the vendors, an entity called Anglo-Soviet Shipping). In any event, it is common ground that neither Paul nor Cheryl made any direct financial contribution to the purchases.

56. Andreas was the majority shareholder in each of the Cyprianos companies, although he gave Paul 25% of each of the companies, and Cheryl 12% of the shares in each except for Dinglis Investments Limited (for reasons he cannot now recall). I again accept Andreas' evidence that he was the one who decided on the level of the shareholdings to be given to Paul and Cheryl, and that he decided to give Paul a greater share because at the time he was actively involved in the family business and Cheryl was not.

57. Andreas was sole director of each of the Cyprianos Companies until March 2002, when as part the process of his relocating to Cyprus he resigned and appointed Paul as sole director of all four companies.

58. Paul moved into one of the Crescent Road flats (Flat 2) soon after they were acquired. He later moved into a larger flat in the same block (Flat 9) with his partner, Laura, and their son, also called Andreas. Eventually, in 2013, they moved into a property at 21 Makepeace Avenue, London N6. The background to that move has given rise to considerable dispute, and I will need to return to it further below.

59. As with the properties purchased by Andreas, Paul and Cheryl in their own names back in 1991, ownership of the 20 Crescent Road flats was ultimately transferred to DPL. This was much later on, in the period between August 2006 and June 2008. By then, Andreas had relocated to Cyprus, and Paul was sole director of the Cyprianos companies and organised the transfers. Again, the transfers to DPL were at cost – i.e., DPL acquired the flats at the cost of the then outstanding mortgages, with the consequence that DPL took the benefit of the increase in the capital value of the flats since their initial purchase. Since the Cyprianos companies had no function beyond holding the Crescent Road flats, once the various transfers had taken place, they were dissolved.

60. Paul relies on this as part of his case on the quasi-partnership status of DPL. He says that he did not at the time of the transfers and dissolutions seek to enforce his strict legal rights as a shareholder in the Cyprianos companies (which would have entitled him to a share of the companies' assets on dissolution), and that was because as far as he was concerned, the Cyprianos Companies (like DPL) were part of a family business which was not conducted in accordance with the participants' strict legal rights, but instead in accordance with the Understandings.

(v) Salaries and dividends

61. It is common ground between the parties that there was a high degree of flexibility in the way in which the affairs of DPL, and the other Dinglis family companies, were managed. This included the payment of salaries and dividends.

62. Paul's evidence on the latter topic in his Witness Statement is that he was paid a salary by DPL, but only at a modest level (starting at about £10,000 per annum and rising to about £25,000 per annum by 2012). In the period up until about 2001-2002, he also received dividends in larger sums from time to time.

63. Paul says that the family businesses were intended to provide a comfortable standard of living for all of the family members. The dividend amounts actually received by the family members never tallied with their percentage entitlements based on their shareholdings in the various family companies. Instead, what happened in practice is that at the end of each financial year, the family companies would each declare a total dividend equivalent to the total monies paid out that year to all family members. For tax return purposes, the family members would then each declare as income their percentage entitlement of the overall dividend declared by each company. If, in the case of a particular family member, there was a difference between that amount and the sums he or she had actually received, that would be accounted for either as a gift received by that family member from the others (if the family member received more than his or her strict entitlement), or conversely as a gift from that family member to one or more of the others (if the family member received less than his or her strict entitlement).

64. This is close to the position as Andreas describes it. His evidence is also that there was considerable flexibility in the way in which individuals received remuneration, either in the form of salary or dividends. He describes what he calls his "*policy*", which:

> " … *was and is that to the maximum extent possible the profits of the businesses should be reinvested for the long term benefit of the family and that drawings should be limited to what I considered to be necessary for a reasonably comfortable lifestyle*."

65. There is again a difference in emphasis here, in that Andreas' evidence is that he was the one setting the "*policy*", and therefore determining the parameters within which the other family members were to operate. On that point, insofar as there is a difference in emphasis between Andreas and Paul, I prefer Andreas' account, which I think is more consistent with the overall picture and the inherent probabilities.

(vi) DML

66. Concerns about having a liability buffer proved to be well founded, in the sense that in about 2000, DPSL was made subject to a claim by Haringey Council in respect of overpaid benefits. The upshot is that it was placed into creditors' voluntary liquidation on 25 July 2000.

67. A new buffer company was needed, and consequently Dinglis Management Limited was incorporated ("*DML*"). The shareholders were Paul and Cheryl, who each held 50% of the issued shares. The intention was that DML would perform essentially the same function as DPSL, i.e., it would be a services company involved in the letting and management of properties. Again, I accept Andreas' evidence that the idea to establish DML was essentially his.

68. That conclusion is consistent with the way in which, in the Chancery Action, Paul and Cheryl themselves described the background to the arrangement which came to exist between DPL and DML, pursuant to which DML would act as the "*buffer*" company, which would lease properties owned by DPL and collect rents. In a Response to a Request for Further Information dated 9 February 2016, they said that the relationship between DPL and DML was intended to replicate the prior relationship between DPL and DPSL, and went on to say:

> *"... Paul and Cheryl took shares in, and were appointed as directors of the new entity [DML], in accordance with the wishes of Andreas Dinglis.*
> …
> *Andreas also said that the nature of the relationship between the managing company and the property holding company would continue in much the same way, but that the make-up of the managing company should change along with its name. Andreas continued to run the business of DML and was fully involved in the business until at least 2005/6".*

69. In the same set of Responses, Paul and Cheryl also said, speaking more generally of the family businesses as a whole:

> *"As the Dinglis family business had been set up and managed by Andreas Dinglis, it follows as a matter of course that it was being run in accordance with his wishes and instructions".*

70. Cheryl was made a director of DML on incorporation, but not Paul. In the Chancery Action, Cheryl in her Witness Statement said that she became aware she was a director on DML only in about 2008. Paul was appointed a director of DML in 2006.

71. When cross-examined, Andreas accepted that the arrangements put in place in relation to DML, although in part motivated by the need to have a new "*buffer*" company in place, were also part of his overall plan to hand over increasing responsibility for the existing businesses to his children, in the hope that one day the businesses would pass to them completely.

(vii) 2002: Andreas' relocation to Cyprus

72. In 2002, Andreas' plan to relocate to Cyprus finally came to fruition. A number of steps were taken in preparation for that move, or as a consequence of it:

i) On 31 December 2001, a new company, Gatemark Limited ("*Gatemark*"), was incorporated in Cyprus. This was wholly owned by Andreas (it is now a subsidiary of MHGL), and was designed to take advantage of his non-UK resident tax status. Neither Paul, Cheryl nor Iris had any shareholding in it or any formal position as director or officer. In due course, from about 2006 onwards, it acquired a number of properties in the UK.

ii) Also in 2001, Andreas incorporated a company in Cyprus called Maremonte Investments Limited ("*Maremonte Investments*"). In due course, again from about 2006 onwards, Maremonte Investments would become the main vehicle for a number of property investments made by Andreas in Cyprus, along with two other, related companies, Anthorina Investments Limited ("*Anthorina*"), and Gastia Limited ("*Gastia*"), also incorporated in Cyprus. Maremonte Investments, Anthorina and Gastia are referred to collectively by the parties as "*the Maremonte Companies*". The Maremonte Companies would run into serious financial difficulties, in the wake of the 2008 financial crisis, and it will be necessary to say more about them below.

iii) On 30 March 2002, Andreas resigned as a director of DPL, leaving Paul as director.

iv) As already noted above, at the same time in March 2002, Andreas resigned as a director of the various Cyprianos companies, and Paul was appointed sole director in his stead.

73. Relatedly, I note that Companies House records show Cheryl also being appointed a director of DPL on 30 March 2002, but thereafter being removed as a director on 4 September 2006, reappointed on 20 October 2008, and then removed again but immediately reappointed on the same day, 1 February 2012. In the Chancery Action, Cheryl's evidence was that she was not in fact aware that she was a director of DPL until May 2012, and the Judge found that she was to be treated as a director for the purpose of owing fiduciary duties only from 1 February 2012 onwards. The relevance of this for present purposes is that it indicates a pattern of Andreas taking action in relation to Cheryl's directorship status without her being aware of what was happening.

74. Andreas accepted when cross-examined in the Chancery Action that his intention in 2002 was to move to Cyprus permanently. That evidence was put to him in cross-examination in the present proceedings and he did not resile from it. Andreas also confirmed the point, again made in the Chancery Action, that in fact at one stage his intention when moving to Cyprus had been to hand over not only management responsibility for the English companies, but also outright ownership of the companies (not only to Paul and Cheryl in that case, but also to his other son Andreas and by this stage his sister, Monica). Andreas changed his mind about that course, however, having received tax advice that it might trigger substantial capital gains tax liabilities. The advice was that he should hold off making any such transfers until he had established domicile (for tax purposes) in Cyprus, and that would take a number of years.

75. Consistent with the idea that Andreas' relocation was to be permanent, new arrangements were made in respect of Iris' accommodation. Throughout the 1990's, Iris and Andreas had lived in a house at 10 Wroxham Gardens, London N11. It is not clear whether Andreas was sole owner of this property, or whether it was jointly owned

by Andreas and Iris. In any event, in 2001 or 2002 it was transferred into Paul's name and he took out a mortgage with Bank of Cyprus, which he was then obliged to service. The mortgage instalments were about £1,500 per month.

76. Also in 2002, Andreas and Iris found another property at 17 Seaforth Gardens, London N1. Andreas thought this would be a better home for Iris to live in, but Iris was reluctant. In the event, it was determined that Paul should buy the Seaforth Gardens property as well, in his name. He duly did so, again with the benefit of a mortgage. Paul's evidence is that the monthly instalments on that mortgage were £3,500, making total monthly mortgage instalments of £5,000, once added to the mortgage on Wroxham Gardens. I accept Paul's evidence on these points, together with his evidence that he also took on responsibility for payment of Iris' utility bills, first for Wroxham Gardens and subsequently for Seaforth Avenue. This left him with an annual liability in the region of £70,000, which he agreed with Andreas would be serviced by drawings from the family companies.

77. At the time, as noted above, Paul himself was living in one of the Crescent Road flats, which was owned by DPL. As to Cheryl, since about 1993/1994, she had been living in No. 5 Wroxham Gardens, close to her parents in No. 10. DPL had made a substantial contribution to the purchase price of No. 5 (Andreas estimated about £70,000 against a total cost of about £90,000).

78. In late 2002 or early 2003, Cheryl returned to work on a part-time basis, and was paid as an employee of DML. Andreas' evidence is that she worked about 10.30 to 14.30 four days a week, undertaking tasks such as making entries into the businesses' electronic rent receipt records and cross-checking entries on DPL's bank statements.

(viii) 2002-2008: management of DPL in England; Andreas' businesses in Cyprus

79. One issue which arises is about the level of control exercised by Andreas between the time of his relocation to Cyprus in 2002, and the time he took back overall management responsibility for DPL in 2012-2013. Certainly, the evidence supports the view that from at least 2002 onwards, Paul – and to some extent Cheryl – were given increased autonomy.

80. Paul gives a number of examples in his Witness Statement. One is an occasion when, having agreed with Andreas a limit up to which he would bid for a property at auction (the property being 81/83 High Road, London N22), Paul decided without further reference to Andreas to bid a higher price – which he duly did, and secured the property, paying £2.12m, £120,000 more than the agreed limit of £2m. Although Andreas questioned this, he did not challenge Paul's decision.

81. It is also clear that Paul exercised increasing autonomy in dealing with DPL's finances, and those of the other English family businesses.

82. In 2006 or 2007, Paul and Andreas discussed the possibility of changing the currency of DPL's loans. They were denominated in Sterling, but Andreas was concerned about this, and wished the loans to be denominated entirely in Japanese Yen. He believed that borrowing in Yen would be significantly cheaper because of the near zero base rate environment in Japan. Paul disagreed, and thought it inherently risky for DPL to have all its liabilities in Yen, but all its assets in England, where if necessary their value

would inevitably have to be realised in a different currency, i.e., Sterling. Contrary to Andreas' request, Paul did not transfer all the existing loans into Yen denominated loans, but instead put roughly two-thirds of the loans into Yen, Euros and Swiss Francs (not only Yen), and left the remainder in Sterling.

83. When he was told about this, Andreas was unhappy, but again, did not challenge the decision, and did not take any steps to remove any of Paul's management or directorship responsibilities. In short he accepted what Paul had done.

84. At about the same time, another issue surfaced about possibly converting DPL's loans from capital and interest repayment loans to interest only facilities. Paul's evidence is that he discussed this possibility with Andreas, and that Andreas appeared to indicate assent, and indeed arranged for companies under his direct control, including Gatemark, to switch to interest only facilities. Andreas when cross-examined maintained his disapproval of Paul's actions, and said that the position as regards Gatemark and his other Cypriot companies was different, because at the time they could not afford to make capital repayments, whereas DPL could; and he said his view was that where a company was in a position to pay down its existing loan liabilities, it should do so.

85. Be that as it may, the essential point for present purposes is that when Andreas found out about the action taken by Paul, in converting DPL's loan facilities, he again accepted it. As he said in cross-examination by Mr Peters:

> "*A. He had the right to make that decision because he was a director, but I didn't necessarily agree with it.*
> *Q. As you said before, you are the majority shareholder if you thought Paul was doing – an anathema to you, you could have said, 'Undo this or I'm going to call a shareholders' meeting', something you have described as a possibility before. 'I'm going to remove you as a director and I'm going to take over'. You didn't do any of those things did you?*
>
> *A. No, I didn't. Perhaps I should have done then.*"

86. Similarly, Paul was responsible for maintaining a proportion of DPL's property investments in residential rather than commercial property, something which was a bone of contention with Andreas. Andreas however did not insist that Paul defer to his judgment. As Andreas put it in giving evidence:

> *"If you put somebody in charge, you must accept some of the things they do, whether they are right or wrong."*

87. Andreas for his part relied on a number of instances of him continuing to exercise ultimate control over management of the family businesses, including DPL. One instance involved Cheryl's position. At some point in 2006 when Cheryl was back working in the family businesses, but after her previous marriage had ended in divorce, it became clear that she had started a relationship with another employee. Andreas' evidence was that the relationship was having a negative effect on other staff, and so he told Cheryl not to come into the office any more. Accordingly, she stopped coming in and indeed remained out of the businesses until late 2008 or early 2009. Paul's evidence when cross-examined was that the decision to ask Cheryl to step away from the business was effectively a joint one, in the sense that he agreed with Andreas that

Cheryl's continued presence was causing difficulties, and spoke to her about it himself (although Andreas may have done so first).

88. Cheryl's account of the same events in the Chancery Action is consistent with Andreas' version. She said in her Witness Statement: "*When my father found out about the relationship in July 2006 he sacked me. I did not return to the office after this time*". That leads me to prefer Andreas' account. In any event, Paul agreed when cross-examined in the present proceedings that when Cheryl returned to the business in 2008 or 2009, that was because Andreas asked her to, since he (Andreas) thought it unfair that Paul was shouldering so much of the burden on his own. Cheryl came back at Andreas' insistence, somewhat reluctantly. Cheryl's evidence in the Chancery Action is consistent with this account: she describes being pressured by Andreas to return, although she was reluctant to do so. Eventually she gave in.

89. Another incident occurred in about 2008 involving Adane Gebre, who worked alongside Andreas in conducting building works. Andreas thought him a hard-working, reliable and honest employee. Andreas' evidence was that Paul threatened to dismiss Adane, but Andreas intervened and told Paul that if he did so then he would fly over to England and remove Paul as a director of DPL. Paul denied that account, and said he never threatened to dismiss Adane. He said what actually happened was a misunderstanding, which arose because he (Paul) had employed a new person as a property manager and Adane thought that that person was being used to sideline him.

90. I have no contemporaneous documents relating to this episode, and no evidence from Adane or anyone else other than Paul and Andreas. It is impossible for me to decode precisely what happened, but it was common ground between the parties that there was certainly a disagreement of some kind between Paul and Adane; that Adane was sufficiently concerned about it to call Andreas in Cyprus to ask him to help sort it out; and that Andreas intervened by speaking to Paul and the upshot was that Adane returned to work the following day and carried on in his existing role. Whatever the underlying details may have been, this picture is consistent with the idea of Andreas continuing to exercise final authority in respect of difficult and sensitive issues.

91. At the same time as Paul's responsibilities for the English businesses were increasing, it is common ground that Andreas began to focus more on his other businesses based in Cyprus, in particular from 2006 onwards.

92. Andreas' property developments were conducted through his Cypriot companies, and in particular Maremonte. They were financed with loans from National Bank of Greece ("*NBG*"), and Andreas gave personal guarantees for the companies' borrowings from NBG. The companies purchased land and, between 2006 and 2008, proceeded to develop some of the plots into a number of villas. Andreas' plan at the time was to complete the developments and sell the villas, and to repay NBG from the proceeds of sale.

93. At about the same time, in 2006, Andreas' other Cypriot company, Gatemark, also became active, but in London rather than in Cyprus. It began to develop its own property portfolio. Gatemark's properties were let and managed by DML. Its bankers

were Bank of Cyprus. Its property portfolio was small (never comprising more than about 7 properties), but they were relatively high value.

(ix) Other Events: 2006-2009

94. On 17 July 2006, apparently for tax reasons, Iris transferred to Andreas the 24% shareholding she then held in DPL (12% being her own shares, and 12% being the shares transferred to her by Cheryl in November 1997, because of concerns about the possible division of property on divorce). That left Andreas as registered holder of 88% of the issued shares in DPL, and Paul the holder of 12%.

95. I have mentioned above that since about 1993/1994, Cheryl had lived close to her parents at No. 5, Wroxham Gardens, London N11. She sold that property in about 2005 and bought a new property with her partner at the time, but when that relationship ended in 2007, Cheryl left with her children and had nowhere to live. Andreas used another company which he owned, called Gategrove Limited, to buy a new house for Cheryl and her children at 58 Hillfield Park, London N21. Andreas' recollection is that the purchase price was in the region of £770,000. Andreas' evidence, which I accept, is that he used £250,000 of his own money to fund the purchase, and the rest was borrowed on a mortgage, and Cheryl paid rent to Gategrove equal to the mortgage repayments.

96. On 1 April 2009, Andreas' then registered holding of 88% of the issued share capital in DPL was transferred to MHGL. I was told that was also for tax reasons.

(xi) The 2008 financial crisis: impact on Andreas' Cypriot businesses

97. The 2008 financial crisis was to have very serious consequences for Andreas and for his Cypriot businesses.

98. Andreas' own evidence is that the Cypriot property market collapsed in the wake of the financial crisis. The effect of this was that the Maremonte Companies were unable to find buyers for the properties they had developed, and were unable to service their loans to NBG. Consistent with the policy he had encouraged Paul to adopt, Andreas had taken out the loans from NBG in Yen, and another result of the economic crash was to cause a sharp rise in the value of the Yen against other currencies, and that had the effect of increasing the liabilities of the Maremonte Companies under their loans. NBG later converted the loans to Euros at what Andreas describes in his evidence as a very disadvantageous exchange rate, and he says, without his consent.

99. Gatemark, which had borrowings from Bank of Cyprus, was also affected. It had also converted its borrowings into loans denominated in Japanese Yen. On 12 December 2008, Paul procured the giving of a guarantee by DPL to Bank of Cyprus, as security for liabilities owed by Gatemark ("*the Gatemark Guarantee*"). The Gatemark Guarantee was later released by Bank of Cyprus, on 7 June 2012; but there was some confusion over this, and it seems that Bank of Cyprus, and Andreas, continued to believe until very recently that the Guarantee was still in place. This will come to feature in a later part of this chronology, which I will return to below.

100. The liabilities to NBG, meanwhile, were very significant, and presented a more substantial threat. I will say more about Andreas' dealings with NBG, and about the Maremonte Companies, below. For now, it is sufficient to note that NBG made demands of the Maremonte Companies for repayment, and then demands against Andreas personally under his guarantees. By 2010, he was seriously worried that NBG might bankrupt him.

101. This prompted Andreas to take a number of steps to try and ensure that the value built up over the years in the various businesses in England and Cyprus might be preserved. The precise range of such steps, and their detail, are somewhat obscure, but they included:

    i) Andreas encouraging Iris to commence divorce proceedings against him in October 2011. These proceedings included a freezing injunction which Iris obtained and which was in force between October 2011 and March 2012. In March 2012 the proceedings were dismissed and the freezing Order discharged by consent.

    ii) In September 2012, Andreas caused MHGL (which at that stage held 88% of the shares in DPL) to transfer 12% of the shares to Warner, which he had set up for Iris at the time and which was wholly owned by her; and also 12% to Eagle, which he had set up for Cheryl and which was wholly owned by her.

102. Eventually, in June 2012, NBG served claims on Andreas and the Maremonte companies, demanding payment of around €17m.

103. These points are relevant for present purposes because they show that Andreas was under considerable pressure during this time, including in the period immediately prior to his decision to remove Paul from his management position in DPL.

(xii) 2012: Exclusion of Paul from DPL

104. Andreas' evidence in his Witness Statement was that a number of factors influenced his decision to remove Paul from DPL. These included becoming concerned to learn that Paul had arranged a £500,000 overdraft facility for DPL, because in Andreas' view, given the nature of its business, DPL should always have had enough money coming in without needing access to an overdraft. They also included Andreas saying he was shocked to discover from Paul in June 2012 that DPL's bank borrowings were at the equivalent of £32m, which was much higher than he had expected; and as a result of that conversation, Andreas says he arranged to meet Kieran Costello, DPL's account manager at Bank of Cyprus, and what he said about DPL "*frightened*" Andreas. Andreas says that Mr Costello confirmed what Paul had told him, i.e., that bank borrowings were over £32m, and that a number of these loans were term loans which would mature in two or three years' time, and full repayment would be required.

105. In the event, none of these points was relied on by Mr Hubbard in either his Opening or Closing Statements as justifying Paul's removal from management. That case was put forward solely on the basis of Paul's alleged misconduct in relation to the treatment of cash receipts by DML, which I will return to below.

106. Andreas was still cross-examined on the points put forward in his Statement, however, and on examination the points largely fell away. For example, although it is correct that at the time, DPL had an account which was consistently in overdraft, it had a second account which was consistently and substantially in credit over the same period. Andreas also accepted that one matter affecting DPL's financial position in early 2012 was the fact that substantial foreign exchange losses (in the amount of £4m) had crystallised during 2011, but these were referable to the decision which Andreas had encouraged to change some of DPL's loans from Sterling to other currencies. Mr Peters relies on these points as supporting the proposition that Andreas has something of a blind-spot when it comes to Paul, in the sense that he can no longer assess Paul's behaviour objectively, and is inclined to be critical of Paul, whatever the evidence may say. I agree with that point, and agree that I must therefore approach Andreas' own criticisms of Paul with some caution – a point which I will bear very much in mind in assessing below the case on Paul's alleged misconduct.

107. As to the true reasons for Andreas' decision, Paul's case is that Andreas' motivation was to be able to take control of DPL, so as to be able to use DPL's funds to deal with the liabilities of the Maremonte Companies, which by this stage were being actively pursued to NBG. I am not persuaded that that case is made out. This is largely because, although Andreas did subsequently make use of DPL's funds in managing his liabilities to NBG, that was not until much later on, in 2015. I do not see the potential for doing so as a principal motivating factor for Andreas in 2012. It seems to me much more likely that a combination of factors was at play, both professional and personal.

108. Andreas no doubt felt under considerable pressure as a result of his exposures in Cyprus, and that no doubt made him irritable and sensitive to perceived shortcomings in Paul's behaviour. I accept Andreas' evidence that one of his major concerns was protecting the value in the existing businesses from his creditors, and trying to preserve it for his children and for future generations. That being the case, and with that objective under threat, Andreas was likely to be very sensitive to any actions of Paul which seemed to him profligate or out of kilter with Andreas' personal vision for how the business of DPL was to be managed. That would have included the news about DPL's increased borrowings, even if, on proper examination, that was not out of step in terms of overall loan to value ratio (approximately 55% according to DPL's accounts to 31 March 2012) with that of other property development companies.

109. Andreas was prone to be capricious. In her evidence in the Chancery Action, Cheryl said:

> *"... my father could be quite capricious. He was prone to react aggressively and unpredictably to disagreement within the family to his plans. If Paul or I did not agree with his plans or actions, or I did something he did not like, he would stop speaking to us and find other ways to punish us".*

110. In my view, this aspect of Andreas' character was also in play. This is apparent from the fact that, when cross-examined as to what financial documents he had reviewed relating to DPL before taking the decision to remove Paul as a director, Andreas accepted candidly that he had reviewed no such documents, beyond a sheet of paper given to him by Kieran Costello, showing the amount of DPL's outstanding loans and their repayment dates. This indicates a decision arrived at quickly and without careful deliberation, as something of a knee-jerk response to a number of factors which Andreas

thought concerning, arising against the backdrop of his own very serious financial problems in Cyprus.

111. When cross-examined, Andreas also gave evidence to the effect that he had had a substantial falling out with Paul in May or June 2012 – at any rate at some point before he took the decision to remove Paul as a director – because of a meeting he (Andreas) had with Cheryl. Andreas' account was that at some point when he was staying with his son, young Andreas, at a flat in London, Cheryl came to see him and told him that Iris was planning to ask Andreas for a divorce. The impression Cheryl gave was that Paul had encouraged Iris in this. Andreas said he concluded this was part of a plan by Paul to take over some or all of the family business.

112. I note that Andreas' evidence on this point was somewhat confused, in the sense that he was unclear in parts about the chronology. I also note that this aspect of the story did not feature in Andreas' Witness Statement and appeared for the first time only when he was cross-examined. I therefore treat it with appropriate caution, but note that the idea that divorce from Iris was being discussed at the time appears consistent with other evidence, and specifically with the exchange of text messages between Paul and Cheryl dated 8 July 2012 which I set out below at paragraph [117], in which Paul said: "*Mum may need to press ahead, you know that??*"

113. Matters came to a head in connection with Paul's planned purchase of a new family home, at 21 Makepeace Avenue, London N6. As noted above, Paul, his wife and son had for some while been living in Flat 9, 20 Crescent Road. They wished to acquire something larger, and it is common ground that Andreas encouraged Paul in this. But Andreas thought Makepeace Avenue was too expensive, and was also against the idea that Paul should acquire it in his own name (with distributions from DPL), and instead suggested that it be acquired by an offshore company (possibly with Andreas as shareholder), much in the way in which Gategrove had acquired Cheryl's property at 58 Hillfield Park, London N21. Paul was reluctant for the property to be purchased by a vehicle associated with Andreas, in light of Andreas' own concerns that his assets might be attacked by his creditors. In the event, against the background of the other factors mentioned above, this seemed to touch a raw nerve with Andreas. Both Andreas and Paul describe a very heated argument over the telephone in June 2012, which Paul says was on 24 June 2012. Paul's evidence before me was that Andreas said on that call that he would dismiss Paul, in order to show he was still the one in charge.

114. It is common ground that Paul was removed as a director of DPL on 25 June 2012, and thereafter excluded from management, including being removed as an authorised signatory on DPL's bank account. He was removed as a director of DEL at the same time.

115. The idea that Andreas was effectively flexing his muscles as majority shareholder, in taking the decision to exclude Paul, is consistent with the way in which Paul himself saw things at the time. In a text message sent to Cheryl on 8 July 2012, a few days after his removal as a director, he said the following:

> *"Really angry still and sickened too! Sacked, accused all the time that I booted him out, I'm greedy, I'm arrogant and I have him to thank for it all existing in the first place .... I would like to ask him what on earth I've done to him ...".*

116. And Cheryl replied:

> *"You've done nothing. Remember last year I didn't go to Cyprus, well, he stopped talking to me for nothing. You don't have to do a thing for him to be off with u. It'll be my turn next, I know it".*

117. Later the same day there was this further exchange (the reference to Ethnik is to Ethniki Bank, i.e., NBG):

> "*Cheryl: R we buying the Euston flats in DPL?*
>
> *Cheryl: He said he doesn't want to buy things in DPL anymore. That we should be offloading from that company. Ethnik and guarantee!!*
>
> *Paul: Yes.*
>
> *Paul: Those contracts were exchanged 16 months ago.*
>
> *Paul: What's your feeling on it all?*
> *Cheryl: A bloody mess on a business level and a bloody awful mess on a personal level. We all want out in more ways than 1.*
>
> *Cheryl: And guess who causes it!!*
>
> *Cheryl: A big bloody mess on a personal level! I'm tired of it and I'm sure you r too.*
>
> *Cheryl: It'll kill us or drive us mad.*
>
> *Paul: How much longer can it go for?*
>
> *Paul: I should have learnt my lesson 8 years ago. It's over as far as I'm concerned*
>
> *Paul: Mum may need to press ahead, you know that??*
>
> *Cheryl: Yes. I do*".

118. In a further text message dated 13 July 2012, Paul said:

> *"He's sacked me to prove he's in control, its (sic.) all twisted and bonkers."*

119. These exchanges were relied on by Mr Hubbard as showing a degree of resignation on Paul's part to his dismissal, and in effect, an acceptance that it was something Andreas as majority shareholder was entitled to do. I will come back to that point below. In any event, it seems to me that the messages also support the view that both Paul and Cheryl had a long history of dealing with Andreas' difficult character, and that they

were aware that features of that character were his controlling nature, and his tendency to capriciousness. In highly pressurised circumstances which arose in 2012, it seems to me that those features would obviously have been heightened.

(xiii) Ongoing access to funds by Paul

120. Although Paul was thus excluded from DPL and DEL, Cheryl remained in place in the family businesses and by this stage (in February 2012) had been reappointed as a director of DPL. She was in contact with Andreas, whereas communication between Paul and Andreas was largely if not entirely cut off.

121. Access to funds became a problem for Paul, who was dependent on cash from the family businesses to cover living expenses, including the mortgage and other costs associated with 10 Wroxham Gardens and 17 Seaforth Gardens. In the event, the acquisition of the 21 Makepeace Avenue property in fact went ahead in September 2012. It was acquired by DPL. But it required renovation work, and Paul needed funds for that as well. (As I understand it, Paul is still living in the Makepeace Avenue property, although in April 2014 Andreas caused DPL to issue possession proceedings against him in the Central London County Court. Those proceedings were subsequently stayed pending the outcome of the Chancery Action and the present action).

122. Text messages between Paul and Cheryl in early 2013 show Cheryl trying to assist with this, and taking steps to ensure that funds were made available to Paul. In cross-examination it was put to Paul that he and Cheryl were secretly taking funds they were not entitled to.

123. Thus, in one exchange on 7 February 2013, Cheryl referred to funds (presumably cash) having been left for Paul with Adane Gebre:

> "*Paul: There's no money.*
>
> *Cheryl: Andane's got it for u. Hiding!!!.*"

124. Paul took exception to his money having been left with Adane, and Cheryl replied:

> "*Look. You don't understand one little bit. Dad walked in and was going off about the money. Adane and I hid your money or he would have taken it. Stop and think for a sec Paul. You do not realise how bad I was today.*
> *Accusing u.*
> *He's been going through Larry's receipts, cheque books etc etc etc TOdAy (sic.).*"

125. A little later, Cheryl said:

> "*I've had no money this week. None. Adane's had it for one reason or another. [?]1,000 (sic.) left for u with Adane in a White envelope for builders as we hid it from him as he was standing staring at us*".

126. Paul denied the accusation he was doing anything dishonest, and said that in any event Cheryl would have cleared any payments to him with Andreas, either before or after they were made. Later exchanges in this same sequence include Paul saying to Cheryl,

in respect of the cash, "*When are you going to ask him?*", and Paul's evidence in re-examination was that the "*him*" referred to was Andreas. This seems to me to be very doubtful, and as I read the later text messages, the more natural implication is that the "*him*" referred to was Adane, who had put the "*White envelope … on (sic.) the grey safe with the cheques*".

127. I do not think the evidence enables me to conclude that Paul and Cheryl were acting dishonestly in the sense of taking funds they were not entitled to, because it is unclear precisely what their entitlements were at the time. What these and later text messages certainly do show, however, is a willingness on Paul and Cheryl's part to be secretive and to hide things from Andreas which they did not want him to know about. That may have been because they thought he was behaving irrationally or unfairly, or because in their view Andreas had unrealistic expectations about what their reasonable outgoings actually were. The upshot, however, was the same: a pattern of secrecy and dysfunctional behaviour among the family members.

128. I should mention at this point that only an incomplete set of text messages from this period is available. The text messages were originally produced on disclosure in the Chancery Action, but none were produced for a period of eight-and-a–half months, between 13 July 2013 and 1 April 2014 – which became known as the "*Text Gap*". In his judgment at [15], HH Judge Barker QC agreed with the submission by Andreas' counsel (again Mr Hubbard) that the Text Gap, and the shortcomings of Paul and Cheryl's attempts to explain it, justified the conclusion that Paul and Cheryl "*had shown no compunction about flouting the rule of law*", and in consequence at [61], the Judge indicated that a high level of caution was required in assessing the reliability of Paul's oral evidence.

(xiv) 2013: Exclusion of Cheryl from DPL

129. It is common ground that Andreas removed Cheryl as a director of DPL on 22 February 2013. Andreas in his Witness Statement said the reason for this was because by that stage he had formed the view that Cheryl had given him misleading information about the extent of cash sums being received by DML in respect of rental income. He says (in effect) that Cheryl had sought to disguise the extent of the funds received by DML in cash, by representing to him that such funds were very limited whereas in fact they were very large, and substantially unaccounted for. This question of the treatment of cash income by DML was to become a very major issue between the parties in the Matrimonial Proceedings and the Chancery Action.

130. Cheryl in her Witness Statement in the Chancery Action gave a different explanation for her removal as a director. This was that Andreas decided to remove her as part of one of his schemes to shield the family businesses from his creditors. The scheme in question, known as the "*dividend plan*", involved (amongst other things) a company called Apollo acquiring properties from DPL at low values. In the event the dividend plan did not materialise, but in the meantime – according to Cheryl's evidence – Andreas removed her as a director because he did not want either Eagle (Cheryl's company) or Apollo to be connected with DPL through Cheryl's directorship, and Cheryl was content with this arrangement.

131. Although the text messages are consistent with the idea that Andreas was becoming suspicious about rental receipts at about this time, the limited materials available

suggest that the point did not really crystallise until later on. Thus, Paul and Cheryl had the following exchange on 4 March 2013:

> "*Paul: Did you get any money today?*
>
> *Cheryl: Yes. Half each as we said. But I'm worried. What if he goes through the receipt book and accuses us".*

132. But as late as 2 May 2013, Cheryl was still able to say in a message to Paul:

> *"It's just he's watching money and he asked if we get money from receipt book. I covered that one".*

133. On the basis of this evidence, I am inclined to think that Andreas in his Witness Statement is mistaken as to the chronology, and that his reasons for removing Cheryl were therefore not connected with any suspicions he held at the time. If that is right, and if therefore Cheryl's removal as a director of DPL was undertaken with her knowledge and implicit approval, as part of Andreas' intended asset-protection scheme, that rather casts doubt on the assertion at §45 of the Re-Amended Petition that Cheryl was removed unilaterally and without her consent, and in a manner constituting unfair prejudice. In any event, no complaint was made by Cheryl at the time about her removal, and I have been shown nothing to suggest that she thought that Andreas had acted illegitimately in removing her, or to suggest that she agitated to be reinstated as a director of DPL.

134. I note finally that the text messages immediately above, like the ones mentioned in the previous section of this Judgment, are consistent with the idea that Paul and Cheryl were being secretive towards Andreas as regards the treatment of cash within the family businesses.

(xv) 2013-2015: The Matrimonial Proceedings

135. Paul's evidence was that at some point in 2012 or early 2013, it became known that Andreas had reconnected with his former partner in Cyprus, from whom he had been separated for a period of time. Paul said that this prompted concerns about Andreas' intentions vis-à-vis the family businesses. Text messages in the early Summer of 2013, in the period following the removal of Paul and Cheryl from management positions in DPL, are consistent with the idea that there was a growing mistrust of Andreas, and a concern that he might try to arrange his affairs in a way which would limit the benefits flowing to Paul, Cheryl and Iris. On 4 May 2013, the following exchange took place between Paul and Cheryl, in the context of their discussing the dividend plan:

> "*Cheryl: I don't disagree with you and it is nasty what he done but we know that's how he is. All I can say is that u will be a director. Let me get the timing right. Mum u and I stuck together.*
>
> *Cheryl: Also, u know I was thinking. If we don't go along with it, he may bypass us in favour of those who have turned 18. It's 2 years away also when his son turns 18.*
>
> *Cheryl: I'm just trying to think for us. That's all.*

Cheryl: I wouldn't put it past him, would u?

Cheryl: i.e., What if we don't go along with it and he uses Anthony for this plan and our dividends small!!

Cheryl: Then in 2 years brings his son into it."

136. Later the same day Paul sent a further text to Cheryl saying:

"Can we meet over the weekend with mum to discuss Apollo".

137. These communications are consistent with the idea developing that Andreas could no longer be relied on to make provision for his English family, and that steps might need to be taken by Iris, Paul and Cheryl to protect themselves.

138. One of the issues in the Chancery Action, which featured also in the present proceedings, was the extent to which Paul and Cheryl were the ones who were really behind Iris' divorce proceedings against Andreas in 2013. Paul's oral evidence when cross-examined, and the text messages above, all support the view that Paul and Cheryl were becoming increasingly concerned about steps that Andreas might take to cut them off from accessing value in the family businesses, and in light of that were thinking about steps they could take – perhaps together with Iris – to help themselves.

139. In those circumstances, and bearing in mind also the inherent probabilities, two things seems quite clear to me. The first is that, although Iris was the one who initiated the Matrimonial Proceedings, the decision to do so was motivated by a desire to protect the interests of the English family members generally, and must have been the product of discussions with Paul and Cheryl, who actively supported it. The second is that it must have been anticipated that the Matrimonial Proceedings would involve a break-up of the family businesses, which is in fact exactly what happened.

140. In the event, Iris initiated divorce proceedings against Andreas in July 2013. On 22 August 2013, Iris applied for, and obtained, a freezing Order against Andreas (the "*Matrimonial Freezing Order*") at a without notice hearing before Hayden J. in the Family Division. This was on the basis of concerns that Andreas was seeking to divert rental income away from DML, in a manner which would affect Iris' ability (and that of Paul and Cheryl also) to access funds derived from that rental income.

141. Andreas made a Witness Statement in response on 12 September 2013, in which he said that the steps he had sought to put in place vis-à-vis DML were motivated by his own concern that Paul and Cheryl were the ones illegitimately diverting rental cash receipts from DML. Nonetheless, the Matrimonial Freezing Order was continued by Moor J. after further hearings on 12 September 2013 and 10 February 2014, albeit subject to a proviso that DML should be required to make monthly payments in the sum of £110,000 to DPL, so that it had a continuing flow of income. Subject to that, the Order prevented Andreas from (1) diverting any payments of rent away from DML, (2) altering or seeking to alter the terms of employment of anyone employed by DML, (3) dealing in any shares held by him in any company, and (4) dealing in any real property in which he had an interest.

142. Before me, Mr Hubbard was critical of the evidence Paul gave in support of the injunction application, and in particular his Witness Statement dated 31 January 2014. There Paul said that his and Cheryl's income derived from a combination of salary and dividends declared *by DML*, thus giving the impression that by granting an injunction preserving the flow of rental income into DML, the Court would be maintaining the *status quo* vis-à-vis Paul, Cheryl and Iris. Mr Hubbard said that that evidence was misleading because in fact, certainly in Paul's case, his income historically had come from *DPL* rather than DML, and so to say the injunction was required to maintain the *status quo* was wrong.

143. Paul's explanation when cross-examined was that the impression intended to be given was that he was *ultimately* dependent on rental income flowing into DML, which had responsibility for collecting rents, even if distributions were in fact made by other companies in the family business. That was not the impression given in his Witness Statement of 31 January 2014, however, when he said at §25:

> *"My and Cheryl's income derives from Management's [i.e., DML's] profits, by way of a combination of salary paid and dividends declared".*

144. That clearly suggests that the salary was paid and dividends were declared *by DML*, and indeed that is exactly what Cheryl had said in her earlier Statement of 21 August 2013 at §11:

> *"My and Paul's income ultimately derives from the rents, by way of a combination of salary paid, and dividends declared by, Management [DML]. Our income is exclusively from that source".*

145. At best this evidence was careless in giving an incomplete picture of the way in which the family businesses operated. Whatever the explanation, it demonstrates a strong desire on Paul's part, in the circumstances he found himself in in 2013 and early 2014, to maintain the flow of rental income coming into DML, the company he still controlled with Cheryl. The importance of this income stream was emphasised by Paul in his cross-examination before me, when he said:

> " *… DML has been collecting all of the rental income for all of the properties owned by the family companies and … if it does not collect the rental income, then I don't … no income exists in terms of the way that that's passed on to any of us."*

146. In his same Witness Statement of 31 January 2014, Paul also dealt with the allegation made by Andreas that in fact he and Cheryl were the ones illegitimately diverting rental income from DML. At §§54 and 57, Paul gave evidence to the effect that all income received by DML was properly accounted for, and sought to downplay the level of cash payments in fact received by DML (Andreas thought it might be as much as £25,000 per month, but Paul said that was "*utterly incredible*"). I will come back to this evidence below.

147. Mr Hubbard was also critical of the fact that, from February 2014 onwards – i.e., immediately after the further hearing before Moor J. mentioned above – DML in fact stopped paying the required monthly payment of £110,000 to DPL. Paul's explanation for this when cross-examined was that the rental income flowing into DML dropped at

the time, because Andreas allowed a number of properties to remain empty, which he was planning to sell. Surprisingly, no complaint was made by Andreas in the Matrimonial Proceedings about the failure to pay, as one might have expected, and the background to it remains obscure. It is consistent, however, with the idea that Paul at the time wished to maintain funds within DML.

148. An unfortunate incident occurred in August 2014. At the time, DPL and DML shared office space at 69 Stroud Green Road, where the various family businesses had been based for many years. On 12 August, Paul and Andreas had a physical altercation there. The circumstances are somewhat unclear, but Andreas' evidence is that Paul was trying to wrestle a briefcase from him, which contained a report on the treatment of cash within DML. The police were called and Paul was arrested, although the matter seems not to have progressed any further. What did happen though is that on 14 August 2014, Andreas changed the locks at the Stroud Green Road premises, and this prompted DML on 19 August to commence possession proceedings in the Central London County Court, which on 20 August were settled. This was by means of an agreement splitting the available office space and giving DML exclusive possession of a defined area.

149. At a hearing in November 2014, Moor J. determined a plan for the division of matrimonial assets between Andreas and Iris. He held that the case was one for equal division of their assets, and consequently determined (among other things) that Andreas should transfer to Iris (1) his 52% shareholding in DEL (held by this stage via a BVI company, Landhouse Holdings Limited), and (2) his shareholding in Gategrove (at the time also held indirectly), which was the owner of the property occupied by Cheryl. At the same time, Iris was to transfer to Andreas her 12% shareholding in DPL, held at this stage by Warner. Andreas retained ownership of Gatemark and the other Cypriot companies.

150. The upshot as regards DPL was that Andreas was left (by this time via MHGL) with a 76% shareholding, with Paul and Cheryl owning 12% each (Paul directly and Cheryl via her company, Eagle). As to DEL, Iris was left with 52% and Paul and Cheryl 24% each. Paul and Cheryl continued to own and manage DML.

151. Although the basic structure for the division of assets was thus worked out in November 2014, it seems that some complications (in particular relating to tax) arose in working through the detail of it, and in the event a final Order was not made until 8 June 2015. In the meantime, however, DPL took back control over the management of its properties from DML.

152. Among other provisions, the final Order between Andreas and Iris required payment of a lump sum to Iris, in the amount of £1,605,465, to be made by 7 February 2016. In due course this payment would be made but using DPL's funds. This forms the basis of one of Paul's complaints in this action about Andreas' later behaviour in 2015 and 2016, and it will be necessary to come back to it.

(xvi) 2015-2019: The Chancery Action

153. I have mentioned above that the Matrimonial Proceedings formally came to an end on 8 June 2015. That was not the end of the litigation between the family members, however. Andreas was still aggrieved about the treatment of rental income by DML,

and only a few days later, on 11 June 2015, DPL and Gatemark issued the Claim Form in the Chancery Proceedings.

154. DPL's main complaint in the proceedings was based on the allegation that DML was its agent for the purpose of collecting rents on its properties, and that it had failed properly to account for rental income. It was further said that Paul and Cheryl, as directors of DPL at the material times, were personally liable for breach of duty in failing (amongst other things) to take steps against DML to ensure that the rental income it collected in was properly accounted for.

155. For the purposes of the present Petition, the most important feature of the Chancery Action is the joint finding of the parties' experts that, as Andreas had suspected, there were important discrepancies in the books and records of DML. The first, the so-called accounting shortfall, refers to the fact that for the four year period between 1 August 2009 and 31 July 2013, some £1.145m of rental income, recorded in internal DML spreadsheets as having been received in cash or by cheque/standing order, was not included in DML's financial statements, as approved by its directors.

156. The second discrepancy, referred to as the cash shortfall, is a different measure. This is essentially the difference between (1) the same rental income recorded in internal DML spreadsheets as having been received in cash or by cheque/standing order, and (2) the amounts of such income shown as having been paid into DML's bank accounts or paid as dividends in cash (this latter point only affected the financial year ending July 2013). In each year under examination, there was a shortfall between the two. i.e. amounts were shown as having been received as rental income in cash or by cheque/standing order, but *not* paid into DML's bank accounts. Additionally, there was some uncertainty about whether tenants' deposits were paid by cash/cheque or paid directly into DML's bank accounts. If the former, then the unexplained shortfall between sums received and sums banked was larger in each year. If the latter, there was still a shortfall, but a smaller one. This uncertainty gave rise, in the joint statement from the parties' experts, to what they referred to as the "*Cash Shortfall Range*". Over the four year period examined by the experts, the "*Upper Bound*" of the Cash Shortfall Range was £1,091.082; and the "*Lower Bound*" was £561,914.

157. The relevant figures are represented in the following table:

	Year ending July 2010 (£)	Year ending July 2011 (£)	Year ending July 2012 (£)	Year ending July 2013 (£)	Total
Accounting shortfall	408,516	334,834	277,294	124,465	1,145,109
Cash shortfall – Upper Bound	388,073	283,313	257,103	162,593	1,091,082
Cash shortfall –	228,943	108,893	198,603	25,475	561,914

Lower Bound					

158. These discrepancies are obviously material and give rise to some serious questions.

159. HHJ Barker ([2017] EWHC 2099 (Ch)) held that DML *was* DPL's agent, and therefore ordered an account to be taken (see at [96] to [99]). He also held that Paul, as a director of DPL, had his own liability to account, coterminous with that of DML (see at [112]).

160. The Judge said that since DML as agent was obliged to keep proper records of tenants' deposits, the account should disregard any adjustment in respect of deposits as a possible explanation for the missing cash (see at [99]). At the same time, he was critical of Paul's evidence and considered him generally an unreliable witness, and rejected the explanations for the missing sums put forward by Paul. He concluded that Paul had regarded rental income from DPL as a cash fund available to him for the maintenance of his lifestyle (see again at [112]). That said, and consistent with the informal manner in which the family businesses had been run, the Judge also held that Paul and Cheryl had an entitlement to remuneration from DPL, pursuant to an understanding endorsed by Andreas (see at [97]).

161. Thus, when the Judge came to give directions for the taking of the account, these included a direction that an allowance be made for drawings by Paul and Cheryl in respect of income, which the Judge assessed (on the basis of Andreas' evidence) at a figure of £135,000 per annum net of tax for the last year in which DML was DPL's agent, with an appropriate adjustment being required in respect of previous years to take account of movements in real earnings. The Judge also accepted that there were cash withdrawals from the business by Andreas himself, but rejected the contention that these were significant and put the figure at £15,600 per annum up until the date of the divorce settlement with Iris (see at [100]).

162. The conclusion that DML was DPL's agent has now been overturned by the Court of Appeal, in a judgment handed down shortly before the trial in this action: [2019] EWCA Civ. 127. This was on the basis that DML's alleged status as agent was incompatible with the intention that it act as a "*buffer*" company, and thus shield DPL from claims by tenants or other possible claimants: see per David Richards LJ at [35] and [36]. On the same basis, the conclusion that Paul was liable to account was also overturned (see at [40]). Cheryl was not a party to the appeal, I assume because by the time the appeal came on she had settled her differences with Andreas.

163. The account ordered by HHJ Barker will not now happen, and as I understand it, the parties are agreed that HH Judge Barker's Judgment on the points above is no longer capable of giving rise to any issue estoppel, as to which see *P&O Nedlloyd BV* v. *Arab Metals Co (No. 2)* [2006] EWCA Civ. 1717, [2007] 1 WLR 2288, per Moore-Bick LJ [28].

164. Nonetheless, the circumstances surrounding the treatment of cash rental receipts by DML continue to be highly relevant, and in the course of the proceedings before me Paul was cross-examined at some length on this topic, including as to the accounts he gave earlier in both the Matrimonial Proceedings and the Chancery Action. I agree with Mr Hubbard that in a number of respects, Paul's evidence was unsatisfactory and unconvincing. In particular:

i) Although in his evidence before me Paul accepted the agreed position as determined by the experts, as Mr Hubbard explained, he and Cheryl had persistently denied that there was any missing cash until shortly before the trial in the Chancery Action when the experts produced their joint statement.

ii) Paul was taken in his cross-examination to a passage in his Witness Statement dated 31 January 2014 in the Matrimonial Proceedings (referred to above), in which he said (§54):

> *"I wholly reject every one of the allegations made by my father in paragraphs 33 to 42 in relation to impropriety with cash payments received by the companies. Any cash received by the company [i.e., DML] has been properly accounted for and either banked, declared as dividends, used to pay company outgoings, or used to return deposits to tenants"* (My emphasis).

iii) Given what is now known, that statement was obviously inaccurate. Rental cash receipts flowing into DML were *not* properly accounted for, in the sense that on any measure, there were material discrepancies in DML's books and records (both its statutory accounts and internal records) over a substantial period of time. Paul accepted as much, but when it was put to him that he must have known that his statement was wrong when made, said that he believed it was true because as far as he was concerned cash was being *used* in the business at the time, and " *... the use of the cash in the business … meant that it was actually being accounted for*." In other words, his justification was that as long as cash was being *used*, as far as he was concerned that meant it was *properly accounted for*, whatever the position in the books and records.

iv) To my mind, that was an entirely unconvincing answer. Paul's evidence was in response to points made by Andreas in his Statement, also dated January 2014, which specifically included his complaint that rental income had not been properly accounted for, in the sense of being reflected in DML's books and records, which Andreas said was always his practice when in charge of day-to-day management (see §38). Paul in putting forward his response in his §54 was addressing that criticism. He sought expressly to say that proper records had been kept, when they had not. I do not see how he can sensibly justify that evidence by now saying that he thought that cash *used in the business*, even if *kept off the books*, was the same as cash being "*properly accounted for*". The gist of the criticism was that cash had been kept off the books and could not be traced.

v) Relatedly, in the same Statement in the Matrimonial Proceedings Paul gave some specific evidence in answer to Andreas' suspicion at the time that rental income was being received in cash and not declared. The basis of Andreas' suspicion is explained in his January 2014 Statement at §§34-35, where he says he was informed by Cheryl in late 2012 or early 2013 that DML's cash income was in the region of £1,000 to £2,000 per week, but was then told by a DML employee that it was actually receiving about £25,000 in cash every month in rental payments. In his evidence in response, Paul said (at §57):

> *"I consider the figure of £25,000 per month as a likely figure for cash receipts to which my father refers at paragraph 35 to be utterly incredible."*

vi) In fact, if one takes the Upper Bound of the Cash Shortfall as correct, the figure (as Mr Hubbard pointed out in cross-examination) was a reasonably accurate one, over the fouryear period in question. Even taking the Lower Bound, one is still in a situation where substantial income is being received in cash each week, and so to describe Andreas' figure as "*incredible*" is unfair and inaccurate.

vii) In his cross-examination before me, Paul's attempted explanation for his earlier evidence was confused and unconvincing. He sought to say that he thought Andreas was referring to payments received in June, i.e. a month at the end of a quarter, in which commercial rents were due, and that would have increased the rental income received. I do not understand the logic of that answer, as an attempted justification for the impression created by Paul's evidence that very little rental income was received in cash, when the agreed position now is that quite substantial sums were received in that manner. Mr Hubbard described Paul's answer as disingenuous, and I agree.

viii) In a similar vein, in a Response to a Request for Further Information in the Chancery Action in October 2015, Paul and Cheryl said:

> *"Notwithstanding the vagueness of paragraph 18 of the Particulars of Claim, the Defendants ... have clearly pleaded that, to the best of their knowledge, all rents which were received in cash and recorded in [DML's] rent receipt books were accounted for in [DML's] annual accounts. Accordingly, it is denied that [DML] received £1,644,684 in excess of the income recorded in its filed financial statements for that period".* (My emphasis).

ix) Once more, on the basis of the now agreed position, it follows that the underlined statement was substantially inaccurate. The experts were agreed that in fact £1.145m was received by DML in excess of the income recorded in its financial statements during the period in question. Paul in cross-examination sought to say that he believed the answer to be true when given, but I reject that evidence. It seems to me that as one of the two directors and shareholders in DML, and given the critical importance of the rental income to DML, Paul must have been aware of DML's income position, and therefore must have known of such a large and material discrepancy.

165. The only other points to draw out at this stage as regards the Chancery Proceedings are as follows:

i) Paul's evidence before me, which I accept, is that he and Cheryl instructed solicitors in respect of the present Petition in the Summer of 2015, after having been served with the freezing Order in the Chancery Action. The Petition thus seems to have been, to some extent at least, a reaction to the further steps taken by Andreas, once the Matrimonial proceedings had concluded.

ii) In the Chancery Action itself, one issue raised in the Defence concerned the question of whether DPL had declared any dividends since the Spring or Summer of 2013. This was first raised in a letter from Paul and Cheryl's solicitors, Stephenson Harwood, dated 11 September 2015, and then featured in the Defence served on 18 September 2015 and in a follow-up letter from Stephenson Harwood dated 12 October 2015. Dealing with this point, both the Defence and the 12 October 2015 letter referred expressly to the possibility of the complaint being taken up by way of a section 994 Petition. Mr Hubbard said that it was significant that these exchanges said nothing about the Understandings now relied on by Paul concerning involvement in management, and said that if such Understandings had existed, one would have expected them to be referred to. They did not emerge, however, until Stephenson Harwood's later letter of 26 January 2016, almost four years after Paul's exclusion from DPL.

iii) The Petition, as originally issued on 26 May 2016, relied on Paul's exclusion from DPL's business, and on Andreas' conduct in using DPL's funds to make payments to Iris, as constituting unfair prejudice arising from the alleged misuse of DPL's funds. It said nothing originally about Andreas' conduct during 2015 in using DPL's funds to support his businesses in Cyprus. Those later payments were only revealed later on, during the course of the Chancery Action, and the allegations relating to the payments were introduced by amendment to the Petition in January 2018. It will be necessary to say more about them below.

(xvi) Shareholdings in DPL

166. At various points in the chronology above, I have referred to the changes over time in the holdings of shares in DPL. For convenience, these are summarised in the following table:

Date	**Transfer/allotment**	**Overall shareholding**
22 September 1989	99% of shares allotted to Andreas 1% of shares allotted to Iris	Andreas: 99% Iris: 1%
1 September 1991	Andreas transfers 11% to Iris Andreas transfers 12% to Paul Andreas transfers 12% to Cheryl	Andreas: 64% Iris: 12% Paul: 12% Cheryl: 12%
4 August 1995	99,800 ordinary shares allotted to DPL's ordinary shareholders in proportion to their existing shareholdings	
18 November 1997	Cheryl transfers 12% to Iris	Andreas: 64% Iris: 24%

		Paul: 12%
17 July 2006	Iris transfers 24% to Andreas	Andreas: 88% Paul: 12%
1 April 2009	Andreas transfers 88% to MHGL	MHGL: 88% Paul: 12%
7 September 2012	MHGL transfers 12% to Eagle MHGL transfers 12% to Warner	MHGL: 64% Eagle: 12% Warner: 12% Paul: 12%
October 2015	Warner transfers 12% to MHGL	MHGL: 76% Eagle: 12% Paul: 12%
August 2018	Eagle transfers 12% to DIL	MGHL: 76% DIL: 12% Paul: 12%

D. Legal Framework: Outline

167. The general principles of law relevant to this area are not in dispute.

168. Section 994(1) Companies Act 2006 provides as follows:

> "*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.*"

169. Both sides referred me to the following summary of the law, as it has generally been understood since the seminal decision of the House of Lords in *O'Neill* v. *Phillips* [1999] 1 WLR 1092, taken from *Hollington on Shareholders' Rights* (8th Edn) at 7-01:

> " *PRINCIPLE 14—THE UNFAIR PREJUDICE REMEDY*
>
> *(1) To establish a claim under s.994, the aggrieved shareholder must demonstrate that (a) the affairs of the company in question have been conducted (b) in a manner which is unfairly (c) prejudicial to the interests of the petitioner or the shareholders generally.*

(2) Both element (b), i.e. unfairness, and element (c), i.e. prejudice, have to be established. Conduct may be unfair without being prejudicial, and vice versa.

(3) As to (b), i.e. the requirement of unfairness:

(i) 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 and understandings between shareholders which identify their rights and obligations as members of the company;

(ii) these are the terms upon which the parties agreed to do business together, which include applicable rights conferred by statute. The starting point therefore is to ask whether the exercise of the power or rights in question would involve a breach of these terms;

(iii) these terms include, by implication, an agreement that any party who is a director will perform his duties as a director;

(iv) these terms 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;

(v) agreements and understandings do not have to be contractually binding in order to be enforceable in equity;

(vi) 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': see O'Neill v Phillips [1999] 1 W.L.R. 1092 HL at 1099A; the conduct need not therefore be unlawful, but it must be inequitable. Although it is impossible to provide an exhaustive definition of the circumstances in which the application of equitable principles would render it unjust for a party to insist on his strict legal rights, those principles are to be applied according to settled and established equitable rules and not by reference to some indefinite notion of fairness;

(vii) to be unfair, the conduct complained of need not be such as would have justified the making of a winding-up order on just

and equitable grounds as formerly required under s.210 of the Companies Act 1948;

(viii) it is not enough merely to show that the relationship between the parties has irretrievably broken down. There is no right of unilateral withdrawal for a shareholder when trust and confidence between shareholders no longer exist. It is, however, different if that breakdown in relations then causes the majority to exclude the petitioner from the management of the company or otherwise to cause him prejudice in his capacity as a shareholder.

(4) The court has a wide discretion with regard to the relief to be granted if unfair prejudice is made out, fashioning the remedy to the unfair prejudice which has been made out."

E. Exclusion from Management: Quasi-partnership

(i) The Authorities

170. Paul's case is that his exclusion from management by Andreas in June 2012 was unfair, and therefore unfairly prejudicial.

171. Paul arrives at this conclusion on the basis that, at the time of his exclusion, DPL was a quasi-partnership company, bearing the characteristics identified by Lord Wilberforce in the following celebrated passage in his speech in *Ebrahimi* v. *Westbourne Galleries* [1973] AC 360, at p. 379:

> *"It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere".*

172. Paul says that in this case, all three characteristics identified by Lord Wilberforce are present, because (1) DPL was formed or continued on the basis of a personal relationship, involving mutual confidence; (2) there was an agreement or understanding that Paul would participate in the conduct of DPL's business; and (3) there is a restriction on transfer of Paul's interest, given Article 6 of DPL's articles of association. Paul says that in those circumstances, a conclusion that DPL was nonetheless *not* a

quasi-partnership (with the consequence that Paul's exclusion from its business was not unfair) would be unprecedented.

173. Some caution is required, however, in applying Lord Wilberforce's guidance. The partnership or quasi-partnership analogy was apposite in that case because of its particular facts, which meant that the majority shareholders' legal rights - and in particular, their right to remove the Petitioner, Mr Ebrahimi, as a director – were to be read subject to equitable constraints. The fact of "*cardinal importance*" (per Lord Wilberforce at p. 373G) was that, up until the time the relevant business had been incorporated as a company in 1958, it had been run by Mr Ebrahimi and Mr Nazar (one of the two individual Respondents to the Petition) as a partnership, in which they equally shared the management and profits. In light of their long association in partnership, the "*indisputable inference"* was that Mr Ebrahimi had agreed to join in the formation of the company on the footing that the same state of affairs would continue (see per Lord Wilberforce at p. 380G). At the time, Mr Ebrahimi and Mr Nazar each held 50% of the issued share capital; but later, the shareholdings changed when each of them gave Mr Nazar's son a 10% shareholding, so that the Nazars (father and son) had a majority (60%) holding.

174. The decision of the Nazars to use their majority holding to oust Mr Ebrahimi as a director justified an Order for the just and equitable winding-up of the company. This was because of a promise, binding in equity, that Mr Ebrahimi was entitled to remain involved in the management of the business in which at the outset he had ventured his own capital. This is clear from the speech of Lord Wilberforce at p. 380B-F. In that passage, Lord Wilberforce records as his starting point the proposition that the law of companies recognises many instances in which a director will have to accept without complaint his removal from office, whether by means of a majority vote of the members or otherwise. But he goes on to say (at p. 380E):

> *"The just and equitable provision nevertheless comes to his assistance if he can point to, and prove, some special underlying obligation of his fellow member(s) in good faith, or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that, if broken, the conclusion must be that the association must be dissolved."* (My emphasis.)

175. In his speech, Lord Wilberforce at p. 378F-G endorsed the formulation adopted in an earlier Australian case by Smith J. The case is *In re Wondoflex Textiles Pty. Ltd* [1951] V.L.R. 458, where on facts resembling those in *Ebrahimi*, Smith J. emphasised that the starting point is to assess whether what is complained of is in fact a valid exercise of powers conferred by the articles. If so, that in many cases will be the end of the inquiry, but:

> *" … this, I think, is subject to an important qualification. Acts which, in law, are a valid exercise of powers conferred by the articles may nevertheless be entirely outside what can fairly be regarded as having been in the contemplation of the parties when they became members of the company; and in such cases the fact that what has been done is not an excess of power will not necessarily be an answer to a claim for a winding up."* (My emphasis).

176. The reference to matters in the contemplation of the parties at the time they became members is the language of agreement or bargain. The logic of the approach adopted

by Smith J., and endorsed by Lord Wilberforce, is that strict legal rights reflected in a company's constitution may in some cases have to be read as subject to a contrary agreement or understanding, binding in fairness and equity only, which limits the untrammelled exercise of those legal rights. As I understand it, that is the sense in which, in the passage cited at [171] above, Lord Wilberforce at (ii), was using the expression " … *an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business."*

177. This reading seems to me consistent with the way in which the unfair prejudice jurisdiction was analysed by Lord Hoffmann in *O'Neill* v. *Phillips* [1999] 1 WLR 1092. Although he was at pains to emphasise that the jurisdiction is a broad one, and that exercising rights in breach of some promise or undertaking is not the *only* form of conduct which will be regarded as unfair for the purposes of (what was then) section 459 Companies Act 1985, Lord Hoffmann nonetheless thought that:

> *" .. one useful cross-check in a case like this is to ask whether the exercise of the power in question would be contrary to what the parties, by words or conduct, have actually agreed. Would it conflict with the promises which they appear to have exchanged? In Blisset v Daniel the limits were found in the 'general meaning' of the partnership articles themselves. In a quasi-partnership company, they will usually be found in the understandings between the members at the time they entered into association. But there may be later promises, by words or conduct, which it would be unfair to allow a member to ignore. Nor is it necessary that such promises should be independently enforceable as a matter of contract. A promise may be binding as a matter of justice and equity although for one reason or another (for example, because in favour of a third party) it would not be enforceable in law*." (See [1999] 1 WLR 1092, at p. 1101F-G; my emphasis).

178. This helps one add some definition to what is otherwise a hopelessly vague exercise. Lord Hoffmann was anxious that that be so, and emphasised that although Lord Wilberforce in *Ebrahimi* spoke of the undesirability of seeking to define the circumstances which might make the exercise of strict legal rights unjust or unfair:

> " *… that does not mean that there are no principles by which those circumstances may be identified. The way in which such equitable principles operate is tolerably well settled and in my view it would be wrong to abandon them in favour of some wholly indefinite notion of fairness.*" (See [1999] 1 WLR 1092, at p. 1099H.)

179. In the same vein, Lord Hoffmann sounded a note of caution in *O'Neill* v. *Phillips* about the use of the phrase "*legitimate expectation*", which he had earlier introduced in *In re Saul D Harrison & Sons Plc* [1995] 1 BCLC 14, at 19. This was not intended to suggest that a minority shareholder should be entitled to relief merely because of an expectation, however reasonable, that a certain state of affairs will be maintained (or will be brought about). Instead, it was intended only as a figure of speech to describe the "*correlative right*" which accrues to a minority shareholder in a case where the majority is limited in the exercise of its rights under the articles by the operation of *established equitable principles* which make the exercise of those rights unfair. Lord Hoffmann used again as an example:

> "*... the standard case in which shareholders have entered into association upon the understanding that each of them who has ventured his capital will also participate in the management of the company. In such a case it will usually be considered unjust, inequitable or unfair for a majority to use their voting power to exclude a member from participation in the management without giving him the opportunity to remove his capital upon reasonable terms" (*See [1999] 1 WLR 1092, at p. 1102C-D).

180. In the event, the lack of any sufficiently clear promise or understanding (as opposed to expectation, in the sense of a hope that matters would turn out in a way which was desirable), was fatal to a key part of Mr O'Neill's Petition in *O'Neill* v. *Phillips*:

> "*To take the shareholdings first, the Court of Appeal said that Mr. O'Neill had a legitimate expectation of being allotted more shares when the targets were met. No doubt he did have such an expectation before 4 November and no doubt it was legitimate, or reasonable, in the sense that it reasonably appeared likely to happen. Mr. Phillips had agreed in principle, subject to the execution of a suitable document. But this is where I think that the Court of Appeal may have been misled by the expression 'legitimate expectation.' The real question is whether in fairness or equity Mr. O'Neill had a right to the shares. On this point, one runs up against what seems to me the insuperable obstacle of the judge's finding that Mr. Phillips never agreed to give them. ...*".

181. In Dashfield v Davidson [2009] 1 BCLC 220, at [65], Lewison J. explained Lord Hoffmann's analysis in O'Neill v Phillips as follows:

> *"... it is clear from Lord Hoffmann's application of these principles to the facts of the case that a promise binding in equity is more than a reasonable and legitimate expectation. Mr. O'Neill had a reasonable and legitimate expectation that he would be allotted more shares, in the sense that it reasonably appeared likely to happen. But Mr. Phillips gave no promise to that effect. So there was no equity binding Mr. Phillips' conscience and s. 459 should not be used to impose on someone an obligation to which he had never agreed.".*

182. *Ebrahimi* is an example of an agreement or understanding, binding in equity, arising at the outset of the parties' relationship as shareholders. It is clear that equitable constraints on the exercise of strict legal rights may also arise during the course of the parties' relationship, but again, traditional equitable principles will usually require the Petitioner to show an agreement or understanding which has become binding because of the Petitioner's reliance. Thus, in *Kaneria* v *Patel* [2000] 2 BCLC 321, at [175], Jonathan Parker J. said:

> *"Applying traditional equitable principles, equity will not hold the majority to an agreement, promise or understanding which is not enforceable at law unless and until the minority has acted in reliance on it. In the case of an agreement, promise or understanding made or reached when the company was formed, that requirement will almost always be fulfilled, in that the minority will have acted on the agreement, promise or understanding in entering into association with the majority and taking the minority stake. But the same cannot be said of agreements, promises or understandings made or reached subsequently, which are not themselves enforceable at law. In such a case, the majority will not as a general*

> *rule be regarded in equity as having acted contrary to good faith unless and until it has allowed the minority to act in reliance on such an agreement, promise or understanding. Absent some special circumstances, it will only be at that point, and not before, that equity will intervene by providing a remedy to the minority which is not available at law."* (My emphasis).

183. Certain other propositions are relevant, none of which I understand to be controversial between the parties:

i) It follows from the points made above that the mere fact that a company is a family company does not result in the conclusion that it is a quasi-partnership, in which the exercise by the majority of their legal rights are subject to equitable constraints: see the recent Singapore case, *Thio Syn Kym Wendy v Thio Syn Pyn* [2017] SGHC 169, per Judith Prakash JA at [46] and [58]; and *Waldron v Waldron* [2019] EWHC 115 (Ch), per HHJ Eyre QC at [29]:

> *"A family company can be one in which such equitable considerations are present ... However, those considerations will not be present in every family company and something more is needed for them to be present than the ownership of the shares in a company by the members of the same family and more even than the mere fact that family members are officers of or employed by the company in question."* (My emphasis).

ii) The starting point, in a case where the parties have chosen to conduct their business through the medium of a company, is the company's constitution, including the articles. If the matter complained of was in accordance with the constitution, then the allegation of some inconsistent obligation or right needs to be carefully scrutinised: *In re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 17-18, per Hoffmann LJ*; Re Edwardian Group Ltd*, *Estera Trust (Jersey) Ltd v Singh* [2019] 1 BCLC 171, per Fancourt J. at [127].

iii) Every director of a company is subject to the possibility of being removed as a director by ordinary resolution under section 168 Companies Act 2006. The right under section 168 has been described as "*one of the most important rights given to shareholders*": Palmer's Company Law, §8.1317. It enables the shareholders to assert themselves against the directors if needs be and makes it clear that the ultimate control is in the hands of the proprietors of the company: *ibid*., §8.1318.

iv) If the conduct complained of *is* in accordance with the constitution, the burden is on the Petitioner (here, Paul) to show that the equitable constraints for which he contends do in fact apply. As to what the Petitioner must show, in *Re Ringtower Holdings* (1989) 5 BCC 82 Peter Gibson J put it as follows, at p.93:

> *"No doubt in almost every case of a small or private company persons coming together to form a new company would not do so without placing trust and confidence in those who are to be the directors and managers of the company. But the fact that the company is small or private is not enough, and that mutual trust and confidence would not in itself be sufficient to make the members' association in substance a partnership*

> *with partner-like obligations owed by each member to the others, in the absence of proof of a mutual understanding as to those obligations."* (My emphasis).

To similar effect, in *Waldron* v *Waldron* [2019] EWHC 115 (Ch), HH Judge Eyre QC (sitting as a High Court Judge) said (at [29]):

> *"Where the equitable considerations are said to derive from an agreement or understanding between the members of a company a degree of precision is required. The agreement does not have to have the degree of certainty which would be necessary for an agreement to be enforceable as contract but there must be 'a sufficient degree of agreement that it can be said that there has been a breach of good faith in departing from it' (Khoshkhou v Cooper & others [2014] EWHC 1087 (Ch) per HH Judge David Cooke at 24)."*

And in an Australian case, *Hunter v Organic and Natural Enterprise Group* [2012] QSC 383, Dalton J (sitting in the Supreme Court of Queensland) said [116] that it was apparent from *O'Neill* v *Phillips* that there must be:

> "*some definite basis shown on the evidence when it is alleged that there is an understanding not recorded in the company's constitution*". (My emphasis).

184. In the present case, it is common ground that Andreas had the legal right under DPL's constitution to remove Paul from his position as a director and to exclude him from management (which included the ability to restrict Paul's access to DPL's financial records: see DPL's Articles, clause 2 (above at [33])).

185. Instead, Paul's case is put forward on the basis of the alleged Understandings, and more specifically as regards unfairness flowing from his exclusion from management, on the basis of the Understandings pleaded in the Petition at §§38.1 and 38.1, *viz.* Understandings "*between Paul, Cheryl and Andreas*" that

    i) Each of them would be entitled to be involved in the business and management of DPL (i.e., Understanding 1); and

    ii) Each of them would be entitled to have access to all of DPL's financial records (i.e. Understanding 2). (Understanding 2 seems to me in reality to be an incident of Understanding 1, and was treated as such by the parties).

186. In accordance with the analysis set out above, it seems to me that an important question to focus on is: notwithstanding that Paul's exclusion from management was in conformity with DPL's constitution, has he shown sufficiently clearly on the evidence the existence of an agreement or understanding, binding in fairness and equity, that he would be entitled to participate in the management of DPL for so long as the business of DPL continued (or at least, so entitled in the absence of an appropriate offer to purchase his shareholding)?

(ii) Paul's case in the Petition

187. Paul's case on the quasi-partnership status of DPL is set out in his Petition at §§37-40. This has a number of features which are important in terms of the present analysis.

188. First, there is a general assertion in §37 that the relationships between Andreas, Paul, Cheryl and Iris (or their respective nominee companies) were for many years "*conducted on the basis of implicit trust and confidence between them*". It is then said: "*The affairs of DPL are therefore properly to be regarded as having been conducted as a quasi-partnership between Andreas, Paul, Cheryl and Iris*". This strikes me as a *non-sequitur*. The mere fact that a company is a family company, and even the fact that it is managed on the basis of mutual trust and confidence, are not in themselves a sufficient basis for the conclusion that the company is a quasi-partnership company. *Something more* is needed.

189. The *something more* relied on by Paul is identification of the three alleged Understandings, including the two mentioned above: see Petition at §38. This gives rise to the second interesting feature of the pleaded case, which is that the Understandings are said to have arisen between *Paul, Cheryl and Andreas only*. Iris is not expressly mentioned in §38 as a party to the "*common understanding*" alleged.

190. Mr Lightman QC and Mr Hubbard in their submissions sought to say that this point in and of itself was fatal to any case based on the alleged Understandings, because in order for an informal agreement or understanding to be binding even in fairness and equity, the Petitioner must demonstrate mutuality – i.e., that it was and is binding on *all* the company's shareholders.

191. I see the force of that point. It is obviously undesirable for a situation to exist in which equitable constraints impact on the rights and obligations of some shareholders but not others, in particular where such others have acquired their shareholdings on the assumption that the company's constitution was contained within its published constitutional documents only. For that reason, it has been held that there can be no place for equitable constraints of a quasi-partnership nature in relation to publicly listed companies: see *Re Blue Arrow plc* [1987] 3 BCC 618, per Vinelott J. at p. 623, and *Re Astec (BSR) plc* [1999] BCC 59, per Jonathan Parker J. at pp. 86-87.

192. On the other hand, in an *obiter* passage in a Hong Kong case, *Re Yung Kee Holdings Ltd* [2014] 2 HKLRD 313, the Hong Kong Court of Appeal refused in terms to rule out the possibility of a quasi-partnership even if some of the shareholders were *not* parties to the mutual understanding relied upon. In *Re Edwardian Group Ltd, Estera Trust (Jersey) Ltd v Singh* [2019] 1 BCLC 171, at [134], Fancourt J. was very doubtful of that proposition, "*except perhaps in a case where the shareholders that are not parties to the equitable considerations are either a very small minority or are closely connected to the quasi-partners … such that the established quasi-partnership character of the company does not change*". In *Waldron* v. *Waldron* [2019] EWHC 115 (Ch), however, HHJ Eyre at [41]-[42] said he preferred the view of the Hong Kong Court of Appeal, and that therefore the "*crucial question is whether there are any equitable considerations arising from the dealings between the shareholders which call for restraints over the exercise of strict legal rights on the particular facts of the case*", albeit that in forming that judgment the existence of third party rights and third party involvement can be very significant in deciding whether such equitable constraints are present.

193. For my part, and while accepting the significance of the points made by Mr Lightman and Mr Hubbard, I do not think it appropriate in the present case to conclude without further investigation that Paul's pleading at §§38-39 of the Petition is so deficient that the case based on the Understandings must fail. I say that in part because the Petition is in fact somewhat ambiguous as regards Iris. Although not mentioned specifically in the introductory language of §38, Iris *is* (1) mentioned expressly as a party to the quasi-partnership in §37, (2) *is* identified as a beneficiary of Understanding 3 in §38.3 (because she is one of the defined "*Family Members*"), and (3) *is* said in §39.1 (again as one of the *Family Members*) to have been party to the "*frequent, daily communications*" giving rise to the Understandings. I therefore do not see Paul's case as treating her as a complete stranger to the Understandings. I also note that even Fancourt J.'s formulation contemplated exceptional circumstances in which equitable constraints might be effective even though some shareholders are not bound by them, such as where those shareholders are a very small minority or are closely connected to the quasi-partners. Here, Iris is obviously closely connected to Andreas, Paul and Cheryl, and they are the only other shareholders in the company. In those very particular circumstances it strikes me as at least arguable that the alleged Understandings are effective, in the sense that Iris, although not directly a party to them as an *inactive* shareholder in DPL, was nonetheless aware of the circumstances said to give rise to them and acquiesced in them.

194. It seems to me, therefore, that on this point the better approach for me is to consider the evidence otherwise said to support the existence of the Understandings, and in doing so to bear in mind:

i) the inherent probability of equitable constraints coming into existence which only *some* shareholders are positively said to have been a party to, and perhaps more importantly

ii) the fact that neither Iris nor indeed Cheryl have given evidence before me, with the consequence that I have not had from either of them their own first-hand account of how they say the relevant Understandings came into being.

195. The third significant feature of the pleaded case in the Petition is that when Paul comes in §39 to set out the particulars said to support the existence of the Understandings, they are set out compendiously – i.e., by reference to all three of the alleged Understandings looked at together, with no attempt made to distinguish between them. Looking at the particulars given, most (if not all) of them are directed to the proposition that the business operated through DPL (like the other family businesses) was run informally, without meetings being called or decisions minuted, and on the basis of a general expectation that profits generated would be used to provide for the immediate family members and would otherwise be retained within the businesses for the benefit of the family as a whole. But I do not understand any of that to be contested. Andreas' own evidence is consistent with it.

196. The nub of Paul's complaint, however, is that there was a breach of Understanding 1 (and Understanding 2). The fact that the family businesses were conducted informally, even if one assumes the existence of something akin to Understanding 3, does not automatically lead to the conclusion that Understandings 1 and 2 must have existed as well. When it comes to assessing Paul's case based on his exclusion from DPL's management, it is necessary for him to show more specifically some form of agreement

or understanding which operates as a limitation on what would otherwise be Andreas' legal right under the Articles to remove him as a director and exclude him from management.

197. The particulars in §39 say little on that point. The high-watermark is §39.2 which pleads specifically that, as a matter of fact, Paul and Cheryl were involved in DPL's business and management from the date of its incorporation until 2012. Even if taken at face value, that pleading does not in itself identify the basis of any agreement or understanding, binding in fairness or equity on Andreas, that would serve to bind him to keep the two of them involved in the management of DPL for as long as its business continued. The mere fact that they were involved in management is equally consistent with the proposition that they were involved because Andreas willed it, and could terminate their involvement if he wished. In any event, §39.2 is a rather simplistic characterisation of Paul and Cheryl's roles. I will say more about that below.

198. Similar comments may be made about the pleading at §39.3, which alleges that Paul and Cheryl's personal finances were closely bound up with the family businesses, in particular as regards their family homes. That is correct, in the sense that between 1997 and 2013, Paul lived in two of the Crescent Road flats (owned originally by the Cyprianos Companies and later by DPL), and since then has lived in the Makepeace Avenue property (also owned by DPL). As to Cheryl, since 2007 she has lived at 58 Hillfield Park, owned by Gategrove, one of Andreas' companies. I fully accept that this indicates a high degree of interconnectedness between the personal and business interests of the family members, and indeed a degree of dependence on Paul's part on continued support from the family businesses. But that is not the same as saying that Andreas had any obligation which would be recognised on established equitable principles to continue to allow Paul to maintain a position in the management of DPL.

199. Other aspects of the Petition are in fact consistent with the idea that Andreas as the senior person in the business had not and would not relinquish ultimate control in respect of such matters. See for example (the emphasis in each quotation is mine):

i) §12: "*As the Family Business began to grow rapidly during the course of 1989, Andreas (following discussions with Paul) decided that the business ought to be operated through a limited company. He therefore incorporated DPL*".

ii) §18: "*In or around 1991, Andreas became impatient with limitations which DPL's bankers were placing on the amount it could borrow*."

iii) §23: "*At around this time [in 1998], Andreas began to harbour concerns … that liabilities incurred by DPL in the course of acting as landlord might ultimately be enforceable against its property portfolio. In order to meet this concern, Andreas procured DPL to enter into an arrangement with another company [DPSL.]*"

iv) §27: "*In around 2000, Andreas decided to wind up the affairs of DPSL, and sought to set up a different company which would have exactly the same relationship with DPL as DPSL had done. In 2000, Andreas therefore arranged for [DML] to be set up. …. Andreas told Paul that he did not wish to be a*

shareholder in DML, because he did not wish it to be regarded as the same entity as DPSL. Accordingly, and at Andreas' behest, Paul and Cheryl took shares in, and were appointed as directors of DML."

v) §30: "*In 2002, Andreas resigned as a director of DPL and started spending more time in Cyprus. However, he continued to be actively involved in the conduct of the Family Business*." Various particulars are given of this general assertion, including at §30.4: "*Andreas would, from time to time, give instructions regarding the management of DPL's loan liabilities. In or around 2006, Andreas contacted Paul by telephone from Cyprus on several occasions and stated that DPL's loans should be converted from sterling to yen. Paul followed this instruction and converted around 50% of DPL's loans into foreign currencies.*"

vi) §39.7: refers, as part of Paul's case on the Understandings, to Andreas' own evidence in the Chancery proceedings that " ... *he was the boss and in overall charge of the Family Business*."

200. The Reply, in dealing with the quasi-partnership allegation in §§16-18, gives little further assistance. What is thus difficult to discern from the pleadings is a clear indication of how, in fairness and equity, Andreas' strict legal rights vis-à-vis Paul's status as manager came to be curtailed or constrained.

(iii) Paul's case at trial

201. I then come to the evidence, and the findings I have made above.

202. Paul's case at trial, as advanced by Mr Peters, focused on the developing relationship between Andreas and the other family members, and in particular on Andreas' own evidence at [37] above, to the effect that his plan was always to involve his children in his businesses, and that his intention was that one day the businesses would pass to them. This developed into a submission that Andreas' long-term plan effectively came to fruition when he left to go to Cyprus in 2002, and handed over the running of the family businesses at that stage to Paul and Cheryl, with the idea that once he had established domicile in Cyprus, he would transfer ownership of the businesses (including DPL) to his children. Relatedly, Mr Peters submitted that the point in time at which to test the existence of the alleged Understandings was in June 2012, at the time of Paul's exclusion, albeit that he accepted that in doing so, it was appropriate to look back through the history of the family relationships up until that point, to test whether the history of those relationships supports the existence of the Understandings or not. I agree with that approach.

203. I start with some observations about Andreas' character and motivations. I have little doubt about two things in particular. The first is that he is a driven and ambitious personality. He regards himself, and others regard him, as the one in charge. In the Chancery Action, Cheryl in her Witness Statement described Andreas as follows:

> *"My father has always been the dominant force in the family business, and in family life. He was always seen (by us and, most particularly, by himself) as the person in charge of key decisions, and his wishes were usually adhered to. People who worked for him often referred to his as 'The Boss', and that was how*

> *I saw him. When it came to decisions which affected the business, or even our personal lives, he expected us to follow his wishes, and we trusted him and would do as he wished".*

204. The second point is that Andreas feels a sense of responsibility to provide for his family, meaning not only his children but also future generations, insofar as he can. Consistent with this, Andreas' evidence, which I accept, was that he retained 64% of the shares in DPL so that he would have enough shares available to hand on to additional family members as time went on, regarding himself as "*the trustee for descendants who were to come*". That approach is consistent with evidence that Andreas gave in the Chancery Action. When cross-examined about the status of his various offshore companies, and challenged on the basis that they fell to be looked at differently to the family businesses in England, Andreas disagreed and said: "*No, what was ours was ours, and what was mine was again ours*". Asked about that passage in the present action, Andreas said:

> *"Well, it goes back to what I had said before, that I never really wanted anything for myself as long, as I had a comfortable standard of living. I will not live for ever and I will not take anything with me, I -- like everybody else, so I felt as if I was creating everything for Paul and Cheryl and for other descendants that were to follow."*

205. Paul understood that. His own evidence was that his father is from a traditional background. His cross-examination by Mr Hubbard included the following exchange:

> *"Q. Yes, as a father and a husband and a member with a traditional mindset, your father always saw it as his obligation to provide for his family, didn't he?*
>
> *A. Yes."*

206. This strikes me as important, because it provides context to the question I have to address, which effectively is whether it came to be agreed or understood at some point that Andreas' legal right to determine who was to manage DPL came to be curtailed or constrained. If (as I hold) Andreas regarded it primarily as *his* duty to provide for his family via the various family businesses, that suggests that he would not easily have given up that responsibility, or easily have agreed to restrictions on his ability to discharge his duty in whatever way he saw fit.

207. I come to the circumstances in which Paul came to join DPL. These were quite different to the circumstances in which (for example) Westbourne Galleries came to be incorporated, and in which Mr Ebrahimi came to be a shareholder (see above). Paul joined what was effectively a new venture, designed to expand on and develop the model followed by Andreas for a number of years via Abaxeon and Abacourt. Paul was not an existing partner who necessarily had an expectation of involvement in management. He came in as someone who was new to the business, and who would learn the ropes. The idea of incorporating DPL came from Andreas (as Paul accepted in cross-examination, it was Andreas' "*original suggestion*", and he "*proposed it and he effected it*"). When originally incorporated in 1989, Andreas retained 99 of the 100 issued shares and appointed himself sole director. There can be little doubt that in those circumstances Andreas regarded himself as in charge of the business. I see nothing in the background at that stage which carries the inference that Andreas' rights as majority

shareholder were to be in any way constrained or curtailed by other agreements or understandings.

208. I do not think that changed at the point in September 1991 when Andreas came to make gifts of his shares in DPL to Iris, Paul and Cheryl, so that Andreas was left with a 64% shareholding, and Iris, Paul and Cheryl 12% each. Again, the initiative to make these gifts came from Andreas. It is likely Paul was not even aware of the transfers until some time after they happened. Andreas' decision was motivated by his interest in making provision for his family. He remained the sole director of DPL. I find it impossible to infer from this decision anything which suggests that Andreas wished to relinquish ultimate control over DPL, including having an unfettered final say in the way it was managed.

209. I come to the same conclusion looking at other events occurring in the early-to-mid 1990's:

i) Paul relies on the fact that he and Cheryl (and indeed Andreas) purchased properties in their own names in about 1991, and in so doing acted to their detriment in the sense that they took on responsibility for the relevant mortgages (albeit that the mortgage payments were met from funds received from DPL), and limited their ability to raise mortgage finance in their own names. He says that this was not the behaviour of a mere employee but instead of a partner. I do not think the point can be stretched that far, if what Paul means is that a necessary inference from this venture was that Andreas must have intended to limit his legal rights as majority shareholder. Against the background described above, and given that it is common ground that again the impetus for the arrangement came from Andreas, that does not seem to me to follow at all. It is more natural to assume that Paul and Cheryl were doing what Andreas expected of them as participants in a family business run along informal lines, and on the assumption that they would benefit from the returns the business produced whether involved in management or not.

ii) That conclusion seems to me to be borne out by Cheryl's position particularly. I find it difficult to see that she came into the DPL business with any expectation that she would necessarily remain involved in management, or that she acted – including in relation to the purchase of the properties mentioned above – with that expectation in mind. She was not in fact involved in DPL's business for most of the 1990s. She left the business in 1994 to have her first child, and did not return until 2002, roughly 8 years later. Later events, which I will come to below, are consistent with the idea that such management responsibilities as she came to have were always understood to be subject to Andreas' ultimate control.

iii) When DEL came to be incorporated in 1994, Andreas followed the model adopted earlier in connection with DPL. He appointed himself sole director, and made gifts of shares to other family members (this time, Paul and Cheryl), but retained a majority of shares (52%) himself. Andreas determined the percentage shareholdings to give to his children (24% each) without any prior consultation. This pattern of activity again seems to me inconsistent with the idea that Andreas intended to relinquish his ultimate position of control.

210. A number of events occurred during 1998 which might be said to indicate a shift in the overall balance of power, or otherwise to support Paul's case:

i) Andreas by his own admission began to spend more time in Cyprus, for a variety of reasons, including tax planning.

ii) On 1 April 1998, Paul was appointed as a director of DPL and of DPSL, in addition to Andreas. At some point in the year he was also appointed a director of DEL.

iii) Paul gave the first of a series of personal guarantees in respect of DPL's borrowings and liabilities.

iv) Paul participated as shareholder in the acquisitions made by the Cyprianos Companies, and when the Companies later came to transfer title to those same properties to DPL, the transfers were at cost, and neither Paul nor Cheryl insisted on their strict legal rights as shareholders to receive a share of the Companies' assets on dissolution.

211. Again, however, such matters must be looked at in context. Paul was certainly beginning to take on increasing responsibilities in 1998, and Andreas was beginning to spend more time in Cyprus. But that is not the question. The question is whether one can read into that some agreement or understanding that Andreas' right as majority shareholder in DPL to remove Paul from management if he so wished was being curtailed. No clear reason has been articulated by Paul as to why that should be the case, and other matters occurring at the same time are inconsistent with it. I have in mind in particular the events surrounding the incorporation of DPSL as a buffer company, and the arrangements entered into between DPL and DPSL in 1998. On the incorporation of DPSL, it was Andreas who determined how the shareholdings in that company were to be divided up, and again he kept a majority shareholding (51%) for himself (with Paul being allocated the remaining 49%). I have already noted above Paul's own pleading in the Petition at §23, to the effect that it was *Andreas* who procured DPL to enter into the new arrangement with DPSL. Two years later, when DPSL was liquidated and DML was incorporated to perform the same function, it was again Andreas (according to Paul and Cheryl's own case in the Chancery Action) who orchestrated the arrangements, in that he determined who would be the shareholders and directors of the new buffer company (see above at [68]). In this and other respects, the family business (again according to Paul and Cheryl in the Chancery Action) had been "*set up and managed by Andreas Dinglis*", and was therefore "*being run in accordance with his wishes and instructions*".

212. As to the more specific points made by Paul:

i) I accept that the giving of personal guarantees by Paul at least raises an issue, in the sense that one can see from Paul's point of view how it would be undesirable to be responsible under guarantees for the liabilities of a business in which one has no management role. However, the question is not whether it is undesirable, but whether, when weighed in the balance with all the other available evidence, it supports the inference that Andreas' legal rights were to be subject to equitable constraints as regards the management of DPL. To my mind, the available

evidence relating to events in this period and up until 2002 points firmly against the idea that Andreas intended to do so.

ii) The same point can be made in relation to the Crescent Road flats. I have accepted Andreas' evidence that he was the driving force behind the acquisitions. The allocation of shares in the Cyprianos Companies by Andreas in 1998 followed the now familiar pattern: Paul and Cheryl were given minority holdings, while Andreas kept a majority holding in each of the four companies for himself and appointed himself sole director of each. It is hard to read into that series of events an inference that Andreas intended a shift in the basic structure of the various family businesses in which he was the major shareholder with overall control. It is correct that when title to the flats eventually came to be transferred to DPL, that was at cost; but again, it seems to me to be very difficult to read into that an inference of the kind that Paul invites, *i.e*, that it is the sort of thing he would only have done only in response to some form of express or implied agreement regarding his status in the management of DPL. It is equally, if not more, plausible that he did so because it was what Andreas expected of him, or because of a sense of family loyalty, as someone involved in a family business run along informal lines but subject ultimately to Andreas' control.

213. That brings us to Andreas' decision in 2002 to relocate to Cyprus. Paul's submissions in closing focused particularly on this event, and on what Mr Peters described as the "*elephant in the room – Andreas' decision to hand the business over to Paul and Cheryl*".

214. The logic of Paul's argument is as follows:

i) It is common ground that Andreas, when he moved to Cyprus in 2002, intended to move there permanently. That was the culmination of a plan which had been in development for many years, and which he must have discussed with Paul and Cheryl.

ii) Part of Andreas' plan involved handing over the running of various of the family businesses to Paul and Cheryl. He did in fact hand over management in the way intended, and one can see that from the way in which, in subsequent periods, Paul took a series of important financial and/or strategic decisions regarding DPL with which Andreas did not agree. These included (1) the redenomination of a number of DPL's loans into foreign currencies, where Paul chose to ignore Andreas' proposal that all such loans be redenominated in Japanese Yen; (2) Paul's decision that DPL would take out interest only loans, rather than repayment loans; and (3) the decisions Paul took as to the balance between residential and commercial properties in DPL's property portfolio, which was a continuing bone of contention between Paul and Andreas.

iii) There was no material change in relation to the management of DPL between (at the latest) 2006 and June 2012. And consequently –

iv) It is to be inferred that there was a common understanding that Paul (and Cheryl) were entitled to be involved in the management of DPL. Indeed, the propositions summarised above show the position to be an *a fortiori* one.

215. This is a seductive argument, and was put forward with great skill by Mr Peters, but in my judgment it fails:

i) The starting point is to identify the relevant issue accurately. The question is not so much whether Paul (or even Cheryl) were entitled to be involved in the management of DPL, in the sense of having an expectation (however reasonably held) that that would be the case, but rather whether some agreement or understanding had arisen, binding in fairness and equity, that they would be entitled to be involved in management of DPL for so long as its business continued; or, to put it another way, some agreement or understanding, based on an assurance by Andreas whether express or implied, that his rights as majority shareholder were to be curtailed or constrained, so that he would no longer be entitled to remove them from any management positions they held at will. What is required is evidence of the latter, and the burden is on Paul to demonstrate it.

ii) True it is that 2002 was a watershed year, and Andreas' move to Cyprus was a major change in the way the family had been organised up until that point; but it was not a completely clean break with the past, and has to be looked at in terms of what had gone before. It seems to me to be very clearly established that, up until that point, Andreas in what he saw as his role as head of a very traditional family unit felt "*an unconditional, self-standing moral duty to provide for his family*" (to borrow a phrase from Mr Hubbard's Written Closing). That did not evaporate when he moved to Cyprus. His move was not intended as an abandonment of his English family and the family businesses. Indeed, it is common ground that an important factor underlying his move was the desire to save tax, and in particular to avoid inheritance tax, in a manner which would maximise the funds eventually available for distribution among family members on his death. Consistent with that, it seems to me natural to suppose that Andreas wished to maintain, to the maximum extent possible consistent with the tax efficient arrangement of his affairs, ultimate control over the business in England which he had been so closely involved in up until that point.

iii) I fully take on board the idea that Andreas' intention eventually was to transfer ownership of the various family businesses (including DPL) to his children, and indeed the idea that he had considered doing so *before* moving to Cyprus in 2002. But the fact is that he did not, and I have been shown nothing to suggest that his intentions ever developed into positive action.

iv) The particular instances of strategic and financial decision making by Paul, mentioned at [214(ii)] above, are certainly evidence of Paul taking on enhanced responsibilities. In my view, however, they do not carry the clear inference that Andreas' legal rights were to be made subject to equitable constraints, in the sense that Paul was to be made a permanent fixture in the management of DPL. They are equally consistent with the idea that Paul was being entrusted with *day-to-day management* of DPL, albeit with considerable latitude to make decisions of some significance to the business, but ultimately subject to Andreas' control as majority shareholder. When Andreas said in cross-examination, "*If you put somebody in charge, you must accept some of the things they do, whether they are right or wrong*", I did not understand him to be saying that he had relinquished ultimate control, merely that he had allowed Paul to operate on a relatively long leash. Andreas' evidence on this point strikes me as entirely

consistent with the inherent probabilities, assessed in light of his general character and behaviour previously. When asked whether, when he moved to Cyprus in 2002, he regarded himself as handing over to Paul some of his responsibility for looking after the family, he said no:

> "*No. Not the responsibility to look after the family and the other descendants. I handed him over the responsibility to manage the various companies so that the companies continued to receive rents and the company would grow by virtue of the money left over from the expenses, income and expenditure but I was also hoping that he would contribute so that the company -- the assets of the companies would grow.*"

v) That evidence seems to me to be consistent with Andreas' character and behaviour over at least the previous twenty years, and consistent also with the inherent probabilities.

vi) It is also consistent with Paul's own evidence, because Paul acknowledged that despite his move to Cyprus, Andreas was still in the UK on a regular basis and was available by phone in Cyprus. Paul in fact goes as far as to say that he and Andreas continued to discuss all aspects of the business, although "*responsibility for managing the business <u>on a day to day basis</u> fell heavily on me*" (my emphasis). I have already noted above the references in the Petition at §30 to Andreas continuing to be actively involved in the conduct of the family businesses, and specifically at §30.4 to him giving *instructions* in about 2006 regarding DPL's loan liabilities, which Paul in the Petition is said to have followed in converting 50% of DPL's loan book from Sterling into foreign currencies. One can see from this that Paul's case on this particular point has been somewhat flexible: in the Petition, the fact that he converted 50% of DPL's loans into foreign currencies on Andreas' *instruction* is relied on as evidence of Andreas remaining actively involved in the family businesses after his move to Cyprus; but in his Closing, Paul's case was that in converting some but not all of the loans into foreign currencies (and not all into Yen), he had ignored Andreas' instruction and defied his authority. This somewhat equivocal characterisation of the same events is not a promising foundation for the type of inference Paul alleges.

vii) I bear in mind also the incident involving Cheryl's removal from the business in 2006, described at [87]-[88] above. I have already indicated that I prefer Andreas' account, which is consistent with the way Cheryl herself put it in the Chancery Action, that it was Andreas who instigated her removal, because of her relationship with another employee. Paul agreed when cross-examined that when Cheryl came back in 2008 or 2009, it was because Andreas asked her to. Both this, and my findings in relation to the separate incident in 2008 involving Adane Gebre (above at [89]-[90]), are inconsistent with the idea that the basic dynamic between the various family members had changed, notwithstanding Andreas' move to Cyprus.

viii) I also bear in mind that, when Andreas moved to Cyprus, Paul took on responsibility for the mortgages on the 10 Wroxham Gardens and 17 Seaforth

Gardens properties. That was a burden on him, even though his assumption was that the mortgage costs would be met by distributions from the family businesses, because his name was the one on the mortgage deeds and that would likely have an impact on his ability to raise any further mortgage in his own name, had he wished to do so. Again, however, the critical question is whether, in taking these steps, Paul was acting in response to some express or implied agreement or understanding regarding his status in the management of DPL. No clear case is put forward on that point. Paul invites me to look at the overall picture, but doing so to my mind suggests a clear pattern of behaviour by Andreas which is inconsistent with the idea that any such agreement or understanding arose.

216. Some other aspects of the overall story also strike me as significant in assessing the viability of the conclusion Paul seeks to advance:

i) Paul's response to his removal from management did not involve agitating for reinstatement, or any complaint made to Andreas that he had taken steps he was not entitled to take. I think it correct to say, looking at the available text messages, that Paul was deeply aggrieved at what had happened, and he felt that it was unfair in a general sense. I fully accept that at the time, he cannot have been expected to know that a remedy such as that afforded by section 994 Companies Act might be available to him, but even so, it is reasonable to think if an understanding or agreement of the type he alleges had in fact existed, there would have been some reference to it, however colloquially expressed, in some contemporaneous documentation. I was shown nothing which meets this point. On the contrary, the contemporaneous text messages (see [115]-[118] above) to my mind show a sense of resignation and acceptance that Andreas was acting in a manner consistent with his position as overall boss, however aggravating that might be to those affected. To put it another way, the text messages are understandable expressions of irritation and annoyance passing between Paul and Cheryl about what Andreas had done, but they do not suggest he was not entitled to do it, and in fact read as if it was just the sort of thing he might be expected to do. That reading is consistent with Cheryl's description of Andreas' character in the Chancery Action as capricious and prone to react aggressively and unpredictably to disagreement. It seems to me natural to think that such a person would not easily give up whatever power or authority he otherwise had as a shareholder, and that one should be slow to infer that he actually did so, in the absence of a clear indication that that was the intention.

ii) Relatedly, there is the fact of the delay between the date of Paul's exclusion in June 2012 and the first indication – in Stephenson Harwood's letter dated January 2016 – that that exclusion was in breach of the alleged Understandings. In submissions (and indeed in Andreas' Re-Amended Points of Defence) this delay was relied on as an independent ground for denying relief to Paul, even assuming his case on the Understandings was made out. I prefer to look at it as an indication that the Understandings alleged did not in fact exist. Had they done so, then notwithstanding the other activities and distractions referred to by Paul in his Witness Statement dealing with delay dated 11 March 2019, one would have expected them to have been referred to earlier. I do not say that the failure to do so is fatal in itself, rather that, looked at together with the other

available evidence, this fact weighs in the balance in favour of the conclusion that there were no relevant Understandings at all.

217. It is also useful as a cross-check to look independently at Cheryl's position, since both she and Paul are said to be beneficiaries of the relevant Understandings as to involvement in management:

i) Cheryl was not in fact involved in the business and management of DPL for very much of the time period covered by the Petition: she was absent between 1994 and 2002, and was then removed again – by Andreas – for a period of about three years between 2006 and 2008 or 2009. She came back only because Andreas asked her to. Moreover, although Companies House records show her as a director of DPL at certain points after March 2002, her evidence in the Chancery Action (see above at ([73]) was that she was unaware until 2012 that she was a director of DPL at all, and so it seems that Andreas was taking steps to have her appointed or removed as he saw fit and without her knowledge. That all seems to me again to be inconsistent with the idea of an equitable constraint operating on Andreas' rights as majority shareholder.

ii) There is also the background to Cheryl's removal as a director of DPL in February 2013 (see above at [129]-[134]). Aspects of this are somewhat obscure, but again it seems to me significant that no complaint was made at the time that Andreas was doing something which he was not entitled to do, or even that was out of character and unexpected. Cheryl's own evidence in the Chancery Action was that she was removed as a director without objection as part of the "*dividend plan*" which Andreas was orchestrating, in order to deal with the threat posed by his Cypriot creditors. Once more, this picture seems to me to point against the conclusion Paul seeks to invite.

218. Finally, I note that neither Cheryl, who is the other beneficiary of the alleged Understandings, nor indeed Iris, who is the other person said to be at least aware of (and perhaps bound by) them, have given evidence before me in support of Paul's case, and Cheryl's evidence in the Chancery Action is inconsistent with it. It is up to Paul to demonstrate the existence of the alleged Understandings at the time of his exclusion and in my judgment he has failed to do so.

(iv) Conclusion on Quasi-Partnership

219. For all the above reasons, I come to the conclusion that Paul's case on his alleged Understandings is not made out. It follows that in my view DPL was not a quasi-partnership company, in the sense in which that phrase was used by Lord Wilberforce in *Ebrahimi* v. *Westbourne Galleries*. Paul's exclusion from the management of DPL by Andreas therefore does not give rise to unfair prejudice.

F. Exclusion from management: alleged misconduct by Paul

(i) Can Andreas rely on matters he was not aware of?

220. I should deal with Andreas' alternative case that, even if exercise of his powers as to the management of DPL was subject to equitable constraints, Paul's dismissal was in any event justified, because Paul was guilty of misconduct.

221. The starting point is a legal question. This arises because at the heart of the wrongdoing relied on is the alleged misappropriation by Paul of rental income flowing into DML, but Andreas acknowledges that he was not aware of any such misappropriation in June 2012, and so it did not feature in his decision making when he terminated Paul's involvement in DPL's business.

222. The legal question is whether it is permissible to take into account a matter which did not operate on Andreas' mind at the time. Paul says not, and relies on *Judge* v. *Bahd & Ors* [2014] EWHC 2206 (Ch), in which Mr Mark Cawson QC (at [119]) said that he would not, in considering whether the exclusion of the Petitioner from management was justified, take account of two issues relevant to the Petitioner's conduct which "*only arose as issues*" once he had been excluded, and which therefore "*did not operate on [the Respondent's] mind at the relevant time*".

223. Andreas says that the proper approach is not confined in that way. He says that ultimately the issue is whether the Petitioner has been unfairly prejudiced. That requires an objective analysis. Thus, in determining whether the conduct complained of was unfair, the conduct of both Petitioner and Respondent, *whether or not known about at the time*, will be relevant considerations: *Amin* v. *Amin* [2009] EWHC 3356 (Ch), per Warren J. at [418] (in a passage not referred to in the judgment in *Judge* v. *Bahd).* Andreas says that further support for this position can be found in the decision of HH Judge Eyre QC in *Waldron* v. *Waldron* [2019] EWHC 115 (Ch). There, HH Judge Eyre rejected a submission by counsel for the Respondent (coincidentally, Mr Mark Cawson QC) that when considering the fairness or unfairness of the Petitioner's exclusion, the Petitioner's conduct could be relevant, but only where there was a "*causal connexion between the conduct in question and the exclusion*". That test was held to be too narrow as a matter of principle, because (per Judge Eyre at [49]):

> *"The exercise for the court is to determine whether conduct which was prejudicial to the party complaining was unfairly so. In the context of exclusion that involves a determination of whether the exclusion was unfair. That determination is an objective one… and is not dependent on the subjective intention with which particular acts were done. The objective nature of this exercise indicates that the court should undertake it in the light of all the circumstances known to the court. Fairness or unfairness is to be determined in the light of those circumstances seen as a whole."* (My emphasis).

224. Judge Eyre went on to make the important point that in any event, separate from the question of whether unfairness is made out, the Court must also consider what relief is appropriate. Consequently (see at [50]):

> *"In practice it is likely that the adoption or rejection of Mr. Cawson's causal connexion requirement would make little difference to the outcome in most cases. This is because even if a petitioner's conduct were held not to be relevant to the fairness of an exclusion which it had not caused it would still be highly relevant to the question of the appropriate relief. In considering what relief is appropriate the*

court is then bound to look to the circumstances as a whole and a petitioner's conduct would be of great significance at that stage."

225. For my own part, I am inclined to agree with the idea that the proper approach is a broad, objective one, and that in assessing the fairness or otherwise of the Petitioner's exclusion, there is no bar to taking account of matters which were in existence at the time, but not actually known to the Respondent. I thus prefer to approach of Warren J. in *Amin* v. *Amin* and of HH Judge Eyre QC in *Waldron* v. *Waldron* to that of Mr Mark Cawson QC in *Judge* v. *Bahd*.

226. This result seems to me to follow from the language of section 994 itself. This posits an objective test: i.e., whether the company's affairs are being or have been conducted in a manner that is unfairly prejudicial. Where the Petitioner has been excluded, the question is: was the exclusion fair? A Respondent ought to be entitled to argue that it was, by reference to all relevant circumstances obtaining at the time of the exclusion, whether he was subjectively aware of them or not. For example, a Respondent may make the decision to exclude the Petitioner on an entirely mistaken basis, not knowing that at the same time – perhaps because the truth had been concealed from him – the Petitioner was in fact guilty of serious misconduct which would certainly have justified exclusion, if known about. In such a case, it seems to me it ought to be open to argue that the Petitioner's exclusion was objectively *fair*, in the sense that his (unknown) conduct was damaging to the business and he deserved to play no ongoing part in managing it.

(ii) Was Paul's exclusion justified and therefore not unfair?

227. Against that background I come to look at the substance of Andreas' case that Paul's exclusion was fair, even if his powers as majority shareholder were subject to equitable constraints. That case as it was put to me rested on the treatment by DML of rental income in the period from July 2009 onwards, in light of the joint findings of the experts on the Chancery Action noted above (see §§ [155]-[157]). The gist of the complaint made was that Paul had misappropriated cash funds flowing into DML, and had in various ways sought to conceal that from Andreas. Andreas therefore said that, even on the hypothesis (not accepted by him) that DPL *was* a quasi-partnership based on the alleged Understandings, Paul's own position was that funds generated by the family businesses were to be for the benefit of the family as a whole and not just for the personal benefit of any one person, and by secretly taking funds for his own benefit, Paul acted in a manner inconsistent with the Understandings, and that justified his exclusion without any offer being made to buy out his shareholding.

228. Mr Peters said that none of this led to the conclusion that Paul's exclusion was justified, in summary because:

i) The pleaded case of misconduct against Paul in §80A of the Re-Amended Defence was based exclusively on the evidence and findings in the Chancery Action, but that was problematic because (1) relevant findings of HH Judge Barker have now been overturned by the Court of Appeal, and (2) the Chancery Action was a claim for an account and for related relief, which did not require findings to be made about whether funds had been misappropriated by any particular individuals.

ii) The case on misconduct as put to Paul in cross-examination was insufficiently well defined, because even on Andreas' evidence his children were entitled to a comfortable and indeed affluent lifestyle from the family businesses. That was a highly elastic concept, and so even assuming that Paul had received some of the unaccounted for cash, that need not have involved him in any wrongdoing. HHJ Barker's conclusion, based on evidence given by Andreas, was that Paul should be entitled to receive around £135,000 net (after tax) per annum from the family businesses, but that finding had been overturned and in any event did not involve any assessment of Paul's or Cheryl's own views of what they were entitled to receive. No clear case had been put to Paul – involving examination of his outgoings and the amount of income he thought he was entitled to – which would enable the Court safely to conclude that he had in fact acted in breach of the loose Understandings underpinning the family businesses, and no reliable conclusion could be drawn about that from the evidence available.

iii) As to the amount of cash that Paul in fact took from the family businesses, Andreas' allegations appeared to be concerned only with alleged misappropriation of physical cash, and that could only be determined by reference to the Cash Shortfall Range. Given that we are here concerned with Paul's conduct prior to June 2012, the final year covered by the expert's joint statement (2012-2013) should be ignored. On that basis, the joint report indicates the Cash Shortfall range as somewhere between £536,439 and £928,489. There was no evidence to justify a firm finding of anything higher than the first of those figures, and no evidence which justifies a firm finding as to what in fact happened to any of the missing cash, because that was not an issue in the Chancery Action.

229. Notwithstanding Mr Peter's points, I have come to the conclusion that Paul's exclusion from the management of DPL was justified, even assuming the existence of the alleged Understandings.

230. I agree there is a lack of definition regarding what Paul was entitled to take from the family businesses, and as regards what he actually took. As to the latter point, however, Paul's evidence, both in his Witness Statement and when cross-examined, was that he only took the sums particularised in the Annex to his Witness Statement. Those totalled approximately £1.3m over the period January 2004 to March 2013, and did not include *any* part of the Cash Shortfall, however large it might be. In other words, Paul's evidence was that he did not benefit at all from any part of the Cash Shortfall. He said all unaccounted for income had been used in the business.

231. I do not accept that evidence, which strikes me as unreliable and contrary to the inherent probabilities:

i) Even excluding the 2012-2013 year, and even taking the Lower Bound of the Cash Shortfall for the previous three years which were examined, that still leaves a figure of £536,439. No documents have been produced which support Paul's generalised assertion that it must have been used in the family businesses, and which I am inclined to disbelieve in any event in light of my general conclusion as to his reliability. I reject the contention (if still pursued) that any significant part of the missing cash is referable to sums taken by Andreas himself from the businesses.

ii) At the same time, there is evidence that by 2012, Paul and Cheryl were used to using the rental income flowing into the family businesses via DML to help fund their lifestyles. That is illustrated by the text messages Paul exchanged with Cheryl in the period following his exclusion concerning access to funds (123]-[126] above), and more particularly by the steps taken in the Matrimonial Proceedings to maintain the flow of income into DML, including by means of the Matrimonial Freezing Order ([141]-[146] above). As Paul himself conceded in cross-examination, DML's rental income was critical, because otherwise " … *no income exists in terms of the way that that's passed on to us*" (see [145] above).

iii) The use of rental income in that way cannot have been a new thing: it is logical to think that a practice had developed of making use of it over a number of years before 2012, and that that is why both Paul and Cheryl were so concerned that it might be lost.

iv) Moreover, it seems to me that the analysis set out at [164] above, of Paul's earlier evidence in both the Matrimonial Proceedings and the Chancery Action, demonstrates Paul being extremely anxious to prevent Andreas uncovering the true picture of cash rental receipts flowing into DML, in the period *before* his exclusion.

v) That conclusion to my mind is reinforced by other factors, including (1) the text messages from March and May 2013 referred to at [131]-[132] above in which Cheryl said "*What if he goes through the receipt book and accuses us*", and "*It's just he's watching money and he asked if we get money from the receipt book. I covered that one*", and also (2) the inherently suspicious nature of the Text Gap (see [128] above), covering a critical period between July 2013 and April 2014, in which the application was being made for the Matrimonial Freezing Order and the question of payments flowing into and out of DML was very much in issue.

vi) I then ask: what is it that Paul did not want Andreas to see? The logical inference is that it was the use he had in fact made of DML's rental income, including in particular payments received in cash, to support his lifestyle. In the circumstances, and although I agree with Mr Peters that one cannot identify a figure with any precision, I think it logical to conclude, in the absence of any other cogent explanation, that Paul made use of DML's cash income for his own purposes, and that even assuming they are measured against the Lower Bound of the Cash Shortfall, the amounts he took must have been material.

232. I next come to Mr Peters' point that there was nothing inherently wrong with the idea that family members might help themselves to distributions of cash, and that there is no clear yardstick against which an allegation of misappropriation can be measured.

233. Again, I agree there is a lack of definition here, but I did not understand Mr Hubbard's allegation to be confined to saying that Paul took more than his entitlement when measured against the Understandings. It is also, and more particularly, a matter of his taking cash in a manner which wholly lacked transparency. What was not consistent with Andreas' policy, or with Paul's own formulation of the Understandings, is the idea that family members might help themselves to material cash distributions from the

family businesses without them being accounted for between the family members. That seems to me to be a natural component of the relationship of trust and confidence said by Paul himself to underpin the way in which the family businesses were run. Paul's own description of the way in which dividends were dealt with between the family members ([63] above) requires transparency and accountability as to the drawings made by each of them. Yet here, if one accepts (as I do) that a material part of the Cash Shortfall made its way to Paul, it was *not* properly accounted for, i.e. dealt with transparently in DPL's books and records in a manner which enabled the other family members to see how it had been treated and what had happened to it. I note in passing that HHJ Barker QC expressed a similar conclusion, when he said (also at [112]):

> " *... having regard to [Andreas'] evidence as to what would be reasonable, [Paul] could honestly have expected to be generously remunerated, but that is very different from simply appropriating cash without accounting for it*."

234. The upshot is that in my judgment, by 2012, Paul had developed a practice which involved cash from the family businesses (specifically DML) being used for his own purposes in a way which lacked transparency or any proper element of accountability as between the family members, including in particular Andreas. That, in and of itself in my view, was sufficiently serious to justify his exclusion.

235. As to Mr Peters' point that these complaints all relate to Paul's conduct vis-à-vis *DML*, and *not* DPL, that seems to me to ignore the facts that (1) the rental income flowing into DML included income from DPL's properties, and (2) Paul's own case on the Understandings relies on the close connection between DPL and the other family businesses.

236. I likewise reject Mr Peters' submission that the allegations of misappropriation against Paul were not sufficiently well pleaded. It must have been entirely obvious well before trial that Paul's conduct prior to June 2012 would be in issue, in particular as regards the treatment of DML's income. Draft Re-Amended Points of Defence put forward at the PTR in February 2019 included a specific allegation at §72.5.1 that for several years, Paul had secretly been drawing large sums of cash from DML and DPL, and at §72.5.2, that DML had been failing to record a substantial proportion of the cash rents received. Those particular proposed amendments were refused, but on the basis that they were not new points and that Andreas would not be shut out from relying on them in consequence of the refusal (see the Judgment of Mr David Holland QC, Sitting as a Deputy High Court Judge, at [23]-[24]). It seems to me, therefore, that Paul was given fair warning of Andreas' case in respect of DML's cash.

237. Nor is my conclusion affected by the fact that Andreas in 2013 authorised the declaration of a dividend by DPL in the amount on £523,730, on the advice of DPL's accountants, to offset the drawings believed to have been taken by Paul and Cheryl during that period. In his Skeleton Argument, Mr Peters relied on this in support of the contention that Andreas regarded the question of misappropriation of funds by Paul and Cheryl as closed. Again, I do not think the point can be stretched that far. The fact that steps were taken to regularise the position in accounting terms does not lead to the conclusion that there was no misconduct in the first place, and I do not think that, looking at the evidence as a whole, Paul can properly have thought that the issue of the complaints against him was closed.

G. Andreas' Actions in 2015-2016

(i) Were breaches of fiduciary duty sufficiently pleaded?

238. I now come to the allegations by Paul that, from 2015 onwards, Andreas has misused DPL's funds for his own personal benefit, and that this provides an independent ground or grounds for concluding that Paul has been unfairly prejudiced.

239. Prior to trial, these allegations centred around two matters:

i) Payments totalling roughly £1.6m, made by Andreas to Iris in February 2016, in discharge of one of the obligations imposed by Moor J's Order of June 2015 (the "*Payments to Iris*"). Andreas accepts that funds were paid from DPL to Iris, but his pleaded case is that these were legitimate payments referable to (1) sums totalling approximately £240,000 due to him as consultancy fees (the "*Consultancy Fees*") under a consultancy agreement (the "*Consultancy Agreement*") with DPL, and (2) a personal loan to him from DPL in the sum of approximately £1.37m (the "*Personal Loan*").

ii) A series of payments made by DPL between March 2015 and September 2015, originally believed by Paul to have been made to the Maremonte Companies, but which Andreas now says were in fact loans made by DPL to Gatemark (these payments continue to be referred to by the parties as the "*Maremonte Loans*").

240. Paul's pleaded case in the Petition is that Andreas' conduct in connection with both the payments to Iris and the Maremonte Loans amounted a "*clear breach*" of either:

i) "*the fiduciary duties which he owes to DPL by virtue of his position as a director thereof*", and/or

ii) Understanding 3 (i.e., the Understanding that DPL's business would be operated for the general benefit of the family members, and not for the exclusive benefit of any one of them).

241. Andreas has taken the point that the alleged breaches of fiduciary duty relied on by Paul are not adequately pleaded, and are therefore not available to Paul as points to run at trial. This is because the allegations are put compendiously, i.e. by reference to the "*fiduciary duties"* owed to DPL as director (Re-Amended Petition at §§52.1 and 56.1). It is said by Mr Hubbard that this is insufficient, because the duties owed by company directors are now set out in statutory form, in sections 171-177 Companies Act 2006, and each of those duties has distinct components which should be properly set out if any complaint is to be made about them. A compendious allegation, which makes no distinction between the different duties, is inadequate. Moreover, Mr Hubbard said that any amplification of Paul's case to be found in the Reply should be ignored for these purposes, because the proper place for any pleading to be set out is in the Petition itself.

242. These points were first identified by Mr Hubbard in his Written Opening, and then in a Supplementary Note handed in by him on day 1 of the Trial (which covered this and various other topics). Initially, Mr Hubbard invited me to deal with these pleading points at the start of trial, but after some discussion, and given that Andreas' evidence on the relevant topics would have to be given anyway (given its relevance to Paul's then

alternative case of breach by Andreas of Undertaking 3), it was agreed that I should determine the pleading points in this Judgment.

243. As to Paul's position, in Mr Peters' Written Opening, his case on breach of fiduciary duty seemed to be focused on CA section 175, i.e., the duty on a director to avoid conflicts of interest; but Mr Hubbard took exception to this on the basis that that duty has no application in cases where the conflict arises in connection with a proposed transaction or arrangement with the company: see section 175(3). In the present case, he said, the matters complained of all involved transactions or arrangements with DPL, and so fell outside the duty in section 175. Instead, as far any conflict of interest is concerned, they fell if anywhere in section 177, where the duty is a different one – it is not a duty to avoid a conflict of interest arising, but instead is a duty to declare an interest in the proposed transaction to the other directors. The difficulty there, according to Mr Hubbard, is that no allegation of failure to declare an interest is made in the Petition in relation to either complaint. That had the result that Andreas had not known clearly before trial what case he had to meet, and in turn gave rise to unfairness.

244. Faced with this, Mr Peters' case in his oral Opening alleged breaches of both section 175 and 177, in the alternative (depending on the proper construction of section 175(3), and on the proper characterisation of the transactions in question), and also breach of the more general duty in section 172 (i.e, the duty to "*promote the success of the company*"). Mr Peters produced a draft Re-Re-Amended Petition setting out these allegations, but on an indicative basis only, and without any amendment application being made, and without prejudice to his contention that the different formulations were available to him anyway on the basis of the existing Petition.

245. More broadly, Mr Peters' main points on this topic were that (1) the Petition was of course a critical document, but it had to be read sensibly, and was not required to set out every single point which might be up for debate at trial; (2) the real test was whether the Petition set out the key allegations of *fact* upon which the Petitioner relies; (3) there can have been no real confusion on Andreas' part as to the case he had to meet, not least because by amendments to his Defence he sought to add in his own positive case that the impugned transactions were honest and reasonable, and therefore attracted relief under section 1157 Companies Act 2006; (4) if there had been any lack of clarity, it could and should have been cleared up by means of inquiries or requests for information made well before trial, and to save up such points and to raise them only at the start of trial was "*technically wrong and procedurally absurd*" (Written Closing at §85).

246. It seems to me that in these circumstances, the proper exercise for me is to look at the existing pleadings to see what can sensibly be read into them. Before turning to the detail on that, however, I should deal with certain preliminary points.

247. The first is to note and acknowledge Mr Hubbard's reliance on a number of statements in the authorities as to the importance of the Petition in defining the scope of inquiry in unfair prejudice cases, including *In re Fildes Bros. Ltd* [1970] 1 WLR 592, per Megarry J at 597-598; *In Re Lundie Brothers Limited* [1965] 1 WLR 1051, per Plowman J. at 1058 (in a passage subsequently cited with approval by Dillon LJ in *Re Tecnion Investments Ltd* [1985] BCLC 434, at 441); and in *Re Edwardian Group Ltd* [2017] EWHC 3112 (Ch), per Nugee J [12].

248. In *Re Coroin Ltd* [2013] 2 BCLC 583, David Richards J. summarised the overall position as follows, at [56]:

> " … *the parties' cases are defined by their pleadings. This is of particular importance to proceedings under section 994 of the Companies Act 2006. The breadth of the jurisdiction means that the petition plays, in my judgment, a vital role in defining the basis of the petitioner's case. This is not a question of taking technical pleading points. The petition must be read sensibly. But it does mean that the grounds on which the petitioner says the affairs of the company have been conducted in an unfairly prejudicial manner should be fairly set out in the petition. Only in this way will the respondents be able properly to meet the case and the court be able to keep the proceedings within manageable bounds...*".

249. Mr Hubbard also made the more general point that serious allegations must be clearly set out and fully particularised. This includes, for the purposes of an allegation against a company director that he is in breach of duty under section 172 Companies Act 2006, any suggestion that he has acted in bad faith: see per Lord Hope in *Three Rivers District Council* v. *Bank of England (No. 3)* [2003] AC 1, at [51].

250. It is also helpful at this stage to set out the language of the provisions of the Companies Act I am concerned with.

251. Section 172 is headed "*Duty to promote the success of the company*", and section 172(1) provides relevantly:

> "*A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as whole, and in so doing have regard (amongst other matters) to –*
> *...*
> *(f) the need to act fairly as between members of the company."*

252. Section 175 is headed, "*Duty to avoid conflicts of interest*", and provides relevantly as follows:

> *"(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.*
> *...*
> *(3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company".*

253. Section 177 is headed, "*Duty to declare interest in proposed transaction or arrangement*". It provides in relevant part:

> *"(1) If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors*
> *...*
> *(6) A director need not declare an interest –*
> *...*

> *(b) if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware) ...".*

254. I will return below to the inter-relationship of sections 175 and 177, and the meaning of section 175(3). The question for the moment is simply whether Paul has done enough in his pleadings to be able to run a case based on one or other section, or indeed both of them as arguable alternatives.

255. Against that background, I turn to the pleadings.

256. The allegations in relation to the Payments to Iris surfaced in the original Petition dated 26 May 2016, at §§50-53. The basic allegations have remained unchanged since then (aside from minor amendments to deal with the withdrawal of Cheryl as a Petitioner):

> *"[50] Andreas has misused the control which he enjoys over DPL (by virtue of his being a director and majority shareholder) so as to procure DPL to make payments for his personal benefit. Whilst the Petitioner is unable to give full particulars of this conduct (in circumstances where they (sic.) have been wrongfully excluded from information relating to DPL's financial affairs and business activities), they are able to identify the following payments, which DPL has made for Andreas' sole benefit, and for which there is no lawful explanation:*
>
> > *[50.1] payments totaling £1,605,465 to Iris on 19 and 29 February 2016. These payments were made for the purpose of discharging part of Andreas' liability to Iris pursuant to an order of the Family Division of the High Court ...*
>
> *...*
>
> *[51] It is the Petitioner's understanding (and they (sic.) hereby allege) that:*
>
> > *[51.1] As a result of (a) the division of assets required by his divorce from Iris; and (b) a serious (sic.) of failed investments in Cyprus, Andreas has (and has had) substantial liabilities, and limited access to liquid assets.*
> >
> > *[51.2] He has responded to this by (a) treating DPL's money as if it were money in his own bank account, and (b) misappropriating that money to himself (and/or for his benefit) to, at the very least, the extent particularized above.*
>
> *[52] This conduct constitutes a clear breach by Andreas of:*
>
> > *[52.1] The fiduciary duties which he owes to DPL by virtue of his position as a director thereof.*
> >
> > *[52.2] The Understanding [i.e., Understanding 3] pleaded ... above ...* ." (My emphasis).

257. Leaving aside for the moment any reference to the Defence and Reply, the question is whether, on the basis of these pleadings, is it open to Paul to advance a case that

Andreas was in breach of either section 172, section 175 and/or section 177 of the Companies Act? In my judgment it is:

i) The allegation in the Petition is essentially one of misuse of company funds by Andreas. It is said squarely that Andreas misused his control over DPL to procure the making of payments for his personal benefit.

ii) It is true that the allegation of breach of fiduciary duty is put forward compendiously in §52.1 of the Petition, but I agree with Mr Peters that the real question in pleading terms is whether relevant facts have been sufficiently set out, whatever the precise legal characterisation of them might be.

iii) As to CA section 172, by alleging, in relation to the Payments to Iris, that Andreas was misusing his control over DPL to procure the making of payments for his personal benefit, and that the reason for this was because of the serious position Andreas found himself in financially in light of his divorce and his failed Cypriot investments, in my view Paul was sufficiently alleging facts which support the contention that Andreas was *not* acting in a way he considered, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. The nub of the complaint was set out, and the payments to which it relates were identified. To put it another way, Andreas must have known, from the date of the Petition onwards, that his justification for the Payments to Iris would be in issue, and that he was to be challenged not only as to the legitimacy of those payments but also as to the propriety of his motivation in making them, given his personal circumstances and obvious personal interest. The words "*good faith*" may not have been used, but in my view, there can have been no real doubt that the good faith of Andreas' actions was in issue.

iv) Although the point is less straightforward, I come to essentially the same conclusion in relation to sections 175 and 177. As I read it, both deal with the regulation of directors' interests, although they do so in different ways, depending on whether the interest (and any resultant conflict) arises in connection with "*a transaction or arrangement with the company*". Either way, the concern is one stemming from an interest of the director. Here again, it seems to me that by alleging that Andreas was misusing his control over DPL to procure the making of payments for his *personal benefit*, because of the financial difficulties he found himself in, Paul was alleging squarely that Andreas had failed properly to manage his *personal interest* in those payments. There was no doubt what payments were being impugned – they were the Payments to Iris. Granted, there was some ambiguity as to what precisely should have been done by Andreas, in light of his alleged personal interest, but to my mind that does not disqualify Paul from advancing his case. Andreas must have realised that the Payments to Iris were being challenged because of the role his personal interests played in causing them to be made. Precisely what legal duty would be breached, if the allegations were made out, would be (and now is) a matter for debate at trial. To put it another way, I do not think that permitting Paul to advance a case at trial of breach of either section 175 or 177 involves travelling outside the scope of the basic complaints in the Petition regarding the Payments to Iris.

258. I reach those conclusions without any reference to the Re-Amended Points of Defence or the Re-Amended Reply. The Re-Amended Defence, however, reinforces my view that Andreas was well aware of the case he had to meet. He engages directly with the Payment to Iris and gives his justifications for them – i.e., he puts forward his detailed positive case in relation to the Consultancy Fees and the Personal Loan, both as regards the legitimacy of those transactions and his motivations in entering into them.

259. As regards Mr Hubbard's particular point about unfairness (see [243] above), as I understand it this was really focused on the case in response to breach of the section 177 duty. The gist of it was the suggestion that Andreas might have produced evidence from the other directors of DPL from time to time, had he known that part of the case he had to meet was that he had failed to make adequate disclosure to them. To my mind, however, these points ring rather hollow in light of:

i) The fact that Paul's schedule of disclosure requests dated 30 April 2018 included (at item 59) a request for "*Board minutes of DPL approving the Personal Loans (sic.)*". In their response, Andreas' solicitors agreed this was a proper request and conducted searches accordingly. (No minutes were found).

ii) The fact that, again as regards the Personal Loan, Andreas in his Witness Statement for trial gives evidence both at §29 and at §274 about how this was approved by his fellow director at the time, Georgia Morphitou.

260. Both these facts suggest to me that Andreas was well aware, in preparing his case for trial, of the importance in terms of defending the Payments to Iris of the manner in which they were treated by DPL, and in particular, the importance of the role played by Andreas' fellow directors in approving them. I therefore do not think that any unfairness in fact arises from allowing Paul to advance his case under section 177.

261. The same broad logic applies in relation to the Maremonte Loans. The relevant allegations in the Re-Amended Petition are to be found in §§54-56, which were added in by amendment after the existence of the loans was revealed in the course of the Chancery Action. These provide materially as follows:

> *"[54] Further and/or alternatively, over the course of the year to 31 March 2016, Andreas caused DPL to loan:*
>
> *...*
>
> *[54.2] a sum believed (pending disclosure) to be up to £5,800,000 to [the Maremonte Companies]. The Maremonte Companies were Cypriot entities through which Andreas conducted his Cypriot business. The loans were made to the Maremonte Companies in order that they could service and/or pay down monies owned to the National Bank of Greece, in respect of which Andreas had provided personal guarantees to the National Bank of Greece. It is believed that the Maremonte Companies are, and have been for some time, insolvent.*

> *[55] … Andreas did not seek Paul's consent for those loans, and they were made without his knowledge. The Petitioner's case is that the purpose of those loans was to allow Andreas to participate in the profits of DPL for his own means, without DPL having to declare a dividend and thereby distribute monies to Paul or Cheryl*
>
> *[56] This conduct constitutes a clear breach by Andreas of:*
>
> > *[56.1] The fiduciary duties which he owes DPL by virtue of his position as a director thereof.*
> >
> > *[56.2] The Understanding [i.e., understanding 3] pleaded … above".*

262. Again, it seems to me that the Petition sufficiently sets out a factual basis for an allegation of breach by Andreas of sections 172, and or sections 175/177, of the Companies Act 2006:

i) As regards section 172, what is alleged is that Andreas procured payments to be made by DPL in order to pay down the indebtedness of insolvent third parties (the Maremonte Companies) to National Bank of Greece which he had personally guaranteed. It is further alleged that Andreas' purpose in proceeding in this way was to allow him to participate in DPL's profits without having to share such profits with Paul. Once more, that may not in terms say that in so doing, Andreas was failing to act in the way he considered, in good faith, would be most likely to promote the success of DPL, but that was plainly the substance of what was pleaded. Andreas can have been in no real doubt that his motivations and judgment in causing DPL to make the Maremonte Loans was very much in issue, and that he would have to be prepared to deal with it.

ii) Likewise, as regards sections 175/177, it is again clear that one of the main points being alleged was that Andreas had failed properly to manage his personal interests in the transactions in question. He obviously had such interests: on the face of the pleading, the transactions were loans to companies closely associated with Andreas, who themselves were in serious financial difficulties, and whose liabilities Andreas had guaranteed. It is entirely obvious that the point being made is that there was a conflict arising from Andreas' admitted personal interests in the relevant arrangements. The substance of that is not at all affected by Andreas' late amendments in February 2019, to adopt the case he now makes that the loans were in fact made to Gatemark, who then lent sums on to the Maremonte Companies. Even so, Gatemark was still Andreas' company, and he still had a direct interest in what was happening, and there was still an obvious conflict, as alleged. The only question is what he should have done about it, and whether the particular deficiency alleged against him is one of allowing the situation to develop at all (section 175), or of failing to make the appropriate disclosures (section 177). That is a matter of working out the proper dividing line between the two sections, and one might well have expected Andreas himself to have taken an interest in that topic. To refer back to what David Richards J. said in *Re Coroin*, the pleadings have to be read sensibly. Here, a direct assertion was made of Andreas' personal interests giving rise to a conflict vis-à-vis the Maremonte Loans. Andreas knew that was the allegation and it is common ground that he had the interests alleged, however

they are put. I think he was in a position where he was able fairly to respond to the allegations made against him, whether by reference to the criteria in section 175 or those in section 177.

263. Once again, I have come to those conclusions based solely on the Petition, and indeed solely on the narrow allegations in the Petition made concerning the Maremonte Loans. I note in passing that the Re-Amended Points of Reply, in a passage added in by late amendment in February 2019, refers expressly to Andreas being subject to a conflict between his duties as a director of DPL, and his personal interests as a shareholder in, and personal guarantor of, the liabilities of the Maremonte Companies. Mr Hubbard has taken issue with such matters being addressed in the Reply, but in my view, this language adds nothing new to the substance of the allegations made in the Petition. It is an articulation in different language of points which, it seems to me, are readily apparent from the face of the Petition, and have been since the Petition was first amended.

264. On Mr Hubbard's fairness point, I note:

i) The fact that Paul's schedule of disclosure requests dated 30 April 2018 included (at item 64) a request for "*Board minutes of DPL and Gatemark"* in relation to the Maremonte Loans. In their response, Andreas' solicitors again agreed this was a proper request and conducted searches accordingly. (No documents were found).

ii) The fact that Andreas in his Witness Statement for trial gives evidence at §289 specifically about his discussions with his fellow directors (Loucas Georghiou and Georgia Morphitou) in relation to the Maremonte Loans. He says they were happy to proceed in the way he wished.

265. Again, these matters reinforce my view that Andreas was well aware of the case he had to meet, and what evidence might be needed in meeting it. Thus, I detect no unfairness in allowing Paul's allegations to be pursued.

(ii) Factual background: use of DPL's funds

The Maremonte Companies and Gatemark

266. The Matrimonial Proceedings left Andreas with ownership of the various Maremonte Companies and of Gatemark. He was also left with the responsibility of paying the outstanding sums claimed by NBG, which by the end of 2014 stood at approximately €17.1m.

267. This presented a problem, because the position of the Maremonte Companies at the time was precarious:

i) *Maremonte Investments*: Andreas' evidence at trial was that Maremonte Investments had in fact completed one property development project in 2008 – the "*Protaras project*" – comprising 21 villas with swimming pools. This had

come in the midst of the Global financial crisis, however, and only three of the units were sold. At the same time, another project was already underway – the "*Pervolia project*" – comprising 8 villas. But given the difficulty of selling units from the first project, work on the second was stopped and the project in effect mothballed. Andreas' evidence was that he had himself paid for the land used for these projects, and had borrowed funds to meet the development costs from NBG. There had been no material change since 2008. The position had if anything been made worse by the Cypriot banking crisis of 2013. Thus, Maremonte Investments' audited accounts for the year ended 31 December 2014 showed (1) assets (mainly the two development projects) of just over €7m, as against (2) liabilities of approximately €12.9m, comprising principally €10.5m of bank lending, together with €1.26m owed to Andreas himself and approximately €876,000 owed to another one of the Maremonte Companies, Gastia. Given the state of the market in 2014, Maremonte Investments at the time was producing no income. When cross-examined, Andreas candidly accepted that Maremonte Investments at the time was in "*the most dreadful position financially*". In fact, the position may have been somewhat worse than that revealed by the accounts, because the value of the two development projects was shown at cost, and there is considerable doubt about the market value they would have attracted on sale, had they been saleable at all.

ii) *Gastia*: Gastia's financial statements for the period to 31 December 2014 show total assets of just over €2m, comprising certain investment properties (flats in Larnaca, Cyprus) valued at just over €1.174m (again on a cost basis), together with a receivable (the loan to Maremonte Investments, mentioned above) of approximately €876,000. Against that are liabilities amounting to approximately €3.9m, made up largely of bank borrowings in the sum of roughly €2.36m and a loan owed to Andreas himself in the sum of approximately €1.5m. Andreas accepted when cross-examined that on the basis of these figures, Gastia's liabilities far exceeded its available assets. Andreas confirmed that at the time Gastia had no income.

iii) *Anthorina*: Anthorina's position was similar. Its accounts show total assets of roughly €244,000, comprising a flat (€55,800), and the value of an investment in a subsidiary company, Elephant Constructions Limited (€187,946). Liabilities total approximately €343,000, comprising bank borrowing of €115,000 and borrowing from Andreas himself of a further €218,800. Andreas confirmed that at the time Anthorina had no income, and again accepted that on the face of the accounts Anthorina's liabilities exceeded the value of its assets.

268. The position in relation to Gatemark is more difficult to discern because no accounts are available. By this stage, at the end of 2014, it is common ground that Gatemark owned a number of valuable properties, but they were mortgaged. No contemporaneous figures (i.e., for 2014) are available, but again it is common ground that when Gatemark's property portfolio was eventually sold in 2017, it raised a total of approximately £9.8m, but its secured debt was in the region of £5.5m, leaving available equity of about £4.3m. I infer that the position in late 2014 was similar, or at least not materially better. As to Gatemark's cash-flow position, I note the Re-Amended Defence at §125G, where it is pleaded that:

"Gatemark remained solvent on a balance sheet basis at all material times and, with funding from DPL, met its liabilities as they fell due".

Andreas settles with National Bank of Greece

269. This background is relevant because, in March 2015, Andreas was able to conclude a settlement with NBG of the various claims it was advancing against the Maremonte Companies, Elephant Constructions Limited, and Andreas himself (under his personal guarantee). The terms, entered into on 23 March 2013, involved NBG agreeing to accept €9.3m in settlement (a very substantial discount on the amounts it claimed were due, which by then stood at roughly €17.2m), but only if the total €9.3m were paid by 30 June 2015 in various instalments (though with the option to extend the final payment date to 30 September, if at least €8m was paid by 8 June). In the event the instalments were not met, then NBG was entitled to revert to claiming the full amount.

270. As Andreas accepted, this created a situation in the Spring of 2015 in which he needed access to €9.3m fairly urgently. As Andreas also accepted, in light of the position of the Maremonte Companies and of Gatemark described above, his options were limited. There was no realistic prospect of raising any further bank finance to meet the €9.3m liability; Gatemark had equity available in its properties, but not enough; and so as Andreas stated: " *... the only other obvious way that I could borrow the money would have been from [DPL]*".

271. This explains the background to a series of payments made by DPL in the period March to September 2015, particularised in the Re-Amended Defence at §12A.2. These have been referred to by the parties as "*the Maremonte Loans*", although they are in fact payments made to Gatemark. I should say that the figures making up the current list of the Maremonte Loans were introduced only shortly before trial, by amendments made at the PTR on 14 February 2019, which struck through a number of figures previously included and reduced the overall amount from roughly £6.6m to £5.8m. The same amendments sought to clarify Andreas' case as to the structure of the Maremonte Loans, indicating that they were loans made by DPL to Gatemark which then in turn advanced its own loans to the Maremonte Companies (the previous language had referred to the Maremonte Loans being made to the Maremonte Companies "*via Gatemark*").

272. Looking at the figures in the current, Re-Amended Defence, the case put forward is that Gatemark received £5.8m from DPL "*for the purpose of onward transfer to the Maremonte Companies to enable those companies to repay their indebtedness to National Bank of Greece*", and then itself advanced €9.3m (roughly £6.7m) to the Maremonte Companies (Re-Amended Defence at §124A.3).

273. Against this background, and given the late changes to Andreas' case, Paul invites me to infer that Andreas has had difficulty in identifying the payments said to form the Maremonte Loans. I agree that must be the case, and the point is reinforced by the fact that the same round of late amendments also identified (in a new Schedule 1) a series of further, unexplained payments by DPL to Gatemark, totalling approximately £2.33m, made in the period November 2014 to August 2017 ("*the Schedule 1 Payments*").

The Schedule 1 Payments

274. Andreas was cross-examined about the Schedule 1 Payments at trial, and it is convenient to deal with them first, before coming back to the Maremonte Loans. Andreas accepted (after some prompting) that the Schedule 1 payments had been made to enable Gatemark to acquire and develop new properties. He categorised the Schedule 1 payments also as loans, and although such loans had never been documented, Andreas indicated that he had determined they should bear interest at a rate of 3.5%. This figure was arrived at on the basis that it was about 0.45% above DPL's own rate of borrowing, and so DPL would not be out of pocket.

275. When asked whether he had given consideration to whether DPL should have been using its funds to build up its *own* portfolio, rather than advancing unsecured loans to Gatemark to do so, Andreas very candidly accepted that he wanted to build up Gatemark's portfolio because it was exclusively *his* company. He accepted that the expectation was that Gatemark would make a return of something *in excess of* 3.5% in carrying out its development work, but he positively did not want those returns to accrue to DPL, only to Gatemark. This reflected Andreas' view that such returns were likely to be the result of his efforts in supervising and carrying out such work, and he considered himself entitled to keep them on his own account, so long as DPL was not losing out. His idea was to build up Gatemark's own portfolio with a view to Gatemark over time paying off its own loans from its development profits. Thus one sees the following exchange in Andreas' cross-examination by Mr Peters:

> "*Q. Exactly. So Gatemark would take the money, develop the properties, make a decent profit, pay back DPL with, you say, 3.5% and would still have a significant profit left over. That's the idea?*
>
> *A. Yes*
>
> *Q. But did you ever address your mind to whether actually, as a director of DPL, that's a profit DPL should be making?*
> *A. My main consideration was to build up more assets for Gatemark, as I said before, in order to pay the loans, but I was reluctant to develop properties and sell in DPL because it was not completely my company."*

276. There was also this further, very telling exchange, after Andreas pointed out that he had carried on with development work on *DPL's* portfolio as well:

> "*Q. Just to be clear, Mr Dinglis, I am not suggesting that you stopped doing anything with DPL. What I am saying is that you used DPL's money to conduct developments and generate profits for Gatemark –*
>
> *A. Yes.*
>
> *Q. – and you did that without any thought to whether that was in the best interests of DPL. It clearly wasn't because you thought that these are in effect your profits from your hard labour and that you should have them. That's how you saw it, wasn't it?*
>
> *A. That's right. I thought I should benefit by the developments in DPL according to my shareholding, but at the same time I should not neglect*

Gatemark, which was entirely my company, in order to enable it to increase its assets".

277. Andreas was also asked, as regards the Schedule 1 Payments, what discussions he had had with his fellow directors of DPL at the time. Up until September 2015, the fellow director (in addition to Andreas) was Mr Loucas Georghiou, and after about September 2015 was Ms Georgia Morphitou. Mr Georghiou was an old friend of Andreas', and Ms Morphitou worked for him as a bookkeeper and secretary. Andreas' evidence was that he told them what was going on, i.e, *" ... I informed the director accordingly and there was never any disagreement*." There was then the following exchange with Mr Peters:

"*Q. Did you explain to your co-directors why you were doing it, because you hoped that Gatemark could use this money to make substantial development profits?*

A. No. I just informed the director I was making loans from DPL to Gatemark".

The Maremonte Loans

278. Andreas was also cross-examined about the background to the Maremonte Loans. He indicated that these were again intended to carry the same rate of interest, i.e. 3.5% per annum, and that the logic behind this was to avoid it being said that DPL was actively worse off. At the same time, Andreas accepted that had DPL kept the money for its own purposes, it could have earned returns greater than 3.5% - he estimated something between 4.5% and 6% for rental returns (less any borrowing and other costs), and a "*much, much higher return*" on developments, at least in those cases where he was personally involved in managing the development work.

279. As to discussions with his fellow directors, Andreas' evidence was that he had discussed the Maremonte Loans with both Loucas Georghiou and Georgia Morphitou, but in each case the tenor of the conversation was in the nature of Andreas informing them of what he planned to do:

"I always say to them, 'I am just informing you what I am going to do so that you know'".

280. When it was later put to Andreas by Mr Peters that in such exchanges, there was no real debate or discussion, and that in substance he was just telling the other directors what he had already decided to do, Andreas effectively agreed:

"Q. ... You are making decisions and you are informing them, to use your words, of your decisions once they have been taken. That is right, isn't it?

A. That is correct, but they could have said to me. 'No, I don't agree", and it is the same with Paul and Cheryl. Whatever I had told them, they agreed with me. They never raised any objections."

281. Andreas also confirmed in his cross-examination that (1) he told Mr Georghiou about the personal guarantee he had given NBG, but not Ms Morphitou; (2) he did not tell either of them that he personally was owed money by the Maremonte Companies; and

(3) he did not tell either of them of the deal struck with NBG, and of the resultant urgency, because "*I didn't want to tell them about my predicament.*"

The Consultancy Agreement and Fees

282. I turn now to the payments said to make up the £1.6m Payments to Iris, made in early 2016.

283. Turning first to the Consultancy Agreement and the Consultancy Fees, Andreas' evidence was that since in 2013 he had taken over various tasks for which DPL had previously retained outside contractors (including architects, surveyors and project managers), he had determined in April 2014 that he would begin charging DPL for these services. At the time, he was the only director of DPL (Mr Georghiou did not become a director until September 2014), and so he did not discuss it with anyone. In due course, Andreas said he discussed the situation with Georgia Morphitou and she did not object. When asked what he had told her, his answer suggested a degree of resentment about the situation the family businesses found themselves in and about his own personal position:

> *"The discussion was on how much I put into the companies at all times, and I said that even Dinglis Estates – when I was doing it in 2013/2014/2015, I was overlooking all the developments for Dinglis Estates, but I never received anything. But I had, I said, at a later time, a couple of years ago, decided that I should charge at least consultancy fees because without my consultancy fees the company would not be able to do any developments."*

284. When cross-examined, Andreas was asked about the make-up of invoices rendered for consultancy fees for the periods to 31 March 2015, 31 March 2016 and 31 March 2017. These were all from another of Andreas' companies, Warner Trust Limited, and were all very high level, giving a total figure, a list of properties worked on, and a general description of the services rendered, but with no detailed breakdown. The first was for €163,335 (and made no express reference to VAT); the second for €164,917 (including Cypriot VAT); and the third for €182,466 (again including VAT). The second and third invoices, in addition to referring to consultancy services for the supervision and management of building projects, also referred to "*Provision of administration, bookkeeping and management services*".

285. The uncertainty about the make-up of the figures in the invoices was increased by Andreas' cross-examination. As regards the first invoice, this was stated to cover work on 17 properties, resulting in a fee per property (or project) of €9,600. Applying the same calculation to the total in the second invoice, which covered 9 properties, gives a total of roughly €18,300 per property. Andreas when questioned said that the second invoice covered not only consultancy services but also fees for the provision of "*back-office*" services to DPL (which the invoice does refer to). The difficulty with this is that Andreas' evidence in his Witness Statement (§269) was that this second invoice covered fees for his consultancy services only, and that Warner started to charge fees for back-office services only from 1 April 2016 onwards (which would cover the period of the third invoice, but not the second). Andreas said as regards the third invoice (for the period to 31 March 2017) that he believed about €130,000 out of the overall total of

€167,000, before VAT, was referable to back-office services, meaning that €37,400 was referable to his consultancy fees, covering work over 7 development projects, i.e. roughly €5,300 per project.

286. The result is that it is very difficult to reconcile these figures reliably, and no supporting documents were produced which would enable one to check the underlying position and calculations.

The Personal Loan

287. As to the Personal Loan, Andreas confirmed that (1) he did not maintain any documentation in relation to it; and (2) he had arrived at the interest rate of 3.5% by applying the same logic as in relation to the Maremonte Loans, i.e., on the basis that it would not leave DPL out of pocket having regard to its own cost of borrowing. Andreas said: "*An accountant told me that as long as the rate of interest was higher than what DPL was paying if it borrowed money from the bank, then that would be satisfactory*".

288. When asked whether he had given any thought to whether making a loan to him was the best use of DPL's money, Andreas very candidly accepted that he had not, and he explained why:

> *"I didn't because I thought I was left without any money because of Paul's misdeeds and because I was not receiving any dividends all those years".*

289. He also very fairly accepted that DPL making a loan to him was not the best use of DPL's money, in the sense that it could have been deployed elsewhere more profitably:

> "*Q. … but I think you'd accept that this is not as profitable a use of DPL's money as using it in its own business and that didn't bother you?*
>
> *A. Yes, but I considered the dividends and also the fact that there was money missing*."

290. Thus, the picture which emerges, consistent with the picture in relation to the Maremonte Loans and indeed the Consultancy Fees, is one of Andreas managing the business of DPL in a manner informed by his own view of the perceived injustices arising from Paul's behaviour, and therefore in a way designed to limit the potential for profits to accrue to DPL which Paul might at some point share in.

291. As to what was discussed with DPL's other directors in relation to the Personal Loan, Andreas' evidence was that he had discussed this with Georgia Morphitou (the further director in early 2016), before the Loan was made. He was asked what he had told her, and replied:

> *"The topic centred round all the dividends that I did not receive over the years and how I found myself now in a position where I had no money of my own, personally, and I needed to pay my ex-wife a large amount of money and there was no way for me to do it other than to borrow it from the company."*

292. Andreas' evidence was that he discussed the interest rate with Ms Morphitou, but did not discuss with her the extent to which that was a commercial rate.

Repayments to DPL

293. Finally, in order to complete the picture as regards the Maremonte Loans and the Personal Loan, it is necessary to deal with Andreas' case that they have been repaid.

294. It is common ground that between October 2016 and July 2017, Andreas directed the sale of the properties in Gatemark's property portfolio, in order to make payments to DPL in respect of the Maremonte Loans and the Personal Loan. The properties were sold for roughly £9.8m, and the proceeds of sale paid into DPL's account at Bank of Cyprus.

295. The oddity here is that, at the time, Gatemark had its own liabilities to Bank of Cyprus, arising from its Yen denominated loans.

296. Inquiries by Paul's legal team flushed out the explanation, which by the time of the trial before me was common ground. The explanation is that at the time Gatemark liquidated its property portfolio, both Andreas and Bank of Cyprus were under the mistaken impression that the Gatemark Guarantee, which DPL had given in respect of Gatemark's liabilities in 2008 (see [99] above) was still in place. In fact, as noted above, it had been released in June 2012. But assuming that the Guarantee was still in place, Bank of Cyprus was content to allow the proceeds of sale of Gatemark's properties to be paid in to DPL's account, thinking they would be available to meet Gatemark's liabilities if needed. Subsequently, acting on the basis of the same assumption, on 8 August 2018 Bank of Cyprus transferred a sum of approximately £3m from DPL's Sterling account, and the sums were converted into Japanese Yen and credited to Gatemark's Yen denominated Business Current Account in partial discharge of Gatemark's Yen denominated liabilities.

297. When cross-examined, Andreas confirmed that he had not taken any steps, or procured DPL to take any steps, to recover the sums taken by Bank of Cyprus. He explained this was because he is concerned to maintain a good relationship with the Bank, in particular because of the difficulties he had encountered in trying to open accounts with other banking institutions.

298. I should add one final point specifically in relation to the Personal Loan, which is that Andreas conceded that when this came to be repaid, the interest element due was not included in the repayment amount. His evidence was that he left his accountants to take care of the repayment, and the interest element was overlooked. It was paid at a later date.

(iii) Authenticity of the Consultancy Agreement and the Personal Loan

299. I should deal first with Paul's case that neither the Consultancy Fees nor the Personal Loan were genuine.

300. As to the former, Mr Peters relied on the relative absence of any documentation, and the difficulty of reconciling the invoices, as supporting the conclusion that there was no

genuine agreement between Andreas and DPL, and that Andreas simply took sums from DPL from time to time as he saw fit.

301. I am not prepared, on the evidence available to me, to reach that conclusion. This is not an instance where there are no documents: there are the invoices, and notwithstanding their shortcomings, they are evidence that consultancy fees and fees for back office services were being charged. Looking at the inherent probabilities, I also find it inherently probable that Andreas, who was certainly supervising building works for DPL during the relevant periods, would in all the circumstances have felt justified in rendering a charge for those services, and chose to do so. It also seems to me inherently probable, in line with the account given by Andreas in his oral evidence, that back office services were being rendered on behalf of DPL by Warner Trust, and that an arrangement was instituted under which Warner Trust would charge for those services.

302. As to the Personal Loan, again Mr Peters in his Closing invited me to find that this was not a genuine arrangement at all, but instead no more than an *ex-post fact*o invention by Andreas. Mr Peters relied on the lack of documentation relating to the Personal Loan, and also on the fact that initially no interest was included when the Loan came to be repaid.

303. It is true that the lack of documentation is an unusual feature, but not uncharacteristic of Andreas' informal business practices. Ultimately, the question is whether I believe Andreas' evidence that when the funds representing the amount of the Personal Loan were paid, he intended to pay them back, with interest at 3.5%. I do accept that evidence, principally in light of the very candid way that Andreas gave his evidence generally in relation to the payments made by DPL in 2015 and 2016. In my judgment the overall story he told, of his intention in making use of DPL's funds but in a manner which would leave DPL no worse off, was conveyed with frankness and candour, and is consistent with the broader picture and the inherent probabilities. As to the fact that the interest element was not repaid, it seems to me perfectly plausible that it was simply overlooked, given the informal manner in which the Personal Loan was dealt with. I accept Andreas' explanation on that point, and therefore reject the submission that the Personal Loan is a fiction.

304. I should say finally that although Mr Peters' Written Closing was careful not to concede the legitimacy of the Maremonte Loans, no direct challenge was made to their authenticity, and I did not understand him to be inviting me to find that they too were a fiction. In any event, I accept Andreas' evidence that funds were advanced as short term loans at interest to Gatemark, and will proceed on that basis.

(iv) Was there a breach of the Understandings by Andreas?

305. I can deal with the point briefly, because Mr Peters in his oral Closing Statement accepted that he would be in very grave difficulty in saying that the alleged Understandings, even if at one stage in existence, were still in existence by March 2015, when the first of the Maremonte Loans came to be advanced. I think he was entirely right to make that concession, because it is very difficult to see how on any view the Understandings can have survived the dismantling of the family businesses which flowed from the Matrimonial Proceedings. I would disagree with Mr Peters only as regards the date. In my view, even if the Understandings existed, they had effectively

dissolved by (at the latest) late 2014, when in substance the outcome of the Matrimonial Proceedings was known.

(v) Does Paul have a valid complaint under Companies Act 2006, section 175?

306. I should deal first with the case under section 175 Companies Act 2006.

307. By section 175(3), section 175 has no application "*to a conflict of interest arising in relation to a transaction or arrangement with the company*". The discussion before me as to the scope of this exclusion was about whether it only covers the case where the relevant director is *himself* a party to the transaction or arrangement, or whether it applies in any case where the director has an interest in a "*transaction or arrangement with the company*", regardless of who enters into it. If the latter formulation is correct, that would exclude from section 175 the case where (for example) the company proposes to enter into a transaction with a third party with whom the director has an association, or in which the director is otherwise interested. In *Burns* v. *Financial Conduct Authority* [2017] EWCA Civ. 2140, [2018] 1 WLR 4161, the Court of Appeal identified (but did not resolve) this issue.

308. In my view, Mr Hubbard is right to say that the broader formulation of section 175(3) is the correct one: *i.e.*, it excludes from the scope of section 175 all cases where the conflict arises in connection with a transaction or arrangement with the company, regardless of who is entering into the transaction. I say that for two reasons:

i) That is what section 175(3) says: it is not in terms confined to cases in which the transaction is one with the director personally.

ii) It makes sense to read section 175 together with section 177, as David Richards J. did in *Re Coroin (No. 2)* [2012] EWHC 2343 (Ch), in holding (at [583]) that the effect of section 175(3) is to make sections 175 and 177 mutually exclusive. The duty under section 177 arises in any case in which the director is interested, *directly or indirectly*, in a proposed transaction or arrangement with the company. An *indirect* interest obviously arises even in a case where the person or entity proposed to enter into the transaction is a third party, and not the director himself. If in such a case the duty under section 177 is engaged, it makes sense to say that the duty under section 175 is not.

309. The consequence of this conclusion in this case is that, if the transactions Paul seeks to impugn are transactions or arrangements with DPL, then they cannot fall within section 175, but only within section 177. It seems to me that Mr Hubbard is correct in saying that they *are* all transactions or arrangements with DPL. The Personal Loan can be looked at either as an advance to Andreas or as a payment by DPL to Iris which Andreas had agreed to repay, but on either view was a transaction or arrangement with DPL. The Consultancy Agreement was an arrangement between DPL and Andreas, and the Consultancy Fees were payable by DPL to Andreas. The Maremonte Loans were loans from DPL to Gatemark.

310. The result is that, in my judgment, the duty imposed by section 175 CA is not engaged and has no relevance to this case.

311. I turn to sections 172 and 177, which are relevant. It is convenient to conduct the analysis by reference to the different transactions.

(vi) Breach of fiduciary duty: the Maremonte Loans

312. The background seems to me quite clear on the evidence. Largely in line with Mr Peters' submissions, I accept that:

i) As at late 2014, the Maremonte Companies were insolvent on the face of their accounts, and it is likely that the situation was much worse than revealed by the accounts because (1) their property assets could not realistically have been sold other than at a substantial discount to book value, and (2) the assets of Gastia included a €875,000 inter-company loan to Maremonte which was very likely worthless.

ii) The settlement Andreas reached with NBG in early 2015 meant that he needed urgent access to funds. There was no possibility of raising other commercial lending, and Gatemark did not have sufficient equity in its portfolio to pay off NBG, even if all its properties were sold.

iii) DPL was the obvious solution. Andreas decided to procure funding from DPL in the form of loans to Gatemark.

iv) At the same time, Andreas continued to harbour resentment towards Paul, arising out of the events which led to Paul's exclusion in 2012 and indeed subsequent events including Andreas' suspicions as to the misuse of DML's cash by Paul and the conduct of the Matrimonial Proceedings. As far as possible, he therefore wished to limit any benefits flowing to Paul from his (Andreas') efforts in the area of property development, and therefore sought to funnel such developments through Gatemark and the other companies of which he was sole owner.

v) This desire to limit benefits flowing to Paul contributed to the decision, both in relation to the Schedule 1 Payments and the Maremonte Loans, to charge interest at a rate of 3.5% pa. The logic of this, on Andreas' own evidence, was to leave DPL no worse off. But it would not be much better off, and certainly not as well off as if its funds were used for other purposes, such as carrying out developments in its own name.

vi) Given the thinking behind the 3.5% interest rate, Andreas did not turn his mind to the question of whether 3.5% represented a proper commercial return, given the risks inherent in lending to Gatemark, on the understanding that it would in turn lend funds on to the Maremonte Companies.

vii) As to the discussions Andreas had with his fellow directors, his own evidence is that he did not tell Ms Morphitou about his personal guarantee, and did not tell either of them (a) that he was personally owed money by the Maremonte Companies, or (b) that if the Maremonte Loans were not advanced, NBG would be free to go back to pursuing him for the higher sum of €17m.

313. Taking CA section 172 first, I have set out the relevant parts of section 172(1) above. The test is framed in subjective terms, so that a director is given latitude to form his own judgment as to what promoting the success of the company might require, provided he acts in good faith. Mr Hubbard relied on the latitude afforded by section 172, and said that Andreas had discharged his duty under the section because:

    i) he thought the 3.5% interest rate was commercial;

    ii) he did not think at the time that there was any positive risk of financial harm arising from lending money to Gatemark;

    iii) although Andreas candidly accepted that DPL might have earned more from property development, that was only if he (Andreas) was in charge, and having others in charge would be risky; and

    iv) in any event it is not appropriate to compare the returns from long term property development with the returns from a short term loan.

314. I am not persuaded by those points, and overall it seems to me clear that Andreas was in breach of the duty under section 172 in relation to the Maremonte Loans. At the heart of the duty is the obligation to act in the way the director considers in good faith would be *most likely* to promote the success of the company *for the benefit of its members as a whole*. He must specifically consider the need *to act fairly as between the members of the company*. It seems to me plain on the basis of Andreas' own evidence that material in his thinking at the time was in fact the desire, very pointedly, to deploy DPL's financial resources in a manner which would benefit him, rather than DPL's other shareholders, including Paul. His own evidence shows a pattern of activity, throughout 2014 and 2015, by which he was using DPL's resources both (1) to stabilise the Maremonte Companies and stave off the threat of his own personal bankruptcy, and (2) to put Gatemark in a position where it (rather than DPL) could make profits from development projects. Meanwhile, as far as such transactions were concerned, the interests of DPL and its other shareholders were subordinated in Andreas' mind so that, as long as it was not out of pocket in terms of its own borrowing costs, those interests were taken care of. Thus, he was not really concerned at all with whether DPL would receive a proper commercial return from the use of its funds. The Maremonte Loans were part of this overall pattern of activity, none of which involved giving proper (or indeed any) consideration to what would most likely promote the success of DPL for the benefit of its members as a whole. It was done for Andreas' benefit, and obviously so. In the circumstances, it seems to me clear that in acting as he did in connection with the Maremonte Loans, Andreas was not properly discharging his duty under CA section 172.

315. Turning to section 177, again I have set out the text above. Where the director has an interest in a transaction, he must declare the nature and extent of that interest to the other directors, though he need not do so (section 177(6)(b)) where the directors are already aware.

316. In the present case, it is not disputed that Andreas had a sufficient interest in the Maremonte Loans to trigger the requirements of the section.

317. As to the disclosures in fact made to the directors, Mr Georghiou and (after about September 2015) Ms Morphitou:

i) Ms Morphitou was not told about the personal guarantee Andreas had given to NBG in respect of the borrowings by the Maremonte Companies. Mr Hubbard submitted that because the loans were in fact made to Gatemark, and because it is reasonable to assume that Ms Morphitou would have known that Gatemark was Andreas' company, nothing turns on this. I cannot agree. Andreas' own pleaded case (Re-Amended Points of Defence at §124A.3) is that the Maremonte Loans were made to Gatemark for the purpose of onward transfer to the Maremonte Companies to enable those companies to repay their indebtedness to NBG. That would also satisfy Andreas' obligations under his personal guarantee. Disclosing the existence of that guarantee was therefore necessary as part of the disclosure of *the extent* of Andreas' interest in the transaction, even if the funds were initially paid to Gatemark.

ii) Neither director was told that Andreas was personally owed monies by the Maremonte Companies, or that the deal he had struck with NBG required funds to be paid urgently, otherwise the full amount of NBG's claim would be revived. Again, it seems to me that both matters were required to be disclosed, because they go to the *extent* of Andreas' interest in the Maremonte Loans. Here, Mr Hubbard referred specifically to section 177(6)(b), and said that I should not make any assumptions about what the other directors were or might have been aware of, in the absence of any evidence being led on this specific subject. Again, I cannot agree. I have already referred above to my view of Mr Hubbard's fairness point. In any event, and more significantly, I have the benefit of Andreas' direct evidence that he positively did not inform the other directors of the two matters in question, and which as regards the terms of the settlement with NBG was very clearly that he did not want to tell them about his predicament. From his point of view, as a purely personal matter, I can understand that impulse and his account seems entirely plausible. Overall, I see no good reason to ignore Andreas' evidence, which effectively is what Mr Hubbard invites me to do.

318. It follows that I hold also, as regards the Maremonte Loans, that Andreas was in breach of his duty under CA section 177.

(vii) Breach of fiduciary duty: the Personal Loan

319. As regards CA section 172, it seems to me that a similar logic applies as in the case of the Maremonte Loans:

i) Andreas again applied the 3.5% interest rate, on the basis that DPL should not be out of pocket vis-à-vis its own borrowing costs.

ii) The issue is that in acting as he did, Andreas was motivated largely if not exclusively by his own personal interests, meaning his need for money to pay to Iris, and his continuing sense of resentment towards Paul. This explains why, as Andreas candidly accepted in his own evidence, he did not consider whether a loan to him at 3.5% was the best use of DPL's money, even though other, obviously more profitable alternatives were available.

iii) One such alternative, which Andreas candidly accepted, would have been loans to someone else at a higher interest rate. Mr Hubbard argues that a comparison with a hypothetical loan is not in issue. That may be so in the sense that that is not the test to apply, but the point Andreas' evidence illustrates is that he simply did not give proper (or any) consideration to what alternatives might be available. He therefore did not give proper consideration in good faith to whether he was acting in the way most likely to promote the success of DPL for the benefit of all its members as a whole.

iv) Mr Hubbard points to the evidence in Andreas' Witness Statement that before making the Payments to Iris (and therefore taking on the Personal Loan) he consulted DPL's accountants, who told him that DPL could, without incurring any tax penalty, make a loan to Gatemark or to him personally, so long as it was made on commercial terms and was repaid before the end of 2016. As noted above, Andreas gave the same evidence in cross-examination, and also said that he checked with them that 3.5% was a suitable interest rate. Mr Hubbard relies on these matters as demonstrating that Andreas was acting in good faith. I do not think these points can be stretched that far. I say that because of Andreas' other evidence as to the factors at play in his decision-making. I do not know precisely what the accountants were told or what advice they were asked to give, but it appears to have been focused on the tax treatment of the payments, rather than on the interests of DPL in a broader sense or on what would or would not be in the interests of DPL's members as a whole. The logic of the 3.5% interest rate has already been explained. It was not calculated as a commercial rate for an unsecured personal loan, and indeed seems to have involved no assessment of the risk profile of the borrower, only the cost of borrowing of the lender. On Andreas' own evidence, when he came to discuss the Personal Loan with his fellow director, Ms Morphitou, at the time, they did not discuss at all whether the rate was a commercial one. That is because its commerciality, in any sense other than by reference to DPL's own cost of borrowing, was not a relevant consideration for Andreas. That is just the problem.

320. In the circumstances, I conclude that Andreas' conduct in relation to the Personal Loan once more was in breach of his duty under CA section 172.

321. As to section 177, again there can be no doubt that Andreas had an interest in the transaction – i.e, the Personal Loan. The only question is whether he made the appropriate disclosures. In this instance, I think he did. His evidence, which I accept, was that he informed Ms Morphitou that the funds were needed in order for him to make a payment to Iris, because he had no money of his own available. I accept that Ms Morphitou was told the proposed interest rate. It seems to me that in those circumstances, the nature and extent of Andreas' interest was sufficiently disclosed. Mr Peters argued that there was insufficient disclosure because Andreas did not disclose the fact that the loan would provide him with credit on uncommercial terms. I do not see that as a matter requiring disclosure. The rate of interest was disclosed, as well as the fact that Andreas was the borrower and that he was borrowing the money to pay his ex-wife. The commerciality or otherwise of the applicable interest rate was one for Ms Morphitou to take a view on in light of the disclosures made to her, not a matter for disclosure in itself.

(viii) Breach of fiduciary duty: the Consultancy Agreement and Fees

322. Paul's case on CA section 172 was put forward solely on the basis that, since there was in fact no Consultancy Agreement at all, and Andreas simply took sums he needed from DPL, Andreas was necessarily in breach of his duty under section 172. I have already expressed my view above as to the authenticity of the Consultancy Agreement, and in light of that finding it follows that the case based on section 172 falls away.

323. As to section 177, if one accepts (as I do) that the Consultancy Agreement was entered into in 2014 (as Andreas says), at the time, Andreas was the only director of DPL. Paul nevertheless says that he could still technically have given disclosure to himself, at a properly convened (and minuted) board meeting: see *Neptune (Vehicle Washing Equipment) Ltd* v. *Fitzgerald* [1996] Ch 264. Andreas for his part did not engage with this particular point. Instead, Mr Hubbard in his Written Closing emphasised Andreas' formal position that the allegation in the Re-Amended Reply §28.3(4), i.e. that the decision to charge consultancy fees to DPL "*represents a further, discrete head of unfairly prejudicial conduct*", falls outside Paul's case as set out in his Petition, and so cannot be relied on.

324. I have already dealt with the pleading point above. My judgment is that the pleaded case in relation to the component parts of the Payments to Iris is sufficiently set out in the Petition. As to the technical point, that Andreas could and should have made disclosure to himself, in my view in the present context it is just that: a technical point. I am prepared to assume there was a technical breach by Andreas, but that is quite different to saying that such breach amounts to conduct which is unfairly prejudicial. That is a separate question, which I will turn to below.

(ix) The Schedule 1 Payments

325. Finally under this heading, I should note the Schedule 1 Payments.

326. I have mentioned Andreas' evidence in relation to these payments above. His thought process in relation to them had the same basic characteristics as that in relation to the Maremonte Loans – i.e., he needed funds for his Cypriot ventures, and decided to use DPL's resources in a manner designed to maximise the personal benefit to him and minimise the benefit flowing to the other shareholders of DPL, and in particular Paul. His consideration of DPL's position only extended as far as wanting to be satisfied that it would not be out of pocket by reference to its own cost of borrowing.

327. The Schedule 1 Payments were not referred to in the Petition. Mr Peters nonetheless invited me to rely on them as constituting a separate head of unfair prejudice. He said there was a very good reason why the payments were not referred to earlier: they were identified for the first time only in the Re-Amended Points of Defence, and the position in relation to them became clear only during Andreas' cross-examination at trial.

328. I see the force of Mr Peters' point, but in the circumstances, and given the findings I have already made, it is not necessary for me to rely on the Schedule 1 Payments as a separate head of unfair prejudice. I prefer to rely on Andreas' evidence in relation to them as part of the background to my assessment of his conduct in connection with the Maremonte Loans and the Personal Loan. I will say that his evidence in connection with the Schedule 1 Payments is consistent with the idea that in authorising them,

Andreas did not have proper regard to his duties under CA section 172. Given that there was no specific pleading on this point, however, I do not express any finally concluded view about it.

(x) Was Andreas' conduct unfairly prejudicial?

329. It follows from what is said above that in my judgment, Andreas was in breach of the following duties:

i) As regards the Maremonte Loans, his duty under CA section 172 and his duty under CA section 177.

ii) As regards the Personal Loan, his duty under CA section 172.

iii) As regards the Consultancy Agreement, his duty under CA section 177.

330. Does that conduct give rise to unfair prejudice? As Mr Hubbard reminded me, it is not every breach of duty which results in unfair prejudice. Mr Hubbard relied on the following propositions of law:

i) Non-compliance by a director with his fiduciary duties does not necessarily ipso facto constitute unfairly prejudicial acts or omissions of the company: see per David Richards J. in *Re Coroin Ltd* [2013] 2 BCLC 583, at [631]: *"Where the acts complained of have no adverse financial consequence, it may be more difficult to establish relevant prejudice. This may particularly be the case where the acts or omissions are breaches of duty owed to the company rather than to shareholders individually."* To put it another way, where a fiduciary duty is breached in the abstract, there is no prejudice.

ii) There must a be causal link between the conduct complained of and the unfair prejudice which the Petitioner suffered (or alleges he has suffered). As Jonathan Parker J stated in *Re Blackwood Hodge Plc* [1997] 2 BCLC 650, at 673, "*... the petitioners must establish not merely that the BH directors had been guilty of breaches of duty in the respects alleged, but also that those breaches caused the petitioners to suffer unfair prejudice in their capacity as… shareholders*".

iii) The courts have shown a longstanding reluctance to become involved in disputes over the internal management of business ventures. See, e.g., *Howard Smith Ltd* v *Ampol Petroleum Ltd* [1974] AC 821, at 832, and *Re Elgindata Ltd* [1991] BCLC 959, where at 993 Warner J. said: " … *the court will normally be very reluctant to accept that managerial decisions can amount to unfairly prejudicial conduct.*"

331. Against this background, Mr Hubbard said as regards the Maremonte Loans and the Personal Loan that:

i) There was no evidence that DPL had been prejudiced financially either specifically or in terms of the value of shareholders' funds overall during the period in question. Implicit in this submission, as I understand it, is reliance on the proposition that the Maremonte Loans and the Personal Loan had in fact been repaid, with interest.

ii) The judgments involved in making the loans were essentially commercial judgments.

iii) There was nothing to suggest that Andreas' actions were inherently objectionable, and in fact what he did was entirely consistent with the manner in which DPL had been managed from the beginning, including as to its relationship with Gatemark. For example, when Paul was a director of DPL, he signed the Gatemark Guarantee, and moreover Paul accepted in his oral evidence that had it not been for the breakdown in the family relationship, he would have been happy for Andreas to have taken funds from DPL to transfer to Iris, and likewise would have been content for Andreas to have access to the funds needed to pay back NBG.

332. I did not understand Mr Peters to disagree with any of Mr Hubbard's propositions of law, but in addition he drew attention to dicta of Vinelott J in *Re Kenyon Swansea Ltd* (1987) 3 BCC 259, and of Peter Gibson LJ in *Re Legal Costs Negotiators Ltd* [1999] BCC 547, to the effect that even where past conduct has been cured, it can still found an unfair prejudice petition if there is a risk it will be repeated. Thus, in *Re Legal Costs Negotiators Ltd*, Peter Gibson LJ said at p.552*:*

> " *The suggestion that to found a petition it is sufficient that the affairs of the company have in the past been conducted in a way which was unfairly prejudicial to the petitioner, even though at the date of the petition the unfairness has been remedied, derives from the words of Vinelott J to that effect in Re Kenyon Swansea Ltd* (1987) 3 BCC 259 *at p. 265. I do not disagree, provided that what Vinelott J said is understood in context. He went on to say:*
>
> > *'The question whether an order is required to protect the interests of the petitioner from the consequences of unfair conduct or of an act which has been proposed and which may again be proposed is one to be answered at the hearing of the petition. In the instant case it is clear that Mr Kenyon, understandably, has not altogether abandoned his wish to reassert his control over the company …'*
>
> *In other words, Vinelott J's remarks were made in the context that what had happened in the past could recur. If the remedying of the unfairness was carried out in such a way that the objectionable conduct could not recur, then there is no scope for giving relief under s. 461 in respect of the matters complained of."*

333. Mr Peters' submission were effectively that:

i) The "*repayment*" of the Maremonte Loans and the Personal Loan was of uncertain status, given that Bank of Cyprus had only allowed funds from the sale of Gatemark's properties to flow back into DPL's account, on the mistaken assumption that there was a subsisting guarantee from DPL for Gatemark's liabilities.

ii) In any event, repayment of the Loans does not mean that the prejudice has been cured, because the prejudice arises from the failure to use DPL's funds more productively.

iii) Given its nature, and Andreas' motivations towards Paul, there is a high risk of Andreas' prejudicial conduct being repeated.

334. Looking first at the Maremonte Loans and the Personal Loan, my view is that Andreas' breaches of duty under CA section 172 *do* constitute unfairly prejudicial conduct:

i) I cannot accept Mr Hubbard's submission that there is no evidence of DPL having been prejudiced financially. Even assuming that the relevant funds have been repaid with interest at 3.5%, I accept Mr Peter's submission that that does not equate to the proposition that the prejudice has been cured. That is because, on the basis of Andreas' own evidence, interest at 3.5% does not adequately compensate DPL for the loss of opportunity to use the relevant funds for the purposes of its own business. To put it another way, Andreas himself recognised that DPL's funds could have been used more profitably in other ways. He did not properly consider the possibility of doing so. The lost opportunity may not be capable of precise quantification in financial terms, but is nonetheless real in my view. It is no answer to say that, looked at overall, DPL's value has increased since 2012. There may be many reasons for that, which I am not in a position to assess. The point is that in this particular instance, and looking at the particular use of funds in question, DPL might well have been better off had they been used differently, but that was not considered, or not properly considered, by Andreas on the basis of his own evidence. I do not regard that as an academic or abstract matter.

ii) I note the uncertain status of the funds repaid to DPL, given the misunderstanding about the Gatemark Guarantee. Nonetheless, I prefer not to base my conclusion on that point. The fact that funds paid into DPL's account have subsequently been withdrawn on a mistaken basis, or that further sums may need to be paid to Bank of Cyprus, does not mean that the debts owed to DPL by Gatemark and Andreas were not discharged when the funds were originally paid back into DPL's accounts. Nor does it mean that there is prejudice caused by the breaches of duty I am concerned with. If funds in DPL's hands are vulnerable to claims from Bank of Cyprus, that flows from Andreas' historic dealings with Bank of Cyprus, and would have been the case anyway, even if the Maremonte Loans and the Personal Loan had never been advanced.

iii) In any event, even if one takes the view that the specific breaches in question have been cured, I agree with Mr Peters' submission that, given the nature of Andreas' default, there is every chance of the problem recurring. That is because of Andreas' continuing feelings towards Paul, which mean he is inclined to divert profitable activity away from DPL and in the direction of the other businesses of which he is the sole owner. I think Mr Peters is correct to say that this is precisely the type of misconduct which is likely to continue for so long as Paul remains a shareholder in DPL, and that indeed Paul's shareholding is the very reason why Andreas is behaving in this way.

335. I am rather less convinced that Andreas' failure to comply with his section 177 duty in respect of the Maremonte Loans, looked at in isolation, amounts to unfairly prejudicial conduct. I say that because it must be relevant to consider what the outcome would have been had proper disclosures been made to the other board members: see *Birdi v Specsavers Optical Group Ltd [*2015] EWHC 2870 (Ch), per Nugee J at [183]-[184] .

Given Andreas' description of the roles they played, it seems likely that they would have approved the Maremonte Loans anyway. That might have resulted in a failure by them to discharge their own duties under section 172, but in the circumstances it is unnecessary and undesirable for me to express any view about that. I prefer to say that Andreas' own failure to discharge his duty under section 172 in respect of the Maremonte Loans justifies the conclusion that there was unfairly prejudicial conduct.

336. As to the Consultancy Agreement, it follows from what I have said above that if there was a breach of section 177 by Andreas at the time this was concluded, it was a technical breach, and I do not see it as giving rise to the conclusion that there was unfair prejudice.

H. Remedy

337. Section 996 of the 2006 Act provides:

> *"(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.*
> *(2) Without prejudice to the generality of subsection (1), the court's order may–*
> *...*
> *(e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly."*

338. In this case, it follows from my conclusions above that I think the Petition was well founded, at least as regards the allegations of unfair prejudice arising from Andreas' use of DPL's funds. Section 996 gives me a broad discretion as to whether to grant relief, including as to the form of relief.

(i) Should Paul be given a remedy?

339. There was considerable discussion at the hearing as to whether Paul's delay in bringing the Petition should debar him from a remedy, even if unfair prejudice were otherwise made out. But that was focused on the delay between the time of Paul's exclusion from management and the date of the Petition. I have concluded there was no unfair prejudice on that ground, and so the question of whether relief should be denied on the basis of delay in complaining about it does not arise.

340. As regards those parts of the Petition relying on breaches of fiduciary duty, there was no delay. The Payments to Iris were made only in February and March 2016, shortly before the Petition was issued. Although the Maremonte Loans were made during the course of 2015, they were not known about until they were revealed in the course of the Chancery Action, and the allegations in respect of them were then added into the Petition by amendment.

341. I have considered whether the manner in which Paul has conducted the Petition, in particular bearing in mind the findings I have made regarding his evidence, should act as a bar to him obtaining relief. I think not. I say that because of the situation he finds himself in. Even bearing in mind how that has come about, the upshot is that Paul is the minority shareholder in a company controlled by Andreas, who has no real incentive to manage that company in a way which will benefit Paul, and indeed a strong incentive

not to. This seems to me to be a paradigm case in which the Court should intervene, and provide for a purchase of shares. Paul's conduct does, though, have an impact on the type of relief which in my view is proportionate.

342. Also under this heading, it is convenient to consider the issue of whether I should identify the date at which Paul's shares are to be valued on sale. In the circumstances, I can deal with this point briefly:

i) Andreas was the one who advocated specifying a date for valuation now, and pressed for an early valuation date, effectively as a means of preventing Paul from benefiting from what Andreas perceives as his own success in managing DPL in the periods post Paul's departure. The logic of Andreas' position was to say: one of the First Issues to be determined under the Order of 29 January 2018 is whether an order should be made for the acquisition of Paul's shares; that requires a broad assessment under section 996(1) of what form of Order for sale is just in all the circumstances; and that in turn requires one to consider the question of valuation date, because the answer may be that an Order for sale *is* justified but only one which includes an early valuation date in light of the Petitioner's delay. That was the result in *Re Edwardian Group Ltd, Estera Trust (Jersey) Ltd v Singh* [2019] 1 BCLC 171, per Fancourt J. at [607].

ii) As already mentioned above, however, the alleged delay here arose exclusively in connection with Paul's case based on his Understandings. I have rejected that case, and found unfair prejudice only in connection with the allegations of breach of fiduciary duty by Andreas. The Order of 29 January 2018 requires me only to determine whether a share purchase order should be made, and based on my findings in relation to Andreas' conduct (based largely on Andreas' own evidence), I have no doubt at all that a share purchase Order is appropriate, and do not feel the need to condition that conclusion on any particular valuation date at this stage.

iii) I realise that, rather untidily, that leaves over the question of valuation date to the next phase of these proceedings. But it must always have been clear that the definition of First Issues would leave matters over to a later trial which are significant to determining the price to be paid on a sale of Paul's shares. These include not only the amount of any minority discount, but also the question of any adjustments to be made to the value of DPL in light of the parties' conduct. No one suggested that the latter issue was a live one in the present trial, and it seems to me that the question of valuation date is connected with it, and that the two are best looked at together as part of a combined exercise.

343. Finally, and for the sake of completeness, I should say that I do not consider the above conclusions to be in any way affected by Andreas' reliance in his Re-Amended Points of Defence on CA section 1157. That gives the Court power, in proceedings "*for negligence, default, breach of duty or breach of trust*" against an officer of the company, to excuse the officer from liability if satisfied that he acted "*honestly and reasonably*". Even assuming the present are proceedings of the relevant type, it follows from my findings that I do not regard Andreas as having acted reasonably in the respects in which I have held him to be in default; and even if I did, section 1157 still requires one to have regard to "*all the circumstances of the case*". Here, I have already expressed the view

that "*all the circumstances of the case*" require an Order to be made for the purchase of Paul's shares.

(ii) MHGL

344. The findings of unfair prejudice I have made relate to Andreas' breaches of duty as a director of DPL. There is no doubt that an Order for the purchase of Paul's shares can be made against him, but the holder of shares in DPL is now MHGL, not Andreas. Should an Order be made against MHGL as well?

345. The wording of CA section 996 (above) is very broad: the Court may make such Order as it thinks fit for giving relief in respect of the matters complained of. Thus, there is jurisdiction to make an Order against MHGL, but Mr Lightman QC argued that the jurisdiction has to be exercised on certain principles, which do not apply in this case as regards MHGL. Importantly, these include the principle that relief can only be granted against a person where some complaint is made about the conduct of that person.

346. There is no difficulty in granting relief against a principal where the relevant conduct is carried out by an agent: see F&C Alternative Investments (Holdings) Ltd v. Barthelemy (No.2) [2011] EWHC 1731 (Ch), [2012] Ch 613, per Sales J. at [1095]. But the jurisdiction is wider than that. Beyond the narrow agency case, Sales J. said the test is whether the Respondent:

> *" ... is so connected to the unfairly prejudicial conduct in question that it would be just, in the context of the statutory regime contained in ss. 994 to 996, to grant a remedy against that [Respondent] in relation to that conduct. The standard of justice to be applied reflects the requirement of fair commercial dealing inherent in the statutory regime. This is to state the test at a high level of abstraction. In practice, everything will depend upon the facts of a particular case and the court's assessment whether what was done involved unfairness in which the relevant [Respondent] was sufficiently implicated to warrant relief being granted against him"*. (My emphasis).

347. In a later case, *Re TPD Investments Ltd* [2017] EWHC 657 (Ch), Asplin J. developed this observation, as follows (at [158])

> *" ... in order to contemplate such an order it is necessary, as Sales J. put it, that the defendant in question is so connected to the unfair prejudice in question that it would be just in the context of the statutory scheme to grant a remedy against him. I agree with Mr Mallin that merely being connected with the acts complained of cannot be enough. If that were the case, personal liability would be imposed in most cases because a company acts through its board of directors. As a matter of logic, more is necessary. In some circumstances, no doubt, relevant factors would be whether the company in question had been a mere cypher for the individual and whether that individual had benefited, for example, from the diversion of the company's business or had otherwise benefited from the unfairly prejudicial conduct."*

348. These principles were applied in two decisions of Sir Nicholas Warren in 2018, which Mr Lightman referred me to: *Re Bankside Hotels Ltd* [2018] EWHC 1035 (Ch), [2018] BCC 617; and *Re Bankside Hotels Ltd* [2018] EWHC 2897 (Ch). There, a family trust company, Truchot, held a 50% shareholding in Bankside Hotels as trustee of a family settlement for the benefit of the family of a Mr Gourgey. Mr Gourgey was a director of Bankside, and allegations of misconduct were made against him said to constitute unfair prejudice. In his first decision, Sir Nicholas Warren struck out those parts of the Petition seeking relief against Truchot, on the basis that it was not sufficiently connected with Mr Gourgey's wrongdoing. At [50] he said:

> *"There is no allegation that Truchot knew of, let alone that it authorised, the alleged breaches of duty by Mr Gourgey. There is not even an allegation along the lines that Truchot ought to have exercised some supervision over the activities of the directors, that it failed adequately to do so and that such failure makes it fair and just for the court to grant relief against them."*

349. Sir Nicholas Warren's second decision concerned applications to amend, later made by the Petitioner, with a view to addressing the issues identified in the first Judgment. The amendments included allegations as to what the Petitioner said would have happened if he had approached Truchot and asked it to take action against Mr Gourgey. The applications were refused, essentially on the basis that none of the proposed amendments addressed the fundamental issue that Truchot was an independent entity which in fact had no knowledge of the allegations of misconduct at the time and was never in fact invited to take any steps in response. Thus at [34] Sir Nicholas Warren said, in agreement with Truchot's counsel:

> *" ... a petitioning minority shareholder cannot fix a respondent shareholder with liability for a director's wrongdoings of which the respondent shareholder was unaware simply by asserting that, had they been aware of it and if they had been asked to take steps to remedy it, they would have refused to do so."*

350. Mr Lightman submitted that the position of MHGL in this case was in substance the same as the position of Truchot: as far as the breaches of fiduciary duty by Andreas are concerned, no proper case had been advanced as to what it had (or had not) done, which was sufficient to justify the conclusion that it was connected with Andreas' wrongdoing.

351. As to MHGL:

i) The Petition at §6 says that Andreas is " … *the sole owner and controller of MHGL and, inter alia by reason of such ownership and/or control, exercises sole effective control over DPL*". That assertion is admitted in the Re-Amended Points of Defence at §6.

ii) On the Respondents' side, no case was pleaded that Andreas and MHGL ought to be treated differently for the purposes of any grant of relief. They have been jointly represented throughout the proceedings. No point was taken about the lack of any proper case against MHGL until Andreas' Trial Skeleton was served, shortly before trial.

iii) Perhaps because of that, little information was available to me about MHGL, although Mr Hubbard confirmed that it is a BVI company, and that Andreas'

case is that he ultimately controls it. He also said that Gatemark is a subsidiary, and that in the ordinary course of events one would expect it to have professional directors. No financial information has been produced, which prompted Mr Lightman to say that we therefore do not know whether MHGL has itself benefited from Andreas' actions.

352. Relying on these factors, Mr Peters sought to distinguish *Re Bankside Hotels*: here, he said, MHGL is Andreas' company; he is its directing mind and will for the purposes of its shareholding in DPL, and so it will know what he knows. That is unlike the position of Truchot, which was an independent family trust company which admittedly had no knowledge of Mr Gourgey's breaches of duty.

353. I have concluded that Mr Peters' view is correct, and that the circumstances justify granting relief against MHGL:

i) The relevant test is whether the particular Respondent is so connected to the unfairly prejudicial conduct in question that it is just, in the context of the statutory scheme, to grant relief against it.

ii) In *Bankside Hotels*, Truchot was wholly independent of Mr Gourgey and had no knowledge of his wrongdoing. Thus, it could not be implicated in Mr Gourgey's actions, for example by having failed to take action to prevent them. It was not a sufficient response to say that, had Truchot been told, it would have refused to take action anyway. That involved a hypothetical inquiry.

iii) Here, I think Mr Peters is right that the inquiry is not a hypothetical one. It is common ground on the pleadings that Andreas is sole owner and controller of MHGL. That overall position is entirely consistent with the fact that Andreas and MHGL have been jointly represented throughout the proceedings, and with the fact that those representing it appear to have been taking instructions from Andreas (or at least, that seems to follow from the fact that Mr Hubbard had no clear information as to who the directors of MHGL actually are). The precise structure of Andreas' ownership is somewhat unclear (hence Mr Hubbard's reference to Andreas having "*ultimate*" control), but if so, that seems to be because the basic proposition in the Petition was admitted and so was not further explored.

iv) That being so, it seems to me the case is a very different one from *Bankside Hotels*. In this case, given Andreas' admitted status as "*sole owner and controller*" of MHGL, and given the fact that no distinction has been made between Andreas and MHGL in the conduct of the Petition, I think Mr Peters is right to say that one can treat it as having knowledge of Andreas' actions. And even if that is wrong, and if one takes the view that MHGL needed to be told what Andreas was up to, it is clear enough what the response would have been given Andreas' position of control.

v) In short, given MHGL's admitted position vis-à-vis Andreas, I am satisfied that this is a case in which it *is* sufficiently connected to Andreas' own unfairly prejudicial conduct that it is just, in the context of the statutory scheme as a whole, also to make an Order requiring MHGL to acquire Paul's shareholding.

(iii) Minority Discount

354. The final question is whether, in valuing Paul's shareholding, a discount should be applied to reflect its minority status. This is expressly one of the First Issues under the Order dated 29 January 2018.

355. Although not completely without controversy, the generally accepted approach in cases involving a quasi-partnership is that the minority holding of the successful Petitioner is valued without any discount: see *Re Bird Precision Bellows Ltd* [1984] 1 Ch 419, per Nourse J. at 429-43 (whose view was later endorsed by the Court of Appeal: [1986] Ch 658); *O'Neill v Phillips* [1999] 1 WLR 1092; and *CVC v Demarco Almeida* [2002] 2 BCLC 108, where Lord Millett at [41]-[42] explained that the rationale for the approach lies in the analogy with a true partnership, where in like circumstances the valuation of a departing partner's share is typically based on a notional sale of the business as a whole to an outside purchaser, rather than on a notional sale of the outgoing partner's share to the continuing partners who, being the only possible purchasers, would offer relatively little. The effect is valuation of a pro-rata share in the business as a whole.

356. In the present case, however, I have reached the view that there was no quasi-partnership. The position there is perhaps more controversial.

357. In *Strahan v Wilcock* [2006] 2 BCLC 555, Arden LJ (with whom Richards and Mummery LJJ agreed) thought it would be very unusual for circumstances to arise which justified a full, *pro rata* valuation, outside the case where a quasi-partnership was held to exist:

> *"[1]. … The general principle is well settled. Normally, in 'quasi-partnership' companies the appropriate basis of valuation is on a non-discounted basis. This is established by [Re Bird Precision Bellows Ltd and O'Neill v Phillips] …*
>
> *[17]. … Shares are generally ordered to be purchased on the basis of their valuation on a non-discounted basis where the party against whom the order is made has acted in breach of the obligation of good faith applicable to the parties' relationship by analogy with partnership law, that is to say where a 'quasi-partnership relationship' has been found to exist. It is difficult to conceive of circumstances in which a non-discounted basis of valuation would be appropriate where there was unfair prejudice… but such a relationship did not exist. However, on this appeal I need not express a final view on what those circumstances might be.*" (My emphasis).

358. Consistent with this, in *Irvine v Irvine (No. 2)* [2007] 1 BCLC 445, Blackburne J ordered the petitioners' shares to be valued subject to a minority discount even though they represented 49.96% of the issued shares in the company. He said (at [11]):

> "*A minority shareholding, even one where the extent of the minority is as slight as in this case, 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 circumstances, there is no reason to accord to it a quality which it lacks. CIHL is not a quasi-partnership. There are no exceptional circumstances. The shareholdings must*

> *therefore be valued for what they are: less than 50% of CIHL's issued share capital. The extent of the discount to be applied will be a matter for the valuers*." (My emphasis).

359. An example of an exceptional case, in which a *pro rata* valuation was justified, is *In Re Sunrise Radio Limited* [2010] 1 BCLC 367. There HH Judge Purle QC (sitting as a High Court Judge) held there was no inflexible rule that a discount had to be applied, and declined to apply one on the facts before him, even though the company was not a quasi-partnership. He relied on a number of factors in reaching that conclusion. These included the value of the company to the Respondents, who were looking to float it on the Stock Exchange (and who would therefore benefit from being able to acquire the Petitioner's shares at a discount in the meantime), and whose conduct appeared to have been influenced by a desire to buy out or worsen the position of the minority.

360. More controversially in *Re Blue Index Ltd* [2014] EWHC 2680 (Ch), Mr Robin Hollington QC (sitting as a Deputy High Court Judge) held at [51] that the general rule was in fact that there should be no discount applied in the valuation of any company, whether it was a quasi-partnership or not, for a minority shareholding, unless the Petitioner had acquired his shares at a discount to their *pro rata* value. Subsequently, in *Re Addbins Ltd* [2015] EWHC 3161 (Ch), at [88]-[91], Mr Edward Bartley Jones QC (sitting as a Deputy High Court Judge) followed the general approach taken in *Re Blue Index Ltd*.

361. In the present case, Mr Lightman QC was critical of the approach in *Re Blue Index*, which he said cut across the approach in a long line of earlier authorities, including *Strahan v Wilcock* and *Irvine v Irvine (No. 2)*. He also drew attention to the following passage from *Hollington on Shareholders' Rights* (8th Ed., 2017), at 8-153, which adopts a slightly modified formulation to the approach in *Re Blue Index Ltd:*

> *" ... where a petitioner has acquired his shares as an investment without any entitlement to participation in the running of the company, as a general rule it will be appropriate to apply a discount, especially if the petitioner originally acquired the shares at a price which was discounted to reflect their minority status."*

362. In *Re Lloyds Autobody Ringway Ltd* [2018] EWHC 2336 (Ch), HH Judge Hodge QC (sitting as a High Court Judge) thought the general rule was that there should be no discount (relying on *Re Sunrise Radio* and *Re Blue Index*), but went on to apply one anyway in the case before him, which included the fact that the Petitioner deserved his exclusion and had no prospect of securing a winding-up of the company on the just and equitable ground. HH Judge Eyre QC (*obiter*) approved of that general approach in *Waldron v Waldron* [2019] EWHC 115 (Ch), and in *Re AMT Coffee Ltd* [2019] EWHC 46 (Ch), HH Judge Paul Matthews (sitting as a High Court Judge) declined to express any concluded view on the difference of approach in the authorities, and preferred instead to rely on his undoubted discretion to reach the view that there should be no discount.

363. Drawing the threads together on the points made above, Mr Lightman QC said that where the company is not a quasi-partnership, the Petitioner's shares should be valued subject to a minority discount, save in exceptional circumstances. He said that such

exceptional circumstances may arise where all three of the following conditions apply: (i) the Petitioner purchased his shares at a non-discounted price, (ii) he would be entitled to an order for the just and equitable winding up of the company, and (iii) he pleads and proves that the conduct of the Respondent(s) which is found to be unfairly prejudicial was influenced by a desire to buy out or worsen the position of the minority.

364. For his part, although Mr Peters in his Written Closing referred to *Re Blue Index*, he did not argue vigorously against what he called the "*conventional conceptual justification*" for applying a minority discount, namely that a minority shareholding does not confer any control over the relevant company and so in purely commercial terms is disproportionately less valuable than a majority shareholding, which does confer such control. But he said that:

i) Even that conventional approach directs the court's attention to valuing the relevant shareholding "*for what it is*" (per Blackburne J. in *Irvine v. Irvine (No. 2*)) and here Paul's shareholding has a special characteristic (which I mention below) which requires it to be valued on a full *pro rata* basis; and

ii) The broad point illustrated by *Re Blue Index* is really whether applying a discount to reflect a commercial market value is fair. Almost certainly it will not be in a quasi-partnership case, because it is obviously unfair to apply a commercial market analysis to someone who is being forced against their will to exit what is in substance a partnership. But it might also be unfair in other cases, depending on the facts, and therefore in the present case the proper approach is for me to ask myself in the round whether it is fair to apply a discount which flows from a commercial market analysis to Paul's exit from DPL, given the history.

365. The particular characteristic borne by Paul's shares which Mr Peters relied on emerged from Andreas' evidence, when he said (in the course of his cross-examination):

"Q. Hang on. This is your witness statement and this was signed off at the end of January this year. You say you gave them shares in DPL to provide them financial security?

A. Yes

Q. Or sorry, with some security. I am asking you what that means. You must have some idea what it means. You must have some idea of what the security you had in mind was?

A. The security to the equivalent of 12% of the company's value.

Q. Right. So if, for example, hypothetically the company were to be sold to a third party. Say you decided you didn't want to do property investment anymore, and the company were to be sold to a third party, the money would obviously come into the shareholders. Your view is that Paul and Cheryl would be entitled to 12% of the proceeds of sale and that's what you mean by financial security?

A. That's right."

366. Thus, Mr Peters relied on Andreas' own evidence that his intention in making his gifts of shares to Paul and Cheryl was to provide them with financial security, and that really what he meant by that was security in the form of a full 12% *pro rata* share in the value of DPL's business and assets.

367. As to the proper approach to apply, it seems to me that the broad approach advocated by Mr Peters is the correct one. That is because the language of section 996 itself gives a broad discretion, albeit one that must be exercised judicially. I must try to arrive at a valuation method which is fair in light of the facts of the case, including the nature of the unfair prejudice identified. As a working hypothesis I am prepared to assume that, outside the quasi-partnership scenario, it will be a very unusual case which calls for *no* discount to be applied. I am also content to have regard to Mr Lightman's checklist of factors, but of course they do not exclude other considerations, and to be fair to Mr Lightman, I did not understand him to suggest that they did.

368. My conclusion is that Paul's shareholding should be valued subject to a minority discount. I say that for the following reasons:

i) In assessing what Paul's shareholding "*for what it is*", some care is required in placing reliance on what Andreas said. The follow-up question he was asked by way of clarification involved a scenario in which 100% of the company's shares were sold to a third party. That would ordinarily result in a 12% shareholder receiving 12% of the proceeds of sale, but it does not tell one anything about what was intended in the case of sale of a 12% shareholding in isolation.

ii) Even assuming, however, that Andreas' subjective intention at the time was to give Paul via his shareholding the rateable value of 12% of DPL's business, that is not the end of the inquiry (as Mr Peters suggested), but only the beginning. For one thing, assessing what a shareholding is, even when shares are the subject of a gift, is not entirely a matter of the subjective intention of the donor. For another, and perhaps more importantly, it seems to me that in this case one must also look at what happened subsequently.

iii) I have in mind particularly the break-up of the family businesses, including DPL, primarily as a consequence of the Matrimonial Proceedings. Andreas' gift, if there was a gift of the rateable value of 12% of DPL's business, must surely have been conditioned on the family and the family businesses staying together. Starting in 2013, they were dismantled as a result of the Matrimonial Proceedings, a result which (even if the final details of it were not foreseen) must have been appreciated at the time they were started. Paul and Cheryl participated actively in those proceedings; and as I have held, even if they were not the ones who formally initiated them, they must have played a material part in Iris' decision to do so.

iv) In other ways, Paul and Cheryl benefited from the dismantling process, in the sense that they were left (together with Iris) in control of DEL, and remained sole shareholders of DML. They were left as minority shareholders in DPL, now with Andreas' company, MHGL, owning all the remaining shares, after Iris' shares (owned by Warner) were transferred to it.

v) It seems to me that the nature of the relationship between Paul, Cheryl and Andreas had thus altered fundamentally by late 2014, when the substance of the arrangements for the division of property between Iris and Andreas was settled (even though the formalities took some further time to complete). In my view by then, if not before, Paul and Cheryl were in substance left as minority investors in a business controlled and managed by Andreas. That was an outcome they had not only initiated, but one which at the time they appeared content with, because they made no complaint about their own (by then historic) lack of involvement in the management of DPL until January 2016, when the point was first raised in correspondence by Stephenson Harwood. Before that, the complaints in Stephenson Harwood's correspondence in relation to unpaid dividends were put forward in a manner entirely consistent with Paul and Cheryl's new-found status as minority investors, whatever the position may have been before that.

vi) In light of those factors, I come back to Mr Peter's question: is it appropriate, in light of the history, and even bearing in mind his characterisation of Andreas' initial gift, now to subject the sale of Paul's minority interest to a commercial market discount? In my view it is fair, because to my mind on any view, since at the latest the end of 2014, Paul has been no more than a minority investor in a business managed by Andreas. Valuing his shareholding "*for what it is*" involves taking that into account, and in such circumstances in my judgment, there is no unfairness in applying a minority discount.

vii) I am reinforced in my overall view by two further factors. The first is that this is not, in my view, the sort of case in which an order for the just and equitable winding-up of DPL would be justified. Notwithstanding the conclusions I have reached as to Andreas' conduct, the fact remains that overall DPL is a stable and successful business. I do not think that it would be just or equitable for it to be wound up. The second factor is the proportionality of the remedy I suggest. In my view, a buy-out Order involving a minority discount is a proportionate order overall, bearing in mind my findings as to Paul's conduct, both as regards the management of cash income within DML and as regards the prosecution of his Petition.

I. Overall Conclusion and Disposal

369. In conclusion, and in light of the findings made above, I therefore answer the First Issues as follows:

i) The Petitioner (Paul) has been unfairly prejudiced in his capacity as a minority shareholder in the Third Respondent (DPL) by the actions of the First Respondent (Andreas).

ii) An Order should be made requiring the First Respondent (Andreas) and/or the Second Respondent (MHGL) to purchase the Petitioner's (i.e., Paul's) shares, and that Order should involve a discount for those shares representing a minority holding (but not the extent of that discount).

370. It remains only for me to thank the parties' representatives for their assistance in managing the trial of this complex matter so efficiently. I am particularly indebted to counsel on both sides for the quality of their submissions, both orally and in writing.