Neutral Citation Number: [2019] EWHC 2304 (Ch)

Claim No 3168 of 2017

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

In the Matter of Audas Group Limited
And in the Matter of the Companies Act 2006

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: 29th August 2019

Before :

His Honour Judge Halliwell sitting as a Judge of the High Court

- -

Between :

Philip Brown — **Petitioner**
- and -
(1) Stephen Bray
(2) Philip Sharp
(3) Audas Group Limited

Respondents

- -
- -

Mark Harper QC and Eleanor Temple (instructed by **Gunnercooke LLP**) for the **Petitioner**
Edward Davies QC (instructed by **Ison Harrison**) for the **First and Second Respondents**

Hearing dates: 29th, 30th April, 1st , 2nd , 3rd , 7th, 8th, 9th, 22nd May 2019

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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.

HH Judge Halliwell:

(1) Introduction

1. The Petitioner, Mr Philip Brown ("Mr Brown"), is a minority shareholder of the Third Respondent, Audas Group Limited ("AGL"). He maintains that the affairs of AGL have been conducted by the First Respondent, Mr Stephen Bray ("Mr Bray"), and the Second Respondent, Mr Philip Sharp ("Mr Sharp") in a manner unfairly prejudicial to his interests. Relying on the provisions of *Sections 994* and *996* of the *Companies Act 2006*, Mr Brown thus seeks an order requiring them to purchase his shares together with certain other relief.

2. For ease of reference only, when referring to Messrs Brown, Bray and Sharp collectively, I shall refer to them as "the Parties".

3. AGL was incorporated on 19th December 2012 as a holding company for two other companies, Audas Project Management Limited ("APML") and Sigma (Leeds) Limited ("Sigma"). APML carries out turn-key fit out services and project management, historically sub-contracting some of its work to Sigma.

4. AGL has an issued share capital of £1,002 divided into 999 £1 ordinary shares - denoted as "A" ordinary shares - of which the Parties hold 333 shares each, and three "C", "D" and "E" ordinary shares of £1 separately held by their wives, Mrs Samantha Bray, Mrs Kirsten Brown and Mrs Victoria Sharp.

5. Mr Brown maintains that AGL is a "quasi-partnership" and that, contrary to his "legitimate expectations", he has been dismissed as an employee and removed as a director without any offer or provision for the fair value of his shares. He also maintains that, by paying staff bonuses, employing staff, entering into a compromise agreement and concluding transactions to a value of over £10,000 without his consent, Messrs Bray and Sharp have committed breaches of the terms of a written shareholders' agreement ("the Shareholders Agreement") in respect of AGL.

6. Messrs Bray and Sharp dispute the pertinence and accuracy of the propositions that AGL is a "quasi partnership" and Mr Brown is entitled to "legitimate expectations" in relation to his office and status as a director and employee. They contend that the putative breaches of contract were part of a settled

practice and, by failing to provide his consent to the transactions, Mr Brown was himself acting unlawfully. In any event, they maintain that Mr Brown has himself committed breaches of the Shareholders Agreement and, following a board resolution requiring him to serve a transfer notice in respect of his shares for £1 each, he is obliged to do so by virtue of AGL's Articles of Association. There is thus a counterclaim for specific performance.

7. The trial before me was and is for the determination of all issues of liability only under District Judge Richmond's directions dated 2nd October 2018. Mr Mark Harper QC and Ms Eleanor Temple represented Mr Brown. Mr Edward Davies QC represented Messrs Bray and Sharp. As a party to the proceedings, AGL has disclosed relevant documentation but it has not advanced a positive case and it was not represented at the trial before me.

(2) Factual sequence

8. Mr Brown is a quantity surveyor. Between 2000 and April 2002, he worked, as such, for Styles & Wood Limited ("Styles & Wood"). Mr Bray also worked for Styles & Wood, as a project manager. They worked together on a number of projects. In April 2003, Mr Brown joined Morris & Spottiswood Limited ("Morris & Spottiswood") as a senior quantity surveyor following contact from Mr Bray who was, by then, employed by them as operations director. Mr Brown was promoted to commercial manager and, in 2005, Mr Sharp joined as an operations manager.

9. During 2006, the Parties decided to set up their own business together. On 16th January 2007, APML was formed. They were each appointed directors, allotted equal shares in the new company and left Morris & Spottiswood to join APML as full time employees. In April 2007, APML commenced in business and has remained in business ever since.

10. On 25th March 2008, the Board approved APML's accounts for the year ending on 31st December 2007. On a turnover of £1,134,809, the company's net profit was £206,357. Directors' remuneration (including pension contributions) was £65,897 and dividends were drawn in the sum of £84,000.

11. APML's accountants were Cassons LLP. In February 2010, Cassons advised the Parties to enter into a shareholders' agreement. On their behalf, Mr Brown

instructed Ms Victoria Bromiley ("Ms Bromiley"), of Napthens solicitors, to attend to the formalities and, in November 2010, Ms Bromiley emailed Napthens' shareholders' agreement checklist to Mr Brown. Mr Brown promptly forwarded the checklist to Messrs Bray and Sharp. Early in January 2011, they attended a meeting with Ms Bromiley at which she took instructions and advised them that, in addition to entering into the shareholders' agreement, they would need to amend APML's articles of association. Ms Bromiley prepared a draft shareholders' agreement for review which was revised following further instructions. New articles of association were also prepared. Having resolved to adopt new articles, the Parties then executed a written shareholders' agreement.

12. During 2012, negotiations ensued for the acquisition of Sigma, an important sub-contractor. In December 2012, AGL was incorporated as a vehicle for the acquisition. It was envisaged that Messrs Brown, Bray and Sharp would acquire the share capital of AGL with their wives, Mrs Samantha Bray, Mrs Kirsten Brown and Mrs Sharp. This was achieved under arrangements concluded on 4th April 2013 with AGL acquiring the share capital of APML. At the same time, new Articles were adopted and the parties entered into a shareholders' agreement in respect of AGL. For material purposes, these were essentially upon the same terms as APML's articles of association and shareholder's agreement. By a written agreement dated 20th December 2013, AGL duly acquired 60% of the share capital of Sigma.

13. Mr Brown was a director of AGL from the outset. On 21st May 2013, Messrs Bray and Sharp were also appointed directors in advance of the acquisition of the share capital of Sigma. However, they each remained directors and employees of APML; indeed, APML, remained their sole employer.

14. In March 2014 or thereabouts, Mr Brown contacted a government funded business support organisation, "Boost Business Lancashire", for guidance on the future development of the business. He was advised by Mr Hamish Hamilton. Mr Hamilton introduced him to an organisation known as "Vistage" which arranges group meetings and mentoring for members in connection with the management and promotion of businesses. Mr Brown attended a Vistage Open Day and, on 19th May 2014, he enrolled as a member on behalf of APML.

However, he was unsuccessful in eliciting any significant interest or enthusiasm on the part of Messrs Bray and Sharp. Mr Bray, in particular, was sceptical of the value of such organisations.

15. At this stage, no one had formally been appointed finance director for any company in the Group. Mr Brown had dealt with at least some aspects of the financial management of the companies but his background was as a quantity surveyor. A decision was thus taken to appoint a finance director and, in or about November 2014, Mr John Marland was formally appointed to the role.

16. In April 2015, Mr Bray advised Messrs Brown and Sharp that he was minded to retire to Australia when he reached 60 years of age, some five years later. He canvassed the possibility of setting up an associated business in Australia and working there for at least two years prior to his retirement. However, having reflected on the matter further, Mr Bray emailed them on 20th May 2015 to say "pipe dreams are shattered" and, whilst he would review his retirement plans in 5 years, he envisaged he would now aim to retire at 65 years of age.

17. At this stage, there was nothing in the Parties' exchanges of emails to suggest that their relationship had deteriorated. However, they no longer shared the same outlook or priorities. This was reflected in Mr Brown's continued interest in Vistage. Once his group became active in September 2015, Mr Brown regularly attended group discussions and personally arranged for APML to pay Vistage's fees by direct debit. Mr Brown came to value, in particular, the advice he was being given by Mr Hamilton.

18. In November 2015, arrangements were made for the Parties to attend a meeting, with Mr Marland, to discuss their business strategy. By then, Mr Sharp's exasperation in relation to issues of management and direction was reflected in an email dated 3rd November 2015 in which he stressed the importance of ensuring "that we get some productivity out of the meeting and not just a talking shop of 'ifs', but's, maybe's (sic) or this and that" and focus on their "business" and "individual strategy". In the abstract, he also raised the possibility that one of the Parties might leave in which case he indicated they would need to discuss "how much" it would "cost the other two…for example I may consider it if the price was right but what is the price?". However, there was no indication in this

email or, indeed, in any email - or at least any disclosed email - leading to the meeting, that one or more of the parties contemplated action to terminate their business relationship.

19. Ahead of the meeting, Mr Marland advised the parties, by email, that if he was looking to sell shares, he would value the business at £3.1m "based on a multiple of 3* earnings + the current balance sheet".

20. On 24th November 2015, the meeting duly took place at the Village Hotel, Leeds. Each of the Parties attended the meeting together with Mr Marland who prepared detailed minutes. After observing that he "wanted to take the business forward", Mr Brown was taken aback when Mr Bray stated that "the working relationship of the three partners had come to an end and was now completely untenable going forward", Mr Brown's "head was no longer in the business" and "the working relationship has completely broken down personally and professionally"; "one or more of the directors had to go and it must be done as sensibly as possible in the best interests of the business, otherwise the business would have to fold". On this basis, "the only way forward" was for Messrs Bray and Sharp to buy out Mr Brown or vice versa. There was then some discussion about the amount Mr Brown would require for his shares. After initially indicating they thought the value of the business as a whole was £2 million, not £3 million, Messrs Bray and Sharp said they had no value in mind and the same "would need to be determined by a professional valuer". Conversely, Mr Brown stated that "in his mind a fair value for his share of the business would be £2.5m".

21. On the following day, 25th November 2015, Mr Marland met two partners from PM&M, chartered accountants, Blackburn. It is recorded in the minutes of the meeting, that they advised Mr Marland that his multiple of 3 was not unreasonable but that "if there is a 'typical' multiple…. they might aim in the region of 4-4.5. But this was heavily caveated by them and they reiterated that it depends on a number of factors".

22. Arrangements were made for PM&M to advise further at a meeting to be attended by the parties themselves. The meeting took place on 4th December

2015. The parties were advised that, applying a multiple of 7, PM&M's "'indicative' valuation on both net assets and earnings was £4m".

23. Following the meeting, Messrs Bray and Sharp instructed PM&M to make a formal offer on their behalf. By letter dated 15th December 2015, PM&M offered to purchase the shares of Mr Brown and his wife, Kirsten, for £1,160,000 payable in three instalments over a period of 24 months. The net amount payable was £875,000 since £285,000 was to be applied to meet Mr Brown's "directors overdrawn loan account".

24. Mr and Mrs Brown instructed Napthens, solicitors, to act on their behalf. By letter dated 8th January 2016, Napthens submitted a "counterproposal" in which Mr and Mrs Brown offered to sell their shares for £1,600,000 on the basis that the directors loan account was written off separately. In response, by an email message dated 5th February 2016, Mr Bray rejected the counterproposal, on behalf of Mr Sharp and himself, and advised Mr Brown that they were no longer willing and able to buy his shares.

25. Following the breakdown in their negotiations, the parties continued to work together although their relationship was strained. At a meeting on 18th October 2016, Mr Brown offered to sell his shares for the reduced sum of £1.35 million. By email dated 11th November 2016, Mr Sharp advised him that this offer was not acceptable stating that "my proposal has always been a third of the balance sheet".

26. By this time, Mr Marland - the finance director - had advised Mr Bray that, having paid a Vistage joining fee of £850, Mr Brown had committed APML to quarterly payments of £2625+VAT per quarter. By an email dated 7th November 2016, Mr Bray advised Mr Brown that no such payments would be authorised in the future unless signed off by a minimum of two directors. The last payment on behalf of APML was in February 2017.

27. There were sporadic negotiations between the parties during the first half of 2017. Messrs Bray and Sharp instructed Ison Harrison to act as solicitors on their behalf. By letter dated 7th July 2017, Ison Harrison reminded Mr Brown that Mr Sharp had recently offered to "purchase… his shares [for] £1.175m plus an additional £75,000 advance dividend (which your client has already

received), a total of £1.25m" and indicated that this offer remained open for acceptance subject to contract". If not acceptable, they threatened to place the company in members voluntary liquidation. Mr Brown declined to accept the offer. At APML's monthly finance meeting on 7th August 2017, Mr Brown indicated he was willing to sell his shares for £1.6 million. However, Messrs Sharp and Bray remained unwilling to proceed on this basis. Mr Sharp advised Mr Brown that they were not prepared to increase their offer of £1.25 million and repeated that they were prepared to take action to wind up the business. At one point in the meeting, Mr Brown suggested that the business, and thus the value of his shareholding, be independently valued but this was rejected by Mr Sharp. When the possibility was canvassed that Mr Brown could cease as an employee but continue to draw dividends, this was rejected by Messrs Bray and Sharp on the basis that they would not countenance Mr Brown drawing money without working in the business.

28. Having finished work on Friday 24th August, Mr Brown was due to take annual leave returning on Monday 4th September 2017. However, Mr Bray emailed him an undated letter on APML's headed notepaper. By the letter, Mr Brown was required to attend a "disciplinary hearing" at Stanley House Hotel, Mellor on 4th September at 11am to "consider the issue of trust and confidence" in his "ability to fulfil [his] senior role within the company in light of [his] apparent continued non-participation in the business and…apparent failure…to address the concerns of [his] fellow directors". The letter was written on APML's headed notepaper and "the issue" was expressed to arise from matters such as Mr Brown's lack of enthusiasm and commitment towards the business, his failure to advance a strategy, his engagement "on a leadership and management course at Vistage" and his absence from the office on a monthly basis to attend such a course.

29. The disciplinary hearing took place, as scheduled, on 4th September 2017, commencing shortly before 11am and finishing at approximately 11.30 am. It was attended by Mr Bray, Mr Marland, Mr Brown and, his father in law, Mr Jim Lee who attended at Mr Brown's request. Mr Brown read out a pre-prepared statement in which he set out to address the issues in Mr Bray's undated letter. Mr Bray chose not to ask him any questions or discuss the

concerns that he had outlined in the undated letter. However, he advised Mr Brown that he would be advised later of APML's decision.

30. Later that day, Mr Bray emailed another letter to Mr Brown on APML's headed notepaper ("the 4th September 2017 Letter"). This time, Mr Brown was advised of his dismissal, albeit on essentially the grounds Mr Bray had identified in his undated letter. Mr Brown was advised that the dismissal would take effect immediately but he had a right of appeal exercisable in writing to Mr Sharp.

31. In the 4th September 2017 Letter, Mr Bray confirmed that Mr Brown remained in office as director of APML and also remained director and shareholder of AGL. However, the following day, Mr Bray sent a further letter to Mr Brown clarifying that he must not communicate further with "staff, clients, suppliers or other partners of" APML or AGL and that if he required further information about either company, he must submit his inquiries in writing to Mr Bray himself or Mr Sharp "along with [his] reasons for requesting the information". This was on the basis only that "such requests [would] be given due consideration".

32. On the same day, 5th September 2017, Messrs Bray and Sharp advised APML's bank, Handelsbanken AB ("the Bank"), that they should have no further communication with Mr Brown and he no longer had any authority to give instructions to the Bank. However this was done without first obtaining a resolution of the board of directors.

33. By letter dated 7th September 2017, Mr Brown appealed the decision to dismiss him. The letter was addressed to Mr Sharp. On 16th October 2017, a meeting was convened to hear the appeal. It was attended by Messrs Sharp, Bray, Marland, Brown and Lee. Messrs Brown and Bray read out pre-prepared statements or notes. There was a short discussion at the end of the meeting in which Mr Bray stated that, having advised Mr Brown at the disciplinary hearing on 4th September 2017 that the decision to dismiss him would be taken jointly with Mr Sharp, he had ultimately made the decision alone. On this basis, Mr Brown was advised that the appeal would be determined by Mr Sharp.

34. By letter dated 20th October 2017, Mr Sharp advised Mr Brown that he had decided to "confirm and uphold" Mr Bray's original decision. He re-stated that

this was "due to a lack of trust and confidence in you in your position as a senior employee of the company and/or some other substantial reason".

35. The next board meeting was scheduled to take place on 6th November 2017. However, on 2nd November, Mr Sharp advised Mr Brown, by email, that it would have to be re-scheduled owing to "unforeseen circumstances". Eventually arrangements were made for it to be held on 27th November 2017. By this time, Mr Brown was aware he no longer had access to information from the Bank in relation to APML. In a conversation, on 22nd November 2017, with an employee of the Bank, Mr Brown obtained confirmation that he was being blocked on the instructions of APML.

36. On the same day, 22nd November 2017, Mr Bray emailed a series of documents to Mr Brown in preparation for the re-scheduled board meeting. This included management accounts and other financial information for the third quarter of 2017, ie the three month period ending on 30th September 2017. When assessed and compared with the previous six month period, they showed a reduction in the gross profit margin from £1,650,600 to £1,060,732 on the accumulated 2017 turnover. It emerged later that this was largely attributable to a change in the provision for accruals prior to discharge and payment. The net margin had been reduced from £1,535,445 to £571,328, in part reflecting an additional £380,000, or thereabouts, of "overheads". The net assets shown on the balance sheet were thus reduced from £2,291,529 to £1,186,187. The overall significance of this is disputed and it is a matter to which I shall return later in my judgment.

37. By an email timed at 11:22 on 24th November 2017 ("the 24th November 2017 Email"), Mr Brown emailed Messrs Sharp, Bray and Mr Scott Woodward, of the Bank, to advise them of his concerns about the management and financial position of AGL, APML and Sigma. The gist of the letter was that, whilst his access to the business and banking affairs of APML was now blocked, he had recently been provided with limited financial information showing a "significant negative swing in net profit…from £1.5m to £0.5m…in part only due to an overhead increase of £380k to £508k when a typical full year overhead would be approx. £250k". In support of this allegation, he attached the management accounts and stated that he was alarmed not to have been provided with further information. "To protect the interests of the company…as well as

those of the Bank", he thus requested "immediate appropriate action…to mitigate any losses to the business" together with "full access to the business financial information" and the reinstatement of his access to the Bank.

38. Following the 24th November 2017 Email, the Bank suspended the operation of the companies' bank accounts. It did so until 28th November 2017. By an un-dated letter in January 2018, the Bank subsequently explained that the accounts were suspended because "it did not wish to be placed at the centre of the dispute" between Mr Brown and the other directors and it advised AGL that the accounts were being "temporarily suspended in order for the Bank to be able to monitor the accounts pending resolution of the dispute". However, this was on the basis that "all business critical payments would be made".

39. On 27th November 2017, the board meeting took place as scheduled. Mr Brown complained that he had not been provided with sufficient financial information about the companies and asked for an explanation about the deterioration in the management accounts. Messrs Bray and Sharp took issue with him. There was a forthright exchange of views in relation to the suspension of the bank accounts following the 24th November 2017 Email. They resolved to remove Mr Brown from the bank mandate and terminate his authority in respect of the company bank accounts. Once copies of their resolutions were delivered to the Bank, the Bank unblocked the bank accounts.

40. On 15th December 2017, Mr Brown presented his petition for relief under Section 994 of the Companies Act 2006.

41. At an AGL board meeting, on 14th March 2018, the directors resolved to require Mr Brown to serve a Transfer Notice in respect of his shares under the provisions of Article 17.1(c) of AGL's Articles of Association. They also resolved to call a General Meeting on 13th April 2018 to consider a resolution providing for Mr Brown to be removed from office. When the meeting was held, the shareholders passed a resolution removing Mr Brown from office and appointing Mr Marland.

42. Mr Brown has not served a Transfer Notice. On the footing that his unfair prejudice petition succeeds, he maintains that, in the exercise of its wide statutory discretion, the Court should make an order requiring the Respondents

to purchase his shares at a fair price rather than at the price dictated by the Articles pursuant to the Transfer Notice. On this basis, he maintains that I should decline to grant the Respondents a decree of specific performance.

(3) Witnesses

43. Ten witnesses were called to give evidence. In evaluating their evidence, I have borne in mind the observations of Leggatt J (as he was) in *Gestmin SGPS SA v Credit Suisse (UK) Limited, Credit Suisse Securities (Europe) Limited [2013] EWHC 3560 (Comm).* At *Para 22*, Leggatt J observed that, in the context of commercial cases, the value of "the oral testimony of witnesses "lies largely…in the opportunity which cross examination affords to subject the documentary evidence to critical scrutiny and to gauge the personality, motivations and working practices of a witness rather than…" their recollection of "particular conversations and events".

44. In the present case, a substantial amount of contemporaneous documentation was incorporated in the Trial Bundle and thus made available for cross examination, including written agreements, notes, minutes of meetings, emails and other correspondence. However, on some aspects of the case, contemporaneous documentary evidence was unavailable either because it does not exist or is undisclosed. On reflection, I have concluded it is un-necessary for me to reach a conclusion whether any such documents have been deliberately withheld. However, it includes the communication that is likely to have taken place between Messrs Bray and Sharp in advance of the 24th November 2015 Meeting and the "disciplinary hearing" on 4th September 2017. The discussions that took place with Forbes, solicitors, in relation to the dismissal of Mr Brown were privileged. In addition to testing the evidence of witnesses on the contemporaneous documentation, it has thus been necessary for me to assess their evidence in the light of the evidence as a whole and to ask whether it is plausible in the overall context of the case.

45. Mr Brown gave evidence himself. He was cross examined at length over a period of four days. He was a careful and, at times, defensive witness. Generally, his oral testimony was internally consistent and consistent with the contemporaneous documentation. I am satisfied that I can generally rely on his

evidence where plausible and confined to specific issues of fact but I have exercised a significant measure of caution in doing so.

46. At times, Mr Brown had an unhelpful propensity to speculate without factual foundation, on matters ranging beyond the scope of the question addressed to him. Where he did so, his comments were generally of no evidential value. For example, when cross examined about the "negative swing" in profits shown in APML's management accounts for the period ending on 30th September 2017, Mr Brown pointed out that, whilst "…the figures were up to the end of September" and could have reflected "a reappraisal of accruals at the end of September…on the 1st of October, there could have been that million pounds stripped out". This point was made on the basis that he did not have access to any accounts or accounting records (including bank accounts) on or after 1st October and thus had no information on which to assess the company's financial position from that time. Although he had no particular reason to believe such money might have been misappropriated from that point in time, he was later drawn into further speculation that, since Messrs Bray and Sharp had previously suggested liquidation, "they could quite easily have doctored the figures and taken the money out after the end of September as a way of suppressing the profits and having some money in the bank". At this stage, Mr Brown's best case was that he was legitimately entitled to serious concerns about the company's financial position owing to the negative swing in the accounts and the fact that financial information was being withheld from him.

47. Mr Davies was sharply critical of Mr Brown's evidence in relation to APML's commitment to pay Vistage's fees. This is on the basis that, when cross examined on the issue of whether he obtained the consent of Messrs Bray and Sharp to APML's commitment to the payment of Vistage's monthly fees, Mr Brown suggested he had done so but accepted he could not provide detail as to when such consent was obtained. Mr Davies submits that Mr Brown's oral testimony on this issue was inconsistent with his observation, at the disciplinary meeting on 4th September 2017, in which he chose to say that he hadn't "tried to hide or deny the monthly fees" rather than that he had obtained the consent of Messrs Bray and Sharp to such fees. A measure of criticism of Mr Brown is justified. However, his evidence on this issue is more nuanced than Mr Davies

allows. Mr Brown maintained that, at the outset, he advised Messrs Bray and Sharp, in general terms, about Boost and Vistage and the nature of the support that they could provide. He also advised them that he had enrolled with Vistage. At this stage, he believed he was entitled to enrol on educative courses or programmes for APML's general benefit and, indeed, to incur commitments for the payment of modest professional fees. However, Mr Brown accepted, in cross examination, that he did not "discuss…the specifics" with Messrs Bray and Sharp. By this, I took him to mean the scope of APML's contractual commitment to Vistage and the amount of their fees. However, if there is any doubt about this, I am satisfied he did not advise them about the scale of the financial commitment to which he signed up APML. I shall return to this later.

48. On Mr Brown's behalf, Richard Ashley, "Hamish" Hamilton and Graham Smith were called to give evidence.

47.1 Messrs Ashley and Smith were employees of APML. From June 2014, Mr Ashley worked under the supervision of Mr Brown as a senior quantity surveyor. In March 2018, he left with a view to furthering his career. Mr Smith worked for APML, again as a quantity surveyor under the supervision of Mr Brown, from January 2009 until October 2017. A significant part of their evidence was directed to Mr Brown's level of commitment and his working relationship with colleagues. In cross examination, Mr Ashley confirmed that he could perceive no reduction in Mr Brown's level of engagement nor did he observe any change in his attitude from 2015 (D4/6/8-12). Mr Smith was not challenged on his perception, in his witness statement, that he observed a "minor change in [Mr Brown's] attitude during the last six months or so before he was dismissed" and that "he seemed to have a bit less involvement in the day to day administration of the schemes". However, their views on these matters were based simply on perceptions from their own personal experiences. I am satisfied their evidence was given to the best of their recollection and accurately reflects their views.

47.2 Mr Hamilton is a chartered accountant. He has carried out voluntary work for Boost Business Lancashire and became a Vistage chairman in 2014. He gave evidence about the Vistage organisation and the advice he gave Mr Brown as Mr Brown's relationship with Messrs Sharp and Bray deteriorated.

His evidence was careful and reflective. I am satisfied that he was an honest and reliable witness.

49. The Respondents, Messrs Sharp and Bray, each gave evidence. On their behalf, John Marland, Gary Lawrence, Martin Howarth and Michael Rhodes were also called to give evidence.

50. Mr Sharp was cross examined over a period of some three days. Significant parts of his evidence were plausible and consistent with the contemporaneous evidence. On some issues, his evidence was also consistent with the evidence of Mr Brown and inconsistent with the evidence of Mr Bray. For example, there was a conflict of evidence between Mr Sharp and Mr Bray in relation to the meeting of 24th November 2015 (Paragraph 20 above) in which Mr Bray announced that the relationship between the parties had come to an end. Mr Brown said he was taken aback by this and Mr Sharp himself accepted that the announcement could accurately be described as a "bombshell". By contrast, when it was put to Mr Bray, in cross examination, that it was "a complete surprise to Mr Brown", Mr Bray doubted that this was the case on the basis that Mr Bray himself had "already announced" he "wanted to go to Australia". This evidence was unconvincing, not least because the 24th November 2015 Meeting took place some six months after Mr Bray advised Messrs Sharp and Brown that the "pipe dreams" in relation to Australia were "shattered". On issues such as this, I unhesitatingly prefer the evidence of Messrs Brown and Sharp to the evidence of Mr Bray.

51. On other issues, Mr Sharp's evidence was less plausible. For example, when asked about the decision to require Mr Brown to attend the "disciplinary hearing" on 4th September 2017, Mr Sharp suggested that, at the time, he contemplated the outcome of the process might be favourable to Mr Brown in the sense that he would remain in the employment of APML once the process was complete. However, until Mr Bray contacted their solicitors after the hearing, it was envisaged that Messrs Bray and Sharp would together make the immediate decision and it was obvious from his answers that, at no stage did Mr Sharp consider the range of options that might be available to APML, such as a written warning or other disciplinary action falling short of dismissal. At the "disciplinary hearing" itself, Mr Bray did not direct any inquiries to Mr Brown

and he was not asked any questions. Mr Sharp did not attend on this occasion but he did not suggest it was ever envisaged Mr Brown would be asked questions at the meeting. The decision was taken and APML's solicitors sent their dismissal letter to Mr Brown within hours of the meeting. When the matter was formally referred to Mr Sharp on appeal, he had no difficulty confirming Mr Bray's decision. Contrary to the evidence of Mr Sharp, it must have been obvious to him from the outset that subject to legal advice, once they had determined to dismiss him, Mr Brown had no realistic prospect of avoiding dismissal.

52. In a disturbing passage of his cross examination, Mr Sharp confirmed that Mr Bray has surreptitiously obtained access to the Vistage website through the unauthorised use of Mr Brown's portal and, during the currency of these proceedings, obtained confidential information about Mr Brown's affairs which he has sought to deploy in support of the Respondents' case. This includes information pertaining to the present dispute and the medical treatment of Mr Brown's wife. Documents incorporating such information have been included, apparently without objection, in the Trial Bundle. Until trial, the Respondents sought to maintain the pretence that this information was sent anonymously, by special delivery, to Mr Sharp in November 2018. The envelope was opened by Mr Marland who forwarded, by email, copies of the enclosed documents to Messrs Sharp and Bray. The documents were then listed in AGL's Disclosure List dated 4th January 2019 as "email from JM to PS and SB-20/11/2018@10.36- attaching Vistage monthly summaries, received anonymously by special delivery" and supported by a certificate signed by Mr Marland. Contrary to the impression that was created on AGL's disclosure list, Messrs Bray and Sharp were, of course, well aware that Mr Bray was the source. Mr Sharp himself confirmed, in cross examination, that he first became aware Mr Bray had obtained access to the Vistage website during 2018, well before AGL's Disclosure List. For his part, Mr Marland accepted, in cross examination, that he was aware Mr Bray had himself obtained the documents prior to trial; he was unable to state precisely when save that it was "recently".

53. Mr Bray was cross examined at much shorter length than Mr Sharp. When giving his evidence, he gave the impression that he is accustomed to getting his

own way and is capable of being abrasive and impatient. He was an unimpressive witness who repeatedly gave evidence which was inherently implausible. This includes his evidence about the 24th November 2015 Meeting and the circumstances leading up to it. Before suggesting that his "bombshell" announcement would not have come as a complete surprise to Mr Brown, Mr Bray stated that he "probably" did not form his own view that the working relationship between the parties had broken down until the morning of the meeting itself. Quite apart from the obvious inconsistencies in his own account, the proposition that he only formed the view that the working relationship had broken down on the morning of the meeting was implausible and inconsistent with the evidence of Mr Sharp who maintained that Mr Bray had already communicated his view to him "probably in the few weeks leading up to…the meeting". It is inherently unlikely that Mr Bray did not discuss his strategy with Mr Sharp prior to the meeting. I have reached the view that it is unsafe for me to rely on Mr Bray's evidence save where independently corroborated by other evidence.

54. Mr Marland's background is as a chartered accountant. He was appointed finance director in November 2014 or thereabouts and was on the board of directors from April 2018 to February 2019 since when he has remained in the employment of APML.

55. Where he assumed the task of preparing the minutes of significant meetings, for example the meetings of 24th and 25th November 2015, it was his *modus operandi* to take a hand-written note at the time and destroy it once he had typed it up. No doubt, when he typed up the note, he will have done a certain amount of tidying up. They did not amount to a comprehensive record of what was said but I am satisfied that they are often the best available evidence of what was said at the meetings. It is notable that, in the case at least of the meeting of 24th November 2015, he circulated the minutes on 26th November 2015 and, in doing so, stated that he had tried to keep it as neutral as possible and sought to give the Parties an opportunity to make corrections.

56. More generally, in his witness statement and in cross examination, Mr Marland sought to maintain that, from the outset, he has sought to take a neutral stance. It is certainly conceivable that, at first, he sought to avoid taking sides in the

dispute. However, Mr Bray and Mr Sharp together had majority control. They were and are strong personalities who have achieved significant business success and they plainly considered the business should be managed in accordance with their own expectations. It is obvious that, over time, Mr Marland sided with them in relation to their dispute with Mr Brown culminating in their arrangements for his dismissal and the events that took place shortly afterwards. Mr Marland participated fully in these arrangements. Following Mr Brown's dismissal, Mr Marland then took action which was to the obvious disadvantage of Mr Brown without taking any steps to warn or advise him what he was doing notwithstanding that Mr Brown remained in office as director. This included terminating Mr Brown's family health insurance and implementing changes to APML's management accounts which had the effect of halving the net assets shown on APML's balance sheet in the period leading up to September 2017. At least in part, these changes were made in order to correct steps taken by Mr Brown himself to enlarge the net assets shown on the balance sheet through his treatment of accruals. However, Mr Marland implemented the changes without consulting or, indeed, notifying Mr Brown.

57. At trial, Mr Marland was called to give evidence on behalf of Messrs Sharp and Bray, not on behalf of AGL. However, in the period leading up to the trial, he chose not to correct the impression he had given in AGL's Disclosure List that the Vistage Reports had been sent from an anonymous source. This was notwithstanding that, by the time of the trial, he was well aware that they had been obtained by Mr Bray. Moreover, the evidence in his witness statement was plainly intended to support the case of Messrs Sharp and Bray.

58. In cross examination, Mr Harper demonstrated that, where it was possible to test Mr Marland's oral testimony in the light of the contemporaneous documentation, his testimony could not be consistently relied upon as an accurate account or fair assessment. For example, in Paragraph 34 of his witness statement, Mr Marland stated that the company lost a profitable contract with Vodafone owing to a failure, on the part of the company, in late 2016 or early 2017, to focus much time on a tender for renewal of APML's contract with Vodafone. This was allegedly attributable to a failure on the part of Mr Brown and his team to understand its "profitability" and a failure on Mr Brown's part

personally to provide adequate leadership and guidance leaving his team to its own devices. However, it can be seen from contemporaneous email messages that Mr Brown was pro-active, at the time, in seeking to persuade Messrs Sharp, Bray and Marland to ensure that the contract was renewed. In an email dated 17th January 2017, Mr Brown stated that "based on last year's margins they are not a client we should be looking to stop working with if at all possible. Would/should we consider Vodafone over some of our other current/potential clients". Later, in this email, Mr Brown observed that "I appreciate we are too busy to undertake works in the next few months, but is there a way we can still be considered for some of their 2017 roll out if we don't undertake a trial store?"

59. Nowhere was the partisan nature of Mr Marland's evidence better illustrated than, at the end of his cross examination, where he insisted that, at the time of the "disciplinary hearing" on 4th September 2017, he had no expectations at all about the outcome.

60. Unfortunately, I have reached the conclusion that Mr Marland cannot be regarded as an independent witness and I have exercised a significant measure of caution in evaluating his evidence.

61. Mr Lawrence was an excitable witness who was prone to make wild allegations without specific evidence to support them. For example, in his witness statement, Mr Lawrence commented that "it was blindingly obvious…that [Mr Brown] didn't care about the business and…he was happy to take it down" at the management meeting on 7th August 2017. When cross examined about the basis for this - in particular his comment that Mr Brown was "happy to take it down" - Mr Lawrence stated that "he [Mr Brown] said as much". However, there was or is no written contemporaneous evidence to this effect nor was there any suggestion from any of the other witnesses that Mr Brown had made such a comment. Had he done so, it would have been surprising for it to be omitted from the issues identified in the un-dated letter requiring Mr Brown to attend the "disciplinary meeting" on 4th September 2017. I have concluded that it is unsafe to rely on Mr Lawrence's evidence save where independently corroborated.

62. Finally, the Respondents called Martin Howarth and Michael Rhodes to give evidence primarily in relation to Mr Brown's apparent loss of interest and enthusiasm in the business from 2015. They were each employed as quantity surveyors albeit at different levels of seniority. Unlike Messrs Ashley and Smith, they discerned a significant change of attitude on the part of Mr Brown characterised by a loss of interest and engagement in the business. However, their differences with Mr Smith were essentially differences of length and degree and, again, their evidence was based on perceptions from their own personal experience. Whilst there was a measure of exaggeration, at least in the accounts in their witness statements, I am satisfied that they did, indeed, observe a change in Mr Brown's attitude to the business in the aftermath to the 24th November 2015 Meeting. Whilst, on the relevant issues, their evidence was essentially a matter of perception and impression, I am satisfied it was generally given to the best of their recollection.

(4) Factual questions

63. There are several significant questions of fact. These include the extent of the Parties' understanding about the APML Articles and Shareholders Agreement, Mr Brown's attitude towards the business from 2014, his relationship with Vistage, the circumstances of the 24th November 2015 Meeting and his subsequent dismissal as an employee, his motivation in sending the 24th November 2017 Email and the overall effect of the email.

64. The Parties were advised by APML's accountants, Cassons, that it would be good business practice to enter into a shareholders' agreement and Ms Bromiley was instructed to attend to the formalities. Mr Brown regarded himself as "the conduit" between Ms Bromiley and the Parties. The Parties can be taken to have understood that the purpose of the shareholders' agreement was to regulate their rights in relation to the company. In cross examination, Mr Brown repeatedly stated that he didn't really understand the agreement. No doubt, he did not have a full understanding of the intricacies and implications of the proposed contractual arrangements. However, it was apparent from at least some of his answers in cross examination that he understood the gist of the questionnaire, and, in general terms, the issues to which it was directed. He can also be taken to have been aware of the general purposes of the shareholders' agreement itself.

65. In general terms, Mr Brown's evidence on this aspect of the case was not inconsistent with the evidence of Mr Sharp. For the most part, Mr Sharp did not have a specific recollection of particular discussions or, at least, the course that they took although he could recollect that such discussions took place. He agreed with the proposition that the shareholders' agreement was not crafted to the particular needs of the individual shareholders and that, in general terms, it was guided by Napthens although there were debates "over the intricacies of things".

66. On 10th October 2011, the Parties signed the APML Shareholders Agreement as a deed and new Articles of Association were adopted by special resolution. I am satisfied that, at this point in time, the Parties were aware of the general purposes of both documents. More likely than not, they were also aware, in general terms, that the APML Shareholders Agreement contained provisions in respect of share transfers and provision for the Parties to participate in many aspects of APML's decision-making process. No doubt, they may have come away with a specific understanding of some of the provisions. However, they did not have a comprehensive understanding of the contractual regime and its implications.

67. When AGL acquired the share capital of APML and, in turn, the Parties acquired their shareholdings in AGL, they entered into the AGL Shareholders Agreement on similar terms to the APML Shareholders Agreement. In material terms, AGL's Articles were also the same. In cross examination, Mr Brown accepted that the intention was to replicate the preceding arrangements.

68. The Parties are in issue about Mr Brown's continuing levels of commitment to the business. This is connected to the issue about his relationship with Vistage.

69. By the time of the 24th November 2015 Meeting, there were important differences of outlook and approach between Mr Brown and the other parties and their relationship was itself troubled. However, the 24th November 2015 Meeting was itself a watershed. From that point, Mr Brown was aware that the other Parties no longer saw any future in business with him and it was their expectation that he would sell his shares to them. Mr Brown recognised that this was likely to be the outcome and he thus entered into negotiations with a

view to selling his shares for the maximum price he could achieve. In the knowledge, however, that he no longer had a long term interest in the business with the other Parties, it is unsurprising that he became demotivated.

70. Mr Sharp gave evidence that Mr Brown's loss of interest in the business was manifested, from 2014, in a noticeable change in his attitude and behaviour. However, Messrs Howarth and Rhodes discerned a change in his attitude later, from 2015, when Mr Brown is alleged to have become less "hands-on", less involved in the day to day detail of specific projects and, according to Mr Rhodes, he interacted less with him, as a senior quantity surveyor, in relation to schemes, invoicing and payments to sub-contractors.

71. As I have mentioned, there are differences between Messrs Howarth and Rhodes on the one hand and Ashley and Smith on the other about Mr Brown's attitude to the business from 2015. However, their differences are primarily based on perceptions from their own personal experience when dealing with Mr Brown at the time.

72. More likely than not, during the period of negotiations following the 24th November 2015 Meeting, Mr Brown ceased to work with the same energy and enthusiasm for the business as before. He continued to attend to his commitments but delegated more work than he had in the past and involved himself less in the day to day detail of projects. He also kept one eye on the negotiations for the sale of his shares and the value of his shareholding. Not only is this supported by the weight of the oral testimony of the other witnesses. It is also consistent with Mr Brown's own comments in the notes and reports that he shared with members of his Vistage Group.

73. Mr Brown and Mr Sharp were both subject to sustained cross examination about Mr Brown's relationship with Vistage. In 2014, Mr Brown advised the other Parties of his approach to Boost and his interest in Vistage. He advised them, in general terms, that Vistage could be of value to APML and, in all likelihood, he advised the Parties he had become enrolled as a member. In cross examination, Mr Sharp accepted that Mr Brown did not require the approval of the other Parties to enrol on courses which he (Mr Brown) perceived to be of benefit for himself and the business. He also accepted that he was generally

aware of Mr Brown's continuing involvement with Vistage. If Vistage was providing a valuable service, the Parties would not have had good reason to challenge Mr Brown in paying its fees if they had been in a modest amount. However, when he enrolled as a member, Mr Brown did not advise the other Parties of the terms on which he had joined the organisation nor, more specifically, did he advise them of the extent of APML's financial commitment. In my judgment, the joining fee of £850 and the quarterly instalments of £2625+VAT were in excess of what the other Parties could reasonably have expected even if, which is doubtful, each such instalment could be characterised as a separate arrangement to a value of no more than £10,000 so as not to engage the restrictions on Shareholder Reserved Matters in Schedule 1 to the Shareholders Agreement.

74. Nevertheless, once the matter was drawn to the attention of Mr Bray, he directed that APML's continuing liabilities to Vistage must immediately be brought to an end and APML's last payment was in February 2017. This was some six months before the initiation of Mr Brown's dismissal.

75. Vistage was apparently formed for the purpose of providing members with advice and business mentoring. Confidential peer group meetings are an important part of the overall service. No doubt, Mr Brown initially joined Vistage with a view to obtaining advice in connection with APML's overall business strategies, developing his own business expertise and thus advancing the business interests of APML. However, he increasingly relied on the organisation for tactical and strategic advice in connection with his dispute with the other Parties. With good reason, Mr Davies submits that, in doing so, he is likely to have disclosed Confidential Information, as defined in the Shareholders Agreement. However, the peer group meetings were themselves held in confidence and there is no evidence any such information was made available to a business rival or competitor. It may also be that, disclosing such information would technically have amounted to a breach of Mr Brown's contractual duty of 'good faith" and, indeed, his general duties of fidelity as an employee and his fiduciary duties as a director. However, if this is so, Messrs Bray and Sharp were unaware of these issues - or, indeed, of Mr Brown's

discussions with his peer group - until after the issue of proceedings. They formed no part of their decision to dismiss Mr Brown as an employee.

76. There are issues between the Parties, or at least between Mr Brown and Mr Bray, in relation to the 24th November 2015 Meeting and the circumstances leading up to it. I have touched on this when referring to the evidence of the witnesses. Contrary to the evidence of Mr Bray, I am satisfied he had already decided to do what he could to sever his connection with Mr Brown and, as a preliminary step, to advise him that their working relationship was at an end several weeks before the meeting took place. I am satisfied he discussed this, in advance of the meeting itself, with Mr Sharp and, in all likelihood, Mr Marland. In all likelihood, there would also have been some discussion between Messrs Bray and Sharp about tactics and the amount which they would be prepared to pay for Mr Brown's shares. No doubt, Mr Brown was well aware his relationship with Messrs Bray and Sharp was not as it had been. However, I am satisfied that Mr Bray's announcement was, indeed, a "bombshell" to him.

77. Between December 2015 and August 2017, there were sporadic negotiations between the Parties with a view to the sale of Mr Brown's shares culminating in the discussions at APML's monthly finance meeting on 7th August 2017. However, the Parties were unable to reach agreement on a purchase price. Mr Brown canvassed the engagement of a professional valuer but the other Parties were unwilling to do so. Mr Sharp indicated he was prepared to wind up APML, a course with which Mr Bray concurred. However, Mr Brown was unwilling to agree. They were apparently at an impasse. Later in the conversation, Mr Bray advised Mr Brown that they had decided to set up business together and had already spoken to clients about their intention to do so.

78. It was in this context that, on 24th August 2017, Mr Bray emailed his un-dated letter to Mr Brown requiring him to attend a "disciplinary hearing" on 4th September 2017. In this letter, Mr Bray made a number of allegations against Mr Brown, expressed in somewhat general terms. They included comments, attributed to Mr Brown himself, that he had "grown tired of the construction industry" and wanted to take a strategic rather than a day to day role in APML. There were also allegations that he was increasingly absent from the business, lacked interest in communicating with his fellow directors or the commercial

team and a more specific allegation that, without their knowledge or consent, he had engaged himself on a leadership and management course with Vistage. The un-dated letter was sent without warning and without taking any steps to discuss the allegations with Mr Brown or identify the underlying issues.

79. At the meeting, styled as a "disciplinary hearing" on 4th September 2017, Mr Bray did not take any steps to clarify or explain the allegations nor did he direct any inquiries to Mr Brown. However, he allowed Mr Brown to read out from a pre-prepared script. At the end of the meeting, he advised Mr Brown that he would digest Mr Brown's comments, discuss them with Mr Sharp and then communicate a decision.

80. Contrary to the impression he had given at the meeting, Mr Bray proceeded to make the decision himself, not jointly with Mr Sharp. He did so after attending a conference with Mr Marland at Forbes solicitors. At that stage, he did not have typed minutes of the meeting that had just taken place. After a meeting that took no more than 1-1 ½ hours, Forbes were instructed to prepare a letter of dismissal. They then prepared a draft letter relying, in broad terms, on the reasons given in the un-dated letter of 24th August 2017 as grounds for Mr Brown's dismissal. The draft letter did not engage with the case that Mr Brown had presented in his pre-prepared statement. It was entered on APML notepaper and emailed to Mr Brown at 16:18 that afternoon, on 4th September 2017.

81. In cross examination, Mr Bray suggested that, following the "disciplinary hearing", he took into consideration the evidence as a whole, including Mr Brown's pre-prepared statement, before deciding whether to dismiss him. This is implausible. No doubt, he wished first to obtain legal advice to ensure that he implemented the necessary legal formalities when dismissing Mr Brown. However, it is obvious that the decision to dismiss Mr Brown was pre-determined. That is apparent from the overall context, the approach that Mr Bray himself had taken at the "disciplinary hearing" itself and, following the hearing, the time taken to provide Forbes with instructions and send the 4th September 2017 Email.

82. By his letter dated 7th September 2017 in which he appealed Mr Bray's decision to dismiss him, Mr Brown relied on several grounds, including Mr Bray's

"failure or refusal to provide…specific details of…the allegations" in Mr Bray's undated letter of 24th August 2017, the absence of any reference to "the discussions at the hearing or [his] statement" and "the timing of…the termination letter" which demonstrated that the decision was "planned and organised in advance of the hearing…"

83. Mr Sharp chaired the meeting, on 16th October 2017, to consider Mr Brown's appeal. He allowed Mr Brown and Mr Bray to read out pre-prepared statements. He also asked Mr Brown whether he wished to present any additional points after listening to Mr Bray's statement. However, he didn't ask any questions with a view to clarifying or investigating the allegations and eliciting whether Mr Brown might be able to answer them. Much of Mr Bray's statement was itself a response to the contentions in Mr Brown's letter dated 7th September 2017. His explanation for the failure to provide specific details of the allegations was that there was sufficient detail in his earlier un-dated letter. The timing of the termination letter reflected "the seriousness of the situation and potential detrimental effect on the business". Towards the end of the meeting, Mr Bray confirmed that, contrary to the impression he had given at the "disciplinary hearing" on 4th September, he had decided to make the original decision alone following legal advice from his solicitors. This time the decision was to be taken by Mr Sharp.

84. In his decision letter dated 20th October 2017, Mr Sharp stated that, having reviewed the procedure adopted by Mr Bray on 4th September, he believed it to be in accordance with the Audas Company Handbook and "there was sufficient detail…regarding the grounds for [Mr Brown's] dismissal & no requirement to raise any further questions during the hearing". He then identified other "key factors", including allegations that "after clear instruction" to the contrary, Mr Brown had attended Vistage courses and charged the costs to the business, "lack of full participation in the business in recent months", "unwillingness to perform [his] day to day commercial role, "lack of communication" and "failure to take an interest in, support and manage the commercial team".

85. Mr Brown has not pursued a claim for unfair or wrongful dismissal and it is not for me to assess the merits of such a claim. However, it is striking that Mr Sharp thought it un-necessary at the meeting to canvass these allegations with Mr

Brown and direct any inquiries to him. In cross examination, Mr Harper asked Mr Sharp whether, from the date that the decision to instigate disciplinary proceedings against Mr Brown was taken, there was any prospect of an outcome other than dismissal at the end of the process. When Mr Sharp replied in the affirmative, I asked him to clarify the possible outcomes. His response was simply that, if not dismissed, Mr Brown would continue as an employee. It is plain he gave no consideration at all to the range of options that would be available as part of the disciplinary process, such as a warning or written advice, notwithstanding that, throughout the process, Messrs Sharp and Bray were obtaining advice from Forbes solicitors.

86. In his closing submissions, Mr Harper described the whole disciplinary process as a sham designed to achieve a pre-determined outcome. No doubt, Mr Bray's un-dated letter of 24th August 2017 was prepared by a solicitor from Forbes. Although Mr Bray sought to give the impression, at the end of the letter, that APML remained open minded on the basis that it "*may* decide to dismiss" him, Mr Harper submitted that, by then, the decision to dismiss him had already been made and the disciplinary process was invoked for the purpose of attending to legal formalities rather than investigating the allegations against him, providing him with an opportunity to state his case and, at the end of the process considering whether Mr Brown ought to be dismissed or subject to some other form of disciplinary sanction. In my judgment, it is an inescapable inference that this is so and it does Messrs Bray and Sharp no credit that they sought, in evidence, to maintain otherwise. It is also overwhelmingly likely that they colluded with one another to dismiss Mr Brown and did so under the guise of the disciplinary procedure following advice from their solicitors about the legal formalities in the period between 7th and 24th August 2017. In doing so, they were not open with Mr Brown about their intentions. Before invoking the procedure, they did not canvass with Mr Brown the allegations on which their decision was to be based, they did not give him any warning and they did not discuss the range of options that were available.

87. The decision of Messrs Bray and Sharp to dismiss Mr Brown was made out of their increasing sense of antipathy towards him and with a view to advancing their own sectional interests rather than for the purpose of advancing the

interests of the companies. The considerations or assertions in their decision letters dated 4th September and 20th October 2017, together with the un-dated letter of 24th August 2017, were deployed to justify their decision to dismiss him. They reflect their sense of antipathy towards Mr Brown. Although exaggerated, several assertions were consistent with their perceptions, for example, their assertions about Mr Brown's lack of involvement in the business. However, when viewed in its overall context, their decision was not made for the purpose of advancing the interests of APML and AGL or promoting the business.

88. For the sake of completeness, Mr Marland gave evidence, in cross examination, that, as late as 4th September when the "disciplinary hearing" took place, he had no expectations about the likely outcome. It is conceivable that Messrs Bray and Sharp were not open with Mr Marland about their overall strategy. However, even on this hypothesis, Mr Marland's evidence on the issue was disingenuous in view of the fact that he was present at the "disciplinary hearing" itself and can thus have been left with no doubt, by that stage, that it was being conducted as a legal formality and not with a view to considering whether Mr Brown ought to be dismissed.

89. Questions remain as to Mr Brown's motives in sending the 24th November 2017 Email and its overall effect. To understand his motives, it is necessary to address the context in which it was sent. By then, Mr Brown had been advised he must not communicate with company staff and, if he had any questions about either company, he must submit written inquiries to Mr Bray or Mr Sharp along with the reasons for his inquiries. He had also been advised that the next board meeting, originally scheduled to take place on 6th November 2017, had been cancelled owing to "unforeseen circumstances", albeit undisclosed. On 22nd November, the Bank had also advised him he was barred access to their information about the companies.

90. On the same day, 22nd November, Mr Bray had emailed Mr Brown, for the first time, copies of management accounts showing a reduction in APML's net profit from £1,535,445 to £571,328 and a reduction in the net assets from £2,291,529 to £1,186,187.

91. The management accounts were in summary form. From them, Mr Brown could see changes in the headline figures which suggested a sharp increase in overheads. Of course, without sight of the accounting records, Mr Brown did not have and, indeed, could not have had a full understanding of the reasons for the shift in APML's financial position. However, he could have surmised that it might be attributable to changes in the accounting methodology and, in particular, the treatment of accruals. Moreover, when it was put to him in cross examination that this was the most obvious explanation, he replied in the affirmative. Later, in cross examination, he sought to qualify his answer by pointing out that there was, of course, no reference to accruals on the face of the management accounts and, in re-examination, he stated that it was not obvious to him, at the time, that the difference was attributable to accruals. It was by no means the only possible explanation for the shift in net profits and assets shown in APML's management accounts nor was it obvious or, indeed, apparent on the face of the management accounts that there had been a change in the treatment of accruals. However, I am satisfied that Mr Brown will have regarded this as the most likely explanation for a substantial part of the change. Whilst Mr Marland was in overall control of APML's accounts and accounting records, Mr Brown had taken an optimistic approach to accruals in the period leading to his dismissal and this was reflected in the information provided to Mr Marland and incorporated in APML's management accounts. It was particularly reflected in the allowance made for un-invoiced expenses. The effect of this was to enhance the value of Mr Brown's shareholding if based on a multiple of the net assets on the balance sheet. Once he ceased to be involved in the management of the company, it cannot have come as a surprise to Mr Brown that there was an adjustment or correction in the company's overall approach to accruals. However, the scale of the shift in APML's financial position was significantly greater than Mr Brown could reasonably have anticipated and he was entitled to a full and proper explanation.

92. On its face, the 24th November 2017 Email was expressly sent "to protect the interests of the company, its employees, its shareholders and other stakeholders, as well as those of the Bank…" However, it included an immediate request for "full access to the business information that [Mr Brown] had always been party

to" and reinstatement of his "full banking access…for monitoring and authorisation purposes". I am satisfied that Mr Brown's immediate purpose, when copying in Mr Woodward to the message, was to persuade Messrs Bray and Sharp to restore his access to financial information about the companies with the Bank together with information about the operation of the company bank accounts. Mr Brown believed that, if Messrs Bray and Sharp were reluctant to do so, the Bank might itself be able to persuade them. He required full and continuing access to this financial information so that he was properly informed about the companies' financial affairs and could take action to prevent the accounts being presented to his disadvantage if and when his shares were valued. There were suggestions in Mr Davies's submissions that the 24th November 2017 Email was sent vindictively or with a view to forcing the other Parties to buy his shares on his terms regardless of any damage that the email might cause to the companies. In my judgment, if there was any vindictiveness in his approach, it was secondary to his main objectives. However, it would have been entirely contrary to his interests, to cause wanton damage to the companies and, in my view, this was not his intention when sending the 24th November 2017 Email.

93. Mr Harper does not dispute the proposition that, by sending the 24th November 2017 and attaching copies of the management accounts for the second and third quarters of 2017, Mr Brown committed a breach of his obligations in the Shareholders Agreement to "use all…reasonable endeavours to keep confidential…any Confidential Information" and the contractual prohibition on the use or disclosure of such information. "Confidential Information" was widely defined in Clause 11.1 so as to include information in relation to the "affairs of the Group" and would thus include the management accounts and the information extracted in the email itself.

94. However, a question arises in relation to the overall effect of the 24th November 2017 Email. In my view, this was fully addressed in the Bank's undated letter of January 2018. The Bank treated the 24th November 2017 Email as notice of a dispute between the Parties in relation to the removal of Mr Brown as a signatory to the bank accounts. Since the Bank did not wish to be placed at the centre of the dispute, it temporarily suspended the bank accounts until 28th

November. On 28th November, it un-blocked the bank accounts upon receipt of the resolutions made at the board meeting the previous day. During the period, 24th-28th November 2017, no payment requests were rejected by the Bank and credits and debits were posted to the accounts. It is thus clear that the operation of the bank accounts was suspended owing to the fact that the Bank had been given notice of a dispute between the signatories to the bank accounts rather than any concern it might have had about the substance of Mr Brown's allegations or the financial information in the attachments. Moreover, whilst the temporary suspension of the bank accounts may have occasioned a measure of inconvenience, this is likely to have been modest given that 25th- 26 November 2017 fell on a weekend.

(5) The AGL Articles and the Shareholders Agreement

95. AGL's Articles of Association (the AGL Articles") contain pre-emption rights over the shares of a shareholder who wishes to transfer shares ("the Pre-emption Rights") and rights to require transfer in defined circumstances ("the Compulsory Transfer Provisions").

96. The Pre-emption Rights, in Clause 15, require the outgoing shareholder to serve a transfer notice on AGL following which a discretion is conferred on the Board to buy the shares out of AGL's distributable profits. Un-purchased shares must then be offered to the remaining shareholders. If, following this process, there remain surplus shares, the outgoing shareholder is entitled to transfer the shares to the person or persons to whom he initially wished to transfer the shares. As part of this process, the shares are to be sold at a price determinable by an independent expert as a rateable proportion of the total value of all AGL's issued shares without any premium or discount on the assumption that the business is being carried on as a going concern.

97. In the Compulsory Transfer provisions, eight sets of circumstances are listed in which the Board are entitled to require a shareholder to serve a Transfer Notice regardless of whether he or she wishes to transfer the shares. This includes death, bankruptcy, mental illness and ill health. Of particular significance, Clause 17.1(c) authorises the Board to require such a notice if "a shareholder commits a material breach of any of the Articles or a breach of any Relevant

Agreement which is specified therein as a material breach and (where capable of remedy) is not remedied by the defaulting party to the reasonable satisfaction of the Board within 20 Business Days of its receipt of notification of such breach from the Board" in which case the sale price is capped at £1.00 per share only.

98. The Parties and their wives are each party to the Shareholders Agreement. It is a "Relevant Agreement" within the meaning of AGL's Articles on the basis that it relates "in whole or in part to the management of" AGL and is binding on AGL or its shareholders.

99. AGL is also a party to the Shareholders Agreement. Although undefined, references, in the Shareholders Agreement, to "the parties" must be taken to include the Parties, their wives and AGL save where the context dictates otherwise.

100. However special status is conferred on the holders of the 999 A ordinary shares since "Shareholder Consent" is defined so as to mean the prior written consent of the holders of all of the A shares in the absence of a unanimously supported resolution at a general meeting of the company or other resolution under the Companies Acts. By Clause 3.1, it is provided that all the shareholders shall exercise their rights to procure that no Group Company undertakes any of "the Shareholder Reserved Matters" without "the Shareholder Consent". "Shareholder Reserved Matters" is then defined in Schedule 1 of the AGL Shareholders Agreement so as to include wide ranging aspects of the direction and management of the Company's affairs. These range from the variation of the Company's memorandum and articles (Para 1) to the appointment of directors (Para 5) and entering into contracts and arrangements with customers or suppliers outside the ordinary course of business or to a value exceeding £10,000 (Para 16).

101. By virtue of Para 17 of Schedule 1, the list of Shareholder Reserved Matters also includes "recruiting or engaging an employee or consultant to [AGL] or any Subsidiary where such person's aggregate annual remuneration (including benefits) exceeds £15,000 or terminating the employment or arrangement of any such employee or consultant".

102. In addition to their initial status as the only holders of the A ordinary shares, the Parties were exclusively entitled to appoint themselves as directors under Clause 3.2 for so long as they remained Shareholders.

103. Clause 1.12 of the Shareholders Agreement expressly provides that "a 'material breach' of this Agreement means a breach by any Shareholder of the provisions of clauses 3.1, 5, 8.1 and 11. This includes failing to procure that Group Companies undertake "Shareholder Reserved Matters" without "Shareholder Consent" (3.1), accepting orders for a competing business without the consent of all the Shareholders (5.2), transferring or charging their shares in AGL (8.1) and using or disclosing "Confidential Information", as defined, in relation to the customers and affairs of the Group (11.3) subject to defined exceptions.

104. According to the contractual definition, any breach of these terms is deemed to be a "material breach" regardless of the seriousness of the breach. Trivial breaches, such as a minor failure to procure that Group Companies do not enter into an arrangement outside the normal course of its business (Schedule 1 Para 12), are equated with potentially more damaging breaches, such as supplying goods and services in competition with APML for the benefit of a rival business (Clause 5.2).

105. The Shareholders Agreement imposes specific obligations on the parties under the heading "Good Faith". By Clause 18.1, it is provided that "all transactions entered into between any party and [AGL] or any Subsidiary shall be conducted in good faith…" Clause 18.2 provides that "each party shall at all times act in good faith towards the other and shall use all reasonable endeavours to ensure that this Agreement is observed". By Clause 18.3 "each party" is also enjoined to "do all things necessary and desirable to give effect to the spirit and intention of this Agreement". With the exception of the reference, in the preliminary part of Clause 18.1, to transactions between "any party" and AGL itself, all references to a "party" in Clause 18.1, 18.2 and 18.3 can be taken to include AGL. There is no good reason to construe them otherwise.

106. In *Interfoto Library Ltd v Stiletto [1989] QB 433*, Bingham LJ observed that acting in good faith "is perhaps most aptly conveyed by such metaphorical

colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upward on the table'. It is in essence a principle of fair and open dealing".

107. In the context of a property development agreement, Morgan J thus concluded, in *Berkeley Community Villages Ltd v Pullen [2007] 3 EGLR 101*, that the parties' obligations to "act with the utmost good faith towards one another" required them to observe commercial standards of fair dealing with "faithfulness to the agreed common purpose and consistency with the justified expectations of [the developer]". The owner of the development land was thus precluded from disposing of the land during the currency of the contract.

108. In the analogous context of partnership law, partners owe one another a duty to act in the interests of the partnership and not in the sectional interest of a particular partner or partners. Consistently with this duty, they must not procure the exercise of a power of expulsion against one partner without first notifying him and providing him with a proper opportunity to explain his case, *Blisset v Daniel (1853) 10 Hare 493.*

109. At all material times, the parties and AGL thus owed one another a duty to act openly and fairly to one another, to ensure that the views of each Party are fully canvassed on important matters relating to the company, to avoid acting in the sectional interests of any particular shareholder or for an improper or collateral purpose, to use reasonable endeavours to ensure the Shareholders Agreement was observed and to act consistently with the objects of the parties in entering into same. The objects of the parties can be discerned from the Shareholders Agreement together with the factual matrix at the time it was made. It included a scheme for regulating the affairs of AGL and enabling the Parties to participate in decision-making.

110. The Parties must thus act in good faith when exercising their powers in respect of the Shareholder Reserved Matters and, in my judgment, it is implicit that their prior written consent to such matters must be deemed subject to a proviso that, once requested, their consent will not be unfairly or capriciously withheld nor will it be withheld for reasons otherwise than in accordance with the "spirit and intention" of the AGL Shareholders Agreement. This is analogous to well-established principles of partnership law arising from a partner's duty to act with

the utmost good faith, see *Lindley & Banks on Partnership Law (20th edn) Paras 10-115 and 16-13.*

111. Contrary to Mr Davies's submissions at the beginning of the case, in my judgment there is no room to superimpose an additional proviso that consent will not be unreasonably withheld. Such a proviso would not satisfy the test of necessity, re-stated by the Supreme Court, in *Marks and Spencer plc v BNP Paribas Security Services [2016] AC 742* and it is inconsistent with the analysis of Millet J in *Price v Bouch [1986] 2 EGLR 179.* In *Price v Bouch (supra),* restrictive covenants in a scheme of development provided for plans to be approved by committee. One of the issues before the Court was whether a term should be implied that approval could not be unreasonably withheld. Millet J concluded that there was no general principle of law that, whenever a contract requires the consent of one party to be obtained by the other, a term was to be implied that consent should not be unreasonably withheld. In the case before him, he concluded that no such term was to be implied following concessions that the committee was under a duty to inspect and consider any application that might be submitted to them, to reach a decision without delegation, and to act honestly and in good faith and not for some improper or unreasonable purpose.

112. In addition to their contractual duties of good faith, the Parties of course owed statutory duties of good faith to the Company, under *Section 172* of the *Companies Act 2006,* for so long as they held office as directors. This included a duty to act so as to promote the success of the companies for the benefit of their members as a whole and, in doing so, to have regard to the need to act fairly between the members.

(6) The statutory jurisdiction in Section 994 of the Companies Act 2006

113. *Section 994(1)(a)* provides that "a member of a company may apply to the court by petition" for relief "on the ground that…the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of the members generally or of some part of the members (including at least himself) …" If satisfied the Petition is well founded, the Court then has wide statutory powers to grant relief under *Section 996(1)* including an order regulating the conduct of the company's affairs, requiring the respondents to

refrain from doing or continuing an act or requiring them to do an act that they have so far omitted to do and provide for the purchase of shares.

114. The starting point is to examine the company's articles and the powers of the board, *Re Saul D Harrison [1995] 1 BCLC 14* at *18g*. Logically, this also includes shareholders' agreements and other binding contractual commitments in respect of the management of the company's affairs, at least contractual commitments to which the company is itself a party. Unfairly prejudicial conduct based on the breach of such commitments will generally suffice to found a petition.

115. Conversely "…it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or other relevant or legally enforceable agreements, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration", *Grace v Biagoli [2006] 2 BCLC 70* at *92, Para [61](2*), according to established "equitable considerations [which] make it unfair for those conducting the affairs of the company to rely upon their strict legal powers", *O'Neill v Phillips [1999] 1WLR 1092 at 1099A-B (Lord Hoffmann).* In this respect, the concept of unfairness runs parallel to the concept of "just and equitable" as a ground for winding up and the guidance of the House of Lords in *re Westbourne Galleries Ltd [1973] 1 AC 360* applies, *O'Neill v Phillips (supra) 1099 B-C.*

116. In *re Westbourne Galleries (supra),* Lord Wilberforce stated, as follows, at *379E-G.*

> "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' interests in the company - so that if confidence is lost, or one member removed from management, he cannot take out his stake and go elsewhere…"

117. Lord Wilberforce did not suggest that these elements are exhaustive. In *re Bird Precision Bellows [1984] Ch 419* at *430*, Nourse J identified, as a relevant element, the capital contributions of the parties, if any.

118. In *O'Neill v Phillips (supra) at 1102C-D*, Lord Hoffmann thus referred to "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". He stated that "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".

119. However, it will in all cases remain necessary to consider whether the majority have used their "…powers and voting rights to protect the company from conduct which is itself either in breach of a relevant agreement, or otherwise detrimental to the well-being of the company or its assets", *Grace v Biagoli (supra) Para 64*. If so, the court is entitled to consider whether their powers and rights have been exercised in a way that is reasonable and proportionate.

(7) Unfair prejudice based on contractual breaches

120. In my judgment, Messrs Bray and Sharp committed and caused AGL to commit serious breaches of their contractual good faith obligations, under Clauses 18.1-18.3 of the Shareholders Agreement, in dismissing Mr Brown as an employee. This is on the basis that the decision was made covertly before initiating the "disciplinary" process against him and without first clarifying and investigating with Mr Brown the substance of their concerns, exploring the range of options that might be available and providing him with at least some form of warning. No doubt, Messrs Bray and Sharp were by then exasperated with Mr Brown and the stance he had taken in the negotiations for the sale of his shares. In all likelihood, they believed he was no longer fully pulling his weight in the business and they perceived he was demanding too high a price for his shares. However, it was a breach of their duties of good faith, for them to peremptorily dismiss Mr Brown when they did. Their decision was disproportionate to the matters furnishing them with a sense of grievance. Moreover, in view of the

context in which the disciplinary process was initiated following the discussions at APML's monthly finance meeting on 7th August 2017, it is plain their decision was taken for the purposes of advancing their own sectional interests. In this respect, it is significant the decision was taken shortly after they declined to appoint, at Mr Brown's suggestion, a professional valuer to value his shares.

121. Having dismissed Mr Brown as an employee, Messrs Bray and Sharp sought to impose sweeping restrictions on his role in the management of APML. Although it remained necessary for them to obtain his consent on "Shareholder Reserved Matters", they took immediate action to prevent him communicating with staff, clients and suppliers and advised the Bank he no longer had any authority to give instructions. Moreover, he was advised that, if he required any information about APML or AGL, he must submit his inquiries to Mr Bray or Mr Sharp along with his reasons for requesting the information notwithstanding that he remained in office as a director. As a director, he was statutorily entitled to inspect the companies' accounting records under *Section 388(1)(b)* of the *Companies Act 2006*. He was also entitled to analogous rights at common law, *Conway v Petronius Clothing [1978] 1 WLR 72*. Conversely, he owed the statutory duties set out in *Sections 170-181* of the *2006 Act* and, at common law or in equity, a duty to exercise reasonable care and well established fiduciary duties. Once he was dismissed as an employee, Mr Brown was not entitled to a role in the day to day management of APML. However, in my view, the restrictions imposed on his access to information were inconsistent with his office as a director and unreasonably interfered with Mr Brown's decision-making role in respect of Shareholder Reserved Matters.

122. More specifically, I am satisfied that Messrs Bray and Sharp committed breaches of their contractual obligations in Clause 3.1 by procuring APML to undertake Shareholder Reserved Matters without requesting or obtaining the consent of Mr Brown. This includes authorising the payment of bonuses, engaging a commercial manager and three site managers, and entering into a compromise agreement with Mr Graham Smith, a senior quantity surveyor in relation to the termination of his employment.

123. Firstly, each of these matters plainly fell within the scope of the Shareholder Reserved Matters, as defined, by virtue of Paragraphs 17 (recruitment and

termination of contracts of employment for remuneration exceeding £15,000) and 21 (bonuses).

124. Secondly, Mr Brown was not requested to give his consent prior to the relevant decisions. As a general principle, where a party's contractual consent is subject to a proviso that consent must not be unfairly or capriciously withheld or, indeed, withheld on any other basis, that party's consent must first be requested and a reasonable period of time provided for giving such a consent, see for example *Wilson v Flynn [1948] 2AER 40.* In my view, this principle certainly applies in the present case.

125. Thirdly, Mr Brown did not give his consent. He certainly did not give written consent as the Shareholder Agreement required nor did he vote on a resolution at a general meeting of the company or as otherwise required in the contractual definition of "Shareholder Consent".

126. On behalf of Messrs Bray and Sharp, Mr Davies submitted that it was established practice for matters such as this to be undertaken without the unanimous prior consent of each of the Parties. He also submitted that, if these matters amounted to a breach, the breaches were of a technical nature and Mr Brown's objections are not advanced in good faith.

127. However, whilst there was certainly some evidential basis for the proposition that at least some of the relevant decisions (such as the decision in relation to the payment of bonuses), were consistent with historic practice, there was and is no suggestion that the Parties have done anything to waive their contractual rights and obligations in Clause 3.1 of the Shareholders Agreement. Moreover, the dismissal of Mr Brown was a significant departure. From that point in time, Mr Brown could reasonably have expected Messrs Bray and Brown to seek his prior consent to all Shareholder Reserved Matters.

128. In view of the fact that Mr Brown's consent was not requested prior to the relevant decisions, the issue as to whether he could have withheld such consent in good faith is entirely academic. It would be unhelpful for me to speculate. However, the relevant decisions would obviously have had to be viewed in the overall context of the dispute that had by then arisen.

129. As unfair prejudice, Mr Brown also seeks to rely on the resolution, at the General Meeting on 13th April 2018, to remove him as a director. However, in my view this stands or falls with the rest of his case and does not furnish him with a separate free standing claim. By the time of the resolution, the Parties were engaged in litigation and it was unrealistic to expect them to co-operate meaningfully with one another on the Board of directors prior to the disposal of these proceedings. As members, Messrs Bray and Sharp were statutorily entitled to vote to remove directors from office under the provisions of *Section 168* of the *Companies Act 2006*. In the present case, it was provided by Clause 3.2 of the Shareholders Agreement that the Parties were entitled to appoint themselves as a director but this only applied for so long as they had not been required to serve a Transfer Notice. Once the Board required Mr Brown to serve such a notice, he was thus no longer entitled to rely on the relevant provisions of Clause 3.2.

130. The statutory jurisdiction in *Section 994(1)* is only engaged where the *company's affairs* have been conducted in an *unfairly prejudicial* manner. However, in my judgment, these requirements are satisfied.

131. AGL is a party to the Shareholders Agreement. The Shareholders Agreement relates to the regulation of the affairs of AGL and its subsidiaries, including APML. This includes the contractual good faith provisions of Clause 18.1 and the Shareholder Reserved Matters in respect of contracts or arrangements to a value exceeding £10,000 (Para 16), recruitment of employees with a remuneration exceeding £15,000 (Para 17) and bonuses (Para 20). AGL controls APML and conducts the affairs of APML as a group undertaking. In this way, each of the material breaches was committed in respect of the conduct of AGL's affairs, *Nicholas v Soundcraft Electronics Ltd [1993] BCLC 360.*

132. The relevant conduct has plainly been to the prejudice of Mr Brown in that it has excluded him from participation in the management of AGL and APML, blocking his access to important information in connection with the conduct of the companies' affairs and denying him a role as employee. Since it involved several breaches of the Shareholders Agreement, it was also unfair.

(8) Unfair prejudice following the superimposition of equitable considerations

133. As an alternative or additional issue, I shall consider whether Mr Brown can rely on a breach or breaches of an extra-contractual understanding or expectation that he would be entitled to participate, whether as an employee or otherwise, in the day to day affairs or management of the business at least until he had been given the opportunity to remove his capital upon reasonable terms.

134. In my judgment, whilst the issues are evenly balanced, the answer is yes.

135. Applying the well-known guidance of Lord Wilberforce in re *Westbourne Galleries (supra),* APML was originally based on an association formed from a personal relationship involving mutual confidence. It was the vehicle for the Parties' business when they left Morris & Spottiswood to join APML as full time employees. From that time, the Parties envisaged they would each participate in the business and be allocated a specific role as employees. The Parties each contributed to the assets of the new business. At the outset, they each contributed £1,000 so that it could be credited to APML's bank account and used as working capital. Moreover, they initially agreed not to draw income from the business, living off their final bonuses from Morris & Spottiswood.

136. When the Parties were persuaded to adopt new Articles and enter into the APML Shareholders Agreement, they understood they were entering into detailed new contractual commitments and they had a general understanding of the documents and matters to which they pertained. Consistently with this, the new Articles and shareholder agreements made specific provision for the Parties to participate in the decision-making process by requiring their unanimous consent to the Shareholder Reserved Matters. The Parties can be taken to have known that this was the case and known also that the contractual provisions would be binding as a legal contract. However, I am not satisfied that the Articles and the APML Shareholders Agreement were intended to supercede the understanding, in its entirety, on which they had originally set up the business.

137. It is quite plain the Parties envisaged they would continue to participate as employees utilising their respective skills and, indeed, be entitled to do so. The Shareholders Agreement did not expressly provide for decisions in relation to

their own contracts of employment to be treated as a Shareholder Reserved Matter but it did provide, more generally, that decisions in relation to such contracts were to be treated as a Shareholder Reserved Matter where the employee's aggregate annual remuneration (including benefits) exceeded £15,000. This would not have applied to the Parties throughout the period in which their income as an employee was less than £15,000 having elected to draw most of their income in dividends. The anomaly is best explained on the basis that the need to make specific contractual provision in relation to their own status was overlooked since it was assumed they would continue to participate in the management of the business whilst they remained shareholders. Perhaps underlining the point, although there is an email message dated 18th November 2015 from the Bank recording their understanding that Mr Brown was, at that stage, in receipt of a notional salary of £7,956 and a car allowance of £7,500, Mr Brown does not contend that the decision to dismiss him was unlawful on the grounds that it was a Shareholder Reserved Matter. For their part, Messrs Bray and Sharp themselves also do not suggest it was a Shareholder Reserved Matter.

138. One of the considerations identified by Lord Wilberforce in *re Westbourne Galleries (supra)* was whether the Articles or other contractual arrangements contain restrictions on the transfer of the members' interests. In the present case, the AGL Articles essentially replicate the material provisions of APML's revised Articles. They contain specific pre-emption provisions for the sale of shares in which a distinction is drawn, for valuation purposes, between shareholders who commit specified breaches and other shareholders. The classes of breach were defined widely so as to encompass all the restrictions in relation to Shareholder Reserved Matters, restraints on trade, share transfers and confidential information without any test of materiality. Once such a breach has been committed, the Board can require the defaulting shareholder to serve a Transfer Notice in which case his shares must be sold at a price of no more than £1. However, in the case of other shareholders, the formula for determining the share price provides for the shares to be valued without any premium or discount attributable to the percentage of the issued share capital which they represent.

139. As with any small company, it is not straightforward for a minority shareholder to dispose of his shares in the open market. However, in the absence of a specified breach, the material restrictions do not limit the outgoing shareholder to a sharply discounted price nor do they confer an absolute right on the directors to refuse to register a transferee. In my judgment, it follows that this particular consideration does not weigh substantially in the scales. However, Lord Wilberforce's "elements" were not intended to provide exhaustive guidance and he was astute to observe that the presence of "one, or probably more, of the…elements" would suffice.

140. In these circumstances, I am satisfied that Mr Brown can rely on an extra-contractual understanding or expectation that he would be entitled to participate in the day to day management of APML and that, by dismissing Mr Brown and excluding him from participation without arranging for his shares to be independently valued or offering to purchase his shares at such a value, Messrs Bray and Sharp caused the affairs of AGL and APML to be conducted in a manner that was unfairly prejudicial to Mr Brown. If there were any legitimate grounds for their sense of grievance in the period leading up to Mr Brown's dismissal, their decision to dismiss him was wholly disproportionate. In any event, their decision was made out of a sense of antipathy towards Mr Brown and with a view to advancing their own sectional interests rather than advancing the interests of the companies. Moreover, they dismissed Mr Brown without affording him the opportunity to remove his capital upon reasonable terms in the sense envisaged by Lord Hoffmann in *O'Neill v Phillips (supra)* at *1102C-D.*

(9) The Counterclaim of Messrs Bray and Sharp for an order requiring Mr Brown to serve a Transfer Notice

141. I have already referred to the Compulsory Transfer provision of the Articles, including Article 17.1(c) (Para 95 above). Article 17.1(c) applies where a Shareholder commits "a breach of any Relevant Agreement which is specified therein as a material breach". "Where capable of remedy", Article 17.1(c) only applies if the breach is not "remedied…to the reasonable satisfaction of the Board within 20 Business Days of its receipt of notification of such breach from the Board…"

142. "Relevant Agreement" is defined, in turn, so as to include any agreement between AGL and its shareholders in relation to the management of AGL and thus included the Shareholders Agreement. By Clause 1.12 of the Shareholders Agreement, "material breach" is expressly defined so as to include *inter alia* any breach of Clause 11 of the Shareholders Agreement.

143. Clause 11 relates to the Parties' duties of confidentiality. By Clause 11.1 (a), "Confidential Information" is defined so as to encompass *inter alia* information relating to the "business, assets or affairs of the Group". "The Group" was defined, in turn, so as to include subsidiaries, such as APML.

144. By Clause 11.3, the Parties covenanted "…at all times [to] use all of [their] reasonable endeavours to keep confidential…any Confidential Information and …not [to] use or disclose such Confidential Information" subject to defined exceptions, including such disclosures as "may be required by law".

145. Messrs Bray and Sharp maintain that, by copying Mr Woodward, of the Bank, to the 24th November 2017 Email, Mr Brown committed a breach of Clause 11.3 of the Shareholders Agreement. They also maintain that the breach was not capable of remedy within the meaning of Clause 17.1(c) and the AGL Board were thus entitled to require Mr Brown to serve a Transfer Notice at their meeting on 14th March 2018.

146. Subject to the duties of the Parties and AGL to act with good faith and the Court's powers under *Section 996(1)* of the *Companies Act 2006* (including its dispensing powers), I am satisfied that each of these propositions is correct.

147. Firstly, the 24th November 2017 Email, with its attachments, plainly contained "Confidential Information" within the meaning of Clause 11.1(a), including the contents of the management accounts for the third quarter of 2017, with a profit and loss account and balance sheet, and Mr Brown's comments about them. Details of the revenue from some customers was also provided. None of this information was in the public domain and it has not been suggested that Mr Brown was required to disclose the information by law. By disclosing the information to the Bank, Mr Brown was thus in breach of his obligations in Clause 11.3 of the Shareholders Agreement.

148. Secondly, the breach of Clause 11 was to be treated as a "material breach" of a "Relevant Agreement" for the purposes of Clause 17.1(c). In the present case, the relevant breach or breaches included the breach of a negative stipulation. Following the disclosure of the relevant information, it was not possible to remedy the breach.

149. Thirdly, the Board resolved to require Mr Brown to serve a Transfer Notice on 14th March 2018. The earliest date upon which they can have become aware of the breach is 24th November 2017. Their resolution was thus within the six-month time scale required by Clause 17.2.

150. However, on balance, I am satisfied that, by causing the Board to require Mr Brown to serve a Transfer Notice, Messrs Bray and Sharp committed breaches of their contractual duties to act in good faith and procured the company to commit such a breach. To the extent it is relevant, I am also of the view that they thus committed a breach of their duty under *Section 172(1)(f)* of the *Companies Act 2006* to act fairly between the members.

151. At the time of the resolution, Messrs Bray and Sharp were obviously aware that Mr Brown was challenging the decision to dismiss and exclude him from the management of APML. He was dismissed shortly after the meeting on 7th August 2017 at which the Parties had reached an impasse about the sale of Mr Brown's shares. As early as 26th September 2017, Mr Brown's solicitors challenged the initial decision to dismiss him in their initial letter before claim and, by 20th December 2017, Mr Brown's Petition in these proceedings was presented to the Court. The breaches were committed as part of Mr Brown's ill-judged attempt to persuade Messrs Bray and Sharp to restore him with continuing access to financial information about the companies. By acting in this way, Mr Brown was in breach of his contractual obligations and his fiduciary obligations to the companies. However, he had been prompted to do so by their own breaches of their contractual duties of good faith and their decisions to dismiss him and withhold information to which he was entitled.

152. It is also significant that, when electing to require Mr Brown to serve a Transfer Notice, the Board appear to have overlooked or dismissed as irrelevant the breaches of Clause 3.1 of the Shareholders Agreement committed by Messrs

Bray and Sharp themselves. This included causing APML to undertake Shareholder Reserved Matters without Mr Brown's consent, including the payment of bonuses, the engagement of a commercial manager and three site managers and the compromise agreement with Mr Graham Smith without obtaining Mr Brown's consent. In the interests of fairness, the Board might at least have been expected to consider whether it was appropriate to single out Mr Brown for such a notice when Messrs Bray and Sharp had also committed "material breaches" within the meaning of Clause 1.12 of the Shareholders Agreement.

153. In these circumstances, I am satisfied that, by procuring AGL to exercise its powers to require Mr Brown to serve a Transfer Notice without ever offering to purchase his shares pursuant to an independent valuation or otherwise seeking to address the underlying issues between them, Messrs Brown and Bray and, through them, AGL itself committed a breach of their duties to act fairly towards one another, in good faith and not for a collateral purpose.

154. Mr Davies relied on the following extracts from the judgment of Mr Stephen Furst QC in *Gold Group Properties Ltd v BDW Trading Ltd [2010] EWHC 1632 (TCC)* in which it was unsuccessfully contended that a landowner had failed to act in accordance with his contractual duty of good faith on the basis that he had declined to give up contractual advantages in a contract for the development of land. At Paragraph 90, the Deputy Judge endorsed the propositions, from Australian authorities, that no contracting party is "fixed with the duty to subordinate self-interest entirely which is the lot of the fiduciary ... The duty is not a duty to prefer the interests of the other contracting party. It is, rather, a duty to recognise and to have due regard to the legitimate interests of both the parties in the enjoyment of the fruits of the contract as delineated by its terms." On this basis, the Judge surmised, at Paragraph 9, that "good faith, whilst requiring the parties to act in a way that will allow both parties to enjoy the anticipated benefits of the contract, does not require either party to give up a freely negotiated financial advantage clearly embedded in the contract."

155. There is no reason to doubt these propositions in their proper context. However, in the present case, the issue arises in connection with the exercise of powers conferred on the Board; it is not limited to the narrow contractual rights of the

parties. In exercising its powers the Board is, indeed, contractually required to "recognise and…have due regard to the legitimate interests of…the parties". However, I am satisfied that the Board did not have proper regard to the legitimate interests of the parties when peremptorily resolving to require Mr Brown to serve a Transfer Notice. There was a significant measure of opportunism in their decision to do so. Since it was served following the commencement of proceedings, it was also served in anticipation that it might operate to pre-empt the outcome of the proceedings.

156. In my judgment, it was and is also implicit in the Shareholders Agreement and Clause 17.1 of the Articles that the Parties would not seek to take advantage of their own breaches of contract to cause or procure AGL to make resolutions in relation at least to matters affecting themselves personally.

157. Mr Harper does not now submit that the Board's resolution to require Mr Brown to serve a Transfer Notice is void. However, he submits that it would be open to me to make an order dispensing with the requirement for Mr Brown to serve such a notice in the exercise of my jurisdiction under *Sections 994* and *996* of the *2006 Act* on the basis that it arises out of the unfairly prejudicial conduct of the Respondents. Alternatively, it would also be open to him to submit that I should make such an order on the basis that the resolution was itself made in breach of the Respondents' duty of good faith. I shall return later to these aspects of the case.

(10) Statutory relief

158. Pursuant to District Judge Richmond's order dated 3rd October 2018, my conclusions are limited to issues of liability only. For the reasons given, I am satisfied that the affairs of AGL have been conducted in a manner that is unfairly prejudicial to the interests of Mr Brown, as a member. To that extent, Mr Brown's claim succeeds. Conversely, I have also determined that, by copying Mr Woodward to the 24th November 2017 and thus disclosing to him Confidential Information in relation to the affairs of the companies, Mr Brown himself committed a breach of the Shareholders Agreement and his fiduciary duties as a director. However, his own misconduct arose from the Respondents' unfairly prejudicial conduct - indeed it was prompted by such conduct - and his

own misconduct is substantially outweighed by the misconduct of the Respondents. Subject to any further submissions on the point, I am thus satisfied that Mr Brown is *prima facie* entitled to statutory relief under the provisions of *Section 994* and *996* of the *Companies Act 2006.*

159. Having determined that Mr Brown's claim based on unfair prejudice succeeds, the Court has a wide discretion in relation to the grant of relief. In *Grace v Biagoli [2006] 2 BCLC 70* at *96, Para [73]*, Patten J, in delivering the judgment of the Court of Appeal observed as follows.

"Once unfair prejudice is established, the court is given a wide discretion as to the relief which should be granted. Although [*Section 996(1)*] speaks in terms of relief being granted 'in respect of the matters complained of', the court has to look at all the circumstances in deciding what kind of order it is fair to make. It is not limited merely to reversing or putting right the immediate conduct which has justified the making of the order. In *Re Bird Precision Bellows Ltd [1985] BCLC 493, [1986] Ch 658* Oliver LJ described the appropriate remedy as one which would 'put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders of the company'. The prospective nature of the jurisdiction is reflected in the fact that the court must assess the appropriateness of any particular remedy as at the date of hearing and not at the date of presentation of the petition; and may even take into account conduct which has occurred between those two dates. The court is entitled to look at the reality and practicalities of the overall situation, past present and future".

160. Without prejudice to the scope of the Court's general discretion, it may grant the relief specified in *Section 996(2)* of the *2006 Act*, including an order providing for the purchase of a member's shares.

161. In the light of my conclusions on the issue of liability, Mr Brown is *prima facie* entitled to an order that the Respondents purchase his shares and an order dispensing with the requirement for him to comply with the Transfer Notice. This is on the basis that by exercising its powers to require Mr Brown to serve a Transfer Notice, AGL was acting otherwise than in good faith towards him

and that Mr Brown's misconduct is substantially outweighed by the misconduct of the Respondents.

162. By their Counterclaim, the Respondents seek *inter alia* a declaration that Mr Brown has committed a material breach of a Relevant Agreement within the meaning of Clause 17.1(c) of the Articles and the breach is incapable of remedy. They also seek an order for specific performance of Mr Brown's obligation to serve a Transfer Notice. They have succeeded in establishing that Mr Brown has committed such a breach. However, if I make an order dispensing with the need for Mr Brown to comply with the Transfer Notice, this will be on the basis that any remedy for non-compliance falls away.

163. I shall make no further determination, order or directions until I have heard further from counsel.