Neutral Citation: [2021] EWHC 1374 (Ch)

Case No: CR-2018-005729

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

The Rolls Building
Royal Courts of Justice
7 Rolls Buildings
London EC4A 1NL

Date: 21/05/2021

Before :

ICC JUDGE MULLEN

- -

IN THE MATTER OF INTEGRATED CONTROL SOLUTIONS (EASTERN) LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

B E T W E E N :

TIMOTHY McMONAGLE

Petitioner

- and -

(1) LEE HARVEY
(2) TRACEY McMONAGLE
(3) MARIA HARVEY
(4) INTEGRATED CONTROL SOLUTIONS (EASTERN) LIMITED

Respondents

- -
- -

Mr Nicholas Michael (instructed by **Fosters Solicitors LLP**) for the **Petitioner**
Mr Jack Watson (instructed by **Howes Percival LLP**) for the **First Respondent**
The Second Respondent did not appear and was not represented
The Third Respondent appeared in person
The Fourth Respondent did not appear and was not represented

Hearing dates: 12th – 15th and 18th January 2021

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Approved Judgment

COVID 19 – This judgment has been handed down by circulation to the parties. The deemed time of hand-down is 2pm.

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ICC JUDGE MULLEN

ICC Judge Mullen :

Section **Paragraph**

Introduction

1. This is my judgment following the trial on liability of:

   i) an unfair prejudice petition presented pursuant section 994 of the Companies Act 2006 ("the 2006 Act") on 10th July 2018 by Mr Timothy McMonagle, as amended on 17th September 2020 ("the Petition"); and

ii) a cross-petition, also brought under section 994 of the 2006 Act, presented on 5th August 2020 by Mr Lee Harvey ("the Cross-Petition").

Both the Petition and the Cross-Petition concern the affairs of Integrated Control Solutions (Eastern) Limited ("ICS" or "the Company").

2. Mr McMonagle holds 25 of the Company's 100 issued shares and, since presentation of the Petition, has become its sole director. The Petition names as respondents:

i) Mr Harvey, who is Mr McMonagle's former co-director and is the holder of another 25 shares in ICS;

ii) Mrs Tracey McMonagle, who is Mr McMonagle's wife and holds 25 shares;

iii) Mrs Maria Harvey, who is Mr Harvey's wife, from whom he is separated, who holds the remaining 25 shares; and

iv) ICS itself.

The Petition does not seek relief against any respondent other than Mr Harvey. As originally presented, it simply sought an order that Mr Harvey sell his shares to Mr McMonagle, at a price to be determined, with a discount to reflect that Mr Harvey's holds only a minority of the Company's shares and taking account of the unfairly prejudicial conduct of ICS's affairs alleged therein. As I shall explain, it was amended, rather late on in the life of these proceedings, to include further allegations of unfair prejudice and additional relief.

3. The Cross-Petition seeks an order that Mr McMonagle and/or Mrs McMonagle and/or the Company purchase Mr Harvey's shares, without a minority discount, and taking into account the unfairly prejudicial conduct of ICS's affairs alleged by Mr Harvey. Although the Cross-Petition annexes a "counterclaim" that seeks relief against Mrs Harvey the Cross-Petition makes it clear that no relief is sought against her.

4. As will be clear from the above, I will refer to the individual parties by their names rather than their roles in either set of proceedings.

The nature of the Company and an overview of the dispute

5. The Company was incorporated in 22nd February 2001 as Tometex Enterprises Limited. Mr McMonagle and Mr Harvey were appointed as directors on 12th April 2001. Mr Harvey was appointed as company secretary on the same day. The Company changed its name to its present style on 1st May 2001. 50 shares were allotted to Mr McMonagle on 14th August 2001 and 49 were allotted to Mr Harvey on the same day. The single share allotted to the formation agent on incorporation was transferred to Mr Harvey at the same time.

6. ICS's business was and remains the installation of building management systems, including in the healthcare and university sectors. As I understand it, a building management system ("BMS") allows for the control of various aspects of a building's operation, which might include temperature, security and lighting.

7. In 2000 Mr McMonagle and Mr Harvey were working at a company called ECS (Anglia) Limited. It was whilst working there that they decided to go into business together. Mr Harvey's position is that this was initially carried on by a partnership, which they referred to as "the ICS Partnership" ("the Partnership"), which commenced trading in February 2001. He and Mr McMonagle subsequently incorporated the Company, to which the business of the Partnership was transferred. Mr McMonagle contended in his statements of case that the Partnership was formed after the incorporation of the Company as a non-trading body for the purposes of receiving dividends in an tax efficient manner.

8. In 2004, the Company began to employ Mrs McMonagle and Mrs Harvey and it grew to have 24 employees at the date of presentation of the petition. Mrs McMonagle and Mrs Harvey received modest remuneration for their employment, each receiving a little over £800 a month. In 2017, Mr McMonagle and Mr Harvey transferred half of their respective shareholdings to their wives, with the result that each couple held 50% of the issued share capital. Mrs McMonagle and Mrs Harvey also became partners in the Partnership.

9. Mr McMonagle and Mr Harvey also received modest salaries of around £300 a month. The bulk of their monthly remuneration came from what were described in the evidence as "dividends" determined by an assessment of monthly performance in accordance with the articles of association. In reality these were loans from the Company pending the proper declaration of a dividend in accordance with the Companies Acts. I shall, however, refer to this element of the remuneration as the parties have done themselves. In the period prior to the final breakdown of the relationship between Mr McMonagle and Mr Harvey in 2017, they each received £2,814 by way of "dividend". These payments came to an end in December 2017 in the circumstances that I shall describe.

10. In 2017 Mr and Mrs Harvey's marriage broke down. Mr McMonagle discovered in around August of that year that Mr Harvey had been operating a competing sole trader business under the trading style ENJ Control Solutions ("ENJ"), which had undertaken some work that had been quoted for by ICS. Worse, he had been using the Company's material and labour to do so. He also alleges that, as part of this deception, Mr Harvey also set up a secret email address in August 2016 with the domain name "ics-controls.co.uk" ("the Controls Email") to lead the Company's customers to believe that they were dealing with ICS, the email domain name of which is "ics-eastern.co.uk". While Mr Harvey denies that this was the purpose of the email address, and there is a dispute as to when the relationship began to break down, there is no doubt that by the end of 2017 or the beginning of 2018 their relationship had deteriorated to the point that it was irreparable.

11. Mr Harvey ceased to attend ICS's premises by February 2018 and he resigned as an employee on 2nd April 2018. He did not resign as a director or seek to dispose of his shareholding at the same time, apparently as a result of threats of an injunction restraining him from doing so made by Mrs Harvey's solicitors in their divorce proceedings. He took employment elsewhere, firstly via a recruiter called the Venn Group, and secondly via a company called Building Integrated Systems Ltd ("BISL"), which was incorporated on 9th April 2018. The registered director of BISL is Mrs Allison Barker, who is Mr Harvey's sister. She is a full-time primary school teacher with no experience in the BMS sector or in associated sectors. Mr Harvey's case is nonetheless that he is an employee of BISL and not a director.

12. Mr Harvey's work for both the Venn Group and for BISL continued to bring him into contact with ICS's principal clients, in particular Addenbrooke's Hospital in Cambridge ("Addenbrooke's"). He maintains that his work for Addenbrooke's and his work through BISL was different from that which could have been undertaken by ICS, in particular because it focuses on consultancy and lighting. His work at Addenbrooke's for the Venn Group did however lead him to advise on whether at least one quote for work by ICS should be accepted, and, indeed, he advised negatively, at a time when he remained a director of ICS. During this time he also unilaterally withdrew sums of money from the Company.

13. Mr Harvey remained a director until 10th May 2019 when a letter of resignation as a director, apparently signed by him, was sent to ICS. Mr Harvey denies that he sent this letter and that he ever formally resigned as a director. There is no evidence as where this letter might have come from, if not from him, and there has been no evidence from a forensic document examiner on the signature it bears. Mr Harvey does however accept that his directorship came to an end at this point and does not contend that he remains an officer of the Company. Indeed, his position is that the Company has been under the effective control of Mr McMonagle since the end of December 2017.

14. Mr McMonagle's case as set out in the Petition, as amended, is that he has suffered unfair prejudice by reason of Mr Harvey having caused a breakdown in the relationship of trust and confidence between them, breaching his duties to the Company and damaging the value of Mr McMonagle's shares by his competitive trading as ENJ and now via BISL. He further alleges that Mr Harvey neglected the affairs of ICS at around the time he was trading as ENJ, made various unauthorised withdrawals of money in 2018, paid for house improvements using the Company's monies and retained various items of the Company's equipment.

15. While Mr Harvey admits his trading as ENJ he contends that it was of a very limited nature and that he disclosed its full extent to Mr McMonagle in an attempt to repair their relationship. He denies that BISL undertakes the same work as ICS or that he has diverted any work away from ICS.

16. The Cross-Petition alleges that Mr Harvey was excluded from the business at the end of December 2017 or beginning of 2018. He contends that his position in the Company was made untenable, not least by having his remote access to the BMS at Addenbrooke's terminated following giving his account of his trading as ENJ to Mr McMonagle in November 2017. The staff at Addenbrooke's were told about his position within ICS and his divorce. Mr McMonagle terminated the dividend payments and began to extract monies from ICS in alternative ways, including by payment of overtime to himself and the payment of an inflated salary to Mrs McMonagle, while also using Company monies to pay personal tax liabilities in 2018, contrary to an agreement reached on 31st October 2017 that the individual partners in the Partnership would pay their own tax bills. This, he contends, was the reason that he continued to make withdrawals from the Company in 2018, though he accepts that those payments were not authorised and that he may have to account for them.

17. He does not accept that his competitive trading via ENJ triggered a breakdown of trust and confidence between him and Mr McMonagle but that it began to break down in around 2012 in that he was subjected to abusive language, bullying and interference with his email account, which prompted the setting up of the Controls Email. He points

to a history of unequal treatment and alleges various unauthorised payments were made for Mr McMonagle's benefit, or were unexplained, and points in particular to the discovery of a cheque stub in 2016 for £7,816.46 marked "Tim Tax", which he contends was unauthorised and was not properly explained.

18. Despite this history of conflict, Mr McMonagle and Mr Harvey are agreed that Mr Harvey's shares should be bought out. The working assumption is that these should be bought by Mr McMonagle. There is a difference between them as to the date of valuation and whether there should be a minority discount. Mr Harvey's case is that the date of valuation should be the end of December 2017 when, he says, he was excluded from the Company. This, he contends would address in large measure the unfair prejudice that he has suffered on account of Mr McMonagle's alleged conduct after that point.

19. Mr McMonagle's case is that this lets Mr Harvey off scot-free, in that the valuation will not take into account the loss of business suffered by ICS in the years thereafter occasioned by Mr Harvey's competitive trading via BISL. He seeks an order for valuation as at the date of the order on liability.

20. Mr Harvey contends that there should be no minority discount in the valuation on the basis that the Company is a quasi-partnership, while Mr McMonagle's case is that the valuation should reflect Mr Harvey's minority shareholding.

Procedural background

21. Having given that brief overview of the broad outline of the dispute I shall set out some of the relevant procedural history and the issues in more detail. The case has been proceeding for some time and there have been a number of interim applications that I need to set out in order that it can be seen how the parties have arrived at their current positions.

The Petition

22. The Petition as originally presented was of relatively limited scope. Mr McMonagle's complaints were that –

    i) In August 2016 Mr Harvey made an unauthorised withdrawal of £20,000 from ICS and withdrew a further £5,008 in August 2017.

    ii) In around August 2017, Mr McMonagle discovered that Mr Harvey established the Controls Email in August of the previous year and had set up ENJ in November 2016, which undertook certain work that would otherwise have been undertaken by the Company. ENJ provided services to a company called James Brown (Mechanical Services) Ltd for Addenbrooke's, using ICS's materials and employees, falsifying time sheets to give the impression that the Company's employees were engaged on different jobs. According to a letter from ENJ's accountants, ENJ invoiced £25,831 for the work carried out in this way.

    iii) As a corollary of this, Mr Harvey failed to devote sufficient time and effort to the Company's affairs, achieving only 59% of his revenue target in the financial year 2017/18. He was often absent from the Company premises and ceased attending them at all from 4th December 2017.

iv) Mr Harvey sought to divert work away from ICS by advising Addenbrooke's in May 2018 not to accept a quotation from the Company, a month after he had resigned as an employee but remained a director, and was working at Addenbrooke's via the Venn Group.

v) Mr Harvey made unauthorised withdrawals from the Company's account as follows:

a) £2,462.53 on 23rd February 2018;

b) £2,462.53 on 5th March 2018;

c) £10,000 on 5th March 2018; and

d) £3,199.58 on 28th March 2018.

The Petition thus alleges that Mr Harvey was in breach of his duties under sections 171 to 175 of the Companies Act 2006, as well as being in breach of the articles of association of the Company, and these acts were unfairly prejudicial to the interests of Mr McMonagle as a member of ICS.

23. At the time of presentation of the Petition Mr Harvey was still a director of the Company. The Petition made no mention of BISL or of Mr Harvey being involved in a competitor company.

Points of Defence to the Petition

24. Automatic directions were given on presentation, providing for the filing of points of defence to the Petition by the individual respondents by 21st August 2018. Only Mr Harvey filed points of defence, which document is dated 20th August 2018.

25. It alleges that Mr and Mrs McMonagle and Mrs Harvey "colluded" against him and sets out various breaches of duty on the part of Mr McMonagle in making payments to Mrs Harvey on 24th July 2017. It is alleged that they attempted to exclude Mr Harvey from the Company, in particular by orchestrating a shareholders' meeting on 31st October 2017 at which restrictions were placed upon him with the intention of removing his powers as director and by making statements to ICS customers that he would be leaving the Company.

26. He further alleged that he was treated unequally and raised various unexplained and unauthorised payments to Mr McMonagle. I shall refer to the allegations made by Mr Harvey in relation to the withdrawals in more detail below as they are repeated in the Cross-Petition. He also complained of a long history of interference with his emails and that it was this that led to the establishment of the Controls Email. It was this that he said prompted him to set up ENJ.

27. He denied acting in breach of duty, although he accepted that he had traded in competition with ICS. He said that the monies earned as ENJ and all sums withdrawn from the Company can be off-set against his director's loan account, leaving a balance due to him of £11,315.06. He attributed the downturn in work of the Company not to neglect of his own duties but to the departure of its principal salesman, Mr Alex

Crawford, in December 2016. He says that his own sales performance was inhibited by his exclusion from the Company and the interference with his email account.

28. He contends that, despite Mr McMonagle having told his solicitors on 26th January 2018 that there was no money to pay dividends and that the Company was in a perilous financial position, Mr and Mrs McMonagle's tax payments in January 2018, totalling £40,020.68, were nonetheless made from the Company without authorisation.

29. As to the sale of his shares, he states that he was been receptive to the sale of them since October 2016. He contends that his attempts to achieve this were rebuffed.

Disclosure applications and directions for an account

30. On 19th January 2019, Mr Harvey made an application for specific disclosure of Company records. That application came before ICC Judge Jones on 11th March 2019 at the first costs and case management conference in the Petition. Judge Jones's order recites that both directors were entitled to see the Company's records and that no party was permitted to remove monies from it, save for authorised salaries and dividends. He directed Mr Harvey to provide an account, verified by a statement of truth, of his business and trading, including under the style ENJ, and, insofar as he was permitted to do so, of the trading of BISL. To the extent that he was unable to provide that information, he was required to explain why he could not.

31. The individual parties were required by 22nd April 2019 to submit accounts of all monies and other benefits received from the Company between 1st January 2012 and 11th March 2019, giving and explanation of their entitlement to those sums or benefits.

32. Mr McMonagle and Mr Harvey complied with this order on 18th April 2019. Mr Harvey however stated that, as an employee of BISL, he was unable to disclose its records without its consent. He stated that he simply received a salary from BISL and was employed to perform electrical and control services. He stated that he was obliged to seek alternative employment as a result of his exclusion from the Company but that neither he nor BISL had used "any money, material or other assets of the Company during the course of the work carried out by BISL." He stated that he recognised that he was still a director of ICS but that he had been under the impression that he was unable to resign as a result of correspondence from Mrs Harvey's solicitors in relation to his divorce.

33. On 25th September 2019 Mr McMonagle made an application for non-party disclosure against BISL. That application came before ICC Judge Burton at the next costs and case management conference on 9th October 2019. She gave directions to trial, including a direction for expert evidence on company valuation. In respect of Mr McMonagle's specific disclosure application she directed BISL to disclose client lists for whom BISL had carried out works capable of being carried out by ICS, together the contracts, details of the profit and income entered into with such customers and other financial information.

34. I varied the directions to trial on 21st April 2020, at which point Mr Harvey had indicated that he wished to file a cross-petition. On 4th June 2020 he applied for permission to do so and made a further application for specific disclosure. Mr McMonagle made an application for specific disclosure on the same day, alleging that Mr Harvey and BISL had failed to comply with previous disclosure orders.

35. On 8th September 2020 Deputy ICC Judge Frith permitted Mr Harvey to present a cross-petition (it had in fact already been presented on 5th August 2020). He gave directions for further disclosure from both parties and from BISL. He made further directions in relation to disclosure by Mr and Mrs McMonagle and BISL on 28th October 2020 following written submissions.

The Cross-Petition

36. The Cross-Petition repeats and expands on the allegations made in Mr Harvey's defence to the Petition, in particular the allegations of interference with Mr Harvey's email accounts, exclusion from the company in December 2017 and payment to Mr McMonagle of unapproved overtime and excessive and unapproved wages to Mrs McMonagle as a device to cause monies to be paid to Mr McMonagle at a time when the payment of the dividend element of remuneration had ceased. It is alleged that Mrs McMonagle's salary was increased by £2,813.31 as a device to enable the sum that would otherwise have been received by her husband by way of dividend to continue to be paid to him following the cessation of such payments on the basis of alleged cashflow difficulties at the start of 2018.

37. The Cross-Petition alleges that ICS was a quasi-partnership and alleges mismanagement of the Company by Mr McMonagle as follows –

    i) Ten payments by cheque totalling £13,463.78 were made to a company called CT Baker Limited between 20th May 2013 and 28th February 2014 to make improvements to Mr and Mrs McMonagle's home.

    ii) On 30th November 2015 £7,200.00 was paid to B & F Mechanical Services Limited, which was not adequately explained despite questions having been raised as to this in an email dated 9th February 2018.

    iii) A payment to Johns Slater & Howard on 31st March 2017 in the sum of £8,385 is said to be similarly unexplained despite a request in the same email.

    iv) Following a resolution to dissolve the ICS Partnership at a members meeting on 31st October 2017 it was decided that payments of tax should be paid from the partners' personal accounts. Notwithstanding this and the alleged cashflow difficulties of the company, Mr and Mrs McMonagle were paid the total sum of £40,020.68 on 29th January 2018.

    v) A payment of £1,437.60 to DG Builders on 5th April 2018, is said to have been given no cogent explanation despite a questions being raised in a letter dated 21st September 2018.

    vi) Mr McMonagle made payments between 5th April 2018 and 1st September 2018 in the sum of £17,882.45 to his personal account for unparticularised company expenses.

    vii) Between 1st July 2018 and 1st September 2018 Mr McMonagle caused payments to be made from the Company to Fosters solicitors in the sum of £13,677 to pay his person costs of this litigation. A further payment was made from the Company's Barclay's account was made on 5th January 2018 in the sum of £4,080.

Points of Defence to the Cross-Petition

38. Both Mr and Mrs McMonagle filed points of defence in response to the Cross-Petition. Mr McMonagle denies all of Mr Harvey's allegations of unfairly prejudicial conduct. I need not set out his defences in detail at this point, save to say that he denies that ICS is a quasi-partnership, contends that the payments to the various persons complained of were for the benefit of ICS and that the increase in Mrs McMonagle's salary reflected her increased workload following Mr Harvey's departure from ICS. Mrs McMonagle incorporates her husband's defence by reference and states that she is neutral in relation to the proceedings.

The amendments to the Petition

39. Mr McMonagle made an application to amend the Petition on 26th October 2020 "to take into account additional allegations of unfairly prejudicial conduct on the part of the First Respondent that have come to light in the course of the litigation, after the petition was issued by the court." On 6th November 2020, Deputy ICC Judge Shekerdemian QC approved a consent order giving Mr McMonagle permission to amend the Petition and gave consequential directions.

40. The amended Petition introduced the allegation that Mr Harvey continued to be involved in "a limited company which directly competes with the business of the company" and retained chattels belonging to the company. The amended petition identifies that company as BISL. The Petitioner's grounds for contending that BISL is a vehicle used by Mr Harvey are that BISL was incorporated on 9th April 2018, a week after Mr Harvey's resignation as an employee of ICS.

41. The amended Petition listed further payments taken out of the Company account by Mr Harvey, being:

    i) £7,541.47 on 7th September 2018;

    ii) £7,000 on 1st October 2018;

    iii) £12,000 on 1st October 2018;

    iv) £30 on 1st October 2018;

    v) £5 on 1st October 2018;

    vi) £1,231.28 on 31st December 2018;

    vii) £2,462.56 on 26th February 2019; and

    viii) £10,185.94 on 5th February 2019.

    The amended Petition also alleges that Mr Harvey used monies to carry out improvements to his house and had retained company chattels, which are particularised in a schedule.

42. The amended points of defence contend that any conduct of Mr Harvey in relation to the affairs of BISL does not constitute conducting the affairs of ICS so as to fall within

section 996 and that any breach of duty on the part of Mr Harvey cannot constitute unfair prejudice now that the Company is under the sole control of Mr McMonagle.

Pre-trial matters

43. A pre-trial review took place before Deputy ICC Judge Kyriakides on 11th December 2020. She gave directions for further evidence and directed that the trial should be on liability only. At trial there was some dispute between the parties as to what "liability" encompassed. In particular it was suggested on behalf of Mr McMonagle that questions of whether a minority discount should be applied, whether there should be discounts for sums owed to the Company and whether equitable compensation should be ordered were questions of "valuation". I do not think that can be right. Findings on those matters are in this case necessary to assist the valuation process.

44. ICC Judge Barber, having reviewed the papers in January 2021, directed a further pre-trial review in the week before the trial to consider the practicalities of the trial, given the ongoing restrictions as a result of the COVID-19 pandemic. That further PTR was heard by me. Counsel were satisfied the trial could be conducted remotely and accomplished within the time estimate. I therefore directed that the trial should proceed remotely and suggested that it would be helpful if an agreed list of issues should be prepared. I also gave directions in relation to the revisions of the electronic trial bundle, which despite running to some 8081 pages had neither an adequate index nor bookmarking.

45. Mrs Harvey also appeared at the PTR and had set out her position in a skeleton argument. She had, however, filed neither her own petition, points of defence or a witness statement for trial. She also appeared at the trial to make submissions on her own behalf. I will return to her position later.

Issues for determination

46. Counsel did not formally agree a list of issues but both produced distillations of the allegations as schedules to their skeleton arguments. Mr Michael helpfully produced a summary of the parties' competing positions on the issues, while Mr Watson set out a conventional list of the issues disclosed by the pleadings. I adopt that list, which I do not understand to be controversial and which seems to me to encapsulate the issues, slightly amended as follows:

Overarching questions

47. The overarching question is whether, in light of the answers to the below issues, the affairs of ICS been conducted in a manner that is unfairly prejudicial to the interests of:

    i) Mr McMonagle; or

    ii) Mr Harvey

    in their capacity as members of the Company.

48. If so the question is whether Mr McMonagle should be entitled to purchase the shares of Mr Harvey as is accepted, at least between them. In relation to this –

    i) What date should the valuation be taken from?

ii) Should there be any minority discount?

iii) Should there be any discount to reflect sums owed by Mr McMonagle and Mr Harvey to the Company?

iv) If so how much?

49. Alternatively, should:

i) Mr McMonagle; and/or

ii) Mrs McMonagle; and/or

iii) Mr Harvey

be ordered to account to the Company and/or pay equitable compensation? If so in respect of what amounts?

50. As to these issues, the following falls for consideration:

i) Was ICS a quasi-partnership? In particular:

a) Did Mr McMonagle and Mr Harvey expressly or impliedly agree that

i) each would be a director of the Company;

ii) each would remain involved in the making of major decisions concerning the Company;

iii) each would be fully remunerated;

iv) no further shares would be allotted without the express agreement of the Petitioner and the First Respondent;

v) the Company would adopt the Clients of the ICS Partnership?

ii) Does the ability of the Company to function depend upon Mr McMonagle and Mr Harvey being able to work together?

Issues on the Petition

51. The issues arising on the Petition are:

i) Did Mr Harvey mismanage the Company by failing to achieve a sales target (and was there any such target)?

ii) Did Mr Harvey divert business away from the Company through ENJ over and above the amount of £25,831 disclosed by his accountant?

iii) Has Mr Harvey used BISL as a trading vehicle to compete with and divert business away from the Company? In particular:

a) What is Mr Harvey's interest in BISL?

b) Is the work carried out by BISL work that could be carried out by the Company?

c) Did Mr Harvey divert work from the Company to BISL?

d) Has Mr Harvey taken and retained the chattels belonging to the Company set out at Schedule A to the Amended Points of Claim? If so, what is their value?

e) Did Mr Harvey pay for personal home improvements using Company funds?

f) Was Mr Harvey entitled to take the sums set out at paragraph 16 of the Amended Petition?

g) Do any of the above facts and matters:

i) Constitute breaches of duty?

ii) Constitute conducting the affairs of the company?

iii) Amount to conduct which is unfairly prejudicial to the interests of Mc McMonagle?

Issues on the Cross-Petition

52. In relation to the Cross-Petition the issues are:

i) Have Mr and Mrs McMonagle failed to account for the following payments or unreasonably caused them to be made (and/or did Mr Harvey agree to the same):

a) £13,463.78 to CT Baker Limited;

b) £7,200 to B&F Mechanical Services Ltd;

c) £8,385 to John Slater & Haward Ltd;

d) £1,437.60 DG Builders.

ii) Did Mr McMonagle wrongly prevent Mr Harvey from having access to Company bank accounts?

iii) Has the Mr McMonagle and/or Mrs McMonagle incurred or caused the Company to pay:

a) unjustified salary;

b) unjustified overtime;

c) unjustified expenses payments.

iv) Did Mr McMonagle wrongly use Company monies to pay his legal fees in these proceedings and have these been repaid?

v) Did Mr McMonagle prevent Mr Harvey from accessing the Company's financial information? If so why?

vi) Have Mr McMonagle and Mrs McMonagle wrongly caused their tax payments to be made by the Company? Were such payments made on the advice of the Company accountants?

vii) Have Mr McMonagle and Mrs McMonagle received greater sums from the Company than Mr Harvey and Mrs Harvey and was this in breach of the agreement (if any) reached between the parties and/or unjustified?

viii) In particular did Mr McMonagle, Mrs McMonagle and Mrs Harvey receive monies not due to them via the ICS Partnership on 28th February 2018?

ix) Did Mr McMonagle and Mrs McMonagle (working with Mrs Harvey or otherwise) wrongly exclude Mr Harvey from the company on 31st October 2017, 4th December 2017, 14th December 2017 or thereafter?

x) Did Mr McMonagle mislead the Company's employees or clients (himself or via the Company's employees) as to Mr Harvey's conduct and/or seek to isolate demean or undermine Mr Harvey?

xi) Did Mr McMonagle prevent Mr Harvey from having access to the Company's emails and/or interfere with Mr Harvey's email access?

xii) Did Mr McMonagle make payments the ICS partnership without board approval?

xiii) Did Mr McMonagle misrepresent the Company's financial position and/or wrongly prevent dividends being paid? If so why?

xiv) Did Mr McMonagle wrongly interfere with Mr Harvey's motor vehicle? If so why?

xv) Has Mr McMonagle tactically sought to delay the proceedings and/or failed to give disclosure?

xvi) Did Mr Harvey resign as a director of the Company? If not was the resignation letter for the benefit of Mr McMonagle or Mrs McMonagle? Did Mr McMonagle unreasonably refuse to reinstate Mr Harvey as a director?

The conduct of the trial and the evidence

53. The trial was conducted by Microsoft Teams. Mr McMonagle and his witnesses gave evidence from one end of a long table from the same room as Mr Nicholas Michael of counsel and his instructing solicitor. Prior to giving evidence the witnesses waited in an adjacent room. No objection was taken to Mr Michael being in the same room as his client's witnesses, although Mr Watson, counsel for Mr Harvey, noted during the course of the hearing that, at one point, Mr Michael's camera remained on during cross-examination of one his own witnesses and he appeared to be nodding during their answers in cross-examination. Mr Watson did not take any further point on this in his closing. I had noted that Mr Michael did nod when I was addressing counsel together,

and I am satisfied that that this was merely an unconscious listening response rather than an attempt to indicate approval or otherwise to what was being said.

54. Mr Harvey and his witness gave evidence from the offices of Howes Percival LLP in Norwich with solicitors from that firm present. Mr Watson appeared from a separate location. Mrs Harvey joined the Teams meeting by telephone.

55. Although time was extremely tight and it was necessary to start early and sit late it was possible to complete the evidence and submissions. I was concerned that Mr Michael, in focusing on the law during the time allotted for closing, had not addressed me in any detail on the evidence heard over the previous days. For that reason, I asked Mr Michael to provide written submissions over the course of the weekend before the final day of the trial, giving Mr Watson sufficient time to consider them and address them in reply, which he did. No transcript of the trial was taken but the hearing was recorded on Microsoft Teams and I have had access to the recordings in addition to my own contemporaneous notes.

56. I shall briefly give my impressions of the witnesses. I shall not go into any detail as to the substance of Mr McMonagle or Mr Harvey's evidence in doing so as I will return to it later in this judgment.

Mr Timothy McMonagle

57. I heard first from Mr McMonagle. He has made some twelve statements in the course of these proceedings. Although he has been a company director for 20 years and understands the duties to which a director is subject. He is, first and foremost, an engineer and in general appeared to be a straightforward and confident witness. He engaged with Mr Watson's questions in a fair-minded way, accepting, for example, that in his attempt to prevent Mr Harvey from accessing ICS's bank accounts for what he saw as protective reasons it was not necessary to prevent him viewing those accounts, though he explained that it was not possible to do the former without the latter. It was evident, however, that he felt deeply aggrieved by both Mr Harvey's admitted conduct in trading in competition with ICS and by what he believes Mr Harvey's subsequent conduct to have been in his role in BISL.

58. In my judgment this sense of grievance and his adoption of, as he put it, "full on protection mode", perhaps also influenced by an evident long-standing sense on his part that he had invested greater time and effort into the Company than others on the management team, has clouded Mr McMonagle's perception of his response to Mr Harvey's competitive trading via ENJ. It is, as I shall explain, quite clear to me that his claims for overtime and the increase in Mrs McMonagle's salary were attempts to maximise his remuneration from the Company at a time when Mr Harvey's remuneration had been restricted. The overtime claims were retrospective and unauthorised and Mrs McMonagle's salary increase, aside from being unauthorised, was simply not justified by reference to the work that she can be shown to have carried out. I do not think that Mr McMonagle actively sought to mislead the court, but it was evident that he, and indeed Mr Harvey, have become entrenched in their respective positions and tended to see their actions through the prism of their sense of grievance.

Mr Gary Saunders

59. Mr Saunders was the next witness for Mr McMonagle. He is the systems support manager for ICS and is part of the management team. He has held this role for eight years but was first employed by the Company in 2002. He has known Mr McMonagle since 1993. He accepted that Mr McMonagle was, as he put it, "the boss" but that questions were decided at management team meetings and Mr McMonagle didn't really have the final say. As to the period when Mr McMonagle and Mr Harvey both had roles in the Company he regarded them as business partners – joint decision makers who were paid equally.

60. His perspective was that the relationship between Mr McMonagle and Mr Harvey began to deteriorate in 2016. There were days when Mr Harvey's whereabouts were unknown, there being a noticeable drop off in his attendance in November 2017. He was complaining of deletion of emails in around 2016. He knew that Mr McMonagle stored ICS's back up servers at his home. He was aware that Mr Harvey had proposed a share sale as a method of resolving matters. Indeed, as I shall explain in due course, Mr Saunders made several attempts to intervene as a peace-maker but, by 9th October 2017, he felt that he had taken things as far as he could.

61. He was challenged on his statement that he had been told that Mr Harvey was working at least three days a week at Addenbrooke's and said that he himself had seen him there when carrying out work there. Mr Harvey was not managing contracts but acting as BSM engineer, i.e carrying out functions that ICS could do. He also gave evidence as to the cross-over between the work done by BISL and that that ICS could undertake, in particular lighting installation work, though much of this appears to have been carried out in the rather distant past from the invoices disclosed. He maintained that he had carried out lighting work for North Cambridgeshire Hospital in around 2019 and that the Company also carried out "consultancy work". He said he had not looked at BISL's invoices and did not know the details of its business. He had inferred the sort of work that BISL does because of it was "what [Mr Harvey's] done all his life".

62. His written evidence addressed the "shock waves" that were sent through the Company after the revelation to the staff of Mr Harvey's competitive business. He stated that he did not tell anyone at Addenbrooke's or Cambridge University about Mr Harvey's conduct. He regarded the steps that the Company took, including informing certain clients that Mr Harvey would no longer be their point of contact, was being directed to protecting the Company rather than excluding Mr Harvey.

63. In relation to Mrs McMonagle's role in the Company, his written evidence was that her workload had undoubtedly increased following Mr Harvey's departure. In his witness statement he said "Tracey, Tim's wife, has a distinct presence in the business. She supports Tim from home. Her role has unquestionably increased with Lee's departure". She was not, however, a senior manager and did not do sales or site work and he could not say what she did on a day-to-day basis. In fact, he was unable to say what she did.

64. My general impression of Mr Saunders was that he was in a difficult position as he has a long-standing relationship with Mr McMonagle and continues to be employed by ICS. This was evident in his tendency to give somewhat equivocal "yes and no" answers to Mr Watson's questions and the contrast, to give one example, between the firm statement given in his written evidence as to Mrs McMonagle's role and his inability

to particularise her work for the Company in his oral answers. I treat his evidence with a degree of caution because it is undoubtedly bears the hallmarks of holding to Mr McMonagle's line.

Mr Toby Hawkes

65. Mr Hawkes was next to give evidence. He too is still employed by the Company and has been since 2008. He is currently the engineering manager. He was, however, appointed as sales manager following resignation of Mr Crawford at the end of 2016 and his departure at the beginning of 2017. He understood this to be a collective decision made by the management team. This, Mr Hawkes candidly admitted, was a complete change of career direction and he did not regard himself as having the skill set for it. This role ended in 2019 and he was replaced by a Mr Stocken. He felt he had been pushed into the role by Mr Harvey. He too evidently felt let down by Mr Harvey and had told him so on one occasion when they were both working at Addenbrooke's in February or March 2018, though he maintains that he did not use any offensive language to him.

66. He was asked if he had agreed the £778,000 sales target allocated to him for 2018/19 of which he achieved £236,332, or 30%. He said that he would have liked to achieve the budgeted figure He accepted that the reason that the sales budget reduced to a little over £2 million in the previous year was as a result of Mr Crawford departing, but the Company had performed roughly as expected in 2017/18.

67. He could not remember exactly when Mr Harvey started being absent from the Company, suggesting that it might have been July 2017. He did know that Mr Harvey was no longer employed by 11th May 2018 when he inadvertently copied Mr Hawkes in to an email intended for Ms Trish Marchant, a senior engineer for Addenbrooke's, in which he advised negatively as to accepting the quote from ICS, which he had asked Mr Hawkes to provide. Mr Hawkes's supposition in his witness statement that this was because Mr Harvey wanted the work for himself was challenged by Mr Watson. Mr Hawkes said that he considered the request for a quote to be to find out what ICS would charge. Mr Watson suggested that this is exactly the sort of information that Mr Harvey would have known in any event. Mr Hawkes said that there were a number of factors that that would affect price, although he did not particularise these factors, other than saying that there were "rigmaroles".

68. Mr Watson also challenged Mr Hawkes's statement that the removal of Mr Harvey's remote access to the Addenbrooke's system on 19th December 2019 was a result of a fear that he might wipe the whole database of the hospital in an attempt to discredit the Company. Mr Watson put it to him that there was no basis for this fear. Mr Hawkes said that they simply did know what Mr Harvey's next action would be. They were shocked by what he had done, as conveyed to them by Mr McMonagle, though he denied that Mr McMonagle had directed what was going to be done. He said it was a Company decision.

69. He was referred to the statement of Mr Stephen Gill, who at the relevant time was the Addenbrooke's hospital engineer with responsibility for the BMS. Mr Gill stated that Addenbrooke's were told at a meeting on 19th December 2017 that Mr Harvey was leaving because of "gross misconduct" and the term "fraud" was mentioned. Mr Hawkes said that the issue had not been described in those terms. Addenbrooke's were

simply told that Mr Hawkes would be taking over from Mr Harvey as a result of the issue that had arisen. He thought Mr Gill was close to Mr Harvey as they had worked together.

70. He disputed that there was any risk to patients as a result of the removal of Mr Harvey's permissions to remotely log in to the BMS. He agreed that Mr Harvey had the only license key but that ICS was only the second or third line of assistance. The Addenbrooke's staff could deal with most issues. Mr Marchant and Mr Hawkes themselves had access. Shift technicians were based on site and Mr Gill would have the next level of access up from those technicians. ICS was rarely called upon. When I asked him why he had not informed Addenbrooke's of the removal Mr Harvey's remote access, Mr Hawkes said that it had simply slipped his mind.

71. Mr Hawkes was a straightforward and spontaneous witness and, again, I am satisfied that he was doing his best to assist the court as far as he could recall. Some of his answers were, however, somewhat vague and based on supposition as to Mr Harvey's motives.

Mr Matthew Taylor

72. Mr Taylor is a commissioning engineer at ICS, reporting to Mr Saunders. He has worked for ICS for 15 years. He is part of the systems support team rather than the management team. His written evidence is that Mr Harvey became less present within ICS from December 2017, though in his oral evidence he said that he had noticed his absence prior to this. He said that he has been aware of the fact that Mr McMonagle and Mr Harvey were having some difficulties prior to a meeting on 14th December 2017, when Mr Harvey's diversion of opportunities was revealed to the Company's staff. He had thought they would be able to work those earlier difficulties out. He too said that the revelations of Mr Harvey's diversion of ICS opportunities came as a shock. He said that people were angry at the 14th December 2017 employee's meeting. He had said to Mr Harvey afterwards that he could have his own meeting but Mr Harvey said he did not feel comfortable with that.

73. He accepted that Addenbrooke's was disappointed by the termination of Mr Harvey's access. He maintained that he did not mention Mr Harvey's personal situation, though it did come up in conversation. Mr Gill had known that Mr Harvey was getting divorced. At the date of his statement on 30th November 2020 he said he was aware that Mr Harvey was working at Addenbrooke's for three days a week.

74. I accept Mr Taylor's evidence as his genuine recollection of the events of the time, though his direct knowledge of the affairs of ICS and the conduct of Mr Harvey and Mr McMonagle is more limited than the members of the management team.

Ms Rebecca Craske

75. Ms Rebecca Craske was the last of Mr McMonagle's witnesses. She is the accounts manager at ICS but also works on reception, pays suppliers, submits PAYE and VAT returns and does the Company's banking. She found out about ENJ in late 2017 with the other employees of ICS. She too refers to the employees' shock at discovering Mr Harvey's competitive business and his use of Company resources to carry out work that could have been carried out by the Company. She recounts Mr Harvey's explanation that he was not getting enough money from the Company and had set up another

business to pay for his daughter's university education. She felt that Mr Harvey was not pushed out of the Company and recalled that, at a shareholders' meeting, he had offered to sell his shares and leave. Importantly, she maintained that she had sent the minutes of the shareholders and directors' meeting on 4th December 2017 to Mr Harvey.

76. She accepted that, when she first joined the Company in 2010, Mr McMonagle and Mr Harvey had a close relationship. They shared decision-making and were paid the same. Equally, she accepted that, from 2018, Mr McMonagle was effectively in charge. She said that she rarely saw Mrs McMonagle as she worked from home. She has little idea what she did. Again, Ms Craske was, in my view, seeking to help the court as far as she could.

Mr Lee Harvey

77. Mr Harvey gave evidence on his own behalf. He has made nine statements in these proceedings. He was a confident and fluent witness, on occasion tending towards flippant and a little confrontational. It is difficult to accept that he is a person who is easily bullied. There was evidently little love lost between him and Mr McMonagle. He now accepts that he should not have diverted work from ICS but maintains that he has disclosed the full extent of that trading, though he has for much of these proceedings maintained that he did not act in breach of duty as the sums that he received as a result of diverting the work away from ICS could be off-set against his director's loan account. He still denied that there had been a conflict between his own interests and those of ICS, saying that the conflict had been with Mr McMonagle.

78. He evidently feels hard done by but, as with Mr McMonagle's contentions as to his wife's salary increase, he clung to assertions that are difficult to reconcile with the available evidence. He maintained, for example, that the establishment of BISL, only seven days after he had resigned as an employee from ICS, was his sister's project and that he was an employee or advisor, despite the fact that she has no experience in the area and works full-time as a primary school teacher. There was no evidence for use at trial from his sister, Mrs Barker, herself. He was nonetheless adamant that BISL had not poached ICS's clients, attributing any dip in the Company's income since he left it to be a result of a failure to cultivate clients or downright alienation of existing clients as well as the on-going effect of the departure of Mr Crawford. He maintained that BISL's work is different to that of ICS. Mr Harvey accepted that he had been Addenbrooke's main contact and that they were BISL's biggest client. He thought Mr McMonagle's estimate that £604,533 had been invoiced to Addenbrooke's by BISL was probably correct.

Mr Stephen Gill

79. Finally, I heard from Mr Stephen Gill who was the hospital engineer with management responsibility for BMS at Addenbrooke's from May 2015 to March 2018. He had known Mr Harvey since about 2013. Mr Michael asked whether they got to know each other outside of work. Mr Gill said that while they had bonded over a shared interest in BMS systems they did not socialise.

80. He gave evidence as to his meeting with Mr Hawkes and Mr Taylor on 19th December 2017 at which he was told that Mr Harvey would be leaving ICS "due to gross misconduct" and as to the removal by ICS of Mr Harvey from access to Addenbrooke's BMS at that date and his subsequent reinstatement. He said specifically that he would

remember hearing the expressions "gross misconduct" and "fraud" being used and discussion of Mr Harvey's divorce. He thought he had referred to his notes of the meeting when preparing his statement. He said that Mr Harvey had mentioned his divorce but had not discussed any Company issues. It had come as quite a shock and was at odds with his experience of Mr Harvey. Addenbrooke's were concerned to maintain the continuation of the BMS system and wanted access to Mr Harvey's expertise in this regard, although Mr Gill was instructed to work alongside Mr Hawkes to ensure the best continuation.

81. As to the circumstances and implications of Mr Harvey's removal from the remote access to the BMS system, Mr Gill explained that access to the system was "graded" with different levels for different people. There were 20 or 30 of those but they had to be on site to access the system. Mr Harvey was the only person with remote access and the only person who could provide an out-of-hours service. He did not accept that this would happen only once or twice a year. A number of engineers on site were not confident or competent to use the system.

82. It was put to him that Mr Harvey's access was merely downgraded and not removed altogether. Mr Gill maintained that his access was removed for all purposes so, for example, he would be unable to review air changes in the intensive care unit or in an operating theatre. There were two aspects of access to the system: a password and a dongle. Mr Harvey's access to the system required a dongle and, if access was to be given to another person, it would be Addenbrooke's that would need to change it. The removal of Mr Harvey's access to the system was not notified to Addenbrooke's and was only discovered when Mr Harvey attempted to access it. This presented a risk to patient care.

83. Mr Gill said that he met Mr Harvey after January 2018 when a planned preventative maintenance programme was followed. Mr Harvey and Mr Taylor mostly attended once or twice a week.

84. I accept Mr Gill's evidence as his honest recollection of events. I should also say that his is the best evidence of operation and access to the BMS at Addenbrooke's and the potential consequences of that access being removed. He was on site and is best placed to explain Addenbrooke's use of the system. He was a careful witness, without an axe to grind, and I accept his evidence.

Legal principles applicable to the section 994 jurisdiction

Section 994 of the 2006 Act

85. The law in this area was generally uncontroversial, subject to one point to which I shall in due course turn. Section 994(1) of 2006 Act provides:

> (1) A member of a company may apply to the court by petition for an order under this Part on the ground —
>
> > (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or

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

86. Section 996(1) confers a wide power on the court, if satisfied that a petition is well founded, to make such order as it thinks fit for giving relief in respect of the matters of which complaint is made. In particular, it may grant the relief set out in sub-section (2). It may:

> "(a) regulate the conduct of the company's affairs in the future;
>
> …
>
> (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;
>
> …
>
> (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."

87. It is apparent from the wording of section 994 that the conduct complained of must relate to the company's affairs. What falls within the ambit of the "the affairs of the company" will be interpreted "liberally" and embraces matters that are capable of coming before the board (see *In re Neath Rugby Ltd (No.2)* [2009] 2 BCLC 427 at para 48-50, per Stanley Burnton LJ). The limits of this were discussed by Sales J (as he then was) in *Oak Investment Partners XII v Boughtwood* [2009] 1 BCLC 453 at paragraph 15:

> "Conduct of anyone involved in a company may be so far removed from actually carrying on the affairs of the company that it does not amount to the conduct of the company's affairs for the purposes of section 994. But in my view, section 994 is concerned with the practical reality which obtains on the ground in relation to the conduct of a company's affairs, and there is no sound reason to exclude the possibility that what someone does in exercising or purporting to exercise managerial powers as a director or senior employee should not in principle qualify as conduct of the affairs of a company for the purposes of that provision."

88. That conduct must prejudice the interests of the members or a section of the members as such. In *O'Neill v Phillips* [1999] 1 WLR 1092, 1105, Lord Hoffmann explained that this is "not to be too narrowly or technically construed". The prejudice suffered must however be "unfair". In *O'Neill*, at 1098, Lord Hoffmann explained that the predecessor to section 994 was enacted:

> "to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. As Warner J. said in *In re J. E. Cade & Son Ltd* [1992] B.C.L.C. 213, 227: 'The court . . . has a very wide discretion, but it does not sit under a palm tree'.
>
> Although fairness is a notion which can be applied to all kinds of activities its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others ('it's not cricket') it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. the context and background are very important."

89. Thus the unfair prejudice that may be complained of by a member may be "some breach of the terms on which he agreed that the affairs of the company should be conducted". In *Re Tobian Properties Ltd* [2013] Bus. L.R. 753, Arden LJ (as she then was) said at paragraph 22:

> "One of the most important matters to which the courts will have regard is thus the terms on which the parties agreed to do business together. These are commonly found in the company's articles. They also include any applicable rights conferred by statute. In addition, the terms on which the parties agreed to do business together include by implication an agreement that any party who is a director will perform his duties as a director. Primary among these duties are the seven duties now codified in ss 171 to 177 of the Companies Act 2006. Under these duties, a director must act in the way which he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. There is also the well-known duty to avoid conflicts of interest and duty: a director must avoid a situation in which he has an interest which conflicts with that of the company. Six out of seven of these duties are fiduciary duties, that is, duties imposed by law on persons who exercise powers for the benefit of others. Non-compliance by the Respondent shareholders with their duties will generally indicate that unfair prejudice has occurred."

Breach of the obligation to promote the success of the Company and to avoid conflicts of interest are of course the foundations of Mr McMonagle's case.

90. Lord Hoffmann observed that the unfair prejudice may similarly consist "in using the rules in a manner which equity would regard as contrary to good faith." These questions are to be considered objectively (see *RA Noble & Sons (Clothing) Ltd* [1983] BCLC

273 *per* Nourse J at 290). It is not necessary to prove that a respondent acted in bad faith or with the intention of causing prejudice to the petitioner or anyone else.

91. The editors of *Hollington on Shareholders Rights* (9th Ed) note that the ways in which a member's interests may be prejudiced are "almost unlimited" but that, in the context of a quasi-partnership, may in particular include the breakdown of trust and confidence. My attention was also drawn to paragraph 7-29:

> "Another common example is that of a small private company formed as a quasi-partnership in which the joint venturers expect to share in the business by reason of their continued employment therein and to be involved in management decisions by reason of their belonging to the board of directors. If that employment is terminated or that office is terminated, then the interests of the excluded joint venturer have been prejudiced. In such a case prejudice is obviously suffered, even though there is no quantifiable effect on the value of shares. Thus, the nature of the prejudice suffered will depend upon the nature of the interest in question."

Again, both parties rely upon a breakdown in trust and confidence here.

92. Mr Watson also relied upon *AMT Coffee Limited* [2019] EWHC 46 (Ch) as an illustration of a case in which a decision to make large payments to the company's officers, leaving inadequate sums to declare dividends, not made in good faith, amounted to unfair prejudice. His Honour Judge Paul Matthews, sitting as a judge of the High Court, said as follows:

> "143. The decision whether to declare dividends is one to be made in good faith in what the directors consider the best interests of the company, and the court will give weight to their commercial judgment: *Corran v Butters* [2017] EWHC 2294 (Ch), [239]. And I accept that directors do not have to keep on meeting to discuss a matter when it is obvious that the decision would be the same: cf *Re Sunrise Radio* [2010] BCLC 367, [141]. But here, my decision is that the directors made no bona fide decision not to pay dividends.
>
> 144. In my judgment, the failure to make a decision in good faith on this subject, when the Company (1) had sufficient reserves to declare dividends; (2) paid out large sums by way of 'bonuses' to two of the directors, thereby paying out significant parts of the profits to them; and (3) had lent large sums of money to those directors on loan accounts to pay personal expenditure, leaving the Company with less cash to pay dividends, amounts to conduct unfairly prejudicial to the petitioners."

Mr Watson invites me to treat the payment out of backdated "overtime" and the increase in Mrs McMonagle's salary as similarly unfair to the interests of Mr Harvey, when seen against the backdrop of what he characterises as misrepresentations as to ICS's financial position.

Quasi-partnership

93. As is clear from the extracts from *O'Neill* and *Re Tobian Properties Ltd* above, the nature of the company is relevant to the question of whether there has been unfair prejudice to the complainant member and thus what the appropriate remedy should be. The rights and obligations of members defined by a company's constitution and statute have to be considered in the context of the relationship of the parties which may subject the legal rights of the members to equitable considerations.

94. In *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 379, a case concerning just and equitable winding up, Lord Wilberforce identified the following factors that might give rise to such considerations:

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

He continued at 380:

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

Companies in which there exists such a personal relationship of mutual confidence are often referred to as quasi-partnerships.

95. In *Re Edwardian Group Ltd* [2019] 1 BCLC 171 Fancourt J noted that:

> "Where equitable considerations of the kind identified by Lord Wilberforce apply, a court is likely to find that, although the conduct of the company was lawful according to its constitution, nevertheless the contravention of the special underlying

> obligation was a wrong done to some or all of the members that justifies the grant of relief. Nevertheless, it is salutary to remind oneself that the initial question on such a petition must be whether the conduct of which complaint is made was in accordance with the articles of association. If it was, then the allegation of some inconsistent obligation or right needs to be carefully scrutinised: *In re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 17-18, per Hoffmann LJ. It is also pertinent to add that there must be something in the nature of the 'special underlying obligation' or the circumstances in which it arises that makes it enforceable in equity at the suit of the petitioner. An unenforceable agreement or understanding will not suffice: there must be something that makes it unconscionable for those controlling the company to disregard the agreement or understanding, and that will generally be found where there is mutuality between the shareholders as to the benefit and burden of the obligation, or some detrimental reliance or change of position that makes it inequitable to deny the obligation."

96. Finally for present purposes, equitable constraints on the exercise of strict legal rights may arise during the course of the parties' relationship after they formed the company, although it is necessary for the petitioner to show that he or she relied on the new arrangements. In *Re Guidezone Ltd* [2000] 2 BCLC 321 Jonathan Parker J said this at paragraph 175:

> "Applying traditional equitable principles, equity will not hold the majority to an agreement, promise or understanding which is not enforceable at law unless and until the minority has acted in reliance on it. In the case of an agreement, promise or understanding made or reached when the company was formed, that requirement will almost always be fulfilled, in that the minority will have acted on the agreement, promise or understanding in entering into association with the majority and taking the minority stake. But the same cannot be said of agreements, promises or understandings made or reached subsequently, which are not themselves enforceable at law. In such a case, the majority will not as a general rule be regarded in equity as having acted contrary to good faith unless and until it has allowed the minority to act in reliance on such an agreement, promise or understanding. Absent some special circumstances, it will only be at that point, and not before, that equity will intervene by providing a remedy to the minority which is not available at law."

The use of the section 994 jurisdiction

97. The principles set out above were uncontroversial between Mr Michael and Mr Watson. Where they parted company was as to whether the allegations set out in the petition could constitute unfair prejudice in circumstances where Mr McMonagle is now the sole director of the Company.

98. Mr Watson points out that the function of a section 994 petition is to prevent oppression of shareholders by those in control of the company. He drew my attention to the decision of the Court of Appeal in *Re Legal Costs Negotiators Ltd* [1999] BCC 547, in which the court considered whether the first instance judge had been right to conclude that the circumstances in which majority shareholders may petition are "exceptional". Peter Gibson LJ said at 553:

> "Miss Garcia-Miller was in my opinion right to submit that there is academic and judicial consensus as to the meaning of the section and as to the mischief which it was intended to cure, *viz.* the abuse of power to the prejudice of shareholders who lack the power to stop that abuse. A mere majority shareholding may not suffice its holder: for example, the voting rights may not accord with the shareholding, as in *Re H R Harmer Ltd* [1959] 1 WLR 62. But in the ordinary case where the shares carry equal voting rights, a majority shareholder will generally have the power to stop unfairly prejudicial conduct of the company's affairs or any unfairly prejudicial act or omission of the company.
>
> In my judgment, the judge was justified in saying that s. 459 was essentially directed at cases where powers in relation to the conduct of a company's affairs have been abused or there has been an unfairly prejudicial omission to use powers. …
>
> If the company through its directors or in general meeting exercised its powers to conduct the affairs of the company in an unfairly prejudicial manner which failed to give effect to the legitimate expectations of its contributories and that state of affairs could not be cured by the petitioners through the exercise of powers available to them, then a petition, I accept, would lie. But that is not this case. Mr Collings submitted that just as a minority shareholder, whose legitimate expectation to share in the management of a company is defeated by the majority shareholders excluding him from that management, can bring a s. 459 petition for the sale of their shares, so majority shareholders, whose legitimate expectation that the minority shareholder would contribute to that management is defeated by his misconduct necessitating his dismissal, can bring a petition for the sale of his shares. I do not accept that the two situations are at all comparable. In the first there is continuing unfairly prejudicial conduct of the affairs of the company by the majority shareholders, relief in respect of which may be given by ordering a sale of the shares. In the second the majority shareholders had a choice between dismissing the minority shareholder from working for the company or allowing their legitimate expectation to be fulfilled by letting the minority shareholder continue to contribute to the management of the company in some way. In the present case they chose the former, thereby putting an end both to their legitimate expectation and to the prejudicial conduct of the affairs of the company by Mr Hateley.

> No relief under s. 461 could properly be given by the court in respect of that conduct which the majority shareholders have remedied and there is no continuing unfairly prejudicial conduct of the affairs of the company when that conduct is in their hands alone."

99. At 555 Peter Gibson LJ considered the decision of Knox J in *Re Baltic Real Estate (No.2)* [1992] BCC 629 in which he said:

> "Having stated that the *Harmer* case was authority for the proposition that a person with voting control cannot be oppressed by a person without voting control, he said ([1992] BCC 629 at p. 636G):
>
> > 'Even the wider phrase "unfair prejudice", however, in my judgment is not apt to encompass prejudice from which the person whose interests are said to be prejudiced can readily rid himself. The prejudice relied upon by the petitioner is based solely upon the activities of the second and third respondents as directors of the company, a status which they only enjoyed until the majority shareholders removed them. That the second and third respondents were in breach of their obligations under the shareholders' agreement, which I assume in the petitioner's favour, does not in my view establish the proposition that the petitioner's prejudice was unfair within the meaning of s. 459, because on that hypothesis the petitioner had an available method of bringing that prejudicial state of affairs to an end and indeed did so. I take into account the consideration that s. 459 does not require the unfair prejudice to be subsisting at the date of the presentation of the petition but is capable of sanctioning past prejudice by ex-members of the company. Nevertheless, the section was I believe enacted to enable help to be given to those who needed it and it seems to me to be improbable that the petitioner could show it fell into such a category.'
>
> The good sense and correctness of those words seem to me obvious. In my judgment the judge was entitled to find Knox J's observations in *No. 2* persuasive on the ground that they contain a clear statement that the section is not apt to deal with a case where the petitioner can himself readily put an end to the unfair prejudice alleged."

100. Similarly, in *Albion Energy Limited v Energy Investments Global BRL* [2020] EWHC 301 (Comm), Foxton J held that an unfair prejudice petition had no real prospect of success in circumstances where the proposed petitioner had been in control of the company and was able to bring a claim against the former directors if necessary.

101. Mr Watson submits that the petition here is brought by the Company's sole director and *de facto* majority shareholder who has been in sole control of the Company since May 2019. He is able to cause the Company to prosecute all the claims of breach of duty alleged against Mr Harvey and, indeed, ICS is the proper claimant in respect of such

claims in ordinary Part 7 proceedings. He can, by means of causing the Company to bring proceedings against Mr Harvey for breach of duty "easily rid himself" of any prejudice to the value of his shareholding. There is thus no subsisting unfair prejudice to him at all that might need to be addressed in any order for the purchase of Mr Harvey's shares and his petition falls to be dismissed.

102. Mr Watson submitted that it was inappropriate to consider the alleged wrongs done to the Company by Mr Harvey in such circumstances. Any obligation to compensate ICS is properly an asset of the Company and would serve to increase the value of Mr Harvey's shares rather than to decrease them, to the detriment of Mr McMonagle, in that he would have to pay a higher price for Mr Harvey's shares. Moreover, a reduction to the buyout price to reflect any wrongdoing would be unjust because it would adversely affect Mrs Harvey and the Company's creditors would be short-changed.

103. I cannot accept Mr Watson's submission that, in this case, consideration of Mr Harvey's conduct simply falls away because Mr McMonagle now has control of the Company and it is agreed that he should buy out Mr Harvey's shares. Mr McMonagle was entitled to present the Petition. He was a minority shareholder and the co-director of the Company at that time. While Mr Watson took me to the authorities above on the limited circumstances in which a person in control of a company may bring a petition under section 994, I was not taken to any authority in support of the proposition that a change in control of a company during the currency of the proceedings means that allegations of unfair prejudice which have an effect on a company's value should cease to be considered. It might go to whether the court would think it appropriate to direct any particular form of relief and it might perhaps justify an early determination of the petition on application if the change in control took place at an early stage in the proceedings and an application to strike out were brought then. There are no doubt other circumstances in which it would be relevant. In this case however it seems to me that Mr McMonagle was entitled to bring the Petition when it was presented, the cessation of Mr Harvey's appointment as a director took place nearly a year later (and was initially contested by Mr Harvey) and the parties have been content to allow the proceedings to continue thereafter.

104. In this case there is, however, the additional question of the allegations in respect of BISL the retention of chattels and certain other matters, which were introduced at a late stage in 2020. Mr Watson submitted that, had Mr McMonagle sought to present his Petition at that stage, on the basis of those allegations, the Petition would likely have been struck out. There is a deal of force in that submission. The amendments were introduced by consent but the amended points of defence do contend that they do not amount to unfair prejudice for the purposes of a section 994 petition by reason of Mr McMonagle's control of the Company. In the case of allegations introduced very late in the progress of the Petition at a time when the petitioner could cause the Company to bring a claim the court will need to consider carefully whether it is just and appropriate to grant any relief in respect of them under the section 994 jurisdiction. I shall turn to this when considering the allegations introduced by the late amendment.

Valuation dates

105. Robert Walker LJ (as he was then) set out the approach to selecting a valuation date in *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031 at paragraph 60 as follows:

> "[60] … The starting point should in our view be the general proposition stated by Nourse J in *Re London School of Electronics Ltd* [1985] BCLC 273 at 281, [1986] Ch 211 at 224:
>
> "Prima facie an interest in a going concern ought to be valued at the date on which it is ordered to be purchased."
>
> That is, as Nourse J said, subject to the overriding requirement that a valuation should be fair on the facts of the particular case.
>
> [61] The general trend of authority over the last 15 years appears to us to support that as the starting point, while recognising that there are many cases in which fairness (to one side or the other) requires the court to take another date. It would be wrong to try to enumerate all those cases but some of them can be illustrated by the authorities already referred to:
>
> (i) Where a company has been deprived of its business, an early valuation date (and compensating adjustments) may be required in fairness to the claimant (*Meyer*).
>
> (ii) Where a company has been reconstructed or its business has changed significantly, so that it has a new economic identity, an early valuation date may be required in fairness to one or both parties (*OC Transport*, and to a lesser degree *London School of Electronics*). But an improper alteration in the issued share capital, unaccompanied by any change in the business, will not necessarily have that outcome (*DR Chemicals*).
>
> (iii) Where a minority shareholder has a petition on foot and there is a general fall in the market, the court may in fairness to the claimant have the shares valued at an early date, especially if it strongly disapproves of the majority shareholder's prejudicial conduct (*Cumana*).
>
> (iv) But a claimant is not entitled to what the deputy judge called a one-way bet, and the court will not direct an early valuation date simply to give the claimant the most advantageous exit from the company, especially where severe prejudice has not been made out (*Elgindata*).
>
> (v) All these points may be heavily influenced by the parties' conduct in making and accepting or rejecting offers either before or during the course of the proceedings (*O'Neill v Phillips*)."

106. The selection of an earlier valuation date may be a convenient way of addressing unfair prejudice. Mr Watson took me to *Hollington* at 8-59, in which it is noted that:

> "The court will, in general, value the shares as if the unfairly prejudicial conduct had not taken place: *Scottish Cooperative Wholesale Society v Meyer* [1959] A.C. 324 at 364. The simplest

> method of achieving this may be, depending on the circumstances, to value the shares as at a convenient date shortly before the unfairly prejudicial conduct began. It may not always be appropriate to back-date the valuation in this way (see the section on "Date of valuation" at para.8-60 below), in which case a specific allowance may, where practicable, have to be made in the valuation for the unfairly prejudicial conduct. For example, in *Lloyd v Casey* [2002] 1 B.C.L.C. 454 Ch D, where the court had ordered the majority to buy out the minority because of excessive drawings from the company, the court directed that in ascertaining the price the assets of the company should be treated as increased by an amount equal to the excessive level of such drawings."

Minority discount

107. A minority discount is not usually appropriate in the case of a quasi-partnership. In *Sunrise Radio Limited* [2009] EWHC 2893 (Ch) His Honour Judge Purle QC, sitting as a judge of the High Court, explained:

> "290. It is well established that an undiscounted valuation is usually appropriate when the successful petitioning shareholder is a quasi-partner as that expression is used in this branch of the law. Moreover, in *Strahan v Wilcock* [2006] 2 BCLC 555, Arden LJ, with whom Richards and Mummery LJJ agreed, commented at 562 that it was difficult to conceive of circumstances in which a non-discounted basis of valuation would be appropriate where a quasi-partnership relationship did not exist. This point was expressly left open, however.
>
> 291. In *Irvine v Irvine* (No 2) [2007] 1 BCLC 445, Blackburne J observed as follows:
>
> 'A minority shareholding, even one where the extent of the minority is as slight as in this case, is to be valued for what it is, a minority shareholding, unless there is some good reason to attribute to it a pro rata share of the overall value of the company. Short of a quasi-partnership or some other exceptional circumstance, there is no reason to accord to it a quality which it lacks.'
>
> 292. The recognition in that case of "some other exceptional circumstance" is a less narrow formulation that that posited by the Court of Appeal in Strahan, and points to the fact that there is no inflexible rule."

108. This is not an inflexible rule however. In *O'Neill* Lord Hoffmann said:

> "… the offer must be to purchase the shares at a fair value. This will ordinarily be a value representing an equivalent proportion of the total issued share capital, that is, without a discount for its being a minority holding. The Law Commission (paras 3.57 to

> 3.62) has recommended a statutory presumption that in cases to which the presumption of unfairly prejudicial conduct applies, the fair value of the shares should be determined on a pro rata basis. This too reflects the existing practice. This is not to say that there may not be cases in which it will be fair to take a discounted value. But such cases will be based upon special circumstances and it will seldom be possible for the court to say that an offer to buy on a discounted basis is plainly reasonable, so that the petition should be struck out.

109. I note too the observations of Nourse J in *Re Bird Precision Bellows Limited* [1984] Ch 419 at 430:

> "I would expect that in a majority of cases where purchase orders are made… in relation to quasi-partnerships the vendor is unwilling in the sense that the sale has been forced upon him. Usually he will be a minority shareholder whose interests have been unfairly prejudiced by the manner in which the affairs of the company have been conducted by the majority. On the assumption that the unfair prejudice has made it no longer tolerable for him to retain his interest in the company, a sale of his shares will invariably be his only practical way out short of a winding up. In that kind of case it seems to me that it would not merely not be fair, but most unfair, that he should be bought out on the fictional basis applicable to a free election to sell his shares in accordance with the company's articles of association, or indeed on any other basis which involved a discounted price. In my judgment the correct course would be to fix the price pro rata according to the value of the shares as a whole and without any discount, as being the only fair method of compensating an unwilling vendor of the equivalent of a partnership share. Equally, if the order provided, as it did in *In re Jermyn Street Turkish Baths Ltd.* [1970] 1 W.L.R. 1194, for the purchase of the shares of the delinquent majority, it would not merely not be fair, but most unfair, that they should receive a price which involved an element of premium."

Was the Company a quasi-partnership?

110. Mr McMonagle's points of defence deny that ICS was a quasi-partnership. This was not seriously pursued by Mr Michael and I can deal with this shortly. I am entirely satisfied that the Company was in the nature of a quasi-partnership from the outset –

i) ICS was joint venture between Mr McMonagle and Mr Harvey, who met while working for ECS Power & Control Ltd and became the equal shareholders and sole directors of the Company. They are described on the Company website as "founders" and their combined experience in the sector is also advertised on it.

ii) Mr McMonagle accepted in cross-examination that the Partnership was established first, albeit by a few weeks or months. The corporate structure was adopted on the advice of accountants, who suggested that it would provide a

degree of protection. The partnership retained ownership of certain chattels, such a computers and, at one point, the desks. It also operated as a tax efficient way of distributing profits.

iii) Mr McMonagle said that he "absolutely" had considered Mr Harvey to be his business partner and had "loved him like a brother". He said that he taught him everything he knew. He is godfather to Mr and Mrs Harvey's children.

iv) Their remuneration was equal and made up of a modest payment of £300 a month by way of salary and a further payment in the region of £2,814 a month by the end of their business relationship, described as a "dividend".

v) Those dividend payments were not decided a formal board meetings. Indeed, Mr McMonagle stated that they did not really have formal board meetings. They worked in the same office space and decided things informally between themselves. The expectation of each of Mr McMonagle and Mr Harvey was that they would be involved in the decision-making process together.

vi) The Company's articles of association are consistent with each of Mr McMonagle and Mr Harvey having an equal role in management. The articles of association do not provide for the chairman of either a meeting of directors or of members to have a casting vote. Newly issued shares, and shares disposed of by members, are to be offered to existing members in proportion to their shareholdings. While the Company seems to have been acquired off the shelf, these articles were not amended.

vii) When Mrs McMonagle and Mrs Harvey became members of the Company in 2017 Mr McMonagle accepted that "each couple was treated as a team". Both Mrs McMonagle and Mrs Harvey were given company cars, though neither of them had a role in the Company that required them to have them.

viii) The Amended Petition acknowledges the basis of the relationship between Mr McMonagle and Mr Harvey as follows:

> "The ability of the Company to function depends upon the Petitioner and the First Respondent being able to work with each other as an effective management team, but the relationship deteriorated and by the end of 2017 it was evident that both the Petitioner and the First Respondent would not be able to work together."

111. The business relationship between Mr McMonagle thus began as a partnership properly so called and continued via a corporate vehicle, the operation of which was dependent on their relationship as the management team. Even if it were right that the Partnership post-dated the Company I would have formed the same conclusion. ICS operated on the basis of a close relationship of trust between its founders predicated on their equal participation in the operation of its business.

Breakdown of relationship, establishment of ENJ and alleged mismanagement

Interference with email and deletion of documents

112. I shall start by dealing with the question of the alleged interference with Mr Harvey's emails for the simple reason that it is alleged that this began in 2012 and thus shows Mr McMonagle's duplicitous and controlling behaviour from a period long before ENJ was established. It also sets the background to Mr Harvey's creation of the Controls Email.

113. It is certainly the case that Mr McMonagle has a degree of technical expertise in information technology. This is evident from the fact that it was to him that Mr Harvey turned to him to resolve issues that arose with his email account to which I shall refer in a moment. Mr McMonagle also latterly apparently kept the Company's back-up servers at his own home. I bear in mind, too, that Mr McMonagle was content for Mr Harvey's remote access to the Addenbrooke's BMS system to be terminated on 19th December 2017 without reference to either Mr Harvey or Addenbrooke's, although Mr Hawkes seemed to accept that the latter was an oversight on his part.

114. It is also clear from contemporaneous emails that there were a number of occasions when Mr Harvey raised issues with his email account with Mr McMonagle. I can give some early examples. On 15th August 2012 he emailed Mr McMonagle from his mobile telephone as follows:

> "Hi Tim
>
> My e-mails have stopped working and the account needs to be verified.
>
> Can you please e-mail me the password as I only have it at home.
>
> Thanks
>
> Lee"

Mr McMonagle responded on 17th August 2012 and apologised for the delay in replying. He said that he couldn't see anything wrong with the email server but highlighted an issue with an IP address being blocked since the previous Tuesday. He asked Mr Harvey to confirm his IP address.

115. On 27th August 2013, Mr Harvey raised login issues with three laptops. Mr Harvey replied later that day to say that he did not have time to do a full investigation but he had identified that Mr Harvey's account had been disabled "due to repeated attempts to login to your account with incorrect passwords." He said:

> "It would appear that for most days during your holiday a large number of attempts were made to access your account. 15 attempts were made this morning… I have re-enabled your account".

Mr Harvey replied to say that two of the laptops used a "biometric scan" so that there wasn't the opportunity to put in incorrect passwords. He suggested that Mr McMonagle run through the account reset procedure with him so that he did not need to bother him in future.

116. Mr McMonagle replied to say that it was not Mr Harvey's unsuccessful password entries that were causing the problem but that it appeared that someone was trying to hack the account. He identified IP addresses in both the UK and Puerto Rico from which the login attempts originated. It was put to Mr Harvey that these are self-evidently attempts to be helpful. On their face that appears to be true and there is no reason advanced as to why Mr McMonagle would have sought to disrupt Mr Harvey's account at that stage.

117. Mr McMonagle was taken to an email chain between a Mr Leonard of Munro Building Services Limited and Mr Harvey, which used Mr Harvey's "eastern" email address. An email from Mr Leonard, dated 3rd January 2018, was sent to Mr Harvey and Mr Hawkes. The reply, however, came from Mr McMonagle, who copied in Mr Hawkes and Mr Saunders to state that Mr Harvey was unavailable and that he, Mr Saunders and Mr Hawkes would be looking after the project in future. Mr McMonagle was asked how, if he was not intercepting Mr Harvey's emails, he came into possession of this email. He thought Mr Hawkes had forwarded it to him. No email forwarding Mr Leonard's email has been disclosed.

118. Mr McMonagle was also taken to a letter, apparently from a Mr Russell Scotter of ECS Power & Control Ltd, which referred to Mr McMonagle's employment with that company. This stated as follows:

> "At the time of Mr McMonagle's employment with ECS (Anglia) Ltd in 2001, he was employed as the Technical Manager and in a position of trust.
>
> This was a senior position and part of that role included the operation and administration of the IT and Software systems which he had intimate knowledge and Administration and Password rights.
>
> This included taking regular tape back-ups of the systems so that the company could function after any catastrophic computer hardware failures by restoring data successfully from the tapes.
>
> In the week that McMonagle left the company, after being found to be working for another company whilst still being paid employment of ECS, it was discovered that no back-up data had been taken.
>
> This was to cover up what he had been doing by deleting various emails, estimates and quotations so they no longer appeared on our system.
>
> This was confirmed when we were able to get some of our valued customers to send us back copies of the same emails and quotations that had been sent by Mr McMonagle on behalf of ECS but deleted from our system.

> We were further given copies of subsequent email and quotations to the same clients with virtually identical working from his new company but with a more competitive offering."

Mr McMonagle stated that this was simply not true and alleged that ECS were currently subcontracting work to BISL, and, indeed, were carrying out work for BISL at Addenbrooke's.

119. This letter is not evidence of anything. It is not verified by a statement of truth and, given the extremely serious nature of the allegations set out in it, I can give no real weight to it in the absence of such a statement and the attendance of the witness for cross-examination. Nor is there any expert evidence as to the question of the operation of the Company's IT.

120. On the basis of the evidence that I have seen I am not satisfied that Mr McMonagle engaged in a long-running campaign to obstruct Mr Harvey's access to his emails. There is no basis for him to have done so in 2012 and 2013. I cannot draw an inference from his reply to the Munro Building Services email, which evidently was copied to Mr Hawkes, on the basis of the absence of a single forwarding email. I am satisfied that Mr Harvey did in fact suffer from repeated IT problems but Mr Harvey has not established on the balance of probabilities that those problems were attributable to Mr McMonagle.

Events in 2015

121. It is apparent the relationship between Mr McMonagle and Mr Harvey had certainly become strained towards the end of 2015. This was around the time that the Company expanded its premises into adjacent units, which it proceeded to convert into offices. Mr McMonagle's evidence was that Mr Harvey was not keen on the idea but came around to it. Nonetheless, he was not involved in organising the works. It was left to Mr McMonagle and Ms Craske. A lot of hours were apparently spent but Mr McMonagle contended that Mr Harvey was not interested and spent a lot of time playing golf, rather than helping with the conversion project. Mr McMonagle's evidence was that Mr Harvey was not pulling his weight from around that time.

122. This view is reflected in an email sent by Mr McMonagle to Mr Harvey and Mr Saunders on 19th August 2015, copied to Ms Craske and Mr Crawford. It was sent in reply to an email sent by Mr Harvey on the same day. He said as follows:

> "Helpful....is that a new word that you have learnt?
>
> What do you want me to do?
>
> What do you really expect of me?
>
> I am working 7 days a week and have been for as long as I can remember
>
> I am working 14+ hour days week…. in.... week out....
>
> There are many calls on my time and your upgrades are just two of them.
>
> My diary is full for at least the next six weeks.

> As I am writing this I have finally realised what a prat I have been in working these ridiculous days and hours, so with immediate effect I intend to work the same number of days and hours as the rest of the management in ICS.
>
> Have a day off every now and again to play golf, roll in late, leave off early, leave my phone off (or in the office) when on holiday, ignore emails when on holiday, etc. etc.
>
> What gets done, gets done and what doesn't get done, doesn't get done.
>
> I really don't give a flying fuck anymore."

Mr Michael, who described this as "the ranty email" suggests that this was the high water mark of any "bullying" behaviour on the part of Mr McMonagle. It is notable that this outburst in not simply directed at Mr Harvey,but Mr Saunders, Ms Craske and Mr Crawford too. This email is certainly intemperate but it does not in isolation demonstrate a campaign of bullying against Mr Harvey or indeed any of the other recipients of it.

Events in 2016

123. In 2016 Mr McMonagle decided to travel to Australia to see his daughter and granddaughter. He cashed in a pension to do so. On 17th June 2016 he wrote a cheque withdrawing £7,816 from the partnership, which he says was to pay the tax on this transaction. The cheque stub was annotated "Tim Tax".

124. On 19th September 2016 Mr Harvey emailed Mr McMonagle, copying in Ms Craske, Mr Crawford and Mr Saunders. He said:

> "Tim,
>
> Before we meet I think it would be worth you providing clarification regarding the cheque that was drawn from the Partnership Bank Account.
>
> On 17th June 2016 a cheque was made out for Tim Tax for £7,816.46 (copy attached.) This payment was unusual and not in the normal tax payment cycle. It was also unusual because payments to HMRC are paid directly via bank transfer.
>
> I queried this with you and you advised that you didn't know what it was for and that Thomas told you to pay it... I know you well enough to understand that you wouldn't make a payment for £7,816.46 without knowing the reason why.
>
> As I was not satisfied with your response I obtained a copy of the cheque from Lloyds bank (copy attached.) The payee was not HMRC as detailed on the cheque stub, but made out to you personally.

> I do not understand why you would mask a payment to yourself when you could have made the payment with the outstanding balances that have been due for some considerable time.
>
> The current situation is clearly not sustainable and I think that it would be prudent to meet and seek a resolution that has the least impact on our employees."

Mr Harvey's evidence was that his suspicions were aroused by Mr McMonagle's statement that he did not know what the cheque was for and that he would not generally sign a cheque "for 8 pence without knowing exactly what it was for".

125. Mr McMonagle's reply on the following day was:

> "Happy to provide the clarification that you seek, I have no issues with your investigation.
>
> It's a tax bill, as I told you at the time.
>
> The partnership has always paid the partners tax bills.
>
> Tracey and I had a tax bill that was paid at source direct to HMRC.
>
> The payment is reimbursement for the tax paid at source.
>
> The Tracey/Tim partnership balances will reflect this payment in the 2016/2017 partnership accounts and be reduced accordingly.
>
> There were sufficient funds in the partnership account to cover this payment.
>
> There was no transfer of funds from the limited company to cover this payment.
>
> This payment had no implications on the limited company whatsoever.
>
> The timing and precise amount of the payment was to ensure the correct audit trail and allocation for HMRC accounts/partnership accounts/personal tax accounts.
>
> With regard to timing, as you are aware there were four - Lee/Maria/Tracey/Tim - tax payments paid to HMRC 17 days later on the 4th July.
>
> There were sufficient funds in the partnership account to cover these payments.
>
> There was no transfer of funds from the limited company to cover these payments.

> The four payments had no implications on the limited company whatsoever.
>
> HMRC payments are not always paid by BACS, they have also been paid by cheque.
>
> No great mystery, so let's move on to more pressing matters."

126. It was put to Mr McMonagle that it would not have been necessary for Mr Harvey to have obtained the cheque stub if he had been aware of the reasons for this payment. Mr McMonagle suggested that Mr Harvey's email was mischievous and was laying the ground for justifying his competitive trading via ENJ. In particular, he noted that the Mr Harvey had set up the Controls Email on 30th August 2016 and established ENJ in November 2016. It was put to him that he did not seek approval for this payment but he said that Mr Harvey knew exactly what he was doing.

127. It was noted by Mr Watson that the reply does not take issue with Mr Harvey's statement that he had been told that Mr McMonagle did not know the purpose of the payment, but gives a great deal of detail about it while neglecting to mention any trip to Australia. Mr McMonagle said that there was no need to mention Australia as the management team knew that he was going there. It is not in dispute that Mr McMonagle did in fact go to Australia thereafter. It is to be noted that, while not expressly stating that it was untrue to say that he had told Mr Harvey that he did not know what it was for, he does state that he explained that it was a tax bill and gave an account of why it was paid and how it would be accounted for. This, he said in evidence, was because Mr Harvey had copied in the management team. Mr Harvey in fact accepts the purpose of this cheque and does not challenge its propriety. It is what he characterised as the secrecy around it that caused him to be suspicious. I do not consider it to be so and there is no rational reason offered as to why Mr McMonagle should have sought to conceal the reasons for this payment from Mr Harvey in circumstances where he explained that it was a tax payment, which indeed it was, and Mr Harvey does not in fact object to the payment itself.

128. A management team meeting was held on 30th September 2016. The minutes are in bullet point form and include the following:

> "• Lee/Tim personal withdrawals from Ltd Company - Gary To Contact External Mediator."

Mr McMonagle explained in re-examination that he thought that this should be a reference to the "partnership" as there had been no authorised withdrawals from the Company. He could not recall why there was a reference to external mediation. Another management team meeting was held on 28th October 2016. The agenda again refers to "• Lee/Tim Relations". The same wording appears on the agenda for 13th January 2017.

129. Mr McMonagle said that Mr Harvey's queries related to the "Tim Tax" email was an attempt to create "a situation" having set up ENJ. In particular he noted that Mr Harvey had set up the Controls Email on 30th August 2016 and established ENJ by November 2016. Mr Harvey maintains that he set this address up simply to address the email problems that he was having.

130. I have accepted that Mr Harvey did indeed have difficulties with the company IT. It is, to say the least, surprising that he waited until 30th August 2016, some three months before establishing his own trading style, to set up an email address that he could be sure would function, having complained of difficulties with his emails since 2012. The evidence shows however that he did use the Controls Email address to engage in Company business and it would be surprising, if his intention was to use it to pass off ENJ as ICS, that he should have chosen such a name to invoice for the work carried out, rather than something closer to ICS.

131. It is however accepted that ENJ was set up with the intention of leaving ICS. Mr Harvey accepted that he diverted two business opportunities way from the Company and he now acknowledges that this was a breach of his duties owed to the Company. On his own case he has admitted the sums diverted and accepts that they should be set off against his director's loan account.

Events in 2017

The discovery of ENJ

132. The discovery of ENJ's diversion of business took place in 2017. By that time Mr Harvey's marriage had broken down and Mr McMonagle's evidence was that he has been informed of the existence of ENJ by Mrs Harvey. Mr McMonagle thought that he had probably been told about this at some point in or before August 2017. I accept that this is the likely timing because, on 29th August 2017, Mr Saunders sent an email to Mr McMonagle and Mr Harvey seeking to mediate between them:

> "I am sending this email after discussions with the both of you with the hope we can all sit down and have open and honest discussions about the future of ICS and the individuals most involved with it.
>
> I still believe that both personally and as a whole it is in the best interests of all parties to try to find a common ground/resolution to the current climate we all find ourselves in.
>
> Setting aside personal involvements I believe discussions should centre around the company and how issues (both with a personal and non-personal involvement) can be resolved in the best interests of the company and parties involved.
>
> This will obviously have to include certain issues that are not the easiest to discuss but, just the same require resolution.
>
> I believe we should arrange the meeting in a neutral, non-work involvement which may help to relax the talks, I am open to suggestions as to where?
>
> Would you rather it was just the 3 of us or do you wish to involve Becky as well?
>
> Finally,

> I personally hope we can all find a way forward, this company and the two of you have both helped me and my family through some really rough times but also good times, so I hope the contents above is taken in the way in which it is meant to be received."

Mr McMonagle thought that, by this point, he and Mr Harvey were still on speaking terms. Indeed, both Mr McMonagle and Mr Harvey expressed a willingness to meet.

The 8th September 2017 meeting and subsequent correspondence

133. A meeting did take place on 8th September 2017. Mr McMonagle wrote to Mr Harvey, copying in Mr Saunders and Ms Craske, on 27th September 2017 to record the matters discussed. According to that email, Mr Harvey set out various options that his solicitors had come up with for the purposes of dealing with his shares as part of his divorce settlement as follows:

> "1.2. LH advised that he had instructed his solicitors some two weeks previous to write to MH with three proposals:-
>
> 1. That ICS was to be sold in its entirety,
> TM stated that how could he possibly make this proposal without any prior discussions with TM or TKM.
>
> TM stated his disappointment in learning this information some two weeks after the fact.
>
> TM stated that neither he or TKM were interested in selling their share of the businesses.
>
> 2. MH to buy LH share in the businesses.
>
> Apparently MH has no desire by buy LH share in the businesses.
>
> 3. LH to buy MH share of the businesses
>
> LH stated that he was not prepared to put himself in debt to proceed with this option.
>
> LH stated that it was a TM proposal to put himself in debt to buy MH share of the businesses.
>
> TM stated that he made no such proposal.
>
> TM stated that he did make a proposal that LH should discuss this option with MH with a view to him making a fair and reasonable offer in order to move the divorce financial settlement forward and this did not include the suggestion that he should put himself in debt.
>
> TM stated that he only made the proposal in an effort to broker a deal and in view of LH reaction would have no further discussions with him on LH/MH divorce.
>
> In view of the above it was agreed that none of the options appeared feasible."

134. It is recorded that Mr Harvey indicated a wish to sell his shares:

> "LH stated once again that he would like to sell his share of the businesses and thought that TM, TKM and MH might like to purchase.
>
> TM advised that neither TM or TKM were interested in buying his share of the businesses.
>
> TM stated again that he did not want LH to leave the business."

135. In respect of Mr Harvey's competitive trading it goes on:

> "1.8. TM asked if LH had started a new company.
> LH stated that he had not.
>
> 1.9. TM asked if LH had any connection with any other businesses and/or entities.
> LH said 'Ah that's different' and stated that yes, he had 'started a separate enterprise'.
>
> 1.10. TM asked if LH had undertaken any work and/or invoiced for any work under this new business.
> LH replied that he did not have to answer that question,
> TM replied that he already had answered the question by not replying no.
>
> 1.11. TM asked if any materials purchased by ICS had been used in the above work,
> LH declined to answer.
>
> 1.12. LH made an allegation against TM relating to payments that had been made to two companies.
> Immediately after the discussions ended TM took two files off the shelf put them in front of LH to prove what the payments were for.
> LH accepted the information provided and agreed that the allegation was incorrect and was withdrawn.
> No apology was sought or offered.
>
> 1.13. TM requested an undertaking from LH that he would not take any further actions that were likely to damage the ICS businesses.
> LH gave an undertaking and his word that he would not take any further actions that would damage the ICS businesses.
>
> 1.14. TM requested an explanation as to the transfer of £5,008.00 on the 22 August 2017 from the ICS partnership account to his new personal bank account,
> TM stated that this payment was made without any prior discussion.

> LH stated that he made the payment because he was pissed off.
>
> TM stated that the payment now meant that LH was not owed any monies from the partnership whilst the other three partners were still owed monies from the partnership"

Mr Michael asked Mr Harvey if the explanation that he was "pissed off" was correct. Mr Harvey said that it "possibly" was.

136. The email goes on:

> "1.15. TM requested an undertaking from LH that he would not transfer any other monies from any of the ICS partnership or ICS limited bank accounts.
>
> LH gave an undertaking and his word that he would not transfer any other monies from any of the ICS partnership or ICS limited bank accounts.
>
> The only exception to this undertaking would be that LH could pay himself the normal level of monthly business expenses.
>
> 1.16. LH raised again the subject of a cheque to the value of £7,816.46 raised by TM on 22nd June 2016.
>
> TM referred LH to the email dated 20" September 2016 which answered in detail what the cheque was for.
>
> LH stated that TM had lied to him about the cheque, TM stated that he had not."

137. Mr Harvey's response on 3rd October 2017 was as follows. It raised allegations of interference with his computer account and queried certain payments out by the Company:

> "Within section 1.3 of your e-mail you have stated that you do not wish me to leave the company. Unfortunately recent actions and comments suggest otherwise, which are detailed below.
>
> - Sunday 20th August you sent an e-mail, copying in numerous people and called me an arse and accused me of playing games.
> - Sunday 20th August my e-mails were deleted.
> - Friday 22nd September my e-mails were deleted.
> - Friday 22nd September my files were deleted from the server,
> - Sunday 24th September my e-mails were deleted,
> - Monday 25th September my e-mails were repeatedly deleted,
> - Monday 25th September my internet access was removed.
> - Sunday 1 October I could not connect to the e-mail server,
> - Monday 2 October I could not connect to the e-mail server.
> - This abuse, bullying and harassment has been recorded since May 2013.

- The document recording a small proportion of these incidents is attached.
- Your actions have and continue to prevent me from working on current and future ICS projects.

In section 1.16 of your e-mail the issue of the cheque raised from the Partnership last year has been discussed again. We have a different account of what occurred, the fact that both sections are the cheque are named differently proves that you behaved dishonestly.

Advice that I received last year confirmed that you had acted in bad faith, which was sufficient reason for the Partnership to be dissolved.

During our meeting of Friday 8th September you also made an undertaking that you would not transfer any other monies from any of the ICS partnership or ICS limited bank accounts.

Can you provide written clarification regarding the payment made to John Slater and Haward detailing the goods and services provided to ICS (Eastern) Ltd.

This payment was made on 31 March 2017 and amounted to £8,385.00.

Can you provide written clarification regarding the payment made to B&F Mechanical detailing the goods and services provided to ICS (Eastern) Ltd.

This payment was made on 30th November 2015 and amounted to £7,200,00,

With regards to other items, you are fully aware of my ongoing divorce. With the ongoing open exchange of information between MH and TM I have been advised not to provide any comment,

Due to your actions I believe that my position at ICS has become untenable."

138. Mr McMonagle replied on 5th October 2017:

"Lee....

Thank you for responding.

I accept your email as an acknowledgement that the events detailed relating to the meeting on the 8" September 2017 are a true and accurate record of the discussions.

I am, however, extremely disappointed with your comments and continued accusations.

My email was a genuine effort to move things forward, you have rejected this effort.

Your admission – albeit dragged out – that you had started your own business came as a huge body blow to me (and I expect Gary and Becky as well).
I still cannot understand why you want to leave ICS, it has provided a good living to us all yet you seem intent on destroying the company and the associated employment of all.
My email even gave you the get out to close down your new company, which again you have rejected.
You continue to dwell on subjects that have been discussed and documented at great length in the past and have absolutely no bearing on where we are now.
I have stuck to agreement that was made in October 2016 to move on from events in the past, however you continue to ignore and break this agreement,
You have rejected every attempt and proposal that I (and Gary) have made in trying to resolve the situation,
You have made relentless unsubstantiated allegations against me which I have ignored in an effort to resolve the situation rather than escalate it.
If you continue to make these unsubstantiated accusations and/or repeat them I will take further action.
I have provided answers to every one of your questions.
You have not provided answers to any of the question put to you regarding your new business(es).
The questions relating to your new business(es) have nothing to do with your divorce, it is about understanding what damage you have done and/or are doing to ICS.

You are obviously pursuing your own agenda and throwing out unsubstantiated allegations in an effort to create a smokescreen to cover your duplicitous activities.
The actions you have taken and are continuing to take are prejudicial to the best interests of the company.

I repeat, for the umpteenth time, that I do not want you to leave the company, I have not carried out any actions that negate this statement, as I said at the meeting on the 8" September loved you like a brother and do not understand why you are acting in this manner.

I no longer have any idea what you want.
I am at a loss to know what to do next.

Do you want me to sell up, retire, leave and walk away from the company?
As you know I am 63 this year and really do not need all this pressure and stress that you are creating and applying, it is now affecting my health and wellbeing.

> Just tell me what you want to do and/or you want me do and if it is in my power I will do it.
>
> This my final throw of the dice, I have tried everything, it is all in your hands now you can either come back from your position or not.
>
> I hope you will be in the office tomorrow and you can tell us all what you want to happen next.
>
> If you are not in the office tomorrow please advise when you are available to tell us all what you want to happen next."

139. A meeting between Mr McMonagle and Mr Harvey took place on 6th October 2017. It was referred to an email sent by Mr McMonagle on the morning of 9th October 2017 as follows:

> "Lee ....
>
> 1. Further to our brief meeting/discussions on Friday 6" October 2017:-
> 1.1. Your proposal to draw a line in the sand and just carry on as we are currently was rejected by me on the grounds that:-
> a) correct and proper company operation in the current situation is not sustainable
> and
> b) Your refusal to withdraw your unsubstantiated allegations against me
> and
> c) Your refusal to close your new business(es), provide full disclosure of your activities, transfer all profits/ proceeds/assets/etc. to ICS and return all ICS equipment that is stored in any locations.
>
> 1.2. You then stated that you would be prepared to close your new business(es) but would not provide full disclosure of your activities or transfer all profits/proceeds/assets/etc, to ICS or return all ICS equipment that is stored in any locations.
> This offer to close your business(es) was linked to demands that ICS IT services and financial account services would be carried out by others.
> I asked where this left me. I have carried out all ICS IT services since the company inception in 2001 and the financial accounts since 2011 and saw your proposal as your open intention to remove me from the company.
> To use your new business(es) as a bargaining chip is clearly unreasonable.
>
> 1.3. I stated that investigations into your unsubstantiated allegations relating to your emails had revealed the true extent of your duplicitous activities.

My investigations are currently back to the early part of 2017 and am staggered how long you have been conducting activities with your new business(es).

1.4. You have rejected every attempt and proposal that has been made over the last year or so to resolve the situation, whilst actively conducting activities with your new business(es).
You have now pushed me too far and I offered to leave the company.
Make Tracey and I an offer and we will walk away, I recall that your valuation of ICS was somewhere between £500K and £1M
I pointed out that of everyone in the company I was probably the only one that didn't actually need it due my financial status and was completely and utterly fed up with trying to find ways forward.
I certainly do not need all this pressure and stress that you are creating and applying.

1.5. Following large periods of silences between us all it was quite obvious that there was nothing more to say. I shutdown my laptop, packed up and left.

2. Following Becky's email (thank you Becky, it contained a mountain of useful information and kept me busy reading all weekend) I now intend to seek legal advice on behalf of the company and shareholders.
Advice will be sought regarding your duplicitous activities and whether the actions you have taken and are continuing to take are prejudicial to the best interests of the company
Advice will be sought as to whether the shareholders have any legal redress relating to your actions.
Advice will be sought as to what legal remedies are available to resolve the current situation.
Advice will be sought as to the best way to extricate Tracey and I from the company.

3. I have considered your proposal to dissolve the partnership and agree that that this the best course of action.
It removes one layer of complication in the extrication process.
I have consulted Tracey and she agrees.
I have not yet consulted Maria.

Assuming Maria agrees then I believe we should proceed as follows:-
Discuss with Thomas at Larking Gowen the legal and financial process to dissolve the partnership.
As you have already transferred all the monies owed to yourself - with no prior discussion with any of the other partners or shareholders - you have no monies left owed.
Maria, Tracey and I are still owed monies from the partnership, monies that we have already paid tax on.

Tracey and I will take the monies owed in the very near future and I will transfer the appropriate monies across
I have not yet discussed with Maria the monies she is owed and/or what she would like to do.
I will discuss with her this week and advise further.

Reviewing the Lloyds partnership account I can see that you have changed your account details from yours and Maria's joint account … to a different account.
You have also changed Maria's account details from yours and Maria's joint account … to a different account ...
I understand from Maria that the new account details are your sole personal account to which she has no access to.
With these new details any payments of outstanding partnership payments to Maria would be paid into your sole personal account which she has no access to.
Your motives for doing this would appear to be questionable and I will consult with Maria further.
I would suggest that you discuss this situation with Maria and change these details so that she receives the monies she is entitled to.
If you do not change these details within the next 7 days I will consult with Maria and act on her instructions and change them myself if so requested.

When all the outstanding monies are paid I propose that the partnership be dissolved and any remaining assets be transferred to the Ltd company.
Assuming that this is all achievable in the next few weeks, I believe that this will then leave us all individually responsible for the taxes that are required to be paid on the 31"January 2018 and 31 July 2018.

4. Management meeting - Friday 13" October 2017.
Due to my commitments this week I am trying to arrange to see solicitors on Friday 13" October 2017 and therefore propose that the management meeting be cancelled.
We have another management meeting planned for Friday 3" November 2017 and I believe that following legal advice this will provide an opportunity to discuss the situation further,
We also have planned a meeting with LG - Mark and Thomas - on Friday 3" November 2017 and I believe this will also provide an opportunity to discuss the situation with them,
You have arranged for our new Barclays account manager to attend the offices on Friday 13" October 2017 at 09:00.
In view of the current situation, my probable inability to attend and your duplicitous activities I believe that it would be inappropriate for you to meet him without me present therefore would suggest that this meeting be cancelled."

140. Mr Saunders sought to intervene again on 9th October 2017. He emailed Mr McMonagle and Mr Harvey, copying in Ms Craske, and said:

> "Tim/Lee....
>
> I no longer wish to be copied in to these emails unless there is some positive move to resolution and/or the contents has a direct involvement upon myself and how the company will continue, the stress of this situation has made me very unwell over the weekend, and for that matter the past few weeks/months /years and continues to do so.
>
> I have always carried out my role within ICS to the best of my abilities and will endeavour to do so over however long the company has left in its current state.
>
> I have made over several years now repeated efforts to resolve the issues that have grown between you, trying not to take sides and I rate this day as one of the saddest days of my life, 15 years of effort (and reward) now seems like a total waste of time. I have made repeated statements in which I have said I did not want to see either of you leave the business for both personal and professional reasons.
>
> The only thing I ask for is clarification on where this all leaves myself and my family, who by the way are also now being directly impacted by this situation. I have recently taken an extension of my mortgage of £30,000.00 based upon my earnings at ICS, I really wish I hadn't.
>
> I also worry for the future for all of your employees,
>
> - Becky who has her student fees to pay.
> - Toby, Matt, Shaun, Jimmy, Mossy, Jon who all have young families, mortgages etc,
> - Mark F who has himself invested 15 years into the company
> - Everybody else who it will affect one way or another,
>
> This ways very heavily on me as I am sure it must do both of you."

141. Mr Harvey replied on the same day. He said:

> "Dear All,
>
> I have deliberately refrained from replying to all of the e-mails that are circulating as it is not allowing any progress to be made whatsoever.

> After the meeting on Friday I asked Becky to investigate starting mediation to find a way forward, even if it is just in the short term. There was no intention to imply / include any financial elements within that request, It is clear that everyone is suffering, which no one is benefitting from.
>
> Can I suggest that nobody takes any action whatsoever or send any further correspondence until we begin mediation.
>
> If everyone is in agreement then I will speak to ACAS regarding their availability.
>
> I firmly believe that this will be the best way forward and look forward to receiving a positive response."

142. Mr McMonagle replied as follows shortly afterwards on the same day in an email to Mr Harvey and copied to Mr Saunders and Ms Craske:

> "I see no benefit in arbitration and/or mediation, you have made your intentions clear through your duplicitous activities.
>
> I do not agree to you contacting ACAS and/or wasting time and money whilst you continue to pursue your own agenda.
>
> I will continue with the actions detailed in my email this morning.
>
> Please confirm that the management meeting is cancelled.
>
> Please confirm you have cancelled the Barclays account manager visit.
>
> Please confirm your intentions regarding Maria's bank account details.
>
> Gary/Becky....
>
> This is the last email I will copy you both in on relating to this situation.
>
> I will not copy you into any further emails relating to this situation and/or update you on my meetings with the solicitors unless you request it.
>
> I agree that this is an appalling situation and it is my desire and stated intention to bring this whole sorry saga to a quick and speedy conclusion."

Mr Watson put to Mr McMonagle that he was rejecting the opportunity to seek settlement. He said that he had asked for information regarding Mr Harvey's competing business for a month and it had not been provided.

143. Mr Harvey replied on 10th October 2017:

> "I am disappointed to receive yet another e-mail from you of this nature.
>
> With regards to the content I do not wish to comment further at this stage other than the following:-
>
> 1 . I am disappointed that you do not wish to attend mediation to help resolve the difficulties that we face.
>
> 2. We both agreed during our meeting of Friday 8" September that no monies would be transferred by any party.
>
> My Directors loan account currently stands at £57,332.00, I have not removed any monies owed as this was the agreement that we both made.
>
> 3. If you wish to cancel the management meeting then please do so.
>
> 4. At your request I will cancel the meeting with our new Barclays account manager.
>
> 5. I have no desire for you to leave the company,
>
> 6. As stated within our meeting I do not wish to purchase your shares. I you would like to sell your shares then can I suggest that you re-consider selling the business in its entirety as previously suggested."

144. Mr McMonagle replied on the following day:

> "Lee.....
>
> Re point 2, we had no discussions relating to directors loan accounts.
>
> Your directors loan account may well stand at the figure you have quoted and I am sure my directors loan account will have a similar figure.
>
> I am unsure why you have now raised this, as you are fully aware directors loan accounts are 'virtual' accounts and are not an indication of any actual monies owed.
>
> As with every other year LG will update the directors loan accounts at the end of our financial year in Feb 2018 to reflect dividends and drawings.
>
> There may well be monies owed to all shareholders at the end of our financial year in Feb 2018 but we are unlikely to know until May/June 2018 when LG produce the draft accounts.

> As you are aware I have been advising the management team for months that the company is making regular month on month losses.
>
> Dividends can only be paid on profits, if there are no profits there can be no dividends,
>
> With no dividends and continuous drawings on the directors loan accounts the numbers will keep decreasing.
>
> I think we need to arrange a shareholders and partners meeting to discuss and resolve the issues surrounding your proposal to dissolve the partnership.
>
> Could you please advise three separate dates and times over the next week or two suggest we allow three hours - when you would be available.
>
> Once I have your proposed dates I will liaise with the other shareholders/partners.
>
> As you have already transferred all the partnership monies owed to yourself - with no prior discussion with any of the other partners or shareholders you have no monies left owed,
>
> Maria, Tracey and I are still owed monies from the partnership, monies that we have already paid tax on. As you proposed the partnership dissolution you were obviously aware that all outstanding monies would need to be transferred and paid to allow it to be dissolved."

It was put to Mr McMonagle he was threatening to "turn off the taps". He said that he prepared the management accounts every month, which would show the profits. If there were profits it was possible to pay dividends. His intention in this email was simply to set out his concerns about the profits of the Company.

The meeting on 31st October 2017

145. A combined meeting of shareholders and partners took place on 31st October 2017. The minutes of the meeting are as follows:

> "Agenda item 1 – Dissolving the ICS partnership
>
> 1-To discuss, resolve and, if determined by the participants, action the proposal made by LH to dissolve the ICS partnership.
>
> Following LA suggestion of dissolving the ICS partnership in previous emails, TM, TKM and MH are all in agreement that this should go ahead. LH cannot remember suggesting that the partnership should be dissolved.
>
> **Resolution**

> To dissolve the ICS partnership.
>
> Voting results – For the resolution – LH, MH, TM, TKM
>
> Against the resolution"

146. At agenda item 1.2 the following is recorded:

> "1.2 – Agreement as to the arrangements of the outstanding monies associated with the partner's individual accounts.
>
> LH, MH, TM and TKM are all in agreement that MH, TM and TKM are to withdraw all outstanding monies due to them and to pay into their individual accounts. LH has previously taken what is due to him. A rough figure of £112,000 was mentioned as money to be paid out of the partnership."

147. At agenda item 2 the following is recorded:

> "Agenda item 2 – ICS Ltd Valuation
>
> To discuss, resolve and, if determined by the participants, action the proposal made by LH to employ a company to value ICS Ltd. LH would like to have ICS Ltd valued whereas TI, TKM and MH do not feel it is necessary at this current moment in time.
>
> **Resolution**
>
> To employ a company to value ICS Ltd.
>
> Voting results-- For the resolution - LH
>
> Against the resolution -- TM, MIH, TKM"

It was put to Mr McMonagle that Mr Harvey was looking to value the shares with a view to selling them. Mr McMonagle said that Mr Harvey's intention in seeking a valuation of the shares was to use that valuation for the purposes of his divorce. Mr McMonagle saw no reason why ICS should pay for a valuation for Mr Harvey's personal purposes.

148. Mr McMonagle accepted however that there was by this stage a severe lack of trust between him and Mr Harvey. This is abundantly clear from the long list of questions set out in these minutes. They are as follows:

> "Agenda item 3 – To request LH to explain to the shareholders his actions in setting up a new company carrying out similar work to ICS Ltd. To request answers to the questions previously submitted to him in the email dated 27th September 2017, items 2.1 to2.19 as detailed below:
>
> 2. Items of information that are required from Lee Harvey.

2.1 The name of your new business. Please confirm that you have started only one new business.

2.2 The type of business i.e. sole trader, partnership, ltd company, etc.

2.3 The date the new business was started.

2.4 What type of works is being/has been undertaken by the new business.

2.5 Names of any other persons that are involved with the new business.

2.6 If applicable, the date that any bank accounts were opened in the new business name.

2.7. What are the contact email addresses associated with your new business?

2.8. Names and details of all persons and/or organisations that you have had discussions with relating to your new business.

2.9. Has your new business undertaken any work for any ICS customers either current and/or historical.

2. 10. Has your new business purchased any material from any ICS suppliers either current and/or historical.

2.11. Provide full details of all work undertaken by your new business.

2.12. Provide dates when work was carried out for your new business.

2.13. Have any ICS materials been used in carrying out work for your new business.

2.14. Have any ICS assets been used in carrying out work for your new business.

2.15. Have any ICS consumables been used in carrying out work for your new business.

2.16. Please provide a full list of all ICS (Partnership and Ltd) assets that are in your possession. This list should contain all items of equipment including, but not limited to, all PC equipment, laptops, mass storage devices, controllers, miscellaneous equipment, etc. etc. The list should detail all serial numbers of PC equipment, laptops, controllers, etc. Your list will be compared with our records and/or information.

> 2.17. Have you any ICS purchased and/or owned equipment, i.e. controllers, etc. stored in any locations.
>
> 2.18. Are you prepared to close down your new business, provide full disclosure and transfer all profits/proceeds/assets/etc. to ICS Ltd?
>
> 2.19. Please complete your whereabouts on the programme of works.
>
> Entries to include historical – from 1st Jan 2017, current and future."

149. The minutes later record, under agenda item 5, Mr Harvey's response to a request for an explanation of his actions as follows:

> "LH informed the rest of the participants that he has been advised to not discuss the subject and he therefore refused to answer the above questions. He believes that there is not currently a conflict of interest based on the fact that the new company is not currently trading.
>
> TM suggested he had evidence of LH new business dealings, however, this was not produced during the meeting. It was suggested that the evidence had shown that the new business had been trading for over 1 year.
>
> LH advised that he had previously offered to shut down the new business however, TM continues to request information regarding the activities of the new business in order for ICS Ltd to move forward. TM suggested that this information is key to the future of ICS Ltd. TIM requested that all profits of the new business are to be transferred to CS Ltd and for all of the ICS Ltd's equipment to he returned.
>
> LH suggested that he would like to seek further advice before disclosing any information to MH TM and TKM.
>
> TM expressed his disappointment in LH's refusal to answer the above questions and referred to an email received from Thomas at Larking Gowen which explains that a Director of a company has the legal obligation to put the interests of the company and is employees first.
>
> Both TM and LH are in agreement that there is a severe lack of trust between them as a result of current and previous issues. LH spoke about TM's previous cheque withdrawal from the ICS partnership and confirmed that this could be a contributing factor of him setting up a new business. TM suggested that these concerns were addressed at the time and an explanation for the cheque withdrawal have previously been given in writing."

150. At agenda item 7 there is a reference to a number of resolutions prepared by Mr McMonagle in advance "on the assumption that LH would not answer any of the above questions." These were:

> "Resolution 1 – Removal of LH's authorisation regarding the company bank accounts to protect the partnership and ICS Ltd
>
> TM, TKM and MH were all in agreement that this should go ahead.
>
> TM has concerns that ICS Ltd is currently losing money and could be as a result of LH's new business. TM and MH expressed concerns that LH will withdraw money from ICS partnership or Ltd Company and therefore requested LH's word that he will abide by the above decision.
>
> TKM also believes that this is the right decision based on the current situation.
>
> LH is unsure as to whether this decision is legally binding and will be seeking further advice on the matter however, he had given his word that he will not withdraw any future monies.
>
> LH raised the issue of TM withdrawing £20,000 in August 2017 and TM advised that this was to match LH's unauthorised withdrawal a year prior. LH has since taken a further payment of £5,000."

151. The following resolution was passed:

> "Resolution.
>
> To protect ICS partnership and ICS Ltd information, assets and future, with immediate effect, Lee Harvey is no longer authorised to carry out any banking and/or financial activities on behalf of ICS partnership and/or ICS Ltd.
>
> For the avoidance of doubt this removal of authorisation includes, but not limited to:-
>
> - Access to any and all bank accounts associated with 1CS partnership and/or ICS Ltd.
>
> - Online access, logging on and/or viewing any and all bank accounts associated with CS partnership and/or CS Ltd.
>
> - Performing and/or carrying out any transactions using any and all bank accounts associated with CS partnership and/or ICS Ltd.
>
> - Signing cheques, associated with any ICS partnership and/or ICS Ltd bank accounts.
>
> …

> For the avoidance of doubt, Lee Harvey is still authorized to use his issued ICS Ltd credit cards and, in the usual manner/procedures, all use must be supported by the appropriate supporting documentation/receipts.
>
> Any future expenses claims made by Lee Harvey should be submitted to the management team for approval and payment."

152. It was put to Mr McMonagle that it was unnecessary to prevent Mr Harvey from viewing the company accounts. Mr McMonagle fairly agreed but said that the account could not be set up so that Mr Harvey could be limited to viewing it. The concern was to prevent him from taking monies and he was seeking to cover all eventualities.

153. The second resolution was:

> Resolution 2 – LH to seek approval for attending meetings alone
>
> TM, MH and TKM are in agreement that this is an appropriate decision given the current situation. TM advised that he is uncomfortable with such activities bases on LH's new business and has suggested that all meetings are to be run by him and Gary first. LH is in disagreement to this suggestion.

154. The resolution passed was as follows:

> "Resolution.
>
> To protect ICS partnership and ICS Ltd information, assets and future, with immediate effect, Lee Harvey is no longer authorised to represent ICS and/or attend any meetings of any type or location on his own.
>
> If Lee Harvey is requested to attend any meetings and/or needs to arrange any meetings of any type or location he will seek the approval of the management team for either approval of attendance on his own or at the management teams discretion an individual will be appointed to accompany him.
>
> Voting results – For the resolution – TM, AMH, TKM
>
> Against the resolution – LH
>
> Lee Harvey is required to acknowledge the shareholders voting and confirm his acceptance of and adherence to the resolution."

Mr Watson suggested to Mr McMonagle that it was obvious that Mr Harvey would be unable to perform his role if he was not free to go to meetings by himself. Mr McMonagle said that that "this was full on protection mode" following the revelations about Mr Harvey's alternative business. Mr Harvey's evidence was that he would attend 10 or 20 meetings a month.

155. The third resolution was as follows:

> "Resolution.
>
> To protect ICS partnership and ICS Ltd information, assets and future, with immediate effect, Lee Harvey is required to complete the programme of works with his location on every day.
>
> Entries to include historical – from 1st August 2016, current and future.
>
> Voting results – For the resolution - MH, TM, TKM
>
> Against the resolution – LH
>
> Lee Harvey is required to acknowledge the shareholders voting and confirm his acceptance of and adherence to the resolution"

It was put to Mr McMonagle that this was very onerous. Mr McMonagle said that it was not, everyone completed such a programme and the whole year could have been accounted for in about an hour.

156. The fourth resolution related to office equipment. The preamble is as follows

> "Resolution 4 – Equipment to be returned to JCS Ltd for inspection regarding concerns that these items may be being used for LH new company
>
> TM, TKM and MH all in agreement. LH is unsure as to whether this is legally binding and will seek further advice. LH advised that one of the laptops listed belonged to MH and that she was involved in the setup of the new business. MH has denied this and has agreed to return her laptop for inspection."

157. The resolution passed was as follows:

> "Resolution.
>
> Based on the discussions and information received today the shareholders have concerns that ICS partnership and/or ICS Ltd information and/or assets are being used by Lee Harvey in his new business[es].
>
> Accordingly Lee Harvey is required to return to the management team, within 7 days, the following items of equipment which are the property and assets of ICS Ltd.
>
> Upon receipt, the management team will inspect the equipment and decide on its future allocation and/or use.
>
> Voting results- For the resolution – AH, TM, TKM
>
> Against the resolution – LH

> Lee Harvey is required to acknowledge the shareholders voting and confirm his acceptance of and adherence to the resolution.
>
> This equipment list is not a complete and/or up to date list of Integrated Control
>
> Solution (Eastern] Ltd assets in the possession of Lee Harvey and further equipment lists will be issued shortly.
>
> Provisional equipment List as at 31 October 2017:-
>
> 1. Sony Laptop VPCS1 IV9E
> Serial No C10483CL
>
> 2. Dell Laptop M6700
> Serial No 1YIZRY1
>
> Microsoft Surface Book ITB purchased by ICS Ltd on 11th September 2016 for £ 2,743.98 via Lee Harvey expenses claim.
>
> MAC Book MI839 purchased by ICS Ltd on 17 December 2016 for £1,249.00 via Lee Harvey expenses claim.
>
> Dell Laptop purchased by ICS Ltd on 23 March 2017 for £2,216.26. via Lee Harvey expenses claim.
>
> HP Elitebook 840 G3 T9X59EA purchased by ICS Ltd on 19th April 2017 for £ 1,243.92 via Lee Harvey expenses claim.
>
> Linkstation 220 NAS 8TB 2BAY 2X 4TB HDD 1X purchased by ICS Ltd on 23rd June 2017 for £235.34 via Lee Harvey expenses claim."

158. Finally, the fifth resolution was to arrange a meeting to inform employees of the matters discussed. The minutes record:

> "LH advised that he would not attend such a meeting and did not feel it was necessary to inform the rest of the company. Becky and Gary agreed that a company meeting should go ahead to inform employees however, they were unsure on the content or date it was to be held. This was agreed by all participants that this would be discussed in the next management meeting on Friday 3rd November".

159. Mr Harvey's case is that this made his continued participation in the Company impossible. He confirmed these minutes as a record of what had been discussed at the meeting but not as agreement to the resolutions, which he had been advised were unenforceable.

The meeting on 17th November 2017

160. Mr Harvey did provide a measure of explanation at a meeting with Mr McMonagle held on 17th November 2017 in a pub in Reepham. He handed Mr McMonagle a letter dated 16th November 2017. It explained his dealings with ENJ as follows:

> Dear Tim,
>
> You have raised a number of questions about my involvement with ENJ Control Solutions and the impact that this has on Integrated Control Solutions (Eastern) Ltd where I am both a director and 25% shareholder.
>
> **Background**
>
> Before dealing with the issues currently before us I want to summarise how we got to where we are now.
>
> Following our disagreement in the summer of 2012 things have not been the same since. My problems with my company e-mail account have been documented but I do not wish to dwell on this matter. However due to these problems that I was having with my emails, I registered the domain name www. ics-controls.co.uk and began to use this for some of my emails instead of the Company email account. This was the only reason why I registered this domain, and I must make it clear that I was not passing off myself in a personal capacity as the company.
>
> I felt that our working relationship had broken down and there was no longer any trust between the two of us. This was bad for the Company and its future success.
>
> During a management meeting in the autumn of 2016, I offered to sell my shareholding in the company and resign as a director. In the circumstances, I thought this was the best thing to do.
>
> At the meeting, you and the management team told me that you did not want me to leave. I told you that I was unhappy with the situation but at the time I felt that I could not walk away from my investment in the Company and I also had obligations to my family. I did not have another job to go to and I would have been unemployed which would have caused problems for the family finances.
>
> I also wondered why it was becoming increasingly difficult to retrieve money owed to me by the Company even though the Company enjoyed a healthy bank balance.
>
> **ENJ Control Solutions**

Against this background I was very unclear about my future in the Company and my financial future, and being able to support my family.

I set up ENJ Control Solutions in November 2016. The reason for doing this was to provide some additional income for the family and in particular to support my daughter Emelye who is at University.

On 1st November 2016 I opened a bank account for ENJ with HSBC. I registered ENJ with HMRC on 2nd January 2017.

On 21st January 2017 you sent me an email advising me that you did not think further payments could be made to me from the Company and cash flow would not permit it. This was at a time when the balances for the Company's bank accounts amounted to £559,000.00. This was at a time when I was working 7 days a week on Project Gemma for Addenbrooke's Hospital yet the Company being unable to release any cash to me.

I therefore took on two pieces of wok through ENJ Control Solutions so as to generate income for my family.

Maria was aware of what I was doing and supported me in my actions. We even discussed her doing the accounts for ENJ.

I did 2 pieces of work through ENJ both for James Brown (Mechanical Services) Ltd, which was as follows:-

1) A contract for plantroom works at an agreed price of £23,500.00 plus VAT.

2) A maintenance contract to the value of £2,331.00 plus VAT.

To carry out these works I did use Company materials and labour.

Actual cash received by ENJ was £20,256.80 plus VAT with a further £2,600.00 yet to be invoiced. The current cash balance in ENJ's account is £16,618.39.

Also, I have also carried out a controller change, which can be invoiced by ICS.

I have not taken any other work through ENJ, and I have already taken advice from accountants that ENJ should be formally closed when my next tax return is filed.

I hope you understand that I was acting under the quadruple pressure of bad feeling at work, lack of cash from the company, my deteriorating marriage and the collapse of the relationship my daughter Emelye and Maria.

> I understand what I did was wrong in setting up ENJ and that I should repay the money earned by ENJ, which I am ready to do.
>
> I believe that frankness by everyone will enable us all to move on from the unpleasant situation which is taking a toll on all of us."

161. ENJ's accountants provided a letter to like effect as to the extent of ENJ's trading. Mr McMonagle does not accept Mr Harvey's admission at face value. In particular, he points to the fact that the first in time of the invoices disclosed by Mr Harvey is numbered 27, that the VAT returns referable to the activity of ENJ do not tally with the disclosed output tax and ENJ did not deregister for VAT until the following year. Mr Harvey's explanation for these discrepancies is that he did not wish to issue his first invoice with the number 1, the VAT returns include sums paid to lawyers and he was advised to deregister at the end of the tax year. I accept those explanations. On the basis of the evidence before me, this letter is a genuine attempt to explain the diversion of business carried out by Mr Harvey as ENJ.

162. Mr McMonagle maintained in cross-examination that, even by December 2017, he wanted to find a way forward. Nonetheless, he acknowledged in his written evidence:

> "Following our discovery of Lee's unlawful activities in September 2017, our relationship became strained to the point that by December 2017 I concluded I could no longer continue to be in business with Lee or Maria."

The meeting on 4th December 2017

163. At a combined meeting of the Partnership and the Company shareholders on 4th December 2017 Mr McMonagle sought the appointment of Mrs McMonagle as a director. This resolution was not passed. Mr Harvey abstained and Mrs Harvey similarly abstained on the basis that that she wanted to seek legal advice as to her own position.

164. It appears that she did in due course seek such advice. Her solicitors, Leathes Prior, wrote to Mr Harvey on 8th December 2017 regarding the meeting as follows:

> "At that meeting there were some 'without prejudice' discussions between the shareholders and in particular the two Directors of the company, namely Tim McMonagle and Lee.
>
> In essence the outcome of those conversations was that Mr McMonagle is insisting that the monies generated by the company set up by Lee (ENJ Control Solutions) must be repaid to Integrated Control Solutions (Eastern) Ltd immediately.
>
> Mr McMonagle is also proposing the following:-
>
> 1. That Lee should relinquish his shares in ICS (Eastern) Ltd and sell them back to the company.

> 2. Lee should accept that his Directors' Loan account will be frozen.
>
> 3. Lee must give up rights to any dividends.
>
> 4. Lee must remain on basic salary only.
>
> In essence Lee is being asked to 'walk away' from the business because, from Mr McMonagle's perspective, Lee's conduct has made the situation untenable. Maria has absolutely no idea as regards whether Lee intends to accept the proposals outlined by Mr McMonagle or not.
>
> From Maria's perspective these conversations, as you will appreciate, have caused her significant concern and any decision that Lee makes in respect of both his shares and the remuneration that he receives from the company will have an impact in relation to Maria and, more importantly, the children.
>
> As a result of the conversations which took place on 4 December at the emergency Shareholders Meeting I am instructed to seek the following clear and unequivocal undertakings from Lee which are:-
>
> He will not dispose of his 25% shareholding in ICS (Eastern) Ltd without either Maria's formal written consent or Order of the Court.
>
> 1. He will not resign as a Director without Maria's consent.
>
> 2. He will not compromise any entitlement to dividends whether accrued or accruing.
>
> 3. He will not enter into any agreement to dispose of his shares (or agree restrictions on the disposal of his shares).
>
> 4. He will not compromise any claim he has against the company (including, without limitation, whether in respect of remuneration or his Directors' Loan account).
>
> Maria also requires clear confirmation from Lee as to his intentions in respect of the proposals outlined by Mr McMonagle."

165. Mr McMonagle did not accept that that letter was an accurate summary of the meeting. He contended that he did not say any of that to Mr Harvey. He rejected the proposition that he was asking Mr Harvey to walk away from the Company as a result of his own perception of what Mr Harvey had done. He said that he only knew what Mr Harvey said he had done. He accepted however that the letter sought to prevent Mr Harvey from leaving the Company.

166. The minutes of the meeting themselves state, as far as is material:

> "Item 1.4
>
> • The Director's loan account split figures had been received from Thomas Norman. Maria was aware of the split between her and Lee - there was enough money in the loan account to pay Lee's tax liability but not enough to pay Maria's.
>
> • There was enough money in Tim's loan account to cover both Tim and Tracey's tax liabilities
>
> • Method of payment needs to be confirmed to Thomas Norman and Mark Curtis
>
> …
>
> Item 5 – Update from LH on the advice sought and the subsequent disclosure of information made to TM
>
> …
>
> • In view of LH admissions, deception, theft, fraud, breach of fiduciary duty, etc. TM stated that he could no longer work with LH and asked that LH review his position and consider resignation of both his employment and directorship.
>
> …
>
> Item 7 -- Update from LH on the advice sought.
>
> Lee stated that Tim's proposed resolutions were repressive and not enforceable however, he would stick by them – therefore the resolutions would remain in place until alternative resolutions had been agreed. Maria and Tim stated that they had already received legal advice and both confirmed that the resolutions were in fact legally binding and enforceable."

167. Mr Harvey did not agree these minutes and said that he has not seen them until 24th February 2020. Ms Craske's evidence is that she took the minutes and posted them to him. I accept Ms Craske's evidence.

The meeting with the employees on 14th December 2017

168. There was a meeting of employees on 14th December 2017. It was put to Mr McMonagle that he had told the employees at the meeting that Mr Harvey had been competing with the Company. He said that he had simply told them what Mr Harvey had admitted. He rejected the proposition that he knew that this would destroy any relationship he had with the employees of the Company. He said that the employees were entitled to know what the management team had known and why Mr Harvey was not around. The people who were involved were very angry and Lee had been invited to attend the meeting.

169. There is no doubt that employees who had not previously been aware of Mr Harvey's activities under the trading name ENJ were shocked by the revelations. Mr Harvey said that he declined to attend a meeting with employees in principle because it would be a "witch hunt". He stated that he was not given notice of that meeting because the email informing him of it was sent to his "eastern" email address.

Removal of access to the Addenbrooke's BMS on 19th December 2017

170. On the morning of 19th December 2017 Mr Harvey's access to the Addenbrooke's monitoring system was terminated. Mr McMonagle's explanation was that this was another protective measure, as Mr Harvey had "gone rogue" and they did not know what he was going to do. He denied that this had been his own direction to the employees. He said that it was the consensus at the meeting and he agreed with it. Whether or not that there was such a consensus, however, Mr McMonagle was the director of the Company and accepted this as an appropriate course of conduct.

171. It was put to Mr Harvey that he had continued to attend Addenbrooke's and he was taken to an email from Mr McMonagle to Mrs Harvey of 19th December 2017 in which he said that he had discovered that Mr Harvey had attended Addenbrooke's "yesterday" and that he was continuing to generate a secret profit and taking them "for fools". Mr Harvey said that he was there doing his job. By this stage, it is clear that neither Mr McMonagle nor Mr Harvey wished to have contact with each other.

172. He denied that the removal of Mr Harvey's remote access gave a risk of control failure. He said that there were 20 to 30 employees who still had access to the Addenbrooke's system. This is in contrast to the evidence of Mr Gill, however, who said that Mr Harvey was the only person to have a licence and permissions to access the BMC system out of hours. Mr Gill's evidence that this change was made without reference to Addenbrooke's and, while it was true that there was always an engineer on site not all of them were competent or confident with all aspects of the system. He said that resort to remote access was a more than once or twice or year occurrence.

173. There was a meeting between Mr Gill, Mr DaCosta, Mr Hawkes and Mr Taylor on 19th December 2017. It is said that the changes to the access to the system were not disclosed to Addenbrooke's at this meeting but they were informed that Mr Harvey would be leaving ICS. Mr Gill recalled that there was reference to "gross misconduct" and to "fraud". Mr Hawkes's evidence was that it was untrue that he told Mr Gill or Mr DaCosta of Addenbrooke's that Mr Harvey was leaving ICS because of fraud.

174. It does however appear that Addenbrooke's had at least been told that Mr Harvey was leaving. On 26th January 2018 Ms Trish Marchant, the senior electrical engineer at Addenbrooke's, wrote to Mr McMonagle about "current changes of staffing for the Addenbrooke's contract" following a meeting on the previous day. She confirmed the following points of discussion following the termination of Mr Harvey's access to the control system:

> "1. That ICS will provide a quote to extend the current contract on a month by month basis, initially for 3 months from the 1April 2018.

> 2. That the Trust expressed disappointment in the way you communicated the current situation to us and how changes to our system were made without discussion with ourselves.
>
> 3. That the Trust request ICS consider not applying any restrictive covenant to Lee Harvey which would prevent him working with the Trust in the future.
>
> 4. That ICS confirmed the new working arrangements and that Toby would be replacing Lee as our main site contact. The Trust will arrange remote access for Toby on the understanding that no changes will be made to the User accounts without agreement from the Trust."

175. Mr McMonagle said that he interpreted this as a request that, if Mr Harvey did leave the Company, it would not prevent him from working with them. He pointed out that, at this stage, he was still employed by the Company. The phrasing used by Ms Marchant however plainly contemplates that Mr Harvey would cease to be employed by the Company.

176. I accept Mr Gill's evidence as to what was said at the meeting and in particular that Mr Harvey was leaving ICS's employment. It is consistent with Ms Marchant's email, which was plainly sent in contemplation that Mr Harvey would be leaving ICS.

177. Mr McMonagle denied that it was this episode, rather than any action of Mr Harvey that soured relations with Addenbrooke's. On the contrary, they continued to do business together.

Mr Harvey's failure to attend to the affairs of ICS from 2017

178. The flip side of the diversion of ICS business opportunities to ENJ is the allegation that Mr Harvey did not devote sufficient time to the Company's affairs, leading to a loss of sales. Mr Harvey denies this and points to other factors that he says are responsible for this.

179. In November 2016 the sales director, Mr Crawford, resigned. He was replaced with Mr Hawkes. Mr McMonagle explained that they had tried to divide up what they could of Mr Crawford's client base, with Mr Harvey taking a number of major clients. Mr McMonagle said that the management team thought that Mr Hawkes was not the right person to go into sales as he was primarily an engineer. He said that Mr Harvey set Mr Hawkes targets that were not achievable. The minutes of the management team on 5th May 2017 record as follows:

> • Sales manager - Toby to oversee sales and engineering alongside myself and Lee, I think he has stepped up to the plate and with hopefully Peter starting this may release him to do this.
>
> • Toby to be given a trial to see how he progresses. Discussion to be had with Toby about what the role entails. Action Gary/Lee/Tim"

180. Though Mr McMonagle characterised oversight of Mr Hawkes as being Mr Harvey's responsibility, the minutes that I have recited do however suggest that responsibility for supervising Mr Hawkes lay with both Mr Harvey and Mr McMonagle. Despite their reservations, and indeed Mr Hawkes's own reservations, at the management meeting on 18th August 2017 it was agreed that Mr Hawkes's new contract as sales manager would be issued following the completion of his probationary period.

181. A table of sales figures from 2014 to 2019 was in evidence. Mr McMonagle said that he had prepared this. Budgeted sales and actual sales (for the year ending 28th February) were as follows:

Year	**Budget**	**Actual**
2013/14	£2,000,000	£2,179,920
2014/15	£2,000,000	£3,077,552
2015/16	£3,000,000	£2,634,730
2016/17	£3,000,000	£3,063,921
2017/18	£2,480,000	£2,389,018
2018/19	£2,001,000	£414,234

182. The chart also sets out the work budgeted for each staff member to bring in and their actual contribution to sales –

i) In 2013/14 Mr Crawford brought in 15% of sales (achieving 31% of his budget target), while Mr McMonagle and Mr Harvey achieved 27% and 29% respectively (136% and 130% of budget target).

ii) In 2014/15 Mr Crawford achieved 9% of total sales (37% of budget target) while Mr McMonagle and Mr Harvey achieved 14% and 23% (88% and 112% of budget target).

iii) In 2015/2016 Mr Crawford again achieved 9% (43% of budget) while Mr McMonagle and Mr Harvey achieved 27% and 17% (189% and 91% of budget). Mr Hawkes brought in 18% of sales (108% of target).

iv) In 2016/17 Mr Crawford brought in 10% of sales (170% of budget) while Mr McMonagle and Mr Harvey brought in 16% and 23% (122% and 133% of budget). Mr Hawkes brought in 14% of sales (96% of target).

v) In 2017/18 Mr Crawford had left and thus contributed nothing to sales. Mr McMonagle and Mr Harvey contributed 27% and 21% (115% and 21% of budget). Mr Hawkes brought in 15% of sales (71% of his target).

183. The percentage figures require some context. In each year, Mr McMonagle's budget target was lower than that of Mr Harvey. Mr McMonagle's budget figure for 2016/17 was £450,000 and Mr Harvey's was £600,000. In 2017/18 Mr McMonagle's budgeted figure had increased by £50,000 to £500,000 and Mr Harvey's had increased to

£750,000. Mr Hawkes's target was £500,000 in 2015/16 and 2016/17 and reduced to £450,000 in 2017/2018. Mr McMonagle, while accepting that the figures were relatively healthy, said that he wondered how much healthier they would have been had Mr Harvey devoted himself to the business. He said that Mr Harvey was absent from the business for 150 days or more.

184. I am not satisfied that the Company's performance in 2017/18 is attributable to a failure of Mr Harvey to focus on the performance of ICS, whether by reason of diverting his attention to ENJ or otherwise. The evidence, which I accept, is that the work diverted to ENJ was modest. There is no evidence to satisfy me that Mr Harvey was absent for 150 days as alleged by Mr McMonagle. The evidence is that his attendance declined from the discovery of ENJ's competitive trading, particularly from November 2017. I am satisfied on the balance of probabilities that the business suffered as a result of the resignation of Mr Crawford and the appointment of Mr Hawkes in a role that was not suited his talents.

185. It is however clear that the sum of £25,831 was diverted via ENJ. That is admitted. Undoubtedly that did serve to divert Mr Harvey's attention from the affairs of ICS to that extent. Given the relatively low value of the work diverted, I accept that this was minimal and is compensated by the price being repaid to the Company.

Payments to the Partnership account in 2017

186. Before leaving 2017, I should deal shortly with a complaint made in the Cross-Petition in relation to payments to the Partnership and subsequent payment of £20,000 to Mrs McMonagle on 23rd July 2017, this is explained in an email of the same date sent by Mr McMonagle to Mr Harvey, Mr Saunders and Ms Craske. At paragraph 7 it said as follows:

> "I have today transferred £30,000.00 from Lloyds Ltd Current to Lloyds Partnership current to cover for the following tax payments:-
>
> Lee £9,538.12
>
> Maria £2,839.02
>
> Tracey £1,909.66
>
> Tim £10,292.22
>
> From this transfer I have also paid the £20,000.00 to Tracey which matches the £20,000.00 paid to Lee and Maria in August 2016."

Mr Harvey did not take issue with the figures, nor did he demur at the time according to the evidence that I have seen.

Events in 2018

187. Mr Harvey's access to the Company bank accounts was cut off in January 2018. On 11th January 2018 Mr Michael Olmer of Clapham Collinge Solicitors wrote to Fosters

Solicitors for the Company. He raised this question as well as the question of Mr Harvey's company car and also a valuation of the Company.

> "I write further to our recent email exchanges in the above matter, and in particular my email of 9th January concerning Mr Harvey's access to the company's bank accounts.
>
> From my email of 5th January, I await confirmation that the funds in Mr Harvey's Director's Loan Account may be used for the tax payment due to HMRC at the end of this month of £13,185.94.
>
> Mr Harvey also requires payment of the balance standing to his credit in his capital account of the ICS Partnership.
>
> I understand from Mr Harvey that a partner from Larking Gowen is visiting the company tomorrow (Friday) for an appointment that was arranged several weeks ago. The meeting was originally intended as a regular review of the company's performance generally over the past year, but is now to include discussion of Larking Gowen's position in connection with the valuation of the company.
>
> I have seen a copy of the letter dated 8th January sent to you by Leathes Prior on behalf of Mrs Harvey in which, amongst other matters, they state that it would be sensible for Larking Gowen to provide a valuation on the basis that the valuation is provided on the instructions of all the shareholders and the cost is borne by the company. Mr Harvey agrees with this proposal, subject to Larking Gowen being prepared to accept joint instructions.
>
> In the meantime, Mr Harvey remains locked out of the company's bank accounts listed in my email of 9th January and requires access to be restored to all the accounts forthwith.
>
> In addition, he has not been provided with any management accounts since 6th October and requires a set of these accounts or access to the server where they are stored immediately, so that he can be properly informed as to the company's cash position and satisfy himself that no irregularities have taken place.
>
> If access to the company's bank accounts is not to be restored and management accounts not to be provided or made accessible, please ask Mr McMonagle to explain why not.
>
> We also have to raise with you the issue of the leased BMW X6 car A066 BXR which Mr Harvey has use of and for which use he is taxed as a benefit in kind.

> The car went in for repair last week following a minor accident some weeks ago and then sustained further damage while at the repairers.
>
> Mr McMonagle has forbidden the repairers to communicate with Mr Harvey.
>
> Mr Harvey has had the use of a rented VW Golf for the last week which does not have sufficient space to allow him to carry all the equipment he needs to carry out his work.
>
> The repairs should be completed by now and Mr Harvey requires the return of this car to him. If the repairs are now completed please confirm that Mr Harvey may collect the BMW from the repairers, if not please advise when they will be completed, and what the arrangements are for the return of the VW Golf.
>
> Mr McMonagle has forbidden the repairers to communicate with Mr Harvey.
>
> Can we please hear from you with positive answers to the following points:
>
> • Confirmation that Mr McMonagle and Mrs McMonagle will agree to Larking Gowen carrying out a valuation of the company on behalf of all the shareholders to be paid for by the company
>
> • Use of the funds in Mr Harvey's Director's Loan Account for payment of the tax payment due to HMRC at the end of this month
>
> • Restoration of Access to the company's bank accounts and management accounts.
>
> • Return to Mr Harvey of BMW X6 A066 BXR
>
> We hope that tomorrow's meeting with Larking Gowen will be fruitful, and the valuation can proceed so that the parties can move towards a resolution of their issues."

Mr McMonagle denied that he forbad the car repairers from speaking to Mr Harvey and said that he did not recall to agreeing to a valuation at the time.

188. The meeting did not proceed as planned on 12th January 2018. It was brought forward to the morning. Mr Olmer wrote to Fosters the following day. He noted that Mr Harvey had attended the offices the previous afternoon to find that the meeting had been brought forward to the morning without reference to him. It was noted that Larking Gowen, the accountants, were prepared to carry out a commercial valuation if all parties concurred and asked for a response to the issues raised in their letter 11th January 2018.

189. Mr McMonagle stated that Larking Gowen had brought the meeting forwards and he assumed that Larking Gowen would have included Mr Harvey in the message. Had Mr

Harvey attended the offices in the morning during ordinary office hours he would have been in time for the meeting. I consider this an unfair point. It is clear that all senior members of the management team spend a proportion of their time out of the office. It could not be assumed that either Mr McMonagle or Mr Harvey would be in the office at any one time. This is illustrative of the pettiness to which the relationship had sunk by this time. Nonetheless it is clear that Mr Harvey was in the office for at least some time on 12th January 2018, contrary to the assertion that he did not attend for months.

190. On 19th January 2018 Mr McMonagle emailed Mr Harvey and said that the management team had reallocated all Addenbrooke's work to other engineers and that it had been noticed that he had BMS workstation access rights for ICS engineers, which he considered to be an attempt to damage the interests of the business. He was asked to reinstate the position and not carry out any further tasks via the remote access. Mr Harvey's response was to say that he was taking advice. Mr Harvey said that there was nothing wrong in taking advice and that this email was consistent with an attempt to remove him.

191. He declined to return information related to Company projects requested in an email dated 29th January 2018. Mr Harvey explained that he had been working on designs for a control panel and that his pay had been stopped – that is to say that the dividend element of his remuneration had been stopped. He denied that he only spent 30 hours attending to the affairs of the Company over the previous 10 weeks from 29th January 2018.

192. Mr Harvey also gave evidence that he had come into the office around 26th February 2028 in an attempt to work. He asked Mr McMonagle if he could connect to the network and was verbally abused by him and a "lady from accounts" came down with two unidentified men and asked if Mr McMonagle wanted him thrown out.

The termination of the payment of dividends

193. Mr McMonagle confirmed that the dividend element of remuneration was stopped from December 2017. On 26th January 2018 Fosters for Mr McMonagle wrote to Clapham and Collinge for Mr Harvey and attached a letter sent to the solicitors acting for Mrs Harvey the previous day. They said of that enclosure:

> "It includes details of the current bank position and the cash flow forecast. The company is in a perilous financial position. In light of Mr Harvey's previous unauthorised withdrawal of sums from the company bank account, his admitted fraud, the current financial position of the company, Mr McMonagle has taken steps to limit access to Mr Harvey to the bank accounts so that he may ensure that only salaries and suppliers are being paid. Mr McMonagle suspects that Mr Harvey wants access in order to withdraw money against his directors loan account. The priority at present must be the financial security of the company and its ability to pay staff and meet its liability to trade creditors.
>
> The company will not be in a position to pay any dividends in January 2018 or as matters stand in February 2018. That applies

> to all shareholders and neither Mr McMonagle nor Mr Harvey will therefore receive dividends this month."

194. The letter to Mrs Harvey's solicitors, Leathes Prior, showed a projected diminishing cash balance on the Company accounts from £411,084 on 24th January 2018 to £3,084.50 on 19th March 2018. That letter noted:

> "Mr and Mrs McMonagle are in the same position as your client. They are partners entitled to the same shares. They are not treating your client any different to themselves. The partners have agreed to dissolve the partnership but that process is ongoing and until the company is on a stable footing the dissolution cannot be concluded. Mr and Mrs McMonagle would like to happen as soon as possible but due to the impact Mr Harvey's conduct has had on the management of the company and your client's obstruction of Mr McMonagle's attempt to remove him has the consequence of prejudicing the effective management of the company."

195. It went on:

> "The relationship between the directors and shareholders is such they cannot function collectively the future of the company requires the parties to reach terms or it will be placed in liquidation. Mr and Mrs McMonagle are willing to purchase your client's shareholding in the company and they have agreed the company will fund a commercial valuation to assist the parties find a resolution which may avoid either insolvency or a costly litigation in the form of a petition to the Business and Property Courts on unfair prejudice grounds. Whilst the company has had a successful past due to the hard work that Mr McMonagle and Mr Harvey have put in, any assumption the current or future trading position will be unaffected by the impact of recent events is simply unrealistic.
>
> Mr and Mrs McMonagle proposed a meeting between shareholders and their representatives on the 29th January 2018 or such other time as may be agreed after the joint commercial valuation is available."

196. In fact on 19th March 2018 the Company's Barclays account had a positive balance of £94,159.44. By 29th March 2018 the balance was £159,308. The Company's Lloyds account showed a credit of £301,758 on 26th January 2018 and £161,237 on 15th March 2018. The disparity between the projected figures and the actual figures led Mr Watson to suggest that the projected figures were an invention. Mr McMonagle said that forecasts tended to favour worst case scenarios. There is however nothing to offer serious justification for the projected figures put forward.

Mrs McMonagle's salary

197. From 26th January 2018 Mr McMonagle also received just the wage element of his salary only, namely £351.79. Up to that point Mrs Harvey and Mrs McMonagle had

received wages of £854 and £862 respectively. From this point, however, Mrs McMonagle's wages increased to £3,676 per month, overtopping Ms Craske as the highest paid employee. The bank statements show this salary being paid into an account in Mrs McMonagle's name (although Mr McMonagle said that it was a joint account) and that £2,700 of the monies were then transferred to an account in the name of Mr McMonagle. Mr McMonagle stated that the recipient account was a bill paying account, into which his salary and dividends would be paid.

198. It was put to Mr McMonagle that what would have been payable to him by way of dividend (with a corresponding payment to Mr Harvey) was being paid to Mrs McMonagle as salary. He said that the management team set her salary as she was doing "a horrendous amount of work" as a result of Mr and Mrs Harvey's actions. She went from working 16 hours a week to working much harder. It was put to him that no evidence of that had been provided and he said that the fact that the Company was "still here" spoke for itself. He accepted that Mr Harvey's consent was not sought to this and explained that this was because he was absent.

199. As I have already noted, while there is some documentary evidence of a reallocation of work, the "horrendous amount of work" undertaken by Mrs McMonagle seems to have left no mark on the employees of ICS, none of whom were able to say what she did. She herself has not given evidence to justify her salary. I am not satisfied that there was any increase in the level of work undertaken by Mrs McMonagle and, taken in context with Mr McMonagle's claims for retrospective overtime I am satisfied that this reflects an attempt to obtain the "dividend" element of Mr McMonagle's remuneration by other means.

Mr McMonagle's overtime and expenses

200. Similarly, at this point Mr McMonagle began to claim overtime. It was put to him that he had never previously done so, even when he was complaining by email in 2015 about how hard he was working. Although Mr McMonagle and Mr Harvey did not themselves have contracts of employment. Mr McMonagle said that they stuck to the overtime procedures contained in the contracts issued to other staff.

201. He was taken to Ms Harvey's contract, which sets out how overtime operated. This provides:

> "Payment for overtime will only be made by special prior arrangement; otherwise you are expected to work such additional hours as are reasonably necessary for the effective performance of your duties.
>
> If you are required to work on weekends, at a client's site, at the request of the Company, then the overtime will be calculated at the rate of normal pay for the actual hours worked and associated travel time.
>
> If you are required to work on Saturdays, at a client's site, at the request of the client, incurring an premium rate to the customer, then the overtime premium will be calculated at the rate of one and a half times normal pay for the actual hours worked and associated travel time

> If you are required to work on Sundays, at a client's site, at the request of the client, incurring an premium rate to the customer, then the overtime premium will be calculated at the rate of twice normal pay for the actual hours worked and associated travel time
>
> If you are required to work on a Public Holiday, at a client's site, at the request of the Company, then the overtime will be calculated at the rate of normal pay for the actual hours worked and associated travel time."

202. As to time recording, the contract provides:

> "You are required to submit an accurate weekly timesheet indicating the hours worked for the prior week, and, where applicable, the nature of the work and the associated project or projects.
>
> You are solely responsible for your own timesheets. Completed timesheets must be submitted by 10.00am on the Monday before the last Friday in the calendar month.
>
> Timesheets may be submitted verbally to the administrator, at this time providing a physical copy is submitted within 3 working days. Failure to submit a physical copy will result in an on-going 'flat rate' payment without any overtime included until the physical copies are submitted. Any overtime owed during the 'flat rate' period will then be recompensed."

203. Mr McMonagle said that timesheets had not been completed since 2012. He accepted that there was no decision of the board approving an entitlement to overtime or any evidence of the hours he worked but said that it was an underestimate.

204. Mr McMonagle similarly accepted that he paid his personal solicitors' bill. This was an error arising, he said, from the solicitors having invoiced the Company and the accountants having approved the payment. Mr Harvey complained of this on 21st September 2018 and repayment was arranged. The repayment in the sum of £21,352 was made on 25th October 2018. On the day before this, however, a payment was made out of the company account to an account in the name of "FSMA". Mr McMonagle accepted that this was in fact a payment to him, to which he was entitled by way of payment for overtime. He had calculated this using his 2017 tax return and he had worked out that he was entitled to £27 per hour. That cannot be calculated on the basis of his salary, properly so called, and must have been calculated on the basis of his monthly remuneration by way of salary and dividends. He accepted this and, again, said that the management team was aware of this.

205. He was taken to a number of other payments that he was unable adequately to explain. On 1st December 2018 he was paid £2,500, which he thought was an error when Mrs McMonagle's wages had been paid to him, though the statement shows Mrs McMonagle receiving £4,597.74 on 29th November 2018 and £3,866.94 on 21st December 2018. Mr McMonagle received £4,680.59 on 29th March 2019, again

described as wages. He thought that might in fact have been the erroneous payment of Mrs McMonagle's wages.

206. On 24th December 2018 Mr McMonagle received £5,134.18, described as expenses. On 26th January 2019 he received a further £2,302. This payment is not annotated in the bank statement and Mr McMonagle was not sure whether it was expenses or not. On 26th April 2019 he received £3,358.83, which he said would have included overtime. On the following day he received £1,242.19 described as expenses. It was put to Mr McMonagle that had not disclosed anything to support these figures. He said that he had not been asked to.

207. On 31st May 2019, Mrs McMonagle received £4,189.38, which Mr McMonagle was again unable to explain. It was put to him that his overtime payments were taking him up to the same level of salary as when he was receiving a dividend. He received £4,189.38 on 28th June 2019, together with his basic wage of £366, and expenses of £2,533. On 1st August 2019 he received expenses of £2,648.42. On 1st September 2019 he received £2,817.37 and a further £1,281.21 on the 28th of that month.

208. On 19th April 2020 Mr McMonagle was paid £12,000 described as "wages". Mr McMonagle said this was "backlog overtime". He said he had chosen to pay it then as the Company could afford it. £15,000 was paid on 31st May 2020, which Mr McMonagle said was backlog overtime over three years. There were further round figure payments of £6,000.00 on 28th June 2020, £15,000 on 2nd August 2020, £10,000 on 26th August 2020. Mr McMonagle maintained that despite payments of £58,000 between 19th April 2020 and £20,000 in 2018 he was still owed some £27,000 by way of overtime.

209. None of the overtime payments was authorised by board resolution or justified by reference to time sheets. They are entirely based on Mr McMonagle's estimate of his entitlement to overtime calculated by reference to his salary and "dividend" payments. Mr Watson put it to Mr McMonagle that his expense claims had not been justified by reference to receipts. Mr McMonagle maintained that he was not asked to produced such receipts. A schedule to a draft order for specific disclosure however shows that Mr McMonagle was asked to produce these documents. He was also asked to produce tax rebate documentation. I need not go through these items now. Mr Watson simply observed that Mr McMonagle had been required to account for these items and had failed to do so.

Tax Payments

210. ICS paid out just over £40,000 in respect of Mr and Mrs McMonagle's tax payments on 29th January 2018. Mr McMonagle's explanation is that these were paid from his director's loan account. As Mr McMonagle explained at paragraph 22 of his 9th witness statement, these were payments of tax due on 31st January 2018 and were paid following advice of the accountants as to how the balances stood. This arrangement is reflected at paragraph 1.4 of the 4th December 2017 minutes, which I accept were sent to Mr Harvey. I set this out again for the sake of completeness:

> "Item 1.4
>
> • The Director's loan account split figures had been received from Thomas Norman. Maria was aware of the split between her

> and Lee - there was enough money in the loan account to pay Lee's tax liability but not enough to pay Maria's.
>
> • There was enough money in Tim's loan account to cover both Tim and Tracey's tax liabilities
>
> • Method of payment needs to be confirmed to Thomas Norman and Mark Curtis"

211. On 27th November 2017 Mr Harvey had indeed agreed the figures on the directors' loan balances produced by the Company's accountants, sent under cover of an email on 21st November 2017. I accept that these balances were approved and that it was agreed that the tax liabilities would be covered as set out in the minutes.

Mr Harvey's work through the Venn Group

212. Mr Harvey began to work through the Venn Group. He resigned as an employee of ICS on 2nd April 2018. On 11th May 2018 Mr Harvey inadvertently copied Mr Hawkes in to an email intended for Ms Marchant. Mr Hawkes had asked Mr Harvey for a quote for various corrective actions following a sensor calibration on 1st May 2018. A quote for £3,610 given on 10th May 2018. Mr Harvey replied on the same day to ask when the works could be completed and was told that the last week of June. Mr Harvey, evidently intending to forward the message to Ms Marchant, replied to Mr Hawkes instead. He said:

> "Hi Trish,
>
> We can discuss this on Monday but the quotation seems expensive and to wait 7 weeks for this important work seems excessive?"

213. Mr Hawkes's supposition in his witness statement that this was because Mr Harvey wanted the work for himself was challenged by Mr Watson. This work was in fact carried out by ICS. I am not satisfied that Mr Harvey was undertaking any work could otherwise have been carried out by ICS through the Venn Group or that the Company suffered loss as result. That is simply unevidenced beyond Mr Harvey being seen on site. I accept Mr Harvey's evidence that he was working as an in-house BMS engineer following a vacancy becoming available, managing contractors on site and managing contracts, including, as illustrated above, evaluating quotes by external contractors.

214. It is of course self-evident that, in advising on quotes by ICS, Mr Harvey was placing himself in a position where his duty to his employer and his duty as a director of ICS conflicted. Moreover, he was plainly in breach of his duty to promote the success of the Company, albeit no loss appears to have been caused. It is telling however that this inadvertent email does not seem to have prompted any reaction from Mr McMonagle.

Mr Harvey's alleged competition via BISL

215. BISL was incorporated on 2nd April 2018 shortly before Mr Harvey's resignation as an employee. Mr Harvey's evidence is that this was a company incorporated by his sister and in which he was merely an employee. As I have noted Ms Barker works full time as a primary school teacher. There was no evidence from her, other than a witness

statement in response to Mr McMonagle's application for specific disclosure dated 4th June 2020. In this she states that her occupation is irrelevant to her ability to act as owner and director or a limited company and that she employs Mr Harvey because of his technical expertise. Ms Barker did not give evidence at trial. I have to say that I find this explanation rather troubling and difficult to accept.

216. There are however two questions that I should deal with first. First, there is the question of whether there is evidence that BISL traded in competition with ICS. Secondly, I must consider Mr Watson's submission that, Mr McMonagle now being in control of the Company, the proper way to pursue such questions in is Part 7 proceedings.

217. Mr Harvey was cross-examined extensively on work carried out by BISL. It was put to him that he was "prising away" work from Addenbrooke's and other clients. He was taken to an entries showing the work done by ICS for James Brown Mechanical Services Limited ("JBMS") including a "Boiler Replacement Scheme" ordered on 18th June 2015 and an order for "Neuro & Body Scanners – Addenbrooke Hospital" placed on 4th October 2017 by JBMS. It was put to him that JBMS were a long-standing client of ICS, which he accepted.

218. On 12th March 2018, Mr Harvey submitted a quotation to JBMS, using the Controls Email, in relation to the Bullard Laboratory for JBMS. He accepted that this work was, in the event, done by BISL but that he had left all paperwork relating to that project in his company car when he resigned as an employee of ICS at an opportunity for ICS. He said that he had not included the quotation on the Company system because he was by that stage locked out of it. He attributed the failure of the Company to win that work to a threat by Mr McMonagle to report both him and JBMS to the police.

219. He was taken to a spreadsheet showing orders placed by Addenbrooke's with ICS and invoices from BISL that were said to show that that BISL was carrying out the same work. Various examples were put to him. I need not go through all of them but the following gives a flavour –

    i) On 14th May 2014 an order was placed with ICS by Addenbrooke's for "BU09 HWS Pump CP Mods". On 16th January 2020 BISL invoiced Addenbrooke's for "BU09 HWS Modifications". This was not accepted to be the same sort of work.

    ii) On 7th August 2014 Addenbrooke's placed an order with ICS for "BU7 HWS Calorifiers Temperature Sensors". On 20th May 2020 BISL invoiced for "BU26 Level 2 HWS Calorifier Works". This was not accepted to be the same sort of work.

    iii) On 26th September 2014 Addenbrooke's ordered "POW BMS Upgrade". On 26th June 2019 BISL invoiced for "Control Panel Modifications & Commissioning for BU3 Clinic 2A". Mr Harvey did not accept it was the same sort of work.

    iv) On 25th November 2014 Addenbrooke's ordered "Incinerator Gas meters". On 8th April 2020 BISL invoiced for "Kefford House Gas Monitoring". Mr Harvey said this was completely different, the former being related to heating and the latter being related to monitoring of gas administered to patients.

v) On 3rd March 2015 "BU19 metering" was ordered for Addenbrooke's. On 13th February 2019 BISL invoiced for "BU10 Metering". On 27th February 2019 "Island Site Metering" was invoice by BISL, on 18th July 2019 "BU07 Level 11 metering" was invoiced and on 11th September 2019 "Histopathology and Hutchinson Metering" was invoiced by BISL. This was not accepted to be the same work.

vi) In April 2015 Addenbrooke's ordered from ICS the supply of "Siemens Valves" and "Siemens Actuators". In March 2016 there were further orders for "Siemens SAS61.03 Actuators" and "Siemens AL 100 Adapters". BISL invoiced for "Siemens Equipment" in June and August 2020. Mr Harvey thought this was an emergency when some equipment was required in a hurry.

vii) In March 2016 there was an order for Addenbrooke's for "Frank Lee Centre Mods". On 28th February 2019 BISL invoiced for "EICR & Remedial Works for the Electrical Installation at the Frank Lee Centre". Mr Harvey said this was the same location but a different sort of work.

220. Mr Harvey did accept that there was some limited overlap in a few instances. The majority of the works were lighting and consulting works. He said that he had given one quote for lighting in 16 years at ICS and it had carried out three lighting jobs in 20 years. Indeed, Mr McMonagle was unable to produce evidence of lighting work being carried out other than in 2002 and 2006. By contrast, BISL had done about 100 lighting jobs in 18 months.

221. It will be apparent that many of these orders with BISL took place long after Mr Harvey was involved with ICS at a time when he was no longer an employee or a director and he was not subject to any non-competition clause. More fundamentally, while there is a superficial resemblance between some of the descriptions of work carried out and equipment supplied it simply not possible to say on the evidence provided that the work would or could have been carried out by ICS.

222. It was further put to Mr Harvey that ICS was taken off the Addenbrooke's approved supplier list. Mr Harvey said that this was simply because Addenbrooke's now used equipment supplied by Siemens, for which BISL was an approved partner, while ICS was a supplier of Schneider equipment. He denied that he had recommended this change of supplier – there were six engineers at Addenbrooke's who had made that decision. There is no evidence to suggest otherwise.

223. The allegations in relation to BISL were introduced by amendment in November 2020. The totality of the pleaded case is as follows:

> "Building Integrated Systems Ltd registered under company number 11299155 ('BISL') is a company not party to these proceedings, but which the Petitioner believes the First Respondent uses as a trading vehicle for him to compete with and divert business away from the Company. The Petitioner's said belief arises for the following reasons; the First Respondent resigned as employee of the Company on 2nd April 2018 and BISL was incorporated on 9th April 2018, the sole director and shareholder of BISL (Allison Barker) is the First Respondent's

> sister and she works as a primary school teacher with no knowledge or attachment to the industry of designing and building of integrated property development solutions. It is averred that Addenbrooke's is a main client of BISL having transferred all its business from the Company to BISL, and that the First Respondent services Addenbrooke's requirements via BISL, to the detriment of the Company and its shareholders. In addition to the work carried out for Addenbrooke's it is averred that all other work carried on by BISL (for other clients) is identical to the services provided by the Company and that BISL in all respects directly competes with the Company to its detriment and that of the shareholders. The Frist Respondent's conduct in this respect also amounts to unfair prejudice for which the Petitioner seeks a remedy."

224. The amendment introduces a bald assertion that the business of the Company transferred to BISL. It is as Mr Watson says, pleaded in a bare bones fashion with much of the case being set out in in Mr McMonagle's statement of 7th December 2020. There is no pleading that Addenbrooke's were "enticed" away or any explanation as to why Mr Harvey was prevented from exploiting opportunities with ICS clients long after he ceased to be a director. It seems difficult on any footing to show how a diversion of work in, say, May 2020, would constitute a breach of duty, still less be capable of amounting to unfair prejudice in the conduct of the affairs of the Company.

225. Moreover, I agree with Mr Watson that it is simply not safe to infer a cross-over of work, still less a breach of duty, from superficial descriptions of work done or assertions as to what preparatory steps BISL would have needed to take before commencing trade. This is an extremely specialist field and a consequence of its introduction so late in the day is that there is no expert evidence to provide any assistance to the court or, indeed, any other evidence other than the conflicting stances of Mr McMonagle and Mr Harvey. This is most unsatisfactory in a claim which, on Mr McMonagle's case, is worth in excess of £600,000.

226. I agree with Mr Watson that these allegations are not appropriate for determination in these proceedings. Mr McMonagle is now in sole control of the Company and can easily bring a properly pleaded Part 7 claim, which, assuming it would be successful, would be an asset of the Company that would accrue for the benefit of its shareholders. I have considered whether I should direct points of claim and points of defence on this issue, but is appears to me that there is insufficient evidence on this element of the claim to justify doing so.

Mr Harvey's resignation as a director

227. I can deal with this quite shortly. The resignation letter is dated 10th May 2019. It appears to bear Mr Harvey's signature. Neither party has sought to rely on expert evidence from a forensic document examiner as to whether the signature is authentic or a simulation. Mr Harvey suggested that he was flying to Faro on that day, but there is no reason why he could not have posted the letter from the airport.

228. It is of course striking that Mr Harvey's solicitors immediately sought his reinstatement. Mr Michael suggested that his resignation and subsequent request for reinstatement was

as a result of BISL's unsuccessful bid to partner with Schneider and that it had been a condition of that bid that he resign as a director of ICS, from which resignation he sought to resile when the bid was unsuccessful. Mr Harvey thought that the explanation was that Mr McMonagle wished to be able to sign off the Company accounts himself on 31st May 2019. He did not however press a claim to be reinstated. I am not satisfied that this letter is a forgery, still less that it was a forgery created by Mr McMonagle.

Unauthorised withdrawals by Mr Harvey and chattels allegedly retained

Unauthorised withdrawals

229. As pleaded, the amended Petition included an allegation that Mr Harvey had improperly used £5,405 of company monies for carpentry services. That claim is no longer maintained. Mr Harvey admits that he used £5,929.62 for which he acknowledges he must account, although he suggests that this liability be divided equally between him and Mrs Harvey as it was spent on bathroom renovation. In my view, the liability is his. He is the director of the Company who caused this unauthorised payment to be made. Finally, it is alleged that he paid £5,000 on driveway works. He simply denies this. There is no evidence to support this allegation at all and I reject it.

230. Mr Harvey accepts that between February 2018 and February 2019, he withdrew £61,664.07 from the Company accounts, having regained access to them by going into a branch. These payments were not authorised and he accepts that it may have to be accounted for.

Chattels retained

231. The Petition claims that some £24,260 of Company equipment remain in possession of Mr Harvey. These claims too were introduced by late amendment and consistently with the principle that a claim that should be brought by the Company ought to be so brought, it seems to me that this should be the subject of properly pleaded Part 7 proceedings. Mr Harvey however accepts that he has retained a Dell Laptop, a Microsoft Surface Laptop, a MacBook, a Linkstation 220 and some meters. In relation to these:

    i) Dell laptop – Mr Harvey accepts that it must be returned or off-set against his director's loan account. While he claims that the value had been inflated he offers no alternative valuation. I accept the petitioner's valuation and if this computer is not returned, Mr Harvey will have to pay for the replacement in full.

    ii) Macbook – Mr Harvey accepts that he has this but says its true value was £1,040.83. He offers no evidence of this. I accept the petitioner's valuation and if this computer is not returned, Mr Harvey will have to pay for the replacement in full as claimed by the petitioner.

    iii) Linkstation 220 – Mr Harvey accepts that he has this but says the true value is £196.12. He offers no evidence this cost. I accept the petitioner's valuation and if this item is not returned, Mr Harvey will have to pay for the replacement in full.

    iv) Meters – Mr Harvey accepts that he has a Fluke 177 Mulitmeter and Metrix MX350 meter but says they are only worth £250. There is no evidence for this contention and he must either return these items or pay the claimed sum in full.

232. Similarly, the amended Petition introduces a claim in relation to unevidenced expenses. This too should be brought by the Company in a Part 7 claim.

Payments queried in the Cross-Petition

CT Baker Ltd

233. CT Baker Ltd carried out improvement works to Mr and Mrs McMonagle's home in 2013. These totalled something in the region of £96,000, of which the Company paid £13,463.78 to cover materials used in the construction of a server room to house the Company's servers. The labour was paid for by Mr and Mrs McMonagle. Mr McMonagle says that Mr Harvey knew all about these payments and indeed, had himself benefited from a payment of £5,405 for the construction of garage space at his then residence in 2005 and a further £5,929.62 for an ensuite bathroom. He says that Mr Harvey signed off the accounts for that year.

234. Mr Harvey noted a number of times that none of this is recorded in the board minutes, in contrast to some remarkably trivial items like the replacement of a broken bathroom blind at the Company premises. Given the informality with which the Company was run, the fact that these payments were made some four years before Mr Harvey left the Company and the evidence of other employees that they were aware that the back-up servers were kept at Mr McMonagle's address, I am satisfied that this work was for the benefit of the Company and, on the balance of probabilities, that Mr Harvey would have been aware of it and informally approved it.

B&F Mechanical Services Ltd

235. Mr Harvey also challenges a payment of £7,200 to B&F Mechanical Services Ltd in 2015. Mr McMonagle stated that it relates to remedial works carried out at West Suffolk Hospital. The Company did not consider itself liable for the remediation but made a contribution as a gesture of goodwill as a result of its longstanding working relationship with the hospital. This is evidenced by an invoice from B&F Mechanical Services Ltd dated 27th October 2015. This payment is, in my judgment, adequately explained and on its face is a legitimate payment.

Johns Slater & Hayward

236. Mr Harvey raises the payment of £8,385 to Johns Slater & Hayward in 2017. Again, Mr McMonagle said that this, again, was a goodwill payment in relation to remedial action at Ipswich Hospital for which the Company did not regard itself liable. This sum was invoiced to the company by Johns Slater and Hayward on 15th March 2017. Again, this payment is adequately explained and is legitimate.

DG Builders

237. This relates to a payment of £1,437. This was a payment to Mr McMonagle's nephew that he said related to works carried out to doors at the company's premises, which needed to be done quickly. Again, this is recorded in the Company's records as "Maintenance works Unit 10" and was paid on 5th April 2015. This payment appears to be legitimate company expenditure.

Conclusions

238. I have not attempted to cover every complaint made in the voluminous evidence in this case. For example, I do not propose to consider the alleged instruction by Mr McMonagle to the garage repairing Mr Harvey's company car not to speak to him. The evidence that I have recited above is sufficient for me to form a conclusion that would not be altered by further findings.

239. This is an unusual case and both Mr Harvey and Mr McMonagle can be criticised and, indeed, each has acted in a manner that is unfairly prejudicial to the other. I have explained above that I consider that Mr McMonagle was, as the date of the Petition, entitled to present it. Mr Harvey undoubtedly breached his duty to promote the success of the Company owed under section 172 of the 2006 Act and his duty to avoid conflicts of interest pursuant to section 175 of the same Act in diverting business opportunities from the Company.

240. I am satisfied that it was the competitive trading via ENJ, and Mr Harvey's defensiveness following its discovery, that was destructive of the relationship of trust and confidence between Mr McMonagle and Mr Harvey so that their business together, which was founded on the basis of such a relationship, could no longer continue. There is no doubt that their relationship was strained prior to this point, and became increasingly so, but I am not satisfied that it was irreparably broken. A relationship of trust and confidence does not require absolute harmony or absence of tensions. I am not satisfied that Mr McMonagle was bullying towards Mr Harvey prior to the establishment of ENJ, although I accept that there were instances of intemperate language. Nor do I consider that the "Tim Tax" cheque stub was a cause of a breakdown in the relationship between Mr McMonagle and Mr Harvey. I accept Mr McMonagle's account of this and that Mr Harvey chose to highlight this with a view to creating a potential reason to leave the Company.

241. While I accept that Mr Harvey genuinely suffered from email difficulties I am not satisfied that these were caused by Mr McMonagle, deliberately or otherwise. There is simply no evidence of this. On the contrary there are explanations offered by Mr McMonagle in an apparent attempt to be helpful in resolving them and Mr Harvey continued to email Mr McMonagle for assistance with this. I am not however persuaded that the Controls Email address was set up deliberately to facilitate the trading of ENJ or any other competing business. It might have been created with one eye on having complete control as to who might access it, but there is evidence of it being used for Company purposes.

242. While it might have been possible to rescue the relationship had Mr Harvey been transparent at the earliest opportunity, his response to the discovery of ENJ was to be defensive rather than open and honest. In the light of his refusal to answer questions as to the nature and extent of the competing business it was inevitable that the trust and confidence between Mr McMonagle and Mr Harvey on which their business relationship was predicated could not survive. The destruction of such a relationship in a quasi-partnership is a paradigm case of unfair prejudice.

243. The reaction to the discovery of ENJ was however both excessive and opportunistic. The restrictions placed on Mr Harvey in October 2017 made it difficult to do his job. Moreover, there was no basis on which to think that he would sabotage the

Addenbrooke's system so as to justify removing his access to it or to tell Addenbrooke's staff, as I find they were told, that he was to be dismissed for "gross misconduct." Similarly, the meeting with the employees of ICS at which his competitive trading was revealed was inevitably going to lead to his position in the Company becoming untenable. The reallocation of responsibilities in January 2018 similarly shows further steps towards his exclusion.

244. The reality is that by his resignation on 2nd April 2018 at the latest Mr Harvey was excluded from the Company and treated as no longer being part of the management team. It is striking that the email that he inadvertently copied to Mr Hawkes advising as to whether the ICS quote should be accepted did not prompt any strong objection from the Company. It is true that he continued to take sums from the ICS account, to which he considered himself to be entitled, and to instruct the company accountant as to how he wished them to be treated, but he had no real management function and the day-to-day control of the Company was in the hands of Mr McMonagle. Mr Harvey was effectively excluded and forced out. That too amounts to unfairly prejudicial conduct in the context of this company.

245. At the beginning of 2018 Mr McMonagle caused the Company to stop paying the "dividend" element of the directors' remuneration. At the same time he put in place alternative ways to extract sums of money from the Company by way of an increased salary paid to his wife and "overtime" payments to himself. There was simply no justification for these and I consider them to be a transparent effort to ensure that he and his wife continued to benefit from the Company while preventing Mr Harvey from doing so. That is similarly unfairly prejudicial. There is at least a question mark over many of his expenses claims.

246. It seems to me that the fair way to address the complaints of the parties is for the valuation date to be 3rd April 2018, that is to say the day after Mr Harvey's resignation as an employee. I say this for the following reasons –

i) There is a certain attraction in the circumstances for the end of December 2017 to be taken as the valuation date, as proposed by Mr Watson. That is the point at which it was clear that the parties could no longer continue in business with each other. It would not however be fair. The valuation must be from a point that recognises that the Company had in fact lost a key person. Mr Harvey was the main point of contact for a number of clients. His final departure from the Company, for all practical purposes, must be reflected in the valuation. It seems to me that a valuation on the date that I have proposed reflects the fact that all parties were treating his role in the Company as being at an end and also that the business of the Company would inevitably be adversely affected by his departure, leaving aside any question of trading in competition.

ii) It would similarly not be just for the valuation to be taken from the date of the order following on from this judgment. Mr Harvey will have been excluded from the Company for three years. During that time Mr McMonagle has, in my judgment, treated the Company as his own, including by making excessive payments to Mrs McMonagle, unauthorised overtime payments to himself and expense payments which are not properly vouched for in this proceedings.

iii) I agree with Mr Watson that there is no principled reason to select a valuation date of February 2019, as suggested on behalf of Mr McMonagle. This particularly so given that I am not satisfied, on the evidence that I have in these proceedings, that Mr Harvey is in breach of duty by reason of his involvement in BISL so as to justify my giving directions in relation to those allegations in this Petition or to seek to fix a date for valuation that would take into account any adverse effect such breaches might have had on the value of the Company. That would be entirely arbitrary. Nor would such a date do justice to the parties without a detailed accounting exercise to address Mr and Mrs McMonagle's salary and overtime payments over the period. That is not proportionate.

iv) I agree with Mr Watson that the grant of relief under section 994 is not appropriate in respect of the BISL allegations in circumstances where the Company was able to bring proceedings by Part 7 claim at the time that the BISL allegations were introduced. A Part 7 claim is the only satisfactory way to deal with what is currently a diffuse and poorly evidenced claim, involving as it would proper disclosure, evidence and expert evidence. That seems to me to be the proper way to address the BISL allegations. Any such claim, if successful, will serve to enhance the value of the remaining shareholders' shares. Mr Watson conceded that the Company would not be estopped from bringing such a claim by reason of the allegations having been included in the Petition, and, indeed, he accepted that I could order that it may be brought. To the extent that such a direction is necessary I will give it. So too with the balance of the claim to chattels and expenses. I note in respect of these that Mr Harvey was not cross-examined on his explanation as to what became of the equipment said to be in his possession or on his expenses claim. Again, were I to have to decide those matters, I have to say that they would have fallen to be dismissed. Having accepted Mr Watson's submission that those elements are not properly the subject of a section 994 petition in the circumstances, however, it must follow that it remains open to the Company to pursue them in Part 7 proceedings.

247. As to whether a minority discount should be applied, the starting point is that, where the court is dealing with a quasi-partnership, it will not provide for a discount where an innocent vendor is a minority shareholder. I bear in mind however the last sentence of the passage of of Nourse J's judgment in *Re Bird Precision Bellows Limited*, which I repeat for convenience here:

> "Equally, if the order provided, as it did in *In re Jermyn Street Turkish Baths Ltd.* [1970] 1 W.L.R. 1194, for the purchase of the shares of the delinquent majority, it would not merely not be fair, but most unfair, that they should receive a price which involved an element of premium."

This is reflective of the position here. It is clear that Mr Harvey created a situation whereby he and Mr McMonagle could not continue in business together. The agreed solution is that Mr McMonagle should buy out Mr Harvey's shares. I do not see why Mr McMonagle should be required to pay a premium for a buy-out to remedy a situation that he did not engineer, even though his reaction to it may itself be criticised.

248. I therefore conclude that Mr Harvey's shares should be bought out at their value on 3rd April 2018 with a discount to reflect that they represent a minority holding. Mr Harvey

is also liable to account to the Company for the payments received by ENJ as disclosed by his letter of 16th November 2017 and to repay the monies he took from the Company accounts without authorisation in 2018 and 2019, as is fairly conceded. He is liable to re-pay the monies spent on his bathroom improvements. He is liable to return the equipment that he has accepted that he has retained or to pay its replacement value. Those matters will need to be reflected in the valuation and purchase price payable.

249. There will be a short period from January to the end of March 2018 during which the additional element of the salary payments to Mrs McMonagle and any unauthorised overtime payments to Mr McMonagle will need to be brought into account. Those payments ought not to have been made and the valuation and purchase price will need to be adjusted accordingly. In relation to Mr McMonagle's expenses over this period they are generally *de minimis* and broadly in line with previous expenses claims, save that one item, "equipment" purchased on 21st March 2018 for £1,602.88, is unexplained. That should also be brought back into account on the basis that I cannot be satisfied that it was a proper payment for the benefit of the Company. Mr McMonagle has had his opportunity to explain it. I am satisfied that the other sums paid by Mr McMonagle referred to in the Cross-Petition were paid for the benefit of the Company and he is not liable to compensate the Company for them.

250. The payments of tax in January 2018 out of Mr McMonagle's director's loan account had been accepted by Mr Harvey at the meeting on 4th December 2017 and the payment of dividends to Mr and Mrs McMonagle and Mrs Harvey in February 2018 to balance sums already paid to Mr Harvey had in principle been approved at the meeting on 31st October 2017. No adjustments are necessary.

251. In my judgment there is no basis for reopening the benefits received by the parties prior to December 2017. There are indeed, as Mr Michael submits, disparities in expenses, allowances for vehicles and healthcare payments but objection was not taken at the time. That is inevitable and total equality cannot be expected in every respect. As I have said that I do not consider that Mr Harvey is a man to be bullied and I am satisfied that he would have raised clear and strident objections to this had he regarded this to be unfair at the time.

252. I am not satisfied that Mr Harvey neglected the affairs of the Company to a material degree. The amount of work undertaken by ENJ was modest. I am satisfied that the downturn in sales was principally attributable to the loss of Mr Crawford, rather than neglect on the part of Mr Harvey. No adjustment is necessary.

253. In relation to Mrs Harvey's position, it is unfortunate that Mrs Harvey neither filed a statement of case nor evidence. It does not appear to me that I can grant any relief to her as it has neither been sought or argued. The parties are however bound by my findings above. I hope that those findings will at least assist in the parties coming to an agreement as to how Mrs Harvey's shareholding should be dealt with. It may be that Mrs Harvey will wish to take advice as to her position following the handing down of this judgment and to take such steps as appear to her to be appropriate with a view to her position being considered at the next stage of the proceedings.

254. I will invite counsel to agree a form of order.