Neutral Citation Number: [2020] EWHC 2000 (Ch)

Case No: BL-2019-NCL-00005

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN NEWCASTLE
BUSINESS LIST

The Moot Hall,
Castle Garth,
Newcastle-upon-Tyne, NE1 1RQ
Date: Friday 24 July 2020

Before:

MR JUSTICE SNOWDEN

Vice-Chancellor of the County Palatine of Lancaster

- -

Between:

TAYLOR GOODCHILD LIMITED	**Claimant/ Respondent**
- and –	
(1) SCOTT TAYLOR **(2) SCOTT TAYLOR LAW LIMITED**	**Defendants/ Applicants**

- -

Simon Goldberg (instructed by **Endeavour Partnership LLP**) for the **Claimant**
Mark Harper QC (instructed by **DWF Law LLP**) for the **Defendants**

Hearing dates: 12-13 December 2019

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Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10 a.m. on Friday 24 July 2020.

MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN:

Introduction

1. This is an application issued on 10 July 2019 by the Defendants to strike out the Claimant's Particulars of Claim on the ground of *res judicata* and/or as an abuse of process pursuant to CPR 3.4, further or alternatively for summary judgment pursuant to CPR 24. The current litigation follows earlier proceedings between the parties and is a salutary warning of what can occur when parties do not ensure that all relevant issues are fully ventilated before the court.

2. The underlying dispute concerns two solicitors, Mr. Taylor and Mr. Goodchild, who were formerly equal joint owners and the only directors of a limited company engaged in the provision of legal services. Following the deterioration of the business relationship between Mr. Taylor and Mr. Goodchild, the two men decided to divide up the legal business and to go their separate ways. In essence, the dispute arose due to their inability to agree the terms on which that separation would take place.

3. The company in question, Taylor Goodchild Limited (the "Company"), is the Claimant in these proceedings. Mr. Goodchild remains a director and is now the sole owner of the Company.

4. Mr. Taylor is the First Defendant. The Second Defendant, Scott Taylor Law Limited ("STL"), is a company set up by Mr. Taylor which is also engaged in the provision of legal services. Mr. Taylor owns all of the issued shares in and is the sole director of STL.

5. The instant Claim follows on from a petition (the "Petition") brought by Mr. Goodchild on 21 November 2017 for relief pursuant to section 994 of the Companies Act 2006 (the "CA"). The Petition alleged that Mr. Taylor had acted in a way that was unfairly prejudicial to Mr. Goodchild's interests as a shareholder in the Company. As is conventional, both Mr. Taylor and the Company were respondents to the Petition.

6. The Petition was heard in July 2018 before the then Vice-Chancellor, Barling J, who handed down his judgment and order on 20 July 2018: see [2018] EWHC 2946 (Ch) (the "Judgment"). Barling J concluded that Mr. Taylor had conducted the affairs of the Company in a way that unfairly prejudiced Mr. Goodchild and that Mr. Taylor's actions in setting up STL and diverting client business to it represented a clear breach of his fiduciary and statutory duties as a director of the Company.

7. Consequently, Barling J ordered that Mr. Taylor sell his 50% shareholding in the Company to Mr. Goodchild at a price of £170,500 which he determined having considered a report from an independent expert valuer who had been jointly instructed by order of the court. Mr. Taylor subsequently sold his shareholding to Mr. Goodchild on 19 August 2018 and resigned his directorship of the Company on 24 August 2018.

8. The Company now seeks to recover monies it contends are still owed to it by Mr. Taylor and/or STL, together with damages and/or an account of profits in respect of losses it claims to have suffered as a result of Mr. Taylor's breaches of duty as found in Barling J's Judgment. In response, Mr. Taylor and STL contend that the

Company's claims were or should have been determined in the Petition and are thus barred *res judicata*, or are an abuse of process, or are bound to fail.

Background

9. The detailed background to this dispute is set out in Barling J's Judgment, and it is not necessary to repeat here the full story of how the dispute arose and developed. However, I shall set out briefly those facts that are relevant to this particular application.

The creation of the Company

10. Between the years of 2004 and 2011, Mr. Taylor and Mr. Goodchild operated together a firm of solicitors as a partnership. In 2011, they decided to switch the business from a partnership to a limited company, and the Company was incorporated in June 2011.

11. Mr. Taylor and Mr. Goodchild were the Company's only directors and each owned 50% of the issued shares. Under the Company's constitution, in the event of any disagreement there was deadlock at board and shareholder meetings, meaning that each man had an effective veto over the running of the Company.

12. Upon incorporation, the Company purchased the business of the partnership for about £900,000. Instead of receiving the purchase price for the partnership's assets in cash, Mr. Taylor and Mr. Goodchild agreed that the money would be treated as a loan by each of them to the Company and it was credited in equal amounts to their respective director's loan account (the "DLAs").

13. Each month the two directors drew a fixed sum from the Company, which was debited against their respective DLA. At the end of the year, the intention appears to have been that provided the Company had sufficient distributable profits and could lawfully do so, it would declare a dividend, which would then be paid or set-off against any indebtedness of the directors to the Company on their DLAs. This type of arrangement, to which I shall return, is commonly employed in small private companies, largely for tax reasons.

14. During the first few years of operation of the Company, Mr. Taylor and Mr. Goodchild both withdrew more than the Company was making in profit, because by May 2016 their respective DLAs were both in debit by substantial sums: Mr. Taylor's by over £200,000 and Mr. Goodchild's by over £180,000. By the end of 2016, the Company's financial position had worsened and no dividend was declared for the years ended November 2016 or November 2017. By the time Mr. Taylor resigned as a director in August 2018, his DLA was in debit by nearly £230,000.

The dispute and the separation of the Company's business

15. Between 2015 and 2016 the relationship between Mr. Taylor and Mr. Goodchild deteriorated. By the end of 2016, the two men had reached an agreement in principle to divide up the Company's legal business so that (broadly speaking) Mr. Taylor would take the civil work and Mr. Goodchild would take the criminal work. However, they were unable to reach agreement on a number of important aspects of the split.

16. One key point of dispute between Mr. Taylor and Mr. Goodchild concerned the DLAs and the question of whether to declare a dividend for the year ended November 2016, and if so the amount of that dividend. In brief, Mr. Taylor refused to approve the draft annual accounts ending 30 November 2016 unless Mr. Goodchild agreed to declaration of a dividend that would have eliminated Mr. Taylor's DLA. Mr. Goodchild refused to do so, on the basis that the Company had inadequate distributable profits to eliminate the DLAs, but he offered to agree to the declaration of a smaller dividend for each shareholder of £89,500 in order to enable the audited accounts to be approved. Mr. Taylor refused to accept this and complained that Mr. Goodchild had not provided him with relevant financial information. The result was that no dividend was declared and the Company incurred an additional £29,000 tax liability.

17. Whilst the negotiations were still continuing, on 31 January 2017, Mr. Taylor incorporated STL. Over the course of the following weeks and months he began removing client files and other documents from the Company's premises and taking them to STL's premises. Mr. Taylor admits that he eventually removed between 90 and 100 files (the "Retained Files"). Many, if not all, of the Retained Files had unbilled work-in-progress which had been done on them and for which the Company would have been entitled to bill its clients ("the Retained Files WIP").

18. On 12 May 2017, Mr. Taylor informed Mr. Goodchild that he would cease carrying on any work for the Company with effect from 16 June 2017, and would be taking with him to STL several of the Company's employees, who would also cease employment on 16 June 2017. After giving such notice, Mr. Taylor also wrote to certain clients of the Company informing them that he was no longer working there and inviting them to instruct STL in place of the Company. Although some clients did indeed instruct STL, it also appears that some work may then have been carried out by STL on the Retained Files in place of the Company without the relevant client's express consent.

19. After Mr. Taylor gave his notice, from 1 August 2017 Mr. Goodchild began drawing £8,000 per calendar month from the Company. In response, in mid-September 2017, Mr. Taylor also paid himself £8,000 from the Company's bank accounts (of which he remained an authorised signatory) which he told Mr. Goodchild was "to keep our positions equal". In November 2017, Mr. Taylor paid himself a further £8,500 from the Company's bank account, seemingly for the same reason.

20. After a failed attempt at mediation, the Petition was presented in November 2017 and heard in July 2018.

The valuation evidence

21. In anticipation that a buy-out order might be made at trial, an independent valuer was instructed. Mr. Andy Poole of Armstrong Watson LLP, was nominated by the court after the parties were unable to agree. He provided his valuation report to the parties on 22 May 2018.

22. In his report, Mr. Poole provided a valuation of Mr. Taylor's 50% shareholding in the Company on the basis of two different scenarios. The first scenario assumed that Mr. Taylor had not left the Company in June 2017 and valued the Company as at that date

("the Continuing Basis"). The second scenario assumed that Mr. Taylor had left in June 2017 and taken business with him, and valued the Company as at the date of the report, i.e. it was premised on what had actually happened ("the Exiting Basis").

23. Mr. Poole adopted a "maintainable profits" approach to his valuation on both the Continuing Basis and the Exiting Basis, and rejected the use of a net asset basis. This involved applying a multiplier to the maintainable profits of the Company which Mr. Poole derived from the audited and draft profit and loss accounts of the Company.

24. For the Continuing Basis, Mr. Poole took the figures for the financial years ending 30 November 2015 and 2016 together with an annualised figure derived from the performance of the Company between 1 December 2016 and 30 June 2017. So far as the directors were concerned, Mr. Poole deducted notional salaries for Mr. Taylor and Mr. Goodchild totalling between £93,885 and £102,147 on the basis that this reflected what a third-party purchaser of the practice would have to pay the directors to work in the business. The weighted average result was maintainable earnings of £163,988, which, when a multiplier of 2.25 was applied, resulted in a value for the Company of £368,972, and a value of Mr. Taylor's shares on a non-discounted basis of £184,486.

25. For the Exiting Basis, Mr. Poole took figures for the Company from its draft audited and management accounts covering the period from 1 July 2017 to 31 March 2018 and deducted £51,073 for a notional salary for Mr. Goodchild to arrive at a maintainable earnings figure of £139,832. When multiplied by the same factor of 2.25, this resulted in a value of £314,622, and a value of Mr. Taylor's shares of £157,311.

26. Mr. Poole checked his conclusions against a net asset valuation of the Company. He concluded that as at 30 November 2017, the net asset value of the Company was £597,210. However, Mr. Poole stated that since this included the balance on the overdrawn DLAs of £445,221, the remaining asset value of £151,989 was less than the value arrived at on a maintainable earnings basis, which confirmed his decision to use the maintainable earnings.

27. During the Petition proceedings, it was also agreed that Mr. Taylor would produce a schedule that detailed the profit costs generated on the Retained Files. This schedule was referred to by the parties as "Schedule 9(e)", and indicated the total value of receipts collected by STL in respect of the Retained Files WIP was £105,632.15 as at 6 April 2018. Schedule 9(e) was not agreed by the parties but was provided to Mr. Poole for the purposes of conducting his valuation report. It was not, however, referred to in his report.

The unresolved issue of Mr. Taylor's DLA

28. Due to the fact that his valuations were conducted on the basis of maintainable earnings rather than net asset value, Mr. Poole repeatedly noted in his report that his valuations had been carried out "separately to any balance owed to the Company by Mr. Taylor". He stated that this was an issue "which will require separate consideration".

29. Nothing concrete was, however, done in this regard until the start of day four of the five day hearing of the Petition, when Mr. Taylor's then counsel, Mr. Murray, raised

the question of the omission of the DLAs from Mr. Poole's valuation. Mr. Murray identified this as "a very important question", and submitted that,

> "Mr. Goodchild's position appears to be that what will happen if a share purchase order is made that Mr.Taylor will get just … the median figure of £170,000 odd for his shares. He will then be faced with an immediate demand from the company, which by this stage will of course be under the sole control and ownership of Mr. Goodchild, for the repayment of his DLA, in the sum of about £230,000."

30. Mr. Murray then asked Barling J to order Mr. Poole to answer some new questions as to the effect on his valuation of including the balance owing to the Company on the DLAs. After hearing submissions, Barling J refused that request on the basis that the parties had had the expert's report for some time and had already asked questions of Mr. Poole, and that embarking upon such a process at such a late stage would cause an adjournment of the trial which would be disproportionate and result in a waste of court time and resources.

31. In closing submissions, Mr. Murray returned to the topic and submitted that when making any order for a buy-out, Barling J should himself increase the valuation of Mr. Taylor's shares by half of the amount owed on both directors' DLAs to reflect the fact that in addition to owning a legal practice which had been valued on a maintainable earnings basis by Mr. Poole, Mr. Taylor's shares gave him a 50% interest in the Company which had a right to enforce repayment of the DLAs.

32. In argument, it would seem that Barling J saw this as, in effect, a request that he should determine what dividend the Company should declare in order to eliminate some part of the balance on the DLAs. That argument was reinforced by Mr. Goldberg for Mr. Goodchild in his closing submissions. Mr. Goldberg resisted the suggestion that Barling J should make any adjustment to the valuation of the shares and clearly indicated that there was "another arena" in which the issues could be resolved. When Barling J interjected, "Litigation starts again?", Mr. Goldberg answered,

> "Well that's unfortunate … but it's a function of Mr. Taylor [failing] to raise these issues in these proceedings until far too late in the day. So if it does cost him some more money to argue about it, then that's really his lookout."

The Judgment

33. The findings made in the Judgment of Barling J can be summarised as follows:

    i) There was no agreement between Mr. Taylor and Mr. Goodchild that permitted Mr. Taylor to set up his own law firm, encourage the Company's staff to leave the Company and join his new firm, take files to his new firm, invite the Company's clients to switch their business to his new firm, start to work for the new firm, or take the Retained Files WIP for the benefit of the new firm. There was certainly no agreement that Mr. Taylor could do any of those things while remaining a director and shareholder of the Company and

while the financial terms of the split had not been agreed (at paragraphs 79-81).

ii) Mr. Taylor continued to exercise his director's powers even after leaving the Company's business, for example in drawing £16,500 from the Company's bank account and in refusing to recommend declaration of the £89,500 dividend; and the way in which he did so was directly contrary to the Company's interests (e.g. his insistence on a dividend that would extinguish his DLA, which led to an increased tax bill of £29,000). Barling J held that Mr. Taylor's extraction of £16,500 from the Company's bank account was "reprehensible" given the precarious financial position of the Company at the time and the fact that Mr. Taylor had not been working for the Company since June 2017 (at paragraphs 96-99).

iii) Mr. Taylor's actions represented "the clearest possible breach of [his] fiduciary and statutory duties", as he had exercised his powers as a director with a view to safeguarding his own interests both before and after leaving the Company (at paragraph 102).

iv) Mr. Taylor had therefore conducted the Company's affairs in a manner that was unfairly prejudicial to Mr. Goodchild as a member of the Company (at paragraph 103).

v) Section 996 of the CA provided for a wide discretion as to relief. Barling J therefore ordered that Mr. Goodchild should retain the Company and that he should buy Mr. Taylor's 50% shareholding "at a fair valuation" (at paragraph 104).

The decision on the DLA and valuation

34. After making his findings on liability, Barling J dealt with the issue of Mr. Taylor's DLA under the heading "A late issue" in paragraphs 105-112 of his Judgment. After outlining how the issue had arisen, he concluded as follows,

> "109. [Mr. Taylor] now complains that [the exclusion of the issue concerning the DLA from Mr. Poole's report] leaves him *prima facie* liable to repay his director's loan account (or the balance of it after the value of the shares to be paid to him by the petitioner are taken into account).
>
> 110. Mr. Murray submitted that in these circumstances I should not adopt the share valuations in the single joint expert's report, but should increase those valuations by some or all of the amount owed by [Mr. Taylor] to the Company. This would wholly, or partly, extinguish his director's loan account and compensate for the lack of a declaration of dividend in 2016 and 2017. The problem with this submission, as Mr. Goldberg points out, is that I would have to descend into the expert's arena, and in effect decide how much of [Mr. Taylor's] loan account should be written off as dividend or how much of it should otherwise be added to the value of his shares, but

> without any material with which to make such an assessment. It is quite impossible for me to do so.
>
> 111. The expert said that the loan accounts would require "separate consideration". I do not consider that it is my role to give them such consideration in the context of this case, nor do I have the wherewithal to do so. If [Mr. Taylor] had wished the expert to opine on this issue, he should have raised it when the report was received, at the very latest some weeks ago, and when other matters were being raised by the parties with the expert.
>
> 112. I therefore propose to use the valuations in the single joint expert report. I acknowledge that this leaves some matters unresolved between the parties, but that is unavoidable. It would obviously be highly undesirable for there to be further litigation between them, and one hopes that they will find a way of resolving remaining issues without recourse to the courts."

35. In respect of the choice on share value between the Continuing Basis and the Exiting Basis, Mr. Goldberg on behalf of Mr. Goodchild submitted that Barling J should use the Exiting Basis "as it reflects what actually happened". Barling J did not accept that submission, and instead adopted the course proposed by Mr. Murray of splitting the difference between the two valuations. He therefore ordered Mr. Goodchild to pay Mr. Taylor £170,500 for his shares.

36. There was no appeal against Barling J's decision, either on liability or as to his refusal to deal with the issue of Mr. Taylor's DLA.

These proceedings

37. Unfortunately, the parties have not resolved the remaining issues, including the issue of Mr. Taylor's DLA, as Barling J hoped.

38. Instead, and as foreshadowed at the trial of the Petition, now that the Company is in the sole ownership and control of Mr. Goodchild, it has issued a claim against Mr. Taylor for repayment of the balance on his DLA. In addition, the claim joins STL, and includes claims for breach of duty on the part of Mr. Taylor, and against STL on the grounds of dishonest assistance or knowing receipt/unconscionable retention. As against Mr. Taylor, the Company relies upon the findings of breach of duty in Barling J's Judgment.

39. The relief claimed can be divided into three categories:

    i) The repayment by Mr. Taylor of his DLA of £229,431.43, being the amount he was indebted to the Company as at the date of his resignation as a director (the "DLA Claim"). This includes the £16,500 withdrawn from the Company's bank account in September and November 2017.

ii) The payment by STL of the amounts said to have been received in respect of the Retained Files WIP as at 6 April 2018 in the amount of £105,632.15, together with an order requiring STL to account to the Company for any further payments received in respect of the Retained Files WIP after 6 April 2018 but prior to the date of judgment, and a declaration that STL remains liable to account to the Company immediately upon receipt of any future payments in respect of the Retained Files WIP (the "WIP Claim").

iii) A declaration that Mr. Taylor and/or STL are liable to account to the Company for (a) all profits generated from work performed by STL for any of its clients between 17 June 2017 (the day Mr. Taylor ceased work for the Company) and 24 August 2018 (the date Mr. Taylor resigned his directorship); and (b) all profits which are attributable to work performed by STL on the Retained Files (the "Account of Profits Claim").

The Application

40. On 10 July 2019, Mr. Taylor and STL filed an application to strike out the Particulars of Claim and/or for summary judgment (the "Application"). In short, the Defendants contend that except for the DLA Claim, the claims advanced in the Particulars of Claim were before the court in the Petition and are therefore *res judicata*: and that the DLA Claim is an abuse of process pursuant to the principle in Henderson v Henderson (1843) 3 Hare 100. Further or alternatively, Mr. Taylor requests summary judgment pursuant to CPR Part 24 in respect of the DLA Claim, on the basis that it has no real prospect of success.

The Law

Summary judgment

41. The principles to be applied on an application for summary judgment were conveniently summarised by Lewison J in Easyair v Opal Telecom [2009] EWHC 339 (Ch), approved by the Court of Appeal in AC Ward v Catlin (Five) [2009] EWCA Civ 1098, and set out by Bryan J in The European Union and Anor v The Syrian Arab Republic [2018] EWHC 1712 (Comm) at [66] as follows:

> "(1) The Court must consider whether the defendant has a realistic, as opposed to a fanciful, prospect of success;
>
> (2) A realistic claim is one that carries some degree of conviction. This means a claim that is more than merely arguable.
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> (3) In reaching its conclusion, the Court must not conduct a 'mini trial' …;
>
> (4) This does not mean that the Court must take at face value and without analysis everything that a party says in its statements before the Court. In some cases it may be clear there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents;

> (5) The Court must take into account not only the evidence actually placed before it but also the evidence that can reasonably be expected to be available at trial;
>
> (6) The Court should hesitate about making a final decision where reasonable grounds exist for believing that a full investigation into the facts of the case would add to or alter the evidence and so affect the outcome of the case;
>
> (7) If the application gives rise to a short point of law or construction and the Court is satisfied it has before it all the evidence necessary for its proper determination, it should grasp the nettle and decide it."

Res judicata

42. *Res judicata* is a term that encompasses a number of different legal principles which were described by Lord Sumption in Virgin Atlantic Airways v Zodiac Seats UK Ltd [2013] UKSC 46 at [17]:

> "Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle.
>
> The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings.
>
> Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v Boot [1928] 2 KB 336.
>
> Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see King v Hoare (1844) 13 M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments

> since 1982: see Civil Jurisdiction and Judgments Act 1982, section 34.
>
> Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 537, 561 and adopted by Diplock LJ in Thoday v Thoday [1964] P 181, 197-198.
>
> Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.
>
> Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

43. In relation to Henderson v Henderson, Lord Bingham provided a helpful description in Johnson v Gore Wood & Co [2002] 2 AC 1. He stated, at page 31:

> "Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter…The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all.
>
> I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts

> of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

44. I was also directed to the case of Aldi Stores Ltd v WSP Group Plc [2007] EWCA Civ 1260 ("Aldi"), in which Thomas LJ provided important practical guidance on the application of Henderson v Henderson. Some of the key principles set out in his judgment can be distilled as follows:

    i) The fact that the defendants or respondents in the original action are different to the defendants or respondents in the later action does not operate as a bar to the application of the Henderson v Henderson principle, though it will be a powerful factor in the application of the broad merits-based judgment if the defendant being sued in the second action is not the same as the defendant sued in the first (at [7]-[10] and [26]).

    ii) The fact that a claim could have been raised in the original action does not mean it is necessarily abusive to raise it in a second action; it is necessary to consider whether in all the circumstances the claimant is abusing the process of the court by seeking to raise issues it could have raised before (at [17]).

    iii) It will not be a necessary finding to a claim being struck out that the claimant has behaved in a way that is culpable or improper, but it may be important to the assessment that they have not (at [18]).

    iv) When parties to existing proceedings are faced with the issue of wishing to pursue other proceedings whilst reserving a right in the existing proceedings, they should raise the issue with the court so that the court is given the opportunity to express its view as to the proper use of its resources and on the efficient and economical conduct of the litigation. In this regard, Thomas LJ concluded (at [30]-[31]):

> "It is plainly not only in the interest of the parties, but also in the public interest and in the interest of the efficient use of court resources that this is done. There can be no excuse for failure to do so in the future".

45. In subsequent cases, a failure to comply with the requirement set out in Aldi to raise the possibility of future litigation with the judge seized of the first case has been said to be a primary factor in identifying subsequent litigation as an abuse: see e.g. Gladman Commercial Properties v Fisher Hargreaves Proctor & Ors [2013] EWCA Civ 1466 at [63]-[67].

Unfair prejudice

46. The court's powers to order relief in respect of a section 994 petition are set out in section 996 CA:

> "(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.
>
> (2) Without prejudice to the generality of subsection (1), the court's order may
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> (a) regulate the conduct of the company's affairs in the future;
>
> (b) require the company—
>
> (i) to refrain from doing or continuing an act complained of, or
>
> (ii) to do an act that the petitioner has complained it has omitted to do;
>
> (c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;
>
> (d) require the company not to make any, or any specified, alterations in its articles without the leave of the court;
>
> (e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly."

47. It is commonplace that where a minority shareholder succeeds in alleging that the majority shareholders or directors have breached their duties or fiduciary duties to the company and thereby conducted the affairs of the company in an unfairly prejudicial manner, an order is made for purchase of the minority's shares by the wrongdoers. In fixing a fair price at which such buy-out should be ordered, the petitioner routinely asks for the price of his minority holding to be determined taking account of the wrongs done to the company by the respondents.

48. It is also the case that even if the court is not minded to make a buy-out order, but finds unfair prejudice to have been established, it can order damages, compensation or an account of profits to be paid to the company by the respondent shareholders or directors or any third party involved in the wrongdoing.

49. In these respects, there are a series of cases in which the court has repeatedly emphasised the breadth of section 996 CA and declined to place any limitation on the power to grant relief under it, either as against a director or a third party (provided that they have been joined to the proceedings): see e.g. Re a Company (No. 005287 of 1985) [1986] 1 WLR 281 at 284-285; Gamlestaden Fastigheter AB v Baltic Partners Limited & Ors [2007] UKPC 26 at [27]-[28]; Sikorski v Sikorski & Anor [2012] EWHC 1613 (Ch) at [71]-[81]; and Wootliff v Rushton-Turner & Ors [2016] EWHC 2802 at [27]-[33].

50. In Apex Global Management v Fi Call & Ors [2013] EWHC 1652 (Ch), Vos J examined the relevant authorities and concluded, at [125]:

> "In my judgment, these authorities all speak with one voice. They show that sections 994-6 provide a wide and flexible remedy where the affairs of a company have been conducted in a manner that is unfairly prejudicial to the interests of some or all of its members. A section 994 petition is appropriate where, for whatever reasons, the trust and confidence of the parties to a quasi-partnership has broken down. Relief can be granted to remedy wrongs done to the company, and in such a situation the alleged wrongdoers must be made parties to the petition. Non-members of a company who are alleged to have been responsible for such conduct can be joined as respondents, and, in an appropriate case, such non-members can be made primarily or secondarily liable to buy the petitioners' shares. Artificial limitations should not be introduced to reduce the effective nature of the remedy introduced by sections 994-6."

51. If, less frequently, the minority shareholder seeks an order that it be entitled to acquire the shares of the majority in order to address the unfair prejudice perpetrated by the majority, logic would suggest that there could also be an order that the majority pay compensation or account to the company for profits derived from such wrongs, and then the price at which the majority's shares are then acquired should reflect such restoration or increase in value.

52. To take a simple example, assume a company in which the shares are held by the majority and minority 60/40 and which is worth £100. If, in breach of duty, the majority expropriate an asset from the company worth £20, and are found thereby to have conducted the affairs of the company in a manner which is unfairly prejudicial to the minority, they could be ordered to sell their shares to the minority. In such a case, they could be ordered to restore the asset to the Company and then their shares would be purchased for £60 by the minority (with no premium payable for control). Depending on the facts (and assuming that the interests of creditors of the Company are not affected), it might also be possible to achieve the same result in practical terms as between the shareholders, by leaving the asset in the hands of the majority and adjusting the value to be paid for the majority's shares.

53. These examples assume that the issues of expropriation and remedy are all dealt with at the same time. In that regard, and as a general proposition, I would remark that in many unfair prejudice cases concerning small private companies (which have often been likened to "corporate divorces"), there is an obvious imperative in the interests of the parties and saving costs and court resources, that in fashioning a remedy for unfair prejudice, the court should seek if possible to create a "clean break" between the parties. This generally means that all outstanding disputes between the parties relating to the company should be resolved at the same time and reflected in the order and valuation for the buy-out.

The DLA Claim

Strike out

54. Mr. Harper QC submitted that the DLA Claim should be struck out as a Henderson v Henderson abuse of process because the issue of whether Mr. Taylor's DLA should be repaid to the Company could and should have been pursued and resolved as part of the Petition. I do not accept that submission.

55. So far as the question of whether the claim "could" have been raised in the Petition, the simple fact is that the DLA Claim is a claim in debt by the Company against Mr. Taylor, the Company was a nominal respondent to the Petition, and given the deadlock between the directors, the Company could not have raised such a claim itself.

56. Nor is it obvious to me that Mr. Goodchild could have complained that Mr. Taylor's personal failure (or inability) to repay his DLA was conduct by Mr. Taylor of the affairs of the Company within the meaning of section 994 CA. As Mr. Goldberg submitted, if the issue was to be raised at all in the unfair prejudice proceedings, the correct approach would have been for Mr. Taylor to cross-petition on the basis that Mr. Goodchild's refusal to agree to recommend that the Company should pay a higher dividend was unfairly prejudicial to his interests, because it deprived him of the opportunity to have the benefit of a larger debt which he could have set-off against his liability for the DLA.

57. So far as the question of whether the claim "should" have been raised, it is clear that the issue of whether, and if so, how, the existence of Mr. Taylor's DLA should be dealt with and factored into the valuation of Mr. Taylor's shares was squarely identified both in Mr. Poole's expert report and at the trial of the Petition. In that context, as I have indicated, Mr. Goldberg made it clear that Mr. Goodchild's view was that if he succeeded in obtaining an order to buy out Mr. Taylor, he considered that the Company would thereafter be at liberty to bring subsequent proceedings to recover the balance on Mr. Taylor's DLA.

58. This was therefore not a case in which, in breach of the Aldi guidelines, the possibility of a claim by the Company to repayment of Mr. Taylor's DLA was not ventilated with the court in the first set of proceedings. Mr. Goodchild appears to have mentioned it, it was then taken up by Mr. Taylor's counsel who asked Barling J to deal with it in the course of the hearing (which he declined) and it was then addressed in closing submissions. Barling J was therefore well aware of the possibility of a subsequent claim being made by the Company in respect of the DLA.

59. Although, as Barling J made clear in his judgment, he regarded the possibility of further litigation as undesirable, neither he nor anyone else suggested that such a claim could not subsequently be brought by the Company because it would be an abuse of process. Rather, Barling J concluded, at paragraph 112 of his Judgment,

> "I acknowledge that this leaves some matters unresolved between the parties, but that is unavoidable"
>
> (my emphasis)

60. In so far as it is appropriate to consider whether the Company (or even Mr. Goodchild as its new owner) has behaved in a way that is culpable or improper, it is also clear that Barling J did not think that the fact that the matter had not been raised at an

earlier stage was the fault of Mr. Goodchild or the Company. Instead Barling J plainly thought that it was for Mr. Taylor to have raised the issue, and that he had failed to do so until it was too late.

61. In light of the above, and given that Barling J's Judgment and his decision not to factor Mr. Taylor's DLA into the value which he fixed for the shares in the Company has not been appealed, I do not see how I can conclude that the Company or Mr. Goodchild could and should have brought and pursued a claim for repayment of the DLA as part of the Petition. I therefore do not consider that the Company's pursuit of the DLA Claim in these proceedings constitutes an abuse of process.

Summary determination

62. As an alternative to his Henderson v Henderson argument, Mr. Harper QC submitted that the DLA Claim has no realistic prospect of success and so should be summarily dismissed.

63. The basis for this submission rests on an assertion by Mr. Taylor that he and Mr. Goodchild had an implied agreement, formed at the time that they first drew on their DLAs, that they would, in effect, be remunerated for their work by way of monthly drawings which would be debited to their respective DLAs, but in the expectation that the Company would declare a dividend at the end of the year. The declaration of such a dividend would create a debt which could be set against any amount owing on the DLAs.

64. Mr. Harper QC further contended that it was an implied term of this agreement between Mr. Goodchild and Mr. Taylor that if the Company was lawfully able to declare a dividend then it would declare one in the "necessary amount" to reduce or extinguish the amount owing on the directors' DLAs. Mr. Harper QC further suggested that there was an implicit expectation or understanding that the directors would not cause the Company to call for repayment of the DLAs where it had, for the relevant financial year, sufficient distributable profits from which it could declare a dividend, but had failed to do so without good reason.

65. Mr. Harper QC further submitted that for the financial year ending 30 November 2016 the Company had distributable profits of £441,449 and, but for the dispute, dividends would have been declared in the normal way to offset the debts due on the directors' DLAs.

66. Mr. Harper QC analysed the legal effect of these contentions in three ways. First, he said that as a matter of contract, Mr. Taylor was not obliged to repay his DLA as the Company had the ability to declare dividends and to be repaid in that way; secondly, that in circumstances in which it had not declared a dividend it would be unconscionable for the Company to claim repayment of Mr. Taylor's DLA such that it is estopped from doing so; and thirdly, even if Mr. Taylor was liable for the DLA, he would have a counterclaim and set off founded on unjust enrichment, because without such a remedy, Mr. Taylor would have provided his services to the Company in the legitimate expectation that he would be remunerated, but would end up having worked for the Company in the years ended November 2016 and November 2017 for free.

67. In response, Mr. Goldberg submitted that there were a number of difficulties with these arguments. First, he contended that Mr. Taylor had provided no particulars of the circumstances in which the alleged agreement was reached, and that its supposed terms were far too uncertain to be legally binding. He pointed out, for example, that it was not alleged and was unclear how the Company itself would be bound by the agreement between Mr. Taylor and Mr. Goodchild; it was not clear what size of dividend would in any year constitute the "necessary amount", or how that would be determined; and it was also unclear how any such contractual obligation was said to co-exist with the fiduciary duties owed by the directors to the Company in relation to recommending a dividend. In Mr. Goldberg's submission, none of the terms

contended for by Mr. Harper QC met the stringent tests for certainty of contract or implication of terms.

68. Mr. Goldberg also submitted that on the facts Mr Taylor would fail to make good his suggestion that the Company could have declared any, or any substantial dividend, or that it had breached any obligation to Mr. Taylor to do so. He referred in this regard to the findings made by Barling J in the Judgment, which included the following,

> "58. In cross-examination, [Mr. Taylor] accepted that he was not willing to sign the accounts, which were in fact overdue, without a dividend declaration at a level that he was happy with. He wanted, he said, a dividend declared which would extinguish his director's loan account. That, it seems clear, would have required a dividend declaration in the order of £400,000. [Mr. Taylor], as I understand it, accepted that the balance sheet showed shareholders' funds of only £242,000 at this time.
>
> …
>
> 97. There is a considerable tension between the insistence of [Mr. Taylor] on the declaration of a dividend which would extinguish his loan account of some £230,000 and the fact that only a few weeks earlier he was under the impression that the Company was going bust and had blocked its overdraft facility renewal. I do not consider that there was anything unreasonable in [Mr. Goodchild's] stance on the declaration of a dividend for 2016. The fact that the £800,000 or £900,000 credit in the directors' loan accounts when the Company was formed had turned into an approximately £400,000 debit indicates that the directors had been paying themselves more than the company could afford over the whole period. Over the five years or so of the Company's existence, it appears that the directors' loan account had decreased by some £1.2 million."

69. In my judgment, it is far from clear that Mr. Taylor would be able to succeed either in establishing that a contract existed on the terms alleged, or establishing on the facts that there was a breach of it which would prevent the Company from claiming the sums due under his DLA.

70. I accept, depending on the facts, a company could be bound by an informal agreement between its two shareholders. Agreements can be legally binding even though not in writing (see e.g. Paul v Constance [1977] 1 W.L.R. 527); in many small private companies, business is frequently conducted on an informal basis; and agreements between shareholders can be binding both upon themselves and the company, even if undocumented: see e.g. Re Duomatic Ltd [1969] 2 Ch 365.

71. However, for a binding legal agreement there does need to be sufficient certainty of terms and some evidence from which the court can conclude, objectively, that there was a meeting of minds on those terms. The evidence that I have seen to date certainly does not satisfy me that the Company has no realistic prospect of disputing

the existence and terms of such a contract. In particular, I am far from convinced that the suggested implied terms as to declaration of a dividend satisfy the strict tests of necessity or that they are so obvious as to go without saying. In particular, any implied terms binding the Company as a matter of contract to declare a dividend in the "necessary amount" seems imprecise, and would have to deal specifically with the fact that as a matter of law the directors are responsible for recommending declaration of a dividend, and they have overriding fiduciary duties to the company in making any such decision: see e.g. BAT Industries v Sequana [2019] Bus LR 2178.

72. There are similar problems with Mr. Taylor's arguments based upon unconscionability and estoppel. The argument that it would be unconscionable for the Company now to seek repayment of the DLA because it failed to declare an earlier dividend appears to me to be founded upon the same premise of a contract binding upon the Company and a failure to act in accordance with it to which I have just referred.

73. In that regard I also accept Mr. Goldberg's submission that in light of the findings of Barling J as to the (lack of) available shareholders' funds and the reasonableness of Mr. Goodchild's refusal to declare a dividend for 2016, it cannot be said that the Company would have no realistic defence to a claim for breach of the alleged contract in failing to declare a dividend for 2016.

74. As a point of detail I would also observe that Mr. Harper's suggestion that the Company had distributable profits of £441,449 for the financial year ending 30 November 2016 appears to have been based upon unaudited draft management accounts for the period from 1 December 2016 to 31 March 2017. Prima facie, however, the relevant accounts for the determination of distributable profits under the CA are the last audited accounts, and even assuming these to be the accounts to 30 November 2016 that Mr. Taylor refused to approve, these showed shareholder funds of only £242,000.

75. I am also not persuaded that the Company has no defence to an argument based upon unjust enrichment. In the recent case of Jones v Sky Wheels Group [2020] EWHC 1112 (Ch), which raised similar issues to the instant case (albeit in the different context of an application to set aside a statutory demand in bankruptcy), I explained at [49]-[50] the background to the type of arrangements which appear to have existed in this case,

> "49. It is frequently the case in small private companies that persons who are both directors and shareholders are paid only a relatively modest amount of remuneration for their work through the PAYE system. They then enter into an informal agreement or arrangement between themselves to draw sums of money from the company periodically during the year. Those sums are then debited to the directors' loan accounts in the expectation that at the end of the year the company will be in a position to declare a dividend. The intention is that the resultant debt created by the declaration of dividend (of the company to the shareholders) will be set off against the indebtedness of the directors on their loan accounts. Under such an arrangement, the periodic drawings are not declared as remuneration for the

> purposes of PAYE and NIC. Instead the directors and shareholders benefit from the more favourable tax treatment accorded to dividend payments.
>
> 50. In light of the manner in which such arrangements are presented to HMRC, in general terms I do not consider that such periodic drawings can simply be re-characterised as remuneration as and when it might suit one of the recipients so to contend. Or at least that cannot be done without acknowledging that the manner in which they had previously been disclosed to HMRC had been incorrect, with all the consequences in terms of the payment of additional tax, interest and penalties that this might entail."

76. The argument advanced on behalf of Mr. Taylor in this case appears to be that although the parties deliberately chose to adopt the course of drawing sums from the Company to be debited to their DLAs rather than being paid salary (and incurring liabilities for PAYE and NIC) on a regular basis, if the Company generated insufficient profits or failed to declare a dividend, it would nevertheless be obliged to pay the equivalent of a salary to Mr. Taylor to avoid being unjustly enriched by having received the benefit of his services without payment.

77. As was the case in Jones v Sky Wheels, I see considerable difficulties in the way of that contention given that, at least on the face of it, Mr. Taylor and Mr. Goodchild freely chose to organise the affairs of the Company on the basis that they would not be employed and paid a regular salary for their work, but would instead rely on the declaration of dividends to receive their share of the profits which they helped their Company to generate. Mr. Taylor does not suggest that this arrangement was a sham. As such I see no obvious reason why the Company could not at least defend a claim in restitution on the basis that it has not been unjustly enriched, because Mr. Taylor and Mr. Goodchild had agreed to render their services to it without receiving any regular salary in return.

78. Accordingly, I do not consider that this is a case in which summary determination of the DLA Claim in favour of Mr. Taylor is appropriate.

79. I therefore refuse the application to strike out or for summary judgment on the DLA Claim in favour of Mr. Taylor. The DLA Claim must be allowed to proceed.

The WIP Claim and Account of Profits Claim

80. Mr. Harper QC submitted that the WIP Claim and the Account of Profits Claim were determined by Barling J as part of the Petition, and are therefore barred by cause of action or issue estoppel. Alternatively, he contended that they could and should have been raised by Mr. Goodchild in the Petition, and that Mr. Goodchild causing the Company to bring the claims now is an abuse of process on Henderson v Henderson grounds. Mr. Goldberg, for the Company, argued that the strict principles of cause of action or issue estoppel are not engaged in respect of either claim; that the only relevant legal principle to be considered is Henderson v Henderson; and that neither the WIP Claim nor the Account of Profits Claim should be struck out as an abuse of process on that ground.

Cause of action estoppel

81. Although the issue of whether Mr. Taylor acted in breach of duty to the Company was and is a common feature in both cases, that does not mean that the Company's cause of action in the instant case is the same as the cause of action advanced by Mr. Goodchild in the Petition.

82. Mr. Goodchild's cause of action in the Petition was a claim by a shareholder that the affairs of the Company were being conducted in a manner that was unfairly prejudicial to his interests qua shareholder. That is a personal claim to which the Company was a nominal respondent. By contrast, the Company's claim in these proceedings seeks compensation for loss and an account of profits in respect of breaches of duty owed directly to it. Although section 994 petitions often rely on breaches of fiduciary duty committed by directors as the relevant conduct of the affairs of the company, conduct of the affairs of the company can be unfairly prejudicial to shareholders without being a breach of fiduciary duty by directors (and may not arise from acts of the directors at all). Moreover, not all breaches of fiduciary duty by directors are necessarily unfairly prejudicial to the relevant shareholders. Depending on the facts they might, for example, be prejudicial, but not unfairly so, given the conduct of the petitioner.

Issue estoppel

83. As indicated by Lord Sumption in Virgin Atlantic, the effect of issue estoppel is that where an issue is decided in earlier proceedings between the same parties, the decision of the court on that issue then binds those parties in subsequent litigation. I do not understand the concept of issue estoppel operates to prevent a *successful* party from relying on findings in its favour. The policy underlying issue estoppel is that a party against whom adverse findings were made in one case should not be able to challenge them in subsequent proceedings between the same parties.

84. As such, there may well be an issue estoppel operating in this case as a result of Barling J's findings in the Judgment, but if it operates, it would do so to prevent Mr. Taylor from re-litigating the findings against him. It would not prevent the Company from relying on Barling J's findings in these proceedings against Mr. Taylor.

85. I therefore consider that it is clear that neither cause of action estoppel nor issue estoppel apply to prevent the Company bringing the WIP Claim or the Account of Profits Claim.

Henderson v Henderson

86. As indicated in the authorities to which I have referred above, in considering whether the Henderson v Henderson principle operates in this case, I am required by the authorities to undertake a broad, merits-based assessment, taking account of the public and private interests involved and all of the facts of the case.

87. The first relevant factor in my assessment is that it was perfectly possible, in my judgment, for Mr. Goodchild to seek the relief now sought through the WIP Claim and the Account of Profits Claim as part of the Petition. Mr. Goldberg submitted that the Company was only a nominal respondent to the earlier proceedings, that it was

deadlocked at the time, and that STL was not a respondent to the Petition. Those matters are all true, and relevant to the question of cause of action estoppel, but I do not think that they carry any force in relation to the broader Henderson v Henderson analysis. That is because the authorities to which I have referred above demonstrate beyond any doubt that Mr. Goodchild could, without any difficulty, have joined STL as a respondent to the Petition. They also show that Mr. Goodchild could have sought an order in the Petition for payment of compensation and/or an account of profits against Mr. Taylor and STL for the benefit of the Company which he was seeking to own in its entirety, and with which, for this purpose, he is now to be identified.

88. Instead of taking that course, it is clear that Mr. Goodchild did, at least initially, seek to achieve a similar result in economic terms by way of an alteration to the price which he might have to pay for Mr. Taylor's shares on account of the value of the Retained Files WIP and the profits from the business diverted from the Company by Mr. Taylor. The prayer for relief in the Petition was as follows:

> "(1) it be ordered that [Mr. Goodchild] do purchase [Mr. Taylor's] shares in the Company at fair value and upon the following bases:
>
> (a) that the Company be valued as a going concern excluding any premium to reflect the loss suffered by the Company as a result of the matters of unfair prejudice pleaded above;
>
> (b) that [Mr. Taylor] is required to give credit to [Mr. Goodchild] against the purchase price of the shares for 50% of the profit made by [STL] on the business unlawfully diverted by him to [STL];
>
> (c) that the sale be as between a willing purchaser and willing vendor;
>
> (d) that there be a discount by reference to the minority nature of [Mr. Taylor's] shares in the Company;…"

89. Although there was a debate between the parties before me as to whether that relief covered precisely the same ground as is now being sought in the WIP Claim and the Account of Profits Claim, that debate misses the point. The issue is whether it would have been possible for Mr. Goodchild to have formulated and pursued an order for the same relief for the benefit of the Company in the Petition as is now sought in the current Part 7 claim. For the reasons set out in the authorities to which I have referred, I consider that section 996 is quite wide enough to have covered all such relief.

90. Secondly, Mr. Goldberg contended that it would have been practically impossible in the Petition to take full account of the Retained Files WIP and business diverted by Mr. Taylor, firstly because Mr. Taylor only resigned his directorship after the end of the trial, and secondly because Mr. Taylor and/or STL had not provided disclosure of the relevant documents and information concerning the value of the Retained Files WIP and the profits made by STL since his departure from the Company's business.

91. I do not regard these as good reasons. The essential facts of the diversion of business which support the allegations in the instant claim were all known at the time of the Petition, and the fact that Mr. Taylor had not resigned served only to support and prolong any claims for unfair prejudice based upon such breach of duty. Indeed, it is clear from the very terms of sections 994 and 996 CA that they encompass continuing and threatened unfair prejudice, and appropriate relief could have been sought in the Petition to deal with the continuing breaches. Further, if and to the extent that details of the Retained Files removed and the work being done by STL was not known, further disclosure could easily have been sought.

92. Thirdly, Mr. Goldberg submitted that the Petition essentially only addressed issues of liability and not quantum, so that Mr. Taylor and STL were not now being vexed with the same issue twice, and no duplication of court time or resources will be involved determination of the WIP Claim and the Account of Profits Claim.

93. That submission is not entirely accurate as a matter of fact, because it is quite clear that the issue of quantum (i.e. the loss to the Company and the profits received by STL from the work diverted) was squarely raised in the Petition, because it was initially proposed by Mr. Goodchild in his prayer for relief that the price which he would have to pay for Mr. Taylor's shares should take account of such matters. But in any event, for the following reasons I do not accept that this is the correct approach to take to the issue.

94. Notwithstanding the prayer for relief, as matters turned out, it would seem that Mr. Poole avoided grappling with the issue of the receipts from the Retained Files WIP or the profits derived by STL from the business diverted to it by Mr. Taylor, and he did not address the accuracy or completeness of Schedule 9(e). His approach to determining the value of the Company on the Continuing Basis simply extrapolated from the Company's results for the period up to 30 June 2017, and made no attempt to add back any amount in respect of the receipts by STL in respect of the Retained Files WIP or the profits from the diverted work so as notionally to increase the Company's maintainable earnings. Likewise, the valuation on the Exiting Basis focussed entirely on the Company's receipts after 30 June 2017: again, there was no addition in respect of the Retained Files WIP or the profits made by STL from the diverted work.

95. As such, it is clear that both bases of valuation advanced by Mr. Poole in essence assumed that the Company had no claim to the value of the Retained Files WIP or the profits made by STL from the diverted business, and that it would not thereafter recover any amounts in respect of these matters so as to increase the Company's maintainable earnings.

96. At trial, neither side appears to have questioned this approach by Mr. Poole. Indeed, when it came to submissions as to the value that Barling J should put upon Mr. Taylor's shares for the purpose of ordering a buy-out by Mr. Goodchild, Mr. Goldberg invited Barling J to value Mr. Taylor's shares on the basis of the Exiting Basis alone, because, as he put it, "it reflects what actually happened". In so doing, Mr. Goldberg was, on behalf of Mr. Goodchild, seeking to persuade Barling J to value Mr. Taylor's shares on the lowest possible basis and (for reasons that I have just explained) by implication on the assumption that the Company had no future entitlement to any part of the Retained Files WIP or the profits from the business diverted to STL.

97. At that stage, in accordance with the Aldi guidelines, if there was an intention that the Company, once wholly owned by Mr. Goodchild, should be entitled to bring claims to recover compensation or an account in respect of the Retained Files WIP or the profits from the business diverted to STL, it was in my judgment imperative that this should have been spelled out to Barling J. That is especially so since the issue of follow-on proceedings was live, because it had been made clear that Mr. Goodchild's intention, if he succeeded in acquiring the Company, was to cause the Company to seek to recover the balance on Mr. Taylor's DLA. That course was, however, not taken by or on behalf of Mr. Goodchild.

98. In my judgment, this is a weighty factor which strongly supports the conclusion that the Company's pursuit of the WIP Claim and the Account of Profits Claim for the ultimate benefit of Mr. Goodchild is an abuse of process. For reasons that I have explained, the clear inference from the two bases of valuation of Mr. Taylor's shares was that the Company would not have any future right to recover monies in respect of the Retained Files WIP or the profits from the diverted business. In my view, the onus lay clearly upon Mr. Goodchild, who had originally raised such issues in his prayer for relief and was then seeking to take advantage of Mr. Poole's approach to valuation to acquire Mr. Taylor's shares at the lowest possible price, to raise the possibility that he might subsequently wish to cause the Company, which he would then wholly own and control, to seek to recover compensation or an account of profits from Mr. Taylor in respect of those matters. To use the phrase from Aldi, there can be no excuse for his failure to do so.

99. I am of course conscious that Barling J found that Mr. Taylor committed material breaches of his fiduciary duties to the Company, and that the result of a determination that it would be an abuse of process for the Company now to seek to recover its losses and an account of profits in respect of those matters is that STL will benefit from being able to retain those amounts.

100. It is also the case that, through STL, Mr. Taylor will benefit from retention of all such amounts, rather than benefitting only to the extent of his 50% shareholding in the Company from which those amounts were allegedly diverted. But the converse is also true: if the Company were now to recover those amounts, STL and Mr. Taylor would pay in full and, via the Company, Mr. Goodchild would benefit 100% rather than just in respect of the 50% share which he previously owned.

101. I believe, however, that I must also take into account that the effect of my earlier decision in relation to the DLA Claim is that Mr. Taylor will face the prospect of being ordered to repay that substantial debt to the Company. Whilst I express no view on the merits of that claim or of the defences which have been indicated to it, if I stand back and take a broad merits-based view, it would seem to me fundamentally wrong that having had his 50% shareholding in the Company acquired for a price that reflected neither the value of the DLAs, nor the possibility that the Company (of which he owned half) might be entitled the receipts and profits in respect of the Retained Files WIP and the diverted business, Mr. Taylor should now face having to pay both those amounts in full to the Company for the sole benefit of Mr. Goodchild.

102. In my view, the order for the buy-out (and costs) was an appropriate remedy in respect Mr. Taylor's breaches of duty and unfairly prejudicial conduct. To require Mr. Taylor to sell his shares for a price that took neither factor into account and then

to subject him to the further risk of having to repay both his DLA and those other amounts in full would seem to me to be inherently penal.

103. In my view, it is to avoid precisely this type of situation arising that I should pay full regard to the procedure set out by Thomas LJ in Aldi. That is particularly apposite in the context of unfair prejudice petitions concerning small private companies, where there is a regrettable tendency for disputes over the breakdown of relations between shareholders to become deeply personal, hostile and lengthy. In such cases, where possible the law should encourage a once-and-for-all determination and a clean break, and should do nothing that might be seen as permitting parties to keep matters up their sleeve and continue to litigate afterwards at further cost to themselves and imposing a further burden on the court to the detriment of other litigants.

104. As such, I reach the clear conclusion that pursuit by the Company of the WIP Claim and the Account of Profits Claim would be an abuse of process under the principle in Henderson v Henderson, and I propose to strike those claims out.

Conclusion

105. In the result I shall strike out the WIP Claim and the Account of Profits Claim but dismiss Mr. Taylor's other applications.