Neutral Citation Number: [2021] EWHC 1661 (Ch)

COMPANY – Unfair prejudice – Petitioner 60% shareholder – Respondents 40% shareholders – Alleged breaches of director's duties and failures to observe Shareholders' Agreement – Undermining company's corporate governance – Appropriate remedy - Buy-out order or order regulating company's affairs

Case No: CR-2020-MAN-0000461

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

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

Date: Monday, 21 June 2021

Before :

HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

- -

IN THE MATTER OF MACOM GMBH (UK) LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Between :

MACOM GMBH

Petitioner

- and –

(1) CHRISTIAN MARK RANDALL BOZEAT
(2) VIRGINIA JANE BOZEAT
(3) MACOM GMBH (UK) LIMITED

Respondents

- -
- -

Mr Mark Harper QC (instructed by **JMW Solicitors LLP**, Manchester) for the **Petitioner**
Mr Charles Newington-Bridges (instructed by **Horwich Farrelly**, Manchester) for the **First** and **Second Respondents**
The Third Respondent did not appear and was not represented

Hearing dates: 7 – 11 June 2021

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Approved Judgment

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

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HIS HONOUR JUDGE HODGE QC

Covid-19 Protocol: This judgment was handed down at a remote hearing on Monday, 21 June 2021 and by release to BAILII. The date and time for hand-down is deemed to be 10.00 am on Monday, 21 June 2021.

The following cases are referred to in the judgment:

Re Audas Group Ltd [2019] EWHC 2304 (Ch)
Re Baumler (UK) Ltd, Gerrard v Koby [2004] EWHC 1763 (Ch)
Re Braid Group (Holdings) Ltd, Gray v Braid Group (Holdings) Ltd [2015] CSOH 146
Re Coroin, McKillen v Misland (Cyprus) Investments Ltd [2012] EWHC 2343 (Ch)
Re Cumana Ltd [1986] BCLC 430
Re Edwardian Group Ltd, Estera Trust (Jersey) Ltd v Singh [2018] EWHC 1715 (Ch)
Grace v. Biagioli [2005] EWCA Civ 1222, [2006] 2 BCLC 70
Hawkes v Cuddy (No.2) [2007] EWHC 2999 (Ch), [2008] BCC 390 (affirmed on appeal at [2009] EWCA Civ 291, [2009] 2 BCLC 427)
Michael Wilson & Partners Ltd v Sinclair [2020] EWHC 1017 (QB)
Michel v Michel [2019] EWHC 1378 (Ch)
O'Neill v. Phillips [1999] 1 WLR 1092
Sikorkski v Sikorksi [2012] EWHC 1613 (Ch)

Judge Hodge QC:

I: Introduction and background

1. This is my judgment on the trial of an unfair prejudice petition presented on 14 May 2020 under s. 994 of the Companies Act 2006. It raises the question of the appropriate order for granting relief for breaches of director's duties and failures to observe the terms of a Shareholders' Agreement. One of the peculiarities of this case is that the petitioner is the majority (60%) shareholder in the company whilst the individual respondents (husband and wife) are the minority (40%) shareholders. However, by the terms of the Shareholders' Agreement, the husband has a casting vote on the board of two directors which means that (with the exception of certain matters specifically reserved to the shareholders) it is he who has control of the company.

2. For structural reasons, this judgment is divided into a number of sections as follows: I: Introduction and background II: Evidence and trial III: The new Articles of Association and the Shareholders' and Subscription Agreement IV: Legal issues V: Unauthorised remuneration VI: Undermining corporate governance VII: Reserved matters VIII: Information failures IX: Unauthorised disclosures X: Remedy. However, each section of this judgment has informed each of the other sections. During the course of this trial, a great many matters were raised which, as the evidence and the case have developed, have diminished in, or have ceased to have any real, importance. The fact that they do not feature in this judgment does not mean that they have been overlooked.

3. The petitioner is Macom GmbH, a German corporate entity which specialises in the provision of digital consulting and audio-visual technology services. It is represented by Mr Mark Harper QC, instructed by JMW Solicitors LLP. The petition relates to the affairs of the third respondent (to which I shall refer as 'the company'), which carries on a similar business to that of the petitioner within the UK. It has taken no active part in the petition; and when I refer to 'the respondents' I refer only to the two active respondents to the petition, who are Mr Christian Mark Randall Bozeat (to whom, without any disrespect, I shall refer as 'Christian') and his wife, Mrs Virginia Jane Bozeat. They are both represented by Mr Charles Newington-Bridges, instructed by Horwich Farrelly (and previously by Knights Solicitors LLP). The petitioner holds 60% of the shares in the company and Christian and his wife together hold the remaining 40%.

4. Prior to the trial, the respondents had asserted that Mrs Bozeat had ceased to be a person with significant control of the company on 27 April 2020 (shortly before the presentation of the petition), having transferred her 20% shareholding to Christian. By the end of the trial, however, it was common ground that Mrs Bozeat had never effected a valid transfer of her shares to her husband, and that they each remain 20% shareholders in the company. It is, I believe, also common ground (and if not I so find) that Mrs Bozeat has never been a director of the company, nor has she ever taken any active role in its operation or the conduct of its affairs, and she has never acted in a manner that is unfairly prejudicial to the interests of the petitioner. Mrs Bozeat's name rarely features in the trial bundles, except as a respondent to the petition. Whatever order, if any, the court may ultimately consider it appropriate to make for giving relief in respect of any of the matters complained of by the petitioner,

I make it clear at the outset that it will not extend to Mrs Bozeat personally (save in relation to her outstanding 20% shareholding).

5. The company was incorporated (under the name 'Reemergent Technology Consultants Limited') on 1 July 2016 under the Act. On (or shortly following) incorporation, Christian was appointed the director of the company. Originally the capital of the company was 100 shares, divided into 50 ordinary A shares (held by Christian) and 50 ordinary B shares (held by Mrs Bozeat), each share having a nominal value of £0.02. The company changed its name to its present style on 15 December 2016 in anticipation of the Shareholders' and Subscription Agreement being concluded with the petitioner and new articles of association being adopted. This took place on 6 September 2017 when the B ordinary shares in the company were re-designated as A ordinary shares, all of those A ordinary shares were re-designated as ordinary shares, and the petitioner applied for, and was allotted, 150 ordinary shares in the company (credited as fully paid) in consideration of the petitioner transferring to the company all of its current projects in the UK. The effect was that the petitioner became a 60% shareholder in the company and Christian and his wife each held 20% of the share capital. The purpose of the Agreement was to govern the relationship between the petitioners and the respondents as shareholders in the company and the conduct of its affairs during the period of their relationship. Initially the company prospered: during the year ending 31 July 2016-7 to 2017-8 turnover grew from £293,443 to £955,173 and operating profit before tax from £130,952 to £512,245. Growth slowed in the following year, 2018-9, when the corresponding figures were £1,051,112 and £517,628.

6. Christian had been introduced to the petitioner by Mr Michael Kottke, one of its employees, who had managed the petitioner's pre-existing relationship with Deutsche Bank in the UK. Initially, Mr Kottke became the petitioner's observer on the company's board; but Christian wanted him to play a more meaningful role in the company, spending more than six to eight days a month in the UK in support of the company's operations, and becoming a shareholder. After some discussions with Christian, on 1 January 2018 the petitioner appointed Mr Kottke to act as a director of the company pursuant to clause 5.3 of the Shareholder's Agreement; but he acquired no shares in the company. Under the terms of the company's articles, any decision of the directors must be made by a majority decision at a meeting of the board (which any director has the right to call), although under the terms of the Shareholders' Agreement, in the event of any disagreement within the board, Christian has the casting vote.

7. It is clear from emails passing between Christian and Mr Kottke in the middle of July 2018 that tensions were already developing between them. Christian was making it clear that "the agenda is set by the MD and approved by the Chairman" and whilst Mr Kottke could suggest topics, and Christian would consider them, it was Christian who was ultimately to decide what was discussed: "In the future as the MD I will propose the agenda and set the time and date for the meetings." From an email sent by Christian to his father, Mr Miles Bozeat (a retired businessman, now in his early seventies) at about 11.45 am on 17 July 2018 it is apparent that even at this relatively early stage Christian (who suffers from dyslexia) was already involving his father, and seeking his input, in the drafting of letters concerning his relationships with his fellow director and the majority shareholder in the company. This is alluded to at

paragraph 8 of Miles's witness statement, where Mr Kottke is described as "a difficult colleague" of Christian. The particular draft letter, addressed to Michael Kottke, reads: "It is clear that you have a misinterpretation of the position that you are in. We are not discussing my position or role within Macom GmbH (UK) Ltd. I am a shareholder, Managing Director and Chair of the Board. If it is not already clear to you it is your role that is under discussion. You are a non-shareholding employed director. The above are clearly documented facts. As the MD and owner I will look to canvas your professional opinion in work matters as I value your experience and knowledge. I will also listen to your opinions in other areas. However the final decisions on the running of the UK business are for me to make. It is not the position of a non-shareholding director to challenge these decisions once made. I understand that this may cause you frustration however if you are not happy with this situation you should address your concerns with the other shareholders."

8. By June 2019, relations had so deteriorated between Christian and Mr Kottke that Mr Bjorn Jensen, the petitioner's Chief Executive Officer, engaged Mr Thomas Salzer, an external consultant, to spend some time working to analyse the causes of the problems and to mediate between the two directors. Mr Salzer's conclusion was that the shareholders and the directors had different goals and different ways of running a company and its staff. In Mr Salzer's view, however, the key event that triggered the breakdown of the shareholder relationship happened at the end of September 2019, after he had ceased his efforts at mediation. According to Mr Salzer, Mr. Jensen asked him to arrange for the 2019 dividend payment after Mr Jensen had tried in vain to do so himself. This turned out to be difficult as Christian simply told the petitioner how much of the dividend it would be paid; and, despite several clear requests, Christian failed to pay its full share of the dividend over to the petitioner before its year end on 30 September 2019, even though Mr Jensen and Mr Salzer had made it very clear to Christian that that date was very important for the petitioner's annual accounts. This late payment prevented the petitioner from including its share of the company's profits in its 2019 accounts, something which greatly upset Mr Jensen. Christian complains that Mr Jensen had demanded that the petitioner should receive £200,000 by way of dividend in order to pay off a loan. Christian says that he was concerned to retain sufficient working capital in the company to pay staff salaries and tax that was due, and that he refused to pay that sum. Eventually, Christian determined, and the petitioner reluctantly accepted, that the petitioner would be paid £142,000 in dividends and that Christian would receive a further £94,000, although it is clear that Mr Jensen was not very happy at this outcome. He was even less happy when the petitioner only received £50,000 on 27 September 2019, with two further payments only arriving after 30 September (£50,000 on 1 October and the final £40,000 on 2 October 2019, apparently due to a daily limit of £50,000 on the amount that could be paid by way of electronic bank transfer).

9. It was at about this time that, without the petitioner's consent, Christian involved his father, Miles, in providing advice on the company's structure and affairs. At first, Miles assisted Christian in drawing up a business plan and in drafting correspondence relating to the company and its affairs that Christian sent out in his own name. Later, at Christian's request, Miles set himself up as the person with whom the petitioner was to deal in relation to matters concerning the company (other than the day-to-day running of its business).

10. In October and November 2019 there were disputes between Christian and Mr Kottke and the petitioner over the submission of a proper business and financial plan. On or about 18 November 2019, Christian unilaterally offered Mr Kottke (who was still only working between six and eight days a month in the UK) the full-time role, based in the UK, of Operations Manager and Executive Director of the company at a salary of £88,000 pa, and with the prospect (subject to shareholders' agreement) of shares in the company. In cross-examination, Mr Kottke described this letter as a "turning-point". At about the same time, there were ongoing issues between Christian and Mr Kottke and the petitioner about Mr Kottke's status and role as a director and about Christian's assertion of the exclusive right to convene and control the timing, and the contents, of board meetings. Christian's email to Mr Jensen of 21 November 2019 is typical of his attitude: "I am not nor have I ever been a manager. Like it or not, contractually, by agreement and in law, I am and have always been the senior shareholder, Managing Director and Chairman of Macom GmbH (UK) Ltd. with all that implies and entails."

11. On 28 November 2019 Miles Bozeat sent an email to Mr Jensen as follows: "Christian asked me to contact you directly … So it leaves him to concentrate on the operative questions and issues and concentrate on the business of getting in the business, Christian has asked me to be the only contact for the Macom UK Company in any other issues with Macom Group. I have agreed and I am delighted to help you both and your organisations accordingly from of today please only contact and deal with me on any non-operative issues as concern the future of Macom Group, its strategic development and the Macom GmbH board. As you are aware am also advising and now representing Christian and the Macom UK Company in respect of its contractual, employment and legal obligations. On which subject you say that 'Michael will remain Director of Macom UK'. I have to advise you again that since Michael's appointment as Director was not and is not in compliance with the applying terms of the shareholders agreement, in fact and in law Michael is not and never has been a Director of the Macom UK Company. Moreover Michael killed any respect Christian may have had for him by sending him an email so insulting that in any other world his feet would not have touched the ground as he left the building. (If you wish to see the offending email I will forward it on request.) Since Michael is still useful to the Macom UK Company on the supply side from Germany and remains an operational contact I have suggested to Christian that he take a pragmatic approach to the issue, against his instincts and judgement Christian has agreed. Providing the Group is agreeable to the arrangement, Michael will be allowed to use the title Director in name only without it implying or bestowing any rights, privileges or powers what so ever. On behalf of Christian you can be assured of my co-operation in all matters and I look forward to working with Matthias in all non-operational matters concerning the Macom UK Company, the Macom GmbH board and the Macom Group and by this email, I extend Matthias a digital handshake." (The references to Matthias are to Mr Matthias Wustefeld, referred to later in this judgment.)

12. The following day, Christian emailed the company's accountants (with a copy to his father) stating: "Looking at the shareholder's agreement it appears that Michael has been added in error as he has not been allowed by the other shareholders to have shares in the company and the agreement is quite clear that shareholders have to have shares, see sections 5.3 and 5.4 As this is clearly in error and therefore void I can't

see that it would need a resolution from the shareholders to reverse, however, I would like to understand how we would go about taking him from the register to set things in line with the agreement."

13. At about this time the petitioner unilaterally withdrew its financial and IT support for the company and this led Christian to look for an alternative IT provider. Christian also announced that since the offer to Mr Kottke of the position of operations manager/director had gone unacknowledged, all payments for his services were immediately to cease. He recruited an existing employee, Ms Amy Cronshaw, to the role of operations manager; and he instructed Mr Kottke to "… transition your work load in respect of all projects and internal management concerning the company to Amy Cronshaw by Friday 5 December 2019". Unless the shareholders decided otherwise, Mr Kottke was to be allowed to continue in his role as 'Observer' for the petitioner, although Christian would allow him to continue to use the title 'Non-Executive Director' in this role, with his name remaining listed in the UK as a director unless the shareholders should agree otherwise. Christian said that he would continue to supply Mr Kottke with management information for the company as and when the Shareholders' Agreement required. Early in December 2019 Christian temporarily restricted Mr Kottke's access to the company's bank account. Christian explains this on the basis that he had been told by Mr Wustefeld that someone else had gained access to the bank account, and access was restricted whilst this was being investigated. Access was later reinstated; but Mr Kottke said in cross-examination that it took at least two weeks before he was able to access the company bank account again.

14. Late in November 2019 the petitioner engaged another external consultant, Mr Matthias Wustefeld, to act as its representative, "effectively in the role of a quasi-mediator", to address any issues concerning the company's affairs that Christian might wish to discuss with the petitioner that were of a non-operational nature. On 28 November Christian received emails: (1) from Mr Jensen confirming Mr Wustefeld's appointment to "lead the communication between you" and the petitioner and to act as "the only contact person for you in non-operative questions and issues"; and (2) from Mr Wustefeld reporting that "due to several strategic and personal reasons the board has made the following decisions concerning UK-business": (i) "to retire from all operative businesses" of the company; (ii) "to stop the financial startup-support for" the company after more than two years; (iii) "to keep the company shares as well as an active part in the shareholder meetings"; (iv) "being represented by Michael Kottke as a 100% enabled director and COO in the board of" the company; and (v) "to enable me as your contact person for all issues, negotiations and questions concerning the board of" the company. In a later letter from Mr Jensen to the respondents, dated 6 December 2019, Mr Jensen reiterated that the petitioner's board had decided "to retire from operative business within [the company] in so far as the owners and the board of [the petitioner] have been involved so far" although "the shareholder part will continue". In cross-examination, Mr Jensen confirmed that at this point he had decided that "the petitioner would go back simply to being a shareholder in the company".

15. Mr Wustefeld soon formed the view that Christian, and Miles Bozeat on his behalf, were taking an entirely "blocking approach" towards co-operating with him as the breakdown in the relationship between Christian and the petitioner worsened towards

the end of 2019 and during the early part of 2020. On 7 January 2020, Miles wrote to Mr Wustefeld (with copies to Mr Jensen and Christian) stating, after consultation with Christian, that the company "does not currently accept or recognise any management consultant as having a role related to the operation of the UK business including you and yours". The email concluded: "Finally, as per the shareholder's agreement, the business plan is to pursue profitable Information Technology consultancy sales in the UK territory, currently, as such Macom GmbH (UK) Ltd requires no other business plan." On the following day Christian sent an email to Mr Kottke (copied to Mr Jensen), which his father had drafted, refusing to answer his requests for information unless and until Mr Kottke had: (1) set out and listed "exactly what you believe your duties to [the company] are" and (2) "by what right and authority do you claim to be and sign yourself Operations Director [the company]? For the avoidance of doubt until I receive your response to the above there will be nothing further from me." This position was reiterated in a further email on 9 January 2020, written in response to a further request by Mr Kottke for information, and for the payment of his expenses and director's remuneration "… as I am currently unable to carry out my directorial duties due to your current conduct".

16. By this time, the petitioner and Mr Kottke had retained JMW Solicitors LLP to act for them. They wrote to the respondents on 9 January 2021 referring to "a breakdown of relationship following a reassessment of the financial support provided by our clients Macom Germany". The letter stated that JMW Solicitors' clients "do not recognise Miles Bozeat as having the requisite authority to act in this matter"; and they asked the respondents to "confirm your willingness to liaise with Mr Wustefeld as we fear that the difficult approach of Mr Miles Bozeat is counterproductive to a cooperative approach".

17. For his part, Mr Wustefeld can hardly have improved relations between Christian and the petitioner and himself by beginning an email to Christian on 24 January 2020 as follows: "On behalf of the Macom GmbH board, Bjorn Jensen personally and me as the representative I have to admit that none of us has ever had an experience with such an unprofessional, aggressive, clueless and arrogant behaviour as you show towards us since November 2019. I doubt, if you should be proud about that, but you probably are. The reason for your incredible way of acting is nothing but pure greed for your personal enrichment …" In cross-examination, Mr Wustefeld denied the suggestion that this email was "unprofessional and rude", characterising it as "absolutely professional", a description which I would not accept.

18. The particular grounds of unfair prejudice alleged in the petition fall under five principal heads as follows:

(1) Christian has taken unauthorised remuneration, dividends and other moneys belonging to the company.

(2) Christian has acted against and undermined the corporate governance of the company.

(3) Christian has acted in breach of the terms of the Shareholders' Agreement and caused the company to act in breach of the Agreement by causing Reserved Matters under the Agreement to be proceeded with where the petitioner's consent has not been sought or provided.

(4) Christian has failed to prepare and provide to the petitioner information that it requires and is entitled to under the terms of the Shareholders' Agreement.

(5) Christian has disclosed to his father Miles confidential information relating to his relationship with the company and the petitioner in breach of the terms of the Shareholders' Agreement.

19. The petitioner's overarching case is that the affairs of the company have been conducted in breach both of Christian's duties as a director of the company and the terms of the Shareholders' Agreement and that he has no intention of conducting the company's affairs in the future so as to comply with the terms of that agreement. In particular, it is said that Christian has no intention of using any endeavours, reasonable or otherwise, to co-operate with the petitioner in the running and operation of the company. In such circumstances, the petitioner asserts that the affairs of the company are being conducted in a manner that is unfairly prejudicial to the interests of the petitioner as its majority shareholder, and that the appropriate relief is to order the respondents to purchase the petitioner's shares in the company, thereby restoring the position to that which had existed prior to the Shareholders' Agreement and allowing Christian to own and to operate the company himself. The prayer for relief in the petition seeks a buy-out order in relation to the petitioner's shares or "such further or other orders as the Court shall deem appropriate (whether by way of interim or final order) in order to remedy the unfair prejudice complained of".

20. Christian denies the allegations made against him and, in particular, that the petitioner has been unfairly prejudiced. In essence, he maintains that:

(1) He withdrew money from his loan account as he had done regularly and without complaint. These sums related to the payment of dividends that were allocated to his loan account. Mr Kottke had been made aware of these payments for years without complaint. In any event, there was no financial prejudice to the petitioner because it has received at all times the dividends it would otherwise have done.

(2) He treated the petitioner's representatives properly; in particular Mr Kottke was offered a role in the company which was only offered elsewhere when he failed to respond.

(3) He sought approval from the petitioner when necessary in making decisions that related to the company and he provided information in relation to decisions of the company.

(4) He provided management and financial information when it was sought and when he was obliged to do so.

(5) The respondents' sharing of information with Miles Bozeat was reasonably necessary for Christian to perform his duties as a director.

21. The respondents maintain that the petition should be dismissed. Alternatively, they contend that the court has a wide discretion in relation to remedy, and that the fair and reasonable remedy, in the event of a finding of unfair prejudice, would be for the petitioner to be ordered to buy out the respondents; that way the petitioner would be

able to continue to trade in the UK and Christian would also free to make a living for himself and his family by way of setting up some form of alternative business.

II: Evidence and trial

22. On 29 April 2020 DJ Richmond directed that the petition should stand as points of claim, and he directed points of defence and points of reply. The original points of defence and counterclaim purported to include a cross-petition seeking: (1) an order that the petitioner be ordered to purchase Christian's shares in the company at such price as the court should determine as fair, or (2) such further or other orders as the court should deem appropriate in order to remedy the unfair prejudice complained of. However, in the face of a plea in the Reply that the "Cross-Petition" should be struck out, on the basis that it was not permissible for the respondents to raise the same unless they were to present their own petition to the court (which they had not done), pursuant to a further case management order made by DJ Carter on 20 August 2020 the respondents served Amended Points of Defence in which they abandoned their counterclaim and purported cross-petition. Further directions for trial were given at a Pre-Trial Review which took place before me on 14 May 2021.

23. The trial took place remotely by Teams over five days between 7 and 11 June 2021. The main trial bundle comprised a single PDF file of 3,596 pages. Mr Harper complains that the main trial bundle contains more documents than should have been necessary, bearing in mind that the dispute is confined to a relatively narrow time-frame. This is said to be because the respondents' only contribution to the preparation of the main bundle had been to insist that all of their disclosure should be included. Mr Harper comments, by way of example, that it is not readily apparent why the court needed to see the photographs from Christian's mobile telephone or his text exchanges with his wife. I consider that there is force in these criticisms. There were two supplemental trial bundles, comprising PDF files of 144 and 51 pages. The original joint bundle of authorities comprised some 695 pages. A supplemental authorities bundle of 344 pages was provided during the course of the trial, to which Mr Newington-Bridges added one further authority during his oral closing. Both counsel had produced helpful written skeleton arguments (and, in the case of Mr Harper, a detailed chronology, cross-referenced to the main bundle) which I had the opportunity of pre-reading before the trial began.

24. After short oral openings from both counsel, I heard the petitioner's witness evidence over the first two days of the trial. The petitioner called four witnesses – Mr Kottke (for about 5 ½ hours in total), Mr Jensen (for a little over 2 hours), Mr Salzer (for about 40 minutes), and Mr Wustefeld (for about 50 minutes) – all of whom gave their evidence (with the authority of the German court) from the petitioner's offices in Stuttgart, and with the assistance (where necessary) of a professional interpreter.

25. I am satisfied that all four of the petitioner's witnesses were trying their best to assist the court. However, I do bear in mind that, in cross-examination, Mr Kottke admitted to having deliberately redacted an email from Christian to Mr Salzer dated 24 September 2019, which had been produced as part of the petitioner's initial disclosure, so as to remove a paragraph which Christian says would have presented him in a favourable light because it shows that he was trying to be both cautious and fair, and was being careful with both his own and the petitioner's money in order to see the company grow: contrast the redacted version at page 401/1839 with the full

version at pages 402/1845-6. I reject as both absurd, and contrary to the petitioner's treatment of the other documents in the case, Mr Kottke's explanation for the redactions, which was that he had removed passages not relevant to the case in order to allow the stakeholders to focus on the important parts of what he considered to be an important email. I note Mr Kottke's acknowledgment that, in retrospect, he should never have made the redactions, which he said had created "a lot of distraction, confusion and noise"; and that, looking back, he would not do so again. However, I also note that not only were Mr Kottke's redactions signposted by ellipses but, since the email had originated from Christian, Mr Kottke's clumsy subterfuge was always likely to be easily identifiable. I reject Mr Newington-Bridges's closing submission that this redacted email undermines the credibility of Mr Kottke, and the petitioner's case, from the outset. I bear in mind that the conduct of the parties in this case is clearly evidenced in the documents and that, as both counsel acknowledged in opening, the oral evidence really adds very little to what is clear from the documents. I also bear in mind that Mr Kottke made a number of admissions in cross-examination that were helpful to the respondents' case (such as that Christian had always supported his original appointment as a director of the company).

26. Christian gave evidence for the whole of Day 3 and for about two hours on the morning of Day 4, a total of about 6 ½ hours. He was a voluble witness, and I did not find him to be particularly convincing or reliable. Nothing that Christian has said leads me to depart from the chronology of events that appears clearly from the documents. I find that Christian is someone who clearly wishes to set his own agenda, and to have his own way. He considered that he alone had the right to approve the calling of board meetings and to control their agenda. He accepted that he had not looked at the company's articles, nor had he sought to take any professional legal advice, as differences began to develop between himself and his co-director, Mr Kottke, and the petitioner and its appointed representatives. In fairness to Christian, I should record that I find that his "For the record" letter to Mr Kottke (drafted by Miles), which was attached to Christian's email of 17 December 2019 (at pp 570-1/2430-2433), and which drew Mr Kottke's attention to "aspects of your conduct when dealing with [the company] that are unacceptable, harmful and unlawful", and required him "to respect and honour my lawful instructions and directions", was sent very shortly after Mr Kottke was understood to have upset Ms Amy Cronshaw, at a time when Christian had been in hospital undergoing a pre-arranged operation under a general anaesthetic, and when Ms Cronshaw had been trying to take over Mr Kottke's workload (as recorded in a letter of 11 December 2019, transcribed at pp 612/2571-3).

27. The respondents' only other witness was Mr Miles Bozeat, who gave evidence for about two hours either side of the luncheon adjournment on Day 4. Whilst I have no doubt that Miles was an honest witness, who was doing his best to assist the court, he acknowledged that he had a tendency to ramble in his evidence. While I accept that Miles had been trying to doing his best to act as an honest broker in assisting his son to resolve his differences over his relationship with the petitioner and its representatives, as Miles himself accepted, he was partisan in his son's cause; and unfortunately Miles was mistaken on matters of law, and he only served to inflame tensions and to make matters worse between his son and the petitioner and its representatives. I am also satisfied that Miles is genuinely mistaken in thinking that Mr Jensen had any wish for Miles to involve himself in the company's affairs, or the

developing differences between his son and the petitioner, or that he had any licence from the petitioner to do so.

28. There was expert evidence in company valuation from two experts, Mr Stuart Airey (for the petitioner) and Mr Andrew Donaldson (for the respondents); but, as I had pointed out at the Pre-Trial Review, there was no permission for them to give oral evidence. Happily, during the course of the trial there was agreement that the value of the company, as at both 31 October 2019 and 29 February 2020 was £1,400,000. Mr Airey (but not Mr Donaldson) had also produced a second valuation of the company, as at 30 November 2020, of between £1 million and £1.2 million. This is because the company's business had been adversely affected by the impact of the Coronavirus pandemic. According to the most recent unaudited accounts for the year ended 31 July 2020, turnover had declined to £782,727 (from £1,051,112) and net profit before tax to £294,645 (from £517,628). It is common ground that there should be no discount (or premium) for a minority (or majority) shareholding, in accordance with article 36 (e) (i) of the company's articles.

29. Mr Harper addressed me in closing for about 1 ½ hours on the afternoon of Day 4 by reference to a revised skeleton argument. Mr Newington-Bridges addressed me for about 2 ½ hours on the morning of Day 5; and Mr Harper replied for about 55 minutes. The court adjourned to consider its judgment shortly after 2.00 pm on Day 5 of the trial.

III: The new Articles of Association and the Shareholders' and Subscription Agreement

30. The company's new Articles of Association were adopted on 6 September 2017. By article 9 (a), except for unanimous decisions made by all the eligible directors, the general rule about decision-making by the directors is that any such decision must be made by a majority decision at a meeting. By article 11 (a), any director might call a directors' meeting (although in cross-examination Christian said that he had thought that, as chairman, he had to approve any board meeting). Article 46 sets out the procedure for declaring dividends. The company may, by decision of the majority shareholders, declare final dividends, and the directors may decide to pay interim dividends. A dividend must not be declared unless the directors have made a recommendations as to its amount. Such a dividend must not exceed the amount recommended by the directors. No dividend may be declared or paid unless it is in accordance with the shareholders' respective rights. The directors may pay at intervals any dividend payable at a fixed rate if it appears to them that the profits available for distribution justify the payment.

31. The Shareholders' and Subscription Agreement was made on the same day (6 September 2017) between (1) Christian, (2) Mrs Bozeat, (3) the petitioner (therein described as 'Macom GmbH'), and (4) the company. The following were (amongst others) material terms of that Agreement:

(1) "The Shareholders undertake to each other that they will at all times act in good faith in all dealings with the other Shareholders and with the Company in relation to the matters contained in this agreement and that they will use reasonable endeavours to promote the success of and develop the business of the Company and to co-operate with the other Shareholders in the running and operation of the Company": clause 4.2.

(2) "The appointment, dismissal and conduct of the Board shall be regulated in accordance with this agreement and the Articles": clause 5.1.

(3) "Christian shall be the managing director of the Company and shall be the chairperson with a casting vote in the event there is a deadlock on the Board. He shall devote all of his time and attention to the Business, save in respect of agreed holiday or other authorised absence": clause 5.2.

(4) "Whilst a Shareholder holds at least 5% of the entire issued share capital of the Company he shall be entitled to be a director or in the case of [the petitioner] (or any other corporate shareholder) appoint a natural person as a director or observer on the Board or subject to clause 5.4 appoint any other director or alternate director": clause 5.3.

(5) "Subject to clause 5.3, no director (or alternate director) of the Company shall be appointed without the prior written consent of Shareholders holding at least 80% of the Company's issued shares for the time being. It is the intention of the parties that no director shall be appointed unless such person also becomes a Shareholder on such terms as determined by Shareholders holding at least 80% of the Company's issued shares for the time being. In the event of such appointment the parties accept and agree that their shareholdings shall be proportionately diluted in light of either the allotment or transfer of shares to the new director": clause 5.4.

(6) "A quorum for the decisions of the Board shall be either two directors or if [the petitioner] has not appointed a director to the Board then one director and the [petitioner's] representative/observer": clause 5.7.

(7) "The Company shall prepare monthly management accounts in a form reasonably acceptable to the Shareholders and shall send copies to each of the Shareholders within 15 days of the end of each month": clause 6.2.

(8) "At least 45 Business Days before the end of each financial year, the Company shall prepare a business plan containing the Company's objectives for the next financial year and shall provide each of the Shareholders with a copy of the business plan for their comments. A financial year is defined to be the period from 1 October to 30 September each year": clause 6.3. (In practice the company's financial year ran until 31 July in each year.)

(9) "At least 45 Business Days before the end of each financial year, the Company shall prepare an operating and capital budget and cash flow forecast for the next financial year": clause 6.4.

(10) "The Company shall provide the Shareholders with such information concerning the Company and its business as the Shareholders may reasonably require from time to time": clause 6.6.

(11) "The Company undertakes to each Shareholder, and each Shareholder shall procure so far as is lawfully possible in the exercise of his rights and powers as a Shareholder of the Company and (where applicable and to the extent that the exercise of such powers does not conflict with his statutory duties as a director) as a director of the Company, that the Company shall not, without the prior written consent of

Shareholders holding not less than 80% of the Shares in issue for the time being: … (l) purchase, lease or otherwise acquire assets or any interests in assets, which in aggregate exceed the value of £2,000; or (m) enter into any contract, transaction or arrangement … for the supply of services by the Company having an aggregate value in excess of £75,000 (exclusive of VAT); or (n) enter into any other contract, transaction or arrangement of a value exceeding £2,000; or … (s) adopt of make any material amendment to the Business Plan (if any); or (t) enter into or vary any contract of employment of any director or employee of the Company; or (u) establish or amend any profit sharing, share option, bonus or other incentive scheme of any nature for directors and employees; or … (x) remove any director who is or is appointed by a Shareholder; or (y) hold any meeting of the shareholders or purport to transact any business at such meeting, unless each Shareholder is present, whether in person or by proxy … :" clause 7.1.

(12) "Christian shall be paid a salary of £8,164 per annum or such higher amount as approved by the Shareholders": clause 8.1.

(13) "Subject to the Company retaining sufficient cash in the opinion of the Board to meet its working capital requirements, the Company and the Shareholders shall procure that in respect of each financial year the Company shall distribute not less than 50% of its post-tax distributable profits by way of cash dividend. £80,000 (or such increased figure as agreed by the Shareholders) of such distributable profits shall be paid to Christian and Virginia together and thereafter any dividends declared and paid shall be paid to [the petitioner]. If 40% of the distributable profits exceed £80,000 the dividends declared and paid shall be paid on a proportionate basis to the Shareholders' holdings of issued share capital in the Company … : clause 8.2.

(14) "The directors may declare and pay interim dividends on a quarterly basis or as otherwise agreed by the majority shareholders": clause 8.3.

(15) "In the event that [the petitioner] transfers its Shares to Christian (or his nominee) [the petitioner] undertakes not to set up or operate (whether directly or indirectly) a business in the UK which competes with the Company for a period of three years from the date of the transfer of its Shares": clause 10.3.

(16) "Except as provided elsewhere in this agreement, and excluding any information which is in the public domain (other than through the wrongful disclosure of any party), or which any party is required to disclose by law or by the rules of any regulatory body to which the Company is subject, or which is disclosed by a party who is an employee or director of the Company and that disclosure is reasonably necessary for that person to perform his duties in that capacity, each party agrees to keep secret and confidential and not to use, disclose or divulge to any third party (other than a party's professional advisers) any: (a) confidential information relating to the Company (including intellectual property, customer lists, reports, notes, memoranda and all other documentary records pertaining to the Company or its business affairs, finances, suppliers, customers or contractual or other arrangements); or (b) information relating to the negotiation, provisions or subject matter of this agreement (or any document referred to in it) … ": clause 11.1.

(17) "Each Shareholder shall exercise all voting rights and other powers of control available to him in relation to the Company so as to procure (so far as is lawfully and

reasonably possible) and, in the case of a Shareholder who is also a director, to the extent that such exercise does not conflict with his statutory duties as a director that, at all times during the term of this agreement, the provisions of this agreement are promptly observed and given full force and effect according to its spirit and intention": clause 14.1.

(18) "No failure or delay by a party to exercise any right or remedy provided under this agreement or by law shall constitute a waiver of that or any other right or remedy, nor shall it preclude or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall preclude or restrict the further exercise of that or any other right or remedy": clause 17.2.

(19) "This agreement and the documents referred to or incorporated in it, constitute the whole agreement between the parties relating to the subject matter of this agreement, and supersede any previous arrangement, understanding or agreement between them relating to the subject matter that they cover": clause 19.1.

32. A key feature of the dispute between the parties has been the approach that Christian and his father have taken towards the relationship between clauses 5.3 and 5.4 of the Shareholders' Agreement. This has led them to challenge the validity of Mr Kottke's appointment as a director because he has never become a shareholder in the company. In cross-examination, Christian maintained that he had always recognised Mr Kottke as a director of the company, although he also recognised that there were documents in which he had said that he did not recognise Mr Kottke as a director. An example is Christian's email response to Mr Jensen and Mr Oliver Mack (copied to Mr Kottke) of 20 November 2019 in which Christian wrote: "Nothing in the shareholders agreement or the Matrix makes MK a 'full director' or any other kind of director." In cross-examination, Christian also said that his reading of clauses 5.3 and 5.4 had led him to conclude that Mr Kottke should have had shares in the company; and Christian acknowledged that this had coloured his view on how they should work together in the company. Christian also said that he had been mistaken in allowing Mr Kottke to be appointed a director without any shareholding in the company. Miles was even clearer in his expressed belief that clauses 5.3 and 5.4 were not mutually exclusive and that Mr Kottke had never validly been appointed as, and was not, a director of the company. In cross-examination, Mr Harper made the point – which I accept – that Miles had led his son into this dispute by his mis-reading of those two sub-clauses (although Mr Harper made it clear that he was not suggesting that Miles had intended deliberately to mislead his son, but merely that he had got it wrong).

33. I accept Mr Harper's submissions as to the true meaning and effect of clauses 5.3 and 5.4. These are entirely separate provisions, addressing separate situations and serving different functions. Clause 5.3 confers the right on a corporate shareholder holding more than 5% of the company's entire issued share capital to appoint a natural person to act as a director. That right does not depend on that person becoming a shareholder. Clause 5.3 is not subject to clause 5.4; rather, clause 5.4 is subservient to clause 5.3, as is made clear by the opening words "Subject to clause 5.3 …". In my judgment, those opening words govern the whole of clause 5.4. As a matter of construction, the stated "intention of the parties that no director shall be appointed unless such person also becomes a Shareholder" only applies to an appointment under clause 5.4, and not to an appointment under clause 5.3. The requirement to become a shareholder of the company does not apply to an appointment made by an existing

qualifying shareholder under clause 5.3, which operates to enable such a shareholder to become involved in the actual management and direction of the company. Clause 5.4 is an entirely separate provision, requiring the written consent of shareholders holding at least 80% of the company's issued shares to the appointment of a director **otherwise** than under clause 5.3, and requiring such an appointee to become a shareholder.

34. I am satisfied that Mr Kottke was validly appointed as a director of the company by the petitioner pursuant to clause 5.3, and that he enjoyed the full powers conferred on a director by the Companies Act 2006, the articles, and the Shareholders' Agreement. It was the failure of Christian and his father to appreciate this fact that has substantially contributed to this litigation. From at least about October 2019, encouraged and assisted by his father, Christian had been advancing the entirely misconceived proposition that Mr Kottke should never have been appointed as a director because of the provisions of clause 5.4, and that his position as a director was in some way defective and subservient to that of Christian. I should add that even if the interpretation of the Shareholder's Agreement entertained by Christian and his father were correct, Mr Kottke had nevertheless been appointed to serve as a director, and his appointment had been registered at Companies' House, so he remained a director, entitled and required to act in that capacity, unless and until he was validly removed from the board of the company.

IX: Legal issues

35. By way of background, Mr Harper reminds the court that, as a director, Christian owed the following statutory duties to the company:

(1) A duty to act in accordance with the company's constitution, and only to exercise powers for the purposes for which they were conferred, under s. 171 of the 2006 Act.

(2) A duty to act in the way he considered, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, under s. 172 of the 2006 Act.

(3) A duty to exercise reasonable care, skill and diligence, under s. 174 of the 2006 Act.

(4) A duty to avoid conflicts of interest, including a duty to avoid a situation in which he had, or could have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company, under s. 175 of the 2006 Act.

36. Section 994 of the Companies Act 2006 provides that:

"(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."

Section 996 provides as follows:

"(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.

(2) Without prejudice to the generality of subsection (1), the court's order may -

(a) regulate the conduct of the company's affairs in the future;

…

(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."

37. There was no dispute between the parties as to the general principles governing the disposal of unfair prejudice petitions, as set out below.

(a) The petitioner's submissions

38. Mr Harper points out that there is nothing in the wording of s. 994 which prevents the presentation of a petition by a majority shareholder; but such a petition will only rarely be required (as where the majority shareholder does not have voting control) because ordinarily a majority shareholder will be in a position whereby he will be able to exercise control over the affairs and decisions of the company, which is a position not afforded to a minority, or equal, shareholder.

39. Mr Harper submits that the breach of a shareholders' agreement, where the terms of such an agreement govern the terms upon which it was agreed that the affairs of the company should be conducted, is capable of amounting to the conduct of the company's affairs. The conduct must be both unfair and prejudicial; and both concepts are to be judged objectively. Prejudice must be real, as opposed to technical or trivial; and this serves to exclude cases where the petitioner cannot show that he is, from a practical point of view, substantially in a worse position as a result of the allegedly unfairly prejudicial conduct. Prejudice is not limited to cases where there either is, or could be, a diminution in the value of the petitioner's shareholding; and it may extend to a breakdown of the relationship of trust and confidence amongst the shareholders as a result of the conduct of the company's affairs and failures of good administration.

40. Mr Harper contends that the purpose of granting relief is to remedy the unfair prejudice suffered by the petitioner, and that the court's powers are very wide. A purchase order will be the usual order where to order otherwise would be to perpetuate a dysfunctional relationship and an impossible relationship of joint management. An order for one party to purchase the shares of another is a personal order, and it does not matter that the shares are no longer worth the sum ordered to be paid, or that the company is no longer in existence. Such an order will only be made

against those who were closely connected to the unfairly prejudicial conduct. An order can be made that third parties, and non-members, should purchase the shares (whether by way of primary or secondary liability); but they must be joined into the proceedings and have been responsible for the conduct giving rise to the unfair prejudice petition. The fact that the purchaser would be unable to afford to pay the price ordered to be paid is no bar to a purchase order being made. In this connection, Mr Harper took me to observations in *Re Cumana Ltd* [1986] BCLC 430 by Nicholls LJ at 443G-444B and by Lawton LJ at 436H-437B. If there is a dispute as to which party should be ordered to buy out the other, the court has to decide who has the better claim on the company. Although a petitioner's conduct may have a bearing on the relief to be granted, the mere existence of fault on the petitioner's part is not normally a reason to deprive it of the benefit of a buy-out order. Since fairness is the touchstone, this may dictate that time should be given to enable the respondents to purchase the shares and to discharge shareholder loans. As for the date of valuation, the starting-point is either the date of sale or the date of the hearing; but an earlier or a later date (such as the date of the petitioner's exclusion from the company's affairs) may be taken in order to produce a result that is fair.

(b) The respondents' submissions

41. Mr Newington-Bridges submits that to satisfy the test of unfair prejudice, the acts or omissions have to be both unfair and prejudicial; and there must be a causal link between the conduct complained of and the unfair prejudice. Speaking for the Court of Appeal in *Grace v. Biagioli* [2005] EWCA Civ 1222, [2006] 2 BCLC 70, Patten J (at [61]) highlighted the following principles from the speech of Lord Hoffmann in the leading case of *O'Neill v. Phillips* [1999] 1 WLR 1092:

> "(1) The concept of unfairness, although objective in its focus, is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. This will usually take the form of the articles of association and any collateral agreements between shareholders which identify their rights and obligations as members of the company. Both are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable.
>
> (2) It follows that it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use Lord Hoffmann's words, 'consist in a breach of the rules or in using rules in a manner which equity would regard as contrary to good faith' … ; the conduct need not therefore be unlawful, but it must be inequitable."

42. In relation to unfairness, Mr Newington-Bridges submits that the starting-point is to identify what the parties had agreed between themselves should be their commercial relationship, and the basis upon which the affairs of the company should be conducted. A member of a company will not ordinarily be entitled to complain of unfairness absent some breach of the terms of the relevant agreements, although it is well established that not every breach of the articles or a shareholders' agreement will constitute unfair prejudice. The articles, or a shareholders' agreement, may be varied

by subsequent agreement, either express or to be inferred from conduct; and, in such a case, the court must take account, not only of the articles or any shareholders' agreement, but also of the parties' conduct and, in particular, of any subsequent agreement, understanding or established pattern of acquiescence which may have led those in control of the company to act, or to continue to act, in a particular way. Equally, the company's affairs may have been conducted on the basis of the waiver of the strict terms of the parties' agreement, or acquiescence.

43. As for prejudice, Mr Newington-Bridges points out that this may, in principle, be found in both economic and non-economic form, although usually the alleged prejudice lies in damage to the value of the petitioner's shareholding or other economic harm which he may suffer as a member. Where the acts complained of have no adverse financial consequences, it may well be more difficult to establish prejudice. This is particularly so where the acts or omissions are alleged to amount to breaches of duties which are owed to the company but the company has suffered no loss as a result (and would therefore have no claim).

44. Mr Newington-Bridges also submits that if a petitioner voluntarily withdraws from management, the exclusion may not amount to unfairly prejudicial conduct. As a general principle, the conduct of a member who presents a s. 994 petition is a relevant consideration because misconduct on his part may result in a finding that the conduct of which he complains is not unfair. It does not necessarily follow from any understandings between the parties that the petitioner should be guaranteed a job for life. A petitioner may behave in such a way as to deserve his exclusion or his removal as director. The task for the court is to determine whether, in spite of the petitioner's conduct, the respondent's conduct is still, considered objectively, unfair.

45. If a petitioner has a right to receive, or there is an understanding that it will receive, information about the company, the failure to provide such information is, of itself, capable of amounting to unfairly prejudicial conduct; although if the failure to provide information is the only complaint, the appropriate relief may be to order the information to be supplied. Where remuneration has not been duly authorised in accordance with the articles or a shareholders' agreement, it is capable of amounting to unfair prejudice; but if the petitioner has acquiesced or participated in the conduct of the company's affairs in this respect, in disregard of the company's constitution, it may not constitute unfair prejudice.

46. It was common ground between the parties that the court has no jurisdiction to make any order under ss. 994-996 of the Companies Act 2006 unless it is satisfied that there has been unfairly prejudicial conduct. In closing speeches, the argument focussed upon the circumstances in which unfair prejudice might be found and, and if a finding of unfair prejudice were made, the extent of the court's power to grant an alternative remedy to that sought by the petitioner.

(i) Unfair prejudice

47. I accept Mr Harper's submission that prejudice is not limited to cases where there is an actual, or potential, diminution in the value of the petitioner's shareholding. Rather, it may extend to a breakdown of the relationship of trust and confidence amongst the shareholders as a result of the respondent's conduct of the company's affairs and failures of good administration. In my judgment, that proposition is

established by the observation of David Richards J in *Re Coroin, McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 2343 (Ch) at [630] that "… prejudice need not be financial in character. A disregard of the rights of a member as such, without any financial consequences, may amount to prejudice falling within the section." Mr Newington-Bridges pointed to the judgment of Chief ICCJ Briggs in *Michel v Michel* [2019] EWHC 1378 (Ch) at [77]-[78] where reference was made to the warning sounded by David Richards J at [631] that: "Where the acts complained of have no adverse financial consequence, it may be more difficult to establish relevant prejudice. This may particularly be the case where the acts or omissions are breaches of duty owed to the company rather than to shareholders individually. If it is said that the directors or some of them had been in breach of duty to the company but no loss to the company has resulted, the company would not have a claim against those directors. It may therefore be difficult for a shareholder to show that nonetheless as a member he has suffered prejudice." I agree with Mr Harper that David Richards J was not ruling out a finding of unfair prejudice where the acts complained of have no financial consequences; he was merely stating that it may be more difficult to establish relevant prejudice in such a case. Where a petitioner has a right to be consulted and involved in the management of the company as a condition of his investment, he may not suffer any financial loss if he is excluded from such consultation and involvement; but he may nevertheless suffer unfair prejudice because he is being denied the full benefit of his investment in the company.

48. That approach is confirmed by the other authorities cited by Mr Harper. In *Re Baumler (UK) Ltd, Gerrard v Koby* [2004] EWHC 1763 (Ch), Mr George Bompas QC (sitting as a Judge of the High Court) recognised (at [181] (i)) that "… in the case of a quasi-partnership company a breach of duty by one participant may not in the event be causative of 'prejudice or loss' to the company, but may nevertheless lead to such a loss of confidence on the part of another, innocent, participant and breakdown in relations that the innocent participant is entitled to relief under section 461 of the 1985 Act. In effect the unfairness lies in compelling the innocent participant to remain a member of what was once a company formed with the characteristics which made it capable of being given the label of 'quasi-partnership', unsatisfactory as that label might be." In my judgment, that principle extends to the case of a company where the shareholders' agreement regulates the rights and duties of the shareholders as between themselves. The shareholders are entitled to expect the terms of that agreement to be observed, particularly where the agreement imports mutual obligations to act in good faith; and a failure to do so may constitute unfair prejudice, even in the absence of resulting financial loss.

49. Similarly, in *Re Edwardian Group Ltd, Estera Trust (Jersey) Ltd v Singh* [2018] EWHC 1715 (Ch) at [338]-[339] Fancourt J rejected the contention that since the relevant breaches of fiduciary duty had caused no loss to the company, the misconduct of the company's affairs was not unfairly prejudicial to the interests of the shareholders generally, or to the petitioners in particular. By their very nature, the breaches of duty had caused all of the shareholders prejudice, in that the respondent was wrongly putting himself in a position where his duty to the shareholders of the company conflicted with his own interests, and was then preferring his own interests. "That kind of conflict is corrosive of good administration and trust between shareholders and directors. Further, the prejudice was by its nature unfair. The members did not know of [the chief executive officer's] personal interest: they were

unaware of the undisclosed conflict that the CEO of the Company continued to have. They were deprived of the right to give or refuse consent to [him] taking the opportunity for his personal benefit." At [493] Fancourt J went on to find that the misleading and inadequate terms in which the shareholders had been informed of certain findings of the company had been unfairly prejudicial to all of the shareholders, as being contrary to the good administration of the company and the interests of the shareholders in having matters of complaint about a director of the company fairly and fully investigated and reported on. At [606] Fancourt J concluded that the company and its CEO had acted in a seriously prejudicial and unfair way in their treatment of the petitioners' interests as shareholders. That prejudice had come about as a result of the CEO's considerable control and influence as such, his willingness to conceal matters that should have been disclosed to the board, the board's weakness and willingness to support the CEO rather than to act truly independently, its willingness to leave wrongdoing covered up and to mislead shareholders about the true nature of it, and its willingness to appoint corporate profits by way of excessive remuneration to the CEO instead of as dividends benefiting all shareholders proportionately. The company's affairs were likely to continue to be run in that way, which had involved consistently applying a policy of attempting to reduce the value of minority shareholdings. Although, in that case, the petitioners were able to point to financial loss, in terms of a loss of dividend income, in my judgment the decision would have been the same even if the breaches of fiduciary duty had caused no loss, whether actual or prospective, to the petitioners.

(ii) Remedy

50. On the issue of remedy, Mr Harper took the court to the decision of Briggs J in *Sikorkski v Sikorksi* [2012] EWHC 1613 (Ch). At [71] Briggs J recognised that the court has very wide powers under s. 996. At [73] Briggs J referred to the submission made by counsel for the respondent (Mr Harper in that case also) that it would be wrong in principle for the court to perpetuate a dysfunctional relationship between the parties into the indefinite future, and that, if minded to grant relief at all, the court should do so by ordering a purchase of the petitioner's shares at a value calculated by reference to his dividend rights under the 1993 bargain, and on the assumption that the depletion in the shareholders' funds was made good. At [74]-[75] Briggs J said this:

> "I recognise of course that an order for the purchase of an unfairly prejudiced shareholder's shares, either by the other shareholders or by the company, has become almost the norm in cases where unfair prejudice is established in relation to the affairs of private companies. It is, nonetheless, not the relief sought by the petition, and the submission that (if otherwise minded to grant relief) I should do so by way of buy-out rather than, in effect, specific performance of the 1993 bargain plus compensation for breach, was made only in closing submissions. The result is that the potentially difficult and expensive process of valuing Joe's shares on the appropriate assumptions has yet even to begin.
>
> More generally I consider that the court should not close its mind to a bespoke solution to a particular form of unfair prejudice, other than by ordering a buy-out, at least in cases where a remedy that leaves the warring parties as shareholders in the same company does not of itself perpetuate an

> impossible relationship of joint management, or otherwise risk aggravating an existing dispute."

51. I have already referred to Mr Harper's citation of observations by Nicholls LJ at 443G-444B and by Lawton LJ at 436H-437B in *Re Cumana Ltd* [1986] BCLC 430. Nicholls LJ rejected in terms the general proposition that the court should not make a share buy-out order at a fixed price in the absence of evidence that the order can be carried out. However, it is important to bear in mind the context in which those observations were made, which was the respondent's wrongful extraction of moneys from the company. Nicholls LJ proceeded to say:

> "The form which the relief to be granted under s. 75 should take is discretionary. If, in a particular case, the court considers that a respondent who has wrongfully extracted substantial sums of money from a company should make recompense by paying a stated sum to the petitioner, or to the company, I do not see why such an order should not be made even if the respondent does not have and is unlikely to obtain the necessary means; although, no doubt, his financial position would be a matter to be taken into account by the court in deciding upon the form of relief. If that is correct, I do not see why the position is in principle any different in the case of a purchaser of shares: the respondent is being ordered to pay a fixed sum of money, and shares (like other forms of property) may subsequently fall or rise in value. Of course, in considering whether to make a purchase order, the court will have regard to the means of the respondent and also, if he will need to have recourse to the property which is the subject of the purchase order, or other property, to obtain the purchase price, to the likelihood of him being able to realise or obtain money on the security of that property. But these are questions of degree, and the weight to be attached to these considerations will depend on all the circumstances of the case. They are matters for the discretion of the trial judge."

That context was also emphasised in the judgment of Lawton LJ:

> "What the judge was deciding was the amount of the compensation which Mr Bolton should pay Mr Lewis for the wrong he had done him … . The fact that a wrongdoer is impecunious is no reason why judgment should not be given against him for the amount of compensation due to his victim. What Mr Lewis should do to get money out of Mr Bolton, claiming, as he still does, that he is impecunious, is a matter from him to decide, not the court."

In my judgment, different considerations may apply where the unfair prejudice does not consist of the wrongful withdrawal of company moneys but a failure of corporate governance: it is all a matter for the discretion of the court.

52. Mr Newington-Bridges relies upon the first instance decision of Lewison J in *Hawkes v Cuddy (No.2)* [2007] EWHC 2999 (Ch), [2008] BCC 390 (which was affirmed on appeal at [2009] EWCA Civ 291, [2009] 2 BCLC 427) as authority for the proposition that the court may exercise its own creativity in matching its remedy to the unfair prejudice which has been established. There the court found that the petitioner had been unfairly prejudiced; but it granted the relief sought by the

respondent. Mr Newington-Bridges submits that the court's wide discretion as to remedy is in no way fettered by the absence of a cross-petition. The relief sought by the petitioner is clearly a relevant factor; but the court's discretion is unfettered, and it has the discretion to make a different order.

53. Mr Harper's response is that in ***Hawkes v Cuddy*** there was also a cross-petition; and he submits that that was crucial to the court's grant of the relief sought by the respondent. He relies on observations of the Lord Ordinary (Lord Tyrie) in the Outer House of the Court of Session in ***Re Braid Group (Holdings) Ltd, Gray v Braid Group (Holdings) Ltd*** [2015] CSOH 146 at [164] for the proposition that if the respondent to a petition contends that it has been unfairly prejudiced, then it should cross-petition in order to seek a buy-out order in its favour. The Lord Ordinary said this:

> "I am not persuaded that the statutory provisions are sufficiently wide to permit the court to make an order in favour of a party who has entered the process as a respondent and who has remained only in that capacity. Section 996 provides for relief to be given 'in respect of the matters complained of'. That is a reference to the complaint of the petitioner, in terms of section 994, that there has been prejudice to the interests of members generally or to some part of the members including at least the petitioner. In other words, the focus is on conduct prejudicial to the petitioner. To the same effect, section 996 makes clear that the court's jurisdiction opens up if it is satisfied 'that a petition under this Part is well founded'. That is a reference to the application by way of petition under section 994: again, the power to make an order may be exercised only under reference to the application of the member who has brought the petition. The power does not extend to a member who has not applied by way of petition."

However, as the Lord Ordinary went on to make clear, in that particular case the respondent had wished to base his case upon complaints of conduct that had been unfairly prejudicial to himself, but those were not issues with which the petition has been concerned.

54. With respect to the Lord Ordinary, I do not agree with his analysis and reasoning. I prefer the alternative submissions of Mr Newington-Bridges. Where the alternative relief sought by the respondent is an appropriate response, both to the matters complained of in the petition and to the unfair prejudice established by the petitioner, in my judgment the width of the discretion as to remedy conferred by s. 996 extends to making an order in terms that may be suggested by the respondent, even though such an order is contrary to the wishes of the petitioner; although I recognise and acknowledge (as stated at [52] above) that the petitioner's opposition to such relief is clearly a relevant factor to be weighed in the balance when deciding what remedy to grant .

55. In my judgment, that conclusion is consistent with, and is supported by, the views of the Court of Appeal in ***Hawkes v Cuddy***. Delivering the only reasoned judgment (with which Moore-Bick LJ and Blackburne J agreed, without further comment) at [85]-[91] Stanley Burnton LJ rejected the suggestion that on a petition under s. 994 the court cannot award relief that the petitioner does not seek. He commented: "In the present case, the correctness or otherwise of that proposition is academic, since ultimately, when it was apparent from the judge's judgment that Mr Hawkes would

not be able to buy out Mr Cuddy, he agreed to the order proposed by the judge being made on his petition. On any basis, therefore, the judge had power to make the order he did. But I would not want it to be assumed that that proposition represents the law. The terms of section 996 are clear: once the court is satisfied that a petition is well founded, 'it may make such order as it thinks fit', not 'such order as is sought by the petitioner'." Stanley Burnton LJ went on to conclude that: "The unacceptability to the petitioner of the relief that the court otherwise considers appropriate is doubtless a major consideration to be taken into account when deciding whether to grant that relief, but it goes to the exercise of the discretion of the court, not to the power of the court to make such order as it thinks fit." Mr Harper has pointed out that this proposition was not in issue before the Court of Appeal, but it was the subject of express consideration by that Court; and in my judgment the Court's analysis and reasoning are unimpeachable. I note that this authority does not appear to have been cited to, or considered by, the Lord Ordinary in the ***Braid Group Holdings*** case.

56. At [90] Stanley Burnton LJ also noted that the "all-but-universal inclusion in the prayer of petitions of 'that such other order may be made as the court thinks fit' itself means that the discretion of the court as to the relief to be granted is unfettered by the petition". Such a prayer was included in the petition in that case; and the prayer for relief in the instant petition incorporates a similar formulation. In closing, Mr Newington-Bridges submitted that those responsible for drafting unfair prejudice petitions may wish to revisit the inclusion of similar wording in such petitions in the future. If I am wrong about the width of the court's discretion to grant relief even though it has not been asked for by the petitioner, I agree for the future, those who draft unfair prejudice petitions may wish to consider limiting such rolled-up relief to "such other relief as the petitioner may invite the court to grant".

57. I therefore conclude that it is open to the court, as a matter of discretion, to grant relief otherwise than by way of such order for the buy-out of its own shares as may be sought by the petitioner. But I acknowledge that the petitioner's opposition to any other form of relief is a major factor for the court to take into account, and weigh in the balance, when it comes to exercise its discretion as to remedy.

V: Unauthorised remuneration

58. This core complaint was the subject of much evidence, discussion, and analysis at trial; but as the debate proceeded the position became clear from an analysis of the relevant documents, of which the excel spreadsheet of Christian's loan account (at p 132/931) is of critical importance. The petitioner's submissions are set out at paragraphs 33 to 28 of Mr Harper's revised skeleton. Mr Newington-Bridges's arguments are set out at paragraphs 75 to 98 of his skeleton argument.

59. Salary, dividends and expenses were credited to Christian's loan account, from which drawings were then made. During the company's first year of trading, Christian did not draw down on his loan account at all, in order to build up the company's cash reserves. After the declaration of dividends for the year ending 31 July 2017, Christian's loan account was in credit to the extent of £138,767.01. By the following year end, this credit had increased to £158,165.60 once Christian's share of the dividend for that year had been declared. Prior to that declaration, Christian's loan account had been overdrawn to the extent of some £7,500; but this is not the subject of any complaint in these proceedings.

60. During the financial year 2018-9, Christian drew down various sums until, on 29 May 2019, a drawdown of £10,000 threw his loan account slightly into debit. This drawdown was known to Mr Kottke at the time. He said in cross-examination that he did not object to Christian about his loan account becoming overdrawn because he did not think that it would contribute towards reconciling the difficult relationship that then existed between them, although he says that he raised the matter with Mr Jensen.

61. On 5 June 2019 Mr Jensen applied, on behalf of the petitioner, to withdraw £200,000 from the company. Christian immediately consulted the company's accountant, and his reply was forwarded to Mr Jensen with Christian's email later the same day. The email chain is at pp 299/1475-9. In summary, Christian told Mr Jensen that in order to leave the business with sufficient capital to cover its trading position, the petitioner could only have £90,000: "The maximum amount that is available for Germany to draw down at the current time is approximately £90,000.00 which is the remainder of the dividend from last year less amounts for Michael's travel and expenses which Germany pays for from its loan account. As the accounts are not yet finalised and no dividend is declared, nothing is available to be drawn. … Once dividends are declared I have first call on my initial dividend and take this when there are sufficient funds available to pay it. We can then look at when funds are available to pay Germany its 60% and whatever is over to the respective parties in the 60-40 amounts." The petitioner rightly relies heavily upon Christian's statement that: "As the accounts are not yet finalised and no dividend is declared, nothing is available to be drawn."

62. Despite Christian's statement that nothing was available to be drawn until dividends were declared, Christian proceeded, without consultation with either Mr Kottke or the petitioner, to draw down further sums of £8,547.37 and £7,593.78 on 25 July 2019 in order to pay the tax liabilities of Christian and his wife. This meant that by the year end of 31 July 2019, his loan account was overdrawn to the extent of £18,686. This is the first of the sums of which complaint is made by the petitioner.

63. Knowing that he would be entitled to the first £80,000 of dividends declared for the year 2018-9, on 6 and 30 August 2019 Christian caused himself to be paid further sums totalling £17,000. Again this was done without the prior agreement of either Mr Kottke or the petitioner. The company's unaudited financial statements for the year ended 31 July 2019, recording the dividends and directors' loan accounts as at that date, state that they were approved by Christian and Mr Kottke, as the board of directors, and were authorised for issue, on 23 September 2019. Mr Kottke said in evidence that he only signed the accounts at the end of October because he had been on holiday in Bali during the second half of September. This is evidenced by emails from Christian to Mr Jensen on 28 October 2019 (stating that the accounts were with Mr Kottke for his signature) and from Mr Kottke to Christian on 30 October 2019 (complaining about the procedure that Christian had adopted: "I was not aware that these were prepared and sent to the shareholders while I was on holiday and I don't think this is the correct process. My understanding is the accounts are sent to both me and you as directors of the business simultaneously for review. The accounts are then reviewed and signed by us, the company directors, and signed copies are then provided to the shareholders, CH and HMRC. I would like to understand if this is your view as well and as I have said earlier why and how this process has been changed as this is exactly how it has been done last year.") The approval of the accounts retrospectively validated Christian's share of dividends of £167,404.20 and

it created a credit on his loan account, as at that date, of £148,717.80. In addition to the £17,000 which he had already drawn down in August, Christian drew down further sums of £50,000 and £44,000 on 27 September and 1 October. The resulting total payment to Christian of £111,000 forms the subject of the second of the petitioner's complaints, on the basis that this resulted in Christian receiving moneys that should have been retained within the company.

64. On 24 September 2019 Christian sent an email to Mr Salzer detailing the dividend position, including the following: "The dividends available total £368,000.00. We don't have the money to pay all of this. If I take my money first that leaves £158,000.00 in the bank, take the £120,000 need for the quarter that leaves £380,00.00. In our agreement we have to ensure there is money in the bank to pay our bills this is a legal requirement in the UK. We also have a shareholding of 60/40 and we have agreed that money in the same proportion has to stay in the account, for example if I have 40k then Germany has to have £60k in the current situation my money is at risk in the same way Germany's is I have £148,000.00 in the account Germany has to have £220,000.00. I don't take my money Germany does not take theirs. "

65. The petitioner relies on this email as evidencing an agreement that the petitioner and Christian were to retain a 60/40 split of unpaid dividends within the company. No such arrangement is recorded in the Shareholders' Agreement, and its origins are obscure. At paragraph 53 of his witness statement, Mr Jensen refers to "the 60/40 retention split" being documented in this email, but he does not, and was unable to, explain when or how it had been agreed. At the end of his evidence, I asked Christian about it, and he said that he had instigated it in order to ensure that sufficient funds were retained within the business. He explained that it was not necessarily an agreement, more a discussion; and that it could never be rigidly adhered to because Christian had been entitled to the first £80,000 and the petitioner the next £120,000 in dividends; and that he had also needed to be able to drawn down against his dividends in order to fund his ordinary living expenses. I find that there was no firm agreement that funds should be retained within the company on a 60/40 basis and that this was merely an aspiration. In any event, any agreement as to a 60/40 dividend retention was superseded by the agreement as to the payment of dividends of £142,000 and £94,000 to the petitioner and Christian respectively to which I now turn.

66. On 25 September 2019, Christian sent an email to Mr Jensen (at pp 414/1866-7) attaching the company's accounts for the year ended 31 July 2019, setting out the division of the company's profits between himself and the petitioner, and proposing payments of £142,000 to the petitioner and £94,000 to Christian. Also attached was a spreadsheet, which Christian and the company's accountant had worked on, that showed what was available for each of Christian and the petitioner to take out of the company. The potential relevance, and importance, of this spreadsheet (which appears at p 401/1842) did not become apparent until the Bench asked about it during the course of Mr Newington-Bridges's closing; and, as a result, Mr Jensen was never questioned about it. It clearly shows that Christian had already received, on account of the 2019 dividend, £18,686.40, as at 31 July 2019, and two further payments totalling £17,000 during August 2019. The statement also shows that, after the proposed payments to the petitioner and Christian of £142,000 and £94,000

respectively, their loan accounts would each be in credit to the extent of £101,335.71 and £37,717.80 respectively.

67. The petitioner's third complaint under this head relates to three payments, totalling some £18,200, that were drawn down from Christian's loan account on 29 January 2020 in order to pay an American Express bill and the tax bills that were payable by Christian and Mrs Bozeat in January 2020. This was done without the agreement of either the petitioner or Christian's co-director, Mr Kottke. By the end of January 2020, Christian's loan account was in credit only to the extent of a little over £25,000, whilst the petitioner's account stood at some £101,000: see pp 401/1840-1.

68. Against these findings of fact, I reach the following conclusions. The payments totalling £18,686 in July 2019 were made on account of the 2019 dividend at a time when no such dividend, and no relevant interim dividend, had been declared, and without the prior authority of the board or the majority shareholder of the company. They benefitted Christian and his wife, and they involved him in a position of conflict because he was acting for both the paying party (the company) and the receiving party (himself). The fact that this merely replicated what had been done the previous year does not serve to validate the payments. As Mr Harper pointed out, the cross-examination of Mr Kottke merely established that on occasions up to 29 May 2019, Christian had appreciated that he should ask for Mr Kottke's consent and it only served to undermine Christian's position that he did not need to seek such consent. The same considerations apply to the payments, totalling £17,000, which were effected in August 2019. All of these payments were made in breach of the terms of the articles and the Shareholders' Agreement; and they were also in breach of Christian's duties as a director under ss. 171 and 175 of the 2006 Act.

69. However, these payments resulted in no financial loss to the company or the petitioner because they merely anticipated Christian's undoubted priority dividend entitlement. As Mr Newington-Bridges pointed out, any financial disadvantage to the company was short-lived. Moreover, Christian disclosed the existence of these payments to the petitioner, through Mr Jensen, at the time Mr Jensen approved the further payment of £94,000 by way of dividend to Christian. In these circumstances, I am satisfied that none of these payments constituted either prejudice, or unfair prejudice, to the petitioner, save to the extent that they demonstrate a propensity on the part of Christian to compromise the good and proper administration and corporate governance of the company and undermine the relationship between the parties under the Shareholders' Agreement. In the light of Christian's stated position in his 5 June 2019 email to Mr Jensen, they also represented inconsistency at best and, more accurately, hypocrisy and self-interest on his part.

70. Similar criticisms apply to the drawdown of sums totalling £18,200 in January 2020 except that these sums represented the proceeds of a declared dividend. However, these payments were effected without the prior authority of either the board or the majority shareholder of the company. They benefited Christian and his wife, and they involved him in a position of conflict since he was acting for both the creditor (himself) and the debtor (the company). The fact that (as to the tax element) the payments merely replicated what had been done in the previous year does not serve to validate the payments, certainly in circumstances where relations between Christian and both his co-director and the majority shareholder had broken down and the latter had retained solicitors to act for them. These payments increased still further the

disparity between Christian and the petitioner in terms of the moneys each retained within the company so as to fund its business activities. They involved Christian in a breach of his duties as a director of the company under s. 175 of the 2006 Act and they therefore amounted to a breach of the Shareholders' Agreement. The payments resulted in no financial loss to the company or the petitioner; and there is no evidence that they ever caused any financial disadvantage to the company. However, I find that they constituted unfair prejudice to the interests of the petitioner as a member of the company in the conduct of the company's affairs in the sense that they reinforce the perception that Christian is prepared to compromise the good and proper administration and corporate governance of the company, and undermine the relationship between the parties under the Shareholders' Agreement, by acting unilaterally without consulting either the board or the majority shareholder of the company.

VI: Undermining corporate governance

71. This allegation is addressed at paragraphs 39 to 43 of Mr Harper's skeleton argument and paragraphs 46 to 62 of Mr Newington-Bridge's skeleton argument.

72. It is clear from the correspondence that Christian has persistently questioned and challenged Mr Kottke's position as a validly appointed director of the company, with equal standing to Christian on its board (subject to Christian's casting vote on non-reserved matters in the event of deadlock on the board). This situation has resulted from the misapprehension entertained by Christian and his father about the relationship between clauses 5.3 and 5.4 of the Shareholder's Agreement which I have explained above. As a result, Christian has maintained that he is entitled to propose the agenda and set the time and date for meetings of the board. As the managing director and chairman, Christian has asserted that only he has the right to call board meetings, despite the provisions of article 11 (a) of the company's articles. When Mr Kottke failed to acknowledge Christian's offer of the role of operations manager/director, Christian announced, on 2 December 2019, that all payments for his services would cease immediately, and Mr Kottke was required to transition his workload in respect of all projects and internal management concerning the company to Amy Cronshaw by Friday 5 December 2019. Unless the shareholders decided otherwise, Mr Kottke was to be allowed to continue in his role as "observer" for the petitioner, using the title 'non-executive director' in that role. In a letter to Mr Jensen of 29 January 2020, Christian purported to suspend Mr Kottke from the position of director, declared himself to be the board of the company, and announced that there would be no meeting of the board until further notice. Christian proceeded to exclude Mr Kottke from both the governance of the company and access to company information and documents, even to the extent of deliberately excluding him from correspondence with the company's accountant, as evidenced by Christian's email exchange with Stuart Gallagher on 2 April 2020 at p 684/2906. Although not specifically relied upon by the petitioner, the way in which the company's 2018-9 accounts were approved by the directors (as related above) also amounted to a failure of corporate governance on the part of Christian.

73. Mr Newington-Bridges contends that the petitioner cannot successfully complain of unfair prejudice under this head. He says that the suggestion that prejudice results from being unable to meet the other director of the company ignores the petitioner's ability to engage in meetings outside the board. He asserts that this issue is no longer

continuing because, on 26 February 2021, Christian sent out an invitation to a board meeting on Friday 11 March at 11.30 am GMT via a Teams video call. This would seem to me to be too little too late. Mr Newington-Bridges also submits that no prejudice, substantial or otherwise, to the interests of the petitioner, as a member of the company, is pleaded in the petition or set out in its witness statements as a result of its exclusion from the company's corporate governance. In fact, he says that the uncontested, or largely uncontested, evidence is that rather than suffering from Mr Kottke's lack of involvement, the company has continued to trade profitably and, if anything, it has performed rather well in the context of the pandemic. However, that ignores Christian's clear failures to observe and adhere to principles of proper corporate administration and governance in relation to the company, as set out in its articles and the Shareholder's Agreement, and the consequent erosion of trust and confidence between its majority and minority shareholders.

74. In closing, Mr Newington-Bridges acknowledged that there has been a significant breakdown in the relationship between Christian and Mr Kottke and the petitioner's other representatives, and that emails have passed between them which, with hindsight, both parties may now regret, with everyone involved slinging significant amounts of mud at each other; but he says that it would not be appropriate for the court to seek to apportion blame, and that the balance of unfairness does not clearly favour the petitioner. He says that it is hardly surprising that, by the end of 2019, Christian should have formed suspicions about what the petitioner and Mr Wustefeld were really up to. Since, so Mr Newington-Bridges asserts, the company was not a quasi-partnership, the breakdown in the relationship between the parties is no proper basis for the court to intervene by way of remedy under s. 996 of the 2006 Act. I cannot accept this submission in the context of the parties' respective shareholdings in the company and the terms of the Shareholders' Agreement. The label 'quasi-partnership' is unhelpful and unsatisfactory as a touchstone for the grant or withholding of relief. As I pointed out to Mr Newington-Bridges in closing, the end result of his conduct has been to leave Christian in control of the company, free to do whatever he chooses without reference to his lawfully appointed co-director, and without the proper application of the carefully crafted checks and balances that the articles and the Shareholders' Agreement were designed to provide against the use of Christian's casting vote, in terms of the calling of proper board meetings, the exclusion of reserved matters, and the regular provision of financial information by the company, as distinct from Christian in his role as its managing director.

75. In my judgment, whilst they overstate the position, the conclusions at the end of Mr Kottke's witness statement, at paragraphs 115 to 117, are largely justified. I find that Christian has acted in breach of clause 4.2 of the Shareholders' Agreement and acted in disregard of article 11.1 of the articles. He has thereby breached his duties under ss. 171 and 172 of the 2006 Act. When viewed objectively, his conduct has been unfairly prejudicial to the interests of the petitioner as a member of the company, as tending to undermine the relationship between the parties under the Shareholders' Agreement, and to compromise the good and proper administration of the company.

76. I would not, however, criticise Christian for failing to communicate, or to co-operate, with Mr Wustefeld since his status and entitlement to represent the petitioner was never entirely made clear. The email from Mr Jensen of 28 November 2019, announcing Mr Wustefeld's appointment, stated in terms that Mr Kottke would

remain as a director of the company; but it announced that he would "also be supported by Matthias in any Macom UK board decisions". Under clause 5.3 of the Shareholders' Agreement, the petitioner had the right to appoint either a director or an observer, but not a person to support a director.

VII: Reserved matters

77. This complaint is addressed at paragraphs 44 to 46 of Mr Harper's skeleton argument. In his response (at paragraphs 68 to 74 of his skeleton) Mr Newington-Bridges did not challenge the fact that these service agreements involved reserved matters that had been entered into without the consent of the petitioner, and thus in breach of clause 7.1 of the Shareholders' Agreement. His focus was upon the absence of any pleading, still less any evidence, that the entry into any of these agreements caused any loss or damage to the company, or that the petitioner suffered any prejudice thereby. He also points to the fact that in its commercial transactions, the company had regularly incurred expenditure in excess of £2,000, as recorded in the company's accounts, which were seen regularly by the petitioner and by Mr Kottke, and that there had been no complaint about this prior to this threatened litigation and the presentation of this petition. Mr Harper's only real answers to these valid points was that, viewed objectively, these breaches of the Shareholders' Agreement were unfairly prejudicial, as undermining the relationship between the parties under the Shareholders' Agreement, compromising the good and proper administration of the company, and depriving the petitioner of the involvement in the affairs of the company that it was promised. He also referred me to the decision in *Re Audas Group Ltd* [2019] EWHC 2304 (Ch) at [122] – [132] where, sitting as a Judge of the High Court, Judge Halliwell QC found that breaches of reserved matters provisions amounted to unfairly prejudicial conduct.

78. I accept Mr Harper's characterisation of these breaches of clause 7.1 of the Shareholders' Agreement. Whether viewed alone or in combination, they would probably not merit the grant of any remedy beyond a mild ticking-off of Christian. But, viewed in the context of the other matters of which complaint is made, they point to a need to regulate the conduct of the company's affairs for the future.

VIII: Information failures

79. This complaint is addressed at paragraphs 47 to 52 of Mr Harper's skeleton argument. Mr Newington-Bridges's response is at paragraphs 63 to 67 of his skeleton argument. Whilst Christian did supply a draft business plan for 2019-2020, this was neither prepared nor approved by the company's board, and the petitioner has challenged its adequacy. The position concluded with Miles Bozeat's email to Mr Wustefeld (copied to Mr Jensen and Christian) of 7 January 2020 stating: "Finally, as per the shareholder's agreement, the business plan is to pursue profitable Information Technology consultancy sales in the UK territory, currently, as such Macom GmbH (UK) Ltd requires no other business plan." The "Business Plan" for 2020, produced on 26 June 2020 (at pp 719/3095 and 720/3096), fails properly to answer the description of a "Business Plan". Further, Christian has failed to provide operating and capital budgets and cash flow forecasts for 2019-20 and 2020-1. He has, however, supplied the petitioner with the company's annual financial statements and regular summaries of the company's financial position. Christian has not supplied certain other information concerning the company and its business which the

petitioner has requested; but I am not satisfied that this information was reasonably required by the petitioner otherwise than in the context of the breakdown of the relationship between the two directors of the company, and the dispute between Christian and the petitioner. In closing, Mr Harper referred me to letters passing between the parties solicitors', JMW Solicitors LLP and Knights Plc, between 23 March and 12 May 2020 requesting and responding (in part) to requests for financial information.

80. I agree with Mr Harper's observation in closing that, in themselves, these information failures were relatively trivial; but he submitted that they took on an added significance in view of Christian's other breaches of the Shareholders' Agreement. Viewed independently and on their own, I would not find that these information failures amounted to unfairly prejudicial conduct of the company's affairs on the part of Christian; but, in the context of the petitioner's other complaints, I find that they have tended further to undermine the relationship between the parties under the Shareholders' Agreement, and to compromise the good and proper administration of the company. Again, this complaint points to a need to regulate the future conduct of the company's affairs.

IX: Unauthorised disclosures

81. This complaint is addressed at paragraphs 53 to 56 and paragraph 99 of the skeleton arguments of Mr Harper and Mr Newington-Bridges respectively. It relates to Christian's disclosure to his father, Miles, during the course of his dealings and dispute with the petitioner and its representatives, of confidential information relating to (among other things) the day-to-day business and operations of the company and its relationship with the petitioner and the respondents, and also the terms of the Shareholders' Agreement. I am satisfied that the repeated disclosure of information by Christian to his father has been established. That information was clearly confidential: as Mr Harper put it in closing, Christian would never have disclosed any of this information to a competitor of the company. Miles is clearly not Christian's "professional adviser"; and I reject the submission that these disclosures were reasonably necessary for Christian to perform his duties to the company. These disclosures were made because Christian perceived them to be to his personal benefit in his dealings with the petitioner and its representatives.

82. I reject the further submission that the petitioner ever agreed to, or acquiesced in, Miles's involvement in the company's affairs or the petitioner's relationship with Christian. On this issue of fact, I reject the evidence of Miles and Christian and I prefer the evidence of Mr Jensen. I find that Miles's involvement has been objectively unhelpful, and unwelcome, because it has served only to make matters worse between his son and the petitioner and its representatives, and that they have always rightly viewed it as such. Miles is, and was, mistaken to think otherwise. Miles has served only to aggravate the present dispute, stoking the fires between his son and the petitioner. He has tended to pour oil on troubled waters, and he has then proceeded to set fire to that oil.

83. I therefore find that Christian has acted in breach of clause 11.1 of the Shareholders' Agreement. In doing so, I also find that Christian has thereby acted in breach of his duties to the company under ss. 172, 174 and 175 of the 2006 Act. Christian's involvement of his father in his dealings and dispute with the petitioner and its

representatives was motivated, and governed, by the desire to seek to promote and advance his own interests rather than to promote the success and interests of the company for the benefit of its members as a whole, and the petitioner in particular.

84. I acknowledge and accept that the purpose and object of clause 11.1 was and is to protect the shareholders from the disclosure of confidential information to an actual or potential competitor of the company or for the purposes of benefitting such a competitor. I note that there is no suggestion that the disclosures to Miles were detrimental to the company's business or to the petitioner financially. However, Miles's involvement has proved an irritant to the petitioner and detrimental to its relations with Christian and, through him, the company. I find that the disclosures of confidential information to Miles constituted conduct of the company's affairs that has been unfairly prejudicial to the interests of the petitioner as a member of the company.

X: Remedy

85. Having determined that Christian's conduct of the company's affairs has been unfairly prejudicial to the interests of the petitioner as a member of the company, I turn to consider the appropriate remedy. At the beginning of Mr Newington-Bridges's closing submissions on the appropriate remedy he suggested, for the first time (and after Mr Harper had already addressed the court on remedies the previous afternoon), that any further submissions on remedy should be deferred until after the court had handed down its judgment on the issues of unfair prejudice. Mr Newington-Bridges advanced two submissions in support of this suggestion. First, since the court should tailor its relief to any unfair prejudice that might be established, the court should first identify such prejudice so as to enable the parties to focus their submissions upon, and the court to formulate, a just and equitable response to the circumstances of the case, and the nature of any unfair prejudice that might be found by the court. Secondly, a buy-out order in relation to the petitioner's shares, as sought by the petitioner, might be entirely unfair to Christian because of its disproportionate effect upon him. There was presently no documentary evidence directed to this issue; and it would be appropriate for Christian to be allowed to adduce such evidence. For example, it might be appropriate for the court to allow Christian to buy-out the petitioner's shares over a period of time, so that he could generate sufficient dividends from the company's continuing trading to enable him to fund the share buy-out. That would be fairer than making an order that might have the effect of bankrupting Christian. Because of the width of the court's discretionary jurisdiction to grant relief, up-to-date information on the company's cash balances, and Christian's personal financial circumstances, might be relevant to the exercise of the court's discretion over the relief to be granted.

86. Predictably, Mr Harper strongly resisted this proposed course. The court had directed a trial of all of the issues. The court's findings on unfair prejudice would not assist the parties' ability to make submissions on the appropriate remedy. Mr Newington-Bridges could, and should, make his submissions on the appropriate remedy as part of his closing. Christian had enjoyed every opportunity to place before the court any evidence that he might have wished the court to consider on the issue of the appropriate remedy for any unfairly prejudicial conduct found by the court. He could have adduced evidence in support of any phased buy-out of the petitioner's shares, or any order that the company should be ordered to purchase some or all of those shares.

The court was looking at an admittedly dysfunctional relationship; and this should not be allowed to continue for a moment longer than was absolutely inevitable.

87. I accept Mr Harper's submissions. It would be both substantively and procedurally unfair, and unjust, to the petitioner, which has come to this court in the expectation that this trial would dispose of the entirety of its petition, to come away from this court without any final resolution of its dispute with Christian over the future of the company. On the hypothesis that submissions on remedy are necessary at all, the court would already have made findings of unfairly prejudicial conduct on the part of Christian in relation to the petitioner in its capacity as a member of the company. Due to existing diary commitments on the parts of both this busy court and counsel, it would not be possible to reconvene for submissions on remedy until, at the earliest, late in the January of next year. On that basis, the admittedly dysfunctional relationship between the two effective shareholders, and the two directors, of the company would continue well into its next financial year. Had the respondents sought a split trial, they could, and should, have asked for this at the original case management hearing before DJ Carter. On that basis, and if a split trial had been ordered, it is unlikely that there would have been any directions for any expert valuation evidence at that stage. As it is, the court has an agreed valuation for the company, as at the end of October 2019 and February 2020, of £1,400,000. The valuer for the petitioner, but not the respondents, has produced a further valuation as at 30 November 2020. If the case now goes over to next year, still further valuations will be required. The respondents have had every opportunity to adduce any relevant evidence of fact, whether documentary or by way of witness statement, on issues relevant to remedy. The issue of a split trial could have been raised at the Pre-Trial Review but it was not. Instead, it was only raised during the course of Mr Newington-Bridges's closing speech on the morning of the last day of the trial, and after Mr Harper had already addressed the court on the issues of both unfair prejudice and remedy. Mr Newington-Bridges was aware of the findings which the petitioner was inviting the court to make on the issue of unfair prejudice. The court's actual findings on that issue will not assist Mr Newington-Bridges's submissions as to the choice of appropriate remedy. I was, and I am, satisfied that Mr Newington-Bridges could, and should, make those submissions as part of his closing and not leave them over for some indeterminate future day.

88. The allegations of unfairly prejudicial conduct having been established, the court clearly has the necessary jurisdiction to intervene under s. 996 of the 2006 Act. Noting that Christian has continued to act in the manner complained of post-presentation of the petition, Mr Harper submits that the relationship between the parties is dysfunctional and therefore the only realistic order is a buy-out order. Having established unfairly prejudicial conduct, the petitioner should be entitled to the order that it seeks, namely that the respondents (as the parties responsible for the conduct of the affairs of the company in the manner complained of) should purchase the petitioner's shares. This is the ordinary and usual order, and it achieves the purpose of s. 996, namely that of remedying the unfair prejudice suffered by the petitioner. It will restore the position to that which existed prior to the Shareholders' Agreement, and to that which Christian has sought to achieve, allowing him to conduct the company's business within this jurisdiction without the petitioner's involvement. In the circumstances of the present case, there can be no suggestion that any lesser order would remedy the unfair prejudice. As a result of the unfairly

prejudicial conduct, the relationship between the parties has broken down, and the court should not perpetuate a dysfunctional relationship. It is doubtful whether the court has the power under ss. 994–996 to make a winding-up order in the absence of any alternative claim for a winding-up of the company on the just and equitable basis. Although the court is not limited to granting the relief sought by the petitioner, such relief is a major factor in deciding what relief to grant.

89. Mr Harper submits that in this case the petitioner has sought the usual order that the respondents should purchase its shares in the company. In their points of defence, the respondents did not plead that this was inappropriate relief if the grounds of unfair prejudice were established, or that any alternative remedy should be granted. By their counterclaim or cross-petition, the respondents had sought an order that the petitioner should be required to purchase their shares in the company; but this had been removed after the petitioner had pleaded in its Reply that if the respondents wished to advance their own allegations of unfair prejudice, then they would need to issue their own cross-petition. Despite stating that a cross-petition would be presented, the respondents had never done so. Although the respondents contend that the appropriate order is that the petitioner should purchase their shares in the company at a price to be determined by reference to its value as at February 2020, this has not been pleaded; nor is any justification advanced, either in the evidence or the submissions, as to why this would be a fair and proper response under s 996 to the unfair prejudice that has been found.

90. Mr Harper submits that there can be no justification for such an order; it would be detrimental and prejudicial to the petitioner (and would therefore not remedy the unfair prejudice complained of); rather it would benefit the respondents. The petitioner would be ordered to purchase the respondents' shares at a price which was not referable to the present value of the company, and in circumstances where the petitioner had been (effectively) excluded from the operation of the company for some time and would effectively be 'buying blind'. The petitioner does not wish to be ordered to purchase the respondents' shares. That is not surprising as it has no visibility as to the state and operations of the company due to the fact that (consistently with the allegations that have founded the petition) Christian has sought to conduct the business of the company without the petitioner's involvement, save for such information as has been advanced through solicitor correspondence. The respondents are effectively seeking to claim relief in their favour, and for their benefit, when they have taken the decision not to proceed with the same by way of a cross-petition. They should not be entitled to do this. Such an order would amount to an order in the respondents' favour on the petitioner's own petition, and notwithstanding the finding that Christian's conduct of the company's affairs has been unfairly prejudicial to the interests of the petitioner as a member of the company. It would unfairly reward Christian for his own unfairly prejudicial conduct.

91. The petitioner's valuation of the company of £1.4 million has been agreed and therefore the sum payable by the respondents for the petitioner's shares will be £840,000. There is no adequate evidence from the respondents that they cannot afford to pay this sum, but merely Christian's bare assertions from the witness box. If they cannot afford to pay £1.4 million, then that is a potential problem for the petitioner in terms of enforcement.

92. Mr Newington-Bridges points out that the effect of clause 10.3 of the Shareholder's Agreement is that if the petitioner is to transfer its shares to the respondents, whether by order of the court or otherwise, the petitioner would be prevented from setting up, or operating, its own business in the UK for three years under the terms of that Agreement. However, it seems to me that that is a matter for the petitioner and it should not affect the exercise of the court's powers under s. 996 if the petitioner chooses, and elects, to seek a buy-out order in relation to its shares.

93. Mr Newington-Bridges submits that the court has a wide discretion in relation to remedy and it may be that the fair and reasonable remedy, in the face of a finding of unfair prejudice, would be that the petitioner should be ordered to buy-out the respondents' shares; in that way the petitioner would be able to continue to trade in the UK and Christian would also be free to make a living for himself and his family by way of setting up some form of alternative business. Furthermore, Christian is the minority shareholder in the company. He is not a well-resourced, large international consultancy with significant means with which to buy-out another shareholder, as the petitioner is. The fair remedy in all the circumstances, so he submits, would be for the petitioner to buy-out Christian. This would not be to reward Christian for his unfairly prejudicial conduct because he would lose the means by which he presently makes his living: the business which he was instrumental in building up and developing and which would otherwise continue to generate salary and dividends for him. Mr Newington-Bridges points out that £1.4 million is an historic valuation of the company and that the petitioner's own expert valuation evidence demonstrates that the company has declined in value since that date. Mr Harper counters that: (1) this valuation relates back to the time when Christian effectively excluded the petitioner from the company, which has had no effective oversight or control of the company's trading since this time, and there is therefore no unfairness in visiting upon the respondents the financial consequences of any adverse trading since the valuation date; and (2) DJ Carter's order had not been prescriptive as to the date of any valuation of the company and, had he been minded to do so, Christian could have produced a more -up-to-date valuation of the company.

94. In the alternative, Mr Newington-Bridges submits that the court should make an order regulating the conduct of the company's affairs for the future. In view of the court's findings of unfair prejudice in relation to the governance and management of the company, that would be the appropriate remedy to grant in all the circumstances of the case. Absent any financial prejudice to the petitioner from Christian's unfairly prejudicial conduct, a crippling financial remedy would not be an appropriate response. Despite what Mr Newington-Bridges described as Christian's equivocal answers to questions from the Bench at the end of his oral evidence, Mr Newington-Bridges assured the court that Christian would agree to the terms of any order which the court might see fit to make to regulate the affairs of the company going forward; he accepts that this could work, and he would do his utmost to comply in the best manner possible. Mr Harper responded to this suggestion by pointing out that Christian has not sought to engage with the petitioner, or with the court, in suggesting any terms that would adequately address the need for the future regulation of the company's affairs. It is both improper and unfair, to leave it to the court to formulate such terms.

95. At the end of his evidence I asked Christian whether he felt that he could still work constructively with Mr Kottke going forwards. Christian's response was that back at the time when he had offered the role of operations manager/director to Mr Kottke in November 2019, he had still believed that they could work constructively together. In the light of subsequent events, and specifically the discovery of Mr Kottke's redaction of Christian's email of 24 September 2019, Christian was no longer sure that he could continue working with him. Although Mr Kottke was said to be a good engineer and a good chap, there was now a lot of bad blood between Christian and Mr Kottke and the petitioner's wider team. Christian did want the company to continue and to grow; but the ways things were now, and after all that had happened, Christian said that he would find it challenging to work with the petitioner and its representatives; nor was he sure that they would wish this since they seemed to want to grow the company's business in a different manner. Personally, Christian did not think it would work. He said that he would comply with any order in the best manner possible; but he did not think that this would be the best for either party. As for a buy-out of the petitioner's shares for £840,000, Christian said that there was no way that he could raise that sum of money. He could not remain in his house if such a buy-out order were to be made. That was why, in 2019, he had suggested that the petitioner should buy the respondents out of the company.

96. On Mr Newington-Bridges's submission that there should be a buy-out order in favour of the respondents, I accept the submissions of Mr Harper. This would be a grossly unfair and unjust response to Christian's unfairly prejudicial conduct. If the price were to be fixed by reference to the existing valuation, it would over-value the respondents' shares, to the petitioner's detriment. It would be unfair on the petitioner to subject it to the costs of any further share valuation when the respondents had not proposed any later valuation date. It would leave the petitioner freely exposed to competition from Christian.

97. However, I accept Mr Newington-Bridges's submission that it would be a wholly disproportionate response to the unfair prejudice found by the court, and unfair to Christian, to order him to buy-out the petitioner's shares, particularly by reference to an historic, pre-pandemic valuation date, when such prejudice has caused no provable financial loss to the petitioner. The over-arching requirement of s. 996, if it exercises its discretion to grant relief for unfair prejudice, is that the court should "make such order as it thinks fit for giving relief in respect of the matters complained of". Therefore any relief must be proportionate, and must respond to the particular unfair prejudice established. Where the unfair prejudice relates to the governance and management of the company, an order regulating the future conduct of the company's affairs may be the most appropriate remedy to grant in all the circumstances of the case. I am satisfied that this would be so in the present case, where an order for the respondents to buy-out the petitioner's majority shareholding would have a crippling and disproportionate effect upon them. I recognise Mr Harper's point about the lack of satisfactory evidence about the respondents' means and financial position; but in my judgment the way in which Christian has needed to dip in to his loan account with the company each half year in order to pay the tax liabilities of himself and his wife speaks volumes in that regard.

98. I acknowledge Mr Harper's point that it should not be left to the court, unaided by the parties, to craft any order regulating the future conduct of a company's affairs. But

where both children have started throwing their toys out of their respective prams (as has been the case here), nanny may sometimes have to impose order upon them. I will invite both parties' counsel to prepare an appropriate draft order. What I have in mind is to require the petitioner and the respondents to comply with the relevant provisions of the company's articles and the Shareholders' Agreement. Christian is to accord full recognition to the petitioner's appointed director, even though he holds no shares in the company. Company decisions are to be taken by the board (subject to Christian's casting vote on non-reserved matters.) There are to be regular board meetings (which may be conducted remotely) at such regular intervals as the parties may agree and, in default if agreement, at no less than two-monthly intervals. Such meetings are to be recorded for the purposes of preparing accurate minutes. Financial information, reports and other documentation are to be provided in accordance with the terms of the Shareholders' Agreement. The directors' loan accounts are never to be overdrawn save with the petitioner's prior written approval. No confidential information or documentation is to be provided to Mr Miles Bozeat, who is to play no further part in the company's affairs.

99. Any breach of the terms of the court's order, apart from amounting to a potential contempt of court, punishable by fine or imprisonment, is likely to be relied upon to found a further unfair prejudice petition: and any such petition may include a prayer for the winding-up of the company on the just and equitable ground. Although initial directions on any such petition would fall to be given by a nominated District Judge of the Business and Property Courts, a copy of this judgment should accompany any such petition; and the District Judge should be invited to reserve any subsequent case management directions to me (if available).

100. That concludes this substantive judgment.

ADDENDUM

101. Paragraph 100 of this judgment has proved to be unduly optimistic. I had originally hoped to be able to hand this judgment down at a remote hearing on Thursday 17 June; but the work of preparing the draft judgment proved to be more extensive and time-consuming than I had foreseen and, after consulting counsel on Wednesday 16 June as to their availability, I put the hand-down hearing back to 10.00 am on Monday 21 June. In the event, that may have proved welcome to Mr Harper because I understand that he was still engaged in an attended committal hearing before HHJ Cawson QC on the morning of Thursday 17 June. I circulated the first draft judgment of this judgment by email shortly after 4.40 pm on Friday 18 June. With commendable speed, at about 6.20 pm that evening Mr Harper sent me a note by email (copied to Mr Newington-Bridges) addressing consequential issues. This note raised issues about the court's reasoning and decision on the issue of remedy that were intended to found an application by the petitioner for permission to appeal. Mr Harper raised these matters at this time to give the court an opportunity to consider them when finalising this judgment. He submitted that that there were substantive issues with the court's approach and reasoning under s. 996. He invited the court to consider these issues and (as appropriate) to address them in its judgment before finalising the same.

102. On the morning of Saturday 19 June I received a circular email from Mr Newington-Bridges. This drew the court's attention to fairly recent observations of Chamberlain J in *Michael Wilson & Partners Ltd v Sinclair* [2020] EWHC 1017 (QB) at [12]:

> "This judgment, exactly as it appears above, was produced in draft in the usual way and sent, under embargo, to the parties for their editorial corrections. Professional lawyers ought to know that the circulation of draft judgments for this purpose should not be taken as a pretext to reargue the case. It has been said on many occasions that an invitation to go beyond typographical and other minor corrections and reconsider the substance should be made only in the most exceptional circumstances: see e.g. *Egan v Motor Services (Bath) Ltd (Note)* [2008] 1 WLR 1589, [49]-[51] (Smith LJ); *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2011] QB 218, [4] (Lord Judge CJ); *In Re I (Children)* [2019] 1 WLR 5822, [25]-[41]. As King LJ put in in the latter case, at [41], 'a judge's draft judgment is not an 'invitation to treat', nor is it an opportunity to critique the judgment or to enter into negotiations with the judge as to the outcome or to reargue the case in an attempt to water down unpalatable findings'."

Mr Newington-Bridges doubted that Mr Harper was suggesting that the court should reconsider the substance of its judgment, recognising that his note had been addressed to his prospective application for permission to appeal; but he nevertheless thought that his authority might be useful in the circumstances.

103. Mr Harper immediately responded by email confirming, for the avoidance of doubt, that he was not suggesting that the court should reconsider the substance of its judgment; rather (and in accordance with Court of Appeal guidance) he had merely been giving the court the opportunity to address any of the appeal issues before finalising its judgment.

104. I replied immediately by circular email confirming that it had been my understanding that the purpose of Mr Harper's note had been to give me an opportunity to address his appeal issues before finalising my judgment. I indicated that I would be sending out a revised draft judgment with an addendum addressing Mr Harper's note but, due to my pre-existing commitments over the weekend, that was unlikely to be before late on Sunday evening. I explained that the reason why the matter had been listed for 10.00 am on Monday was that I had been told that Mr Newington-Bridges was only available on Monday, Tuesday or Friday of next week; that I could not hear the matter on Friday because I already had a very full applications list that day; and that Mr Harper's clerk had indicated that he was only available on Monday morning. I offered to put the hearing back to later on Monday or to Tuesday if Mr Harper were available and both counsel would prefer that; but Mr Harper quickly confirmed by email that, unfortunately, he was due to be appearing in the Court of Appeal on Tuesday and Wednesday and so was unavailable except on Monday morning. Unfortunately, after this coming Friday, 25 June, I am not due to be sitting again to hear Manchester work until Monday 26 July; and it is my understanding that Mr Harper is not able to undertake any professional commitments during that week. The hearing this Monday morning must therefore stand.

105. It is against this background that I must turn to the substance of Mr Harper's note. As regards the terms of the court's substantive order, he suggests that there has been

insufficient time for the parties and their representatives to agree the terms of any order, the breach of which would amount to a contempt of court. The petitioner proposes that time should be given to the parties to agree the terms of the court's order, with permission to apply to the court in the event that terms cannot be agreed.

106. I have explained why it is not practicable for more time to be given before the substantive judgment is handed down. The court has identified the principal terms of the order which it proposes to make at [98] above. The court reminds the parties of the duty which rests upon them under CPR 1.3 to help the court to further the overriding objective. They should produce an editable word document incorporating terms which give effect to the court's order and identifying any differences which remain between the parties as to those terms. Any differences can be resolved by the court by way of email exchanges.

107. Costs issues will be addressed at the hand-down hearing.

108. Mr Harper seeks permission to appeal. He says that an appeal by the petitioner not only has real prospects of success but is one that engages important issues as to the remedies available to the court under s. 996 and the factors which the court should take into account when granting any remedy under that section.

109. The petitioner's proposed ground of appeal is that the court's exercise of its discretion under s. 996 produced a decision that was outwith the range of reasonable decisions open to the court and/or was reached after taking irrelevant factors into account or after ignoring relevant factors.

110. Mr Harper submits, first, that despite finding that (a) there had been unfairly prejudicial conduct, including breaches of the terms upon which the parties had agreed to conduct their relationship and the affairs of the company, and (b) the relationship between the parties was dysfunctional – with the petitioner not wishing to continue in business with the respondents, thereby explaining why each party was seeking a conventional buy-out order against the other - the court has decided that the parties should remain in business together on the terms of the Shareholders' Agreement, backed up by an injunction (the terms of which the parties are to agree) with the result that any breach of the same may lead not only to another petition but also potential proceedings for contempt of court.

111. Secondly, in doing so the court has (at [97]) ordered this because "it would be a wholly disproportionate response to the unfair prejudice found by the court, and unfair to Christian, to order him to buy-out the petitioner's shares, particularly by reference to an historic, pre-pandemic valuation date, when such prejudice has caused no provable loss to the petitioner". Breaking this down, Mr Harper submits that:

(1) Christian and his advisers chose not to adduce expert evidence of the valuation of the company at the date of the hearing (although the petitioner did so) nor did it agree the petitioner's valuation at the later date. The respondents omitted to do so because they wrongly gambled on the court ordering the petitioner to purchase their shares. They could, and should, have been in a position to ask the court to value the petitioner's shares by reference to a later date but they chose not to do so; and the court is said to have rewarded them for this failure.

(2) If this were a concern for the court, it could have explored with Christian whether or not he would accept the later valuation proffered by the petitioner.

(3) If the Court were to conclude that the amount and the date of valuation were factors that should militate against the order sought by the petitioner, then it has to address (1) and (2) above.

(4) The court has not only ignored these points but it has also been overly influenced by the bare assertion by Christian that the respondents would not be able to afford to comply with a purchase order and that it "would have a crippling and disproportionate effect upon them". Not only was this not sustained by the evidence (because the drawings that the respondents take from the company do not indicate what resources they have, or could have had recourse to, in order to realise or raise the necessary funds) but it was also legally irrelevant; in effect, the court has said that the respondents will not be able to pay so it will not order them to pay.

(5) The fact that the petitioner has not suffered loss is irrelevant. It has established unfair prejudice. The absence of loss is not a reason to deprive the petitioner of a remedy.

(6) The unfair prejudice found by the court was that Christian had, in numerous instances, acted in breach of the terms upon which the parties had agreed that they would operate in business together. The response of the court to remedy that unfair prejudice by ordering the parties to continue in business together on terms to be agreed, backed up by an injunction, is no proper remedy for that unfair prejudice.

(7) The court has ignored the views of the petitioner as to the remedy (despite this being a key consideration: see ***Hawkes v Cuddy***) and it has been wholly influenced by an evidentially unjustified concern as to Christian's ability to comply with any buy-out order and the consequences for him if he does not do so.

(8) The petitioner does not want to continue in business with the respondents, not only because of the unfair prejudice alleged by the petitioner and found by the court, but also for the same reasons that they did not wish to purchase the respondents' shares, namely they do not know what has been going on in the company.

(9) It is of note that the court asked Christian his views as to continuing in business with the petitioner but it did not ask the same of either Mr Jensen or Mr Kottke. In the light of the approach that the court has adopted as to remedy, this is, and was, materially unfair.

112. I make the following clear: First, the court has at all times had regard to the overarching principle, advanced by Mr Harper at paragraph 25 of his skeleton argument (and recorded at [40] above), that the purpose of granting relief under s. 460 of the 2006 Act is to remedy the specific acts of unfair prejudice which the court has found that the petitioner has suffered as a result of the unfairly prejudicial conduct of the respondents, and that the court's powers are very wide. It is not correct to claim that the court has denied the petitioner any remedy for the unfair prejudice that it has found that the petitioner has suffered. Rather, it has granted what it considers to be the appropriate and proportionate remedy for the unfairly prejudicial conduct that it has suffered.

113. Second, the court has not ignored the views of the petitioner as to the appropriate remedy to be granted in response to the unfair prejudice which it has suffered. In its judgment, the court has repeatedly acknowledged that the relief sought by the petitioner was clearly a relevant factor to be weighed in the balance when deciding what remedy to grant; and the court has also recognised that the petitioner's opposition to any form of relief, other than an order for the respondents to buy-out its shares, was a major factor for the court to take into account, and weigh in the balance, when it came to exercise its discretion as to remedy: see [52], [54], [55] and [57] above. The court took these factors fully into account when it came to exercise its discretion as to remedy. The court also had regard to Mr Harper's submission (recorded at [88] above) that the relationship between the parties was dysfunctional and therefore the only realistic order was a buy-out order. In addition, the court also had in mind the observations of Briggs J in the case of ***Sikorski*** that were cited to the court by Mr Harper (as recorded at [50] above).

114. Third, the court has not been influenced, whether wholly or in substance, by any concern, whether evidentially unjustified or not, as to Christian's ability to comply with any order made by the court or the consequences for him if he did not do so. The court considered that an order for the buy-out of either party's shares would not be the fair, proportionate or appropriate responsive remedy to the unfair prejudice that it has found in the present case, irrespective of any difficulties that the respondents might experience in complying with any order for the buy-out of the petitioner's shares. This was merely an additional factor militating against the making of a buy-out order.

115. Fourth, the court was alive to the fact that had it been appropriate to order the respondents to buy-out the petitioner's shares at a more recent valuation date, it could have ordered a more-up-to-date valuation of the company, probably at the respondents' cost. The court has in no way rewarded the respondents for their failure to provide relevant up-to-date valuation evidence. This was merely an additional factor that militated against the making of any buy-out order. That was what the court had sought to convey by its use of the word "particularly" in the first sentence of [97] of this judgment.

116. Fifth, the court does not accept that it was at all unfair to ask Christian his views as to continuing in business with the petitioner even though it did not ask the same of either Mr Jensen or Mr Kottke. The court was fully aware, from the evidence and Mr Harper's opening skeleton argument, that the petitioner did not want to continue in business with the respondents, not only because of the unfair prejudice alleged (and ultimately found), but also for the same reasons that they did not wish to purchase the respondents' shares, namely they did not know what had been going on in the company. However, the respondents had not suggested that an appropriate remedy for any unfair prejudice might be an order regulating the future conduct of the company's affairs. The company wanted to know Christian's response to this, as he was the company's effective operating presence in the UK and, as a result of his casting vote on the board, he was its controlling mind (subject to the reserved matters). In the event, Christian's evidence (recorded at [95] above) was, if anything, more helpful to the petitioner's case than it was to the grant of the respondent's ultimate alternative suggested remedy. However, the court did bear in mind Christian's expressed willingness to comply with any order the court might make in the best manner possible even though he did not think that this would be the best

outcome for either party. The court also recognised that Christian's misapprehension as to the true status of Mr Kottke, or any other petitioner-appointed director, which has been so productive of the dissension between the parties and their representatives, has now been resolved by the court's determination as to the true inter-relationship between clauses 5.3 and 5.4 of the Shareholders' Agreement.

117. Sixth, the court is fully alive to the fact that the petitioner does not wish to continue in business with the respondents. However, the court did not consider that a buy-out order in the petitioner's favour was the appropriate response to the unfairly prejudicial conduct that had been established on the part of the respondents. If the petitioner wishes to dispose of its shares in the company, the court considers that it should resort to the mechanisms agreed in the articles and the Shareholder's Agreement. The court had noted that early in his cross-examination, Mr Jensen, as the petitioner's Chief Executive Officer, had acknowledged that in the event of a dispute with any decision made by Christian (otherwise than in respect of any of the reserved matters), there was ultimately nothing that the petitioner could do about it.

118. For these brief further reasons, the court cannot agree with Mr Harper that the informed, and principled, exercise of its discretion under s. 996 of the 2006 Act has produced a decision that was outwith the range of reasonable decisions open to the court, or that its decision was reached after taking into account irrelevant factors or after ignoring relevant factors.

JUDGMENT ON HANDING DOWN

119. I formally handed down my substantive judgment at a remote hearing by Teams on Monday, 21 June 2021. Happily, over the weekend counsel had largely agreed the terms of an appropriate order to reflect the terms of the court's judgment and I was able to resolve the few minor, outstanding matters. A copy of the Court's Order appears at the end of this further Judgment. Inevitably that left the issue of costs to be determined, together with Mr Harper's application for permission to appeal the court's decision as to remedy.

120. As regards costs, Mr Harper submitted that the petitioner had succeeded on its petition save that it had not obtained the relief that it had sought under s. 996 of the 2006 Act. The petitioner had secured a finding (as evidenced by the relevant recital to the court's order) that "the conduct of the company's affairs by the first respondent has been unfairly prejudicial to the interests of the petitioner as a member of the company". The petitioner has not secured its primary relief, but the relief obtained fell within the scope of paragraph (2) of the prayer for relief in the petition (as noted at [56] above). The respondents have been unsuccessful save that the court has acceded to their alternative, and secondary, submission (never previously suggested in their pleadings, their witness evidence, or counsel's opening skeleton as a possible, appropriate remedy) that the court should make an order regulating the affairs of the company moving forward. Mr Harper therefore submitted that there was no reason to depart from the usual order that the petitioner should be entitled to its costs; and for the court to deprive it of those costs, or any material proportion of them, would be unreasonable and would amount to rewarding the respondents for their unfairly prejudicial conduct of the company's affairs. In the light of the primary relief, in the form of share buy-out orders, sought by both parties, the expert valuation evidence

had been necessary; and it had not been wasted since it had helped to inform the exercise of the court's discretion as to remedy.

121. Mr Newington-Bridges pointed out that the petitioner had not secured the order that the respondents should purchase its shares in the company at their fair value that it had claimed as "the appropriate remedy" (at paragraph 57b of Mr Harper's skeleton) and had sought at trial. It was therefore not correct to characterise the petitioner as the successful party because it had not got what it had wanted, as was apparent from the fact that it was the petitioner which was seeking permission to appeal the court's order. On the petitioner's core complaint of taking unauthorised remuneration, it had been apparent at trial that neither Mr Kottke nor Mr Jansen had properly analysed the relevant sums; and substantial time had been taken up at the trial in doing so, which had revealed that the petitioner's key complaints about the £18,868 and the £110,000 had been substantially misconceived, thereby making a share buy-out order much less likely. The petitioner had also failed to make out the 60/40 retention agreement pleaded at paragraph 21d of the petition. A significant amount of time had been taken up with the redacted email. It was only at trial that Mr Kottke had admitted responsibility for the redactions; and the differing explanations for the redactions had not been borne out by the evidence and were absurd. The court had found that taken on their own, the complaints about reserved matters and information failures would not have amounted to unfairly prejudicial conduct. In its judgment at [98], the court had recognised that both parties to the dispute had been at fault in squabbling about the company's affairs. The court's costs order should fairly reflect these matters. The appropriate order was either that there should be no order as to costs or an order that the respondents should pay a proportion of the petitioner's costs, in the order of 50%.

122. There have been no relevant admissible offers to settle.

123. The court is satisfied, in the exercise of its discretion as to costs, that the petitioner is the successful party and that there is no good reason, whether relating to conduct or otherwise, why it should not recover its costs in full (subject to assessment).

124. The petitioner has succeeded in establishing that Christian's conduct of the company's affairs has been unfairly prejudicial to the petitioner's interests as a member of the company. The petitioner has succeeded in (1) securing a finding of unfairly prejudicial conduct and (2) obtaining an order regulating the conduct of the company's affairs going forward. In the absence of any relevant offer of settlement, it was necessary for it to proceed to trial in order to achieve this. The petitioner has not secured the relief which it had sought; but neither have the respondents secured the alternative relief which they had sought in the event of a finding of unfairly prejudicial conduct (which they had denied).

125. The matters on which the respondents have achieved some limited, and qualified, measure of success were matters which had required investigation at trial; and such investigation has not added significantly to the costs of either the proceedings or the hearing. Christian (and his father) had misunderstood the provisions of the Shareholders' Agreement and the articles, yet they had not sought professional legal advice as differences had emerged between themselves and the petitioner. It would not be just to the successful petitioner to allow any discount from the usual order that the successful party should be entitled to recover its costs from the unsuccessful party to the petition.

126. Mr Harper sought an interim payment on account of costs (pursuant to CPR 22.2 (8)) in the round sum of £200,000, representing roughly 60% of the incurred costs in the approved budget and 90% of the approved budgeted future costs. Mr Newington-Bridges rightly did not oppose an interim payment; but he submitted that it should be in the sum of £172,750, representing some 50% of the incurred costs and 75% of the future costs. The court accepted that Mr Harper's percentages were more in line with recognised practice; but it made a small deduction from his total figure to reflect an enhanced margin of safety and it determined that the interim payment should be £195,000. Without opposition from Mr Harper, the court allowed 28 days for payment (until 19 July 2021).

127. The court refused the petitioner's application for permission to appeal the court's decision on remedy. For the reasons stated in the addendum to the court's approved judgment, the court considered that an appeal against the exercise of the court's discretion as to the appropriate remedy would stand no real prospect of success. On this basis, Mr Harper did not suggest that there was any other reason (still less any compelling reason) why an appeal should be heard.

ORDER

Case No: CR-2020-MAN-000461

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN MANCHESTER

INSOLVENCY & COMPANIES LIST (ChD)

IN THE MATTER OF MACOM GMBH (UK) LIMITED (Company Number 10261778)

AND IN THE MATTER OF THE COMPANIES ACT 2006

BEFORE HIS HONOUR JUDGE HODGE QC SITTING AS A JUDGE OF THE HIGH COURT ON MONDAY 21 JUNE 2021

BETWEEN:

MACOM GMBH

Petitioner

-and-

(1) CHRISTIAN MARK RANDALL BOZEAT

(2) VIRGINIA JANE BOZEAT

(3) MACOM GMBH (UK) LIMITED

Respondents

ORDER

BEFORE His Honour Judge Hodge QC sitting remotely at Manchester Civil Justice Centre

UPON the trial of the petition (presented pursuant to s. 994 Companies Act 2006) herein taking place via Microsoft Teams on 7 – 11 June 2021

AND UPON the handing down of judgment taking place via Microsoft Teams

AND UPON hearing Leading Counsel (Mark Harper QC) for the Petitioner and Counsel (Charlie Newington-Bridges) for the First and Second Respondents ("the Respondents"), the Third Respondent ("the Company) taking no part in the trial

AND UPON the Court finding that the conduct of the Company's affairs by the First Respondent has been unfairly prejudicial to the interests of the Petitioner as a member of the Company

AND UPON the Court declining to make a share purchase order in favour of either party

IT IS ORDERED THAT:

1. During the period that they remain shareholders in the Company and save as may be agreed between them in writing:
    a. The Petitioner and the Respondents shall comply with the terms of the Shareholders and Subscription Agreement dated 6 September 2017 ("the Agreement");
    b. The Petitioner and the First Respondent shall each conduct the affairs of the Company in accordance with the Agreement and the Articles of Association relating to the Company;
    c. The business of the Company shall (in accordance with the terms of the Agreement and the Articles of Association) be conducted at board meetings to be held (including remotely) at such intervals as the parties may agree but, in default of agreement, no less than one every two months;
    d. Company decisions are to be taken by the board (subject to the First Respondent's casting vote on non-reserved matters);
    e. Board Meetings shall be recorded for the purposes of preparing board minutes and agreed versions of the minutes shall be maintained by the Company following which the recordings can and shall be deleted;
    f. The loan accounts with the Company are not to be overdrawn save with the prior written approval of the shareholders (which is to be governed by the provisions of the Agreement);
    g. In particular:
        i. The First Respondent shall, notwithstanding that he/she may have no shareholding in the Company, accord full recognition to any person appointed by the Petitioner as director of the Company pursuant to clause 5.3 of the Agreement;
        ii. The First Respondent shall not make drawings from the Company save with the prior written approval of the shareholders;

iii. The First Respondent shall not cause the Company to transact business in relation to the Reserved Matters (defined in the Agreement) other than in compliance with clause 7 of the Agreement;

iv. The First Respondent shall not disclose any confidential information or documentation (as defined in the Agreement) relating to the Company to his father, Miles Bozeat nor shall he cause or allow Miles Bozeat to take any part in the operation of the Company or the Company's affairs.

2. The parties shall (without prejudice to any other courses of action open to them) each have permission to apply for further orders in relation to the management of the Company including (but not limited to) for the order in paragraph 1 above (or such other orders as may be subsequently made) to be made subject to a penal notice.

3. The First Respondent shall pay the Petitioner's costs of the proceedings such costs to be the subject of a detailed assessment. The First Respondent shall pay the sum of £195,000 on account of the aforesaid liability, such payment to be made no later than 19 July 2021.

4. The Petitioner's application for permission to appeal is refused.