Neutral Citation Number: [2024] EWHC 2104 (Ch)

Claim No: CR-2022-BHM-000439

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
COMPANIES COURT (ChD)
In the matter of Brand Evolution Ltd
And in the matter of the Companies Act 2006

Priory Courts
33 Bull Street
Birmingham, B4 6DS

Date: 8 August 2024

HIS HONOUR JUDGE RICHARD WILLIAMS
(Sitting as a High Court Judge)

- -

Between:

DEAN JOSEPH BANFIELD

Petitioner

- and –

(1) PAUL ROBERT EDWARDS
(2) NEIL GORDON GILES
(3) EMMA KATHERINE FISHER
(4) BART WAI KIT CHEUNG
(5) BRAND EVOLUTION LIMITED

Respondents

- -

Maria Mulla (instructed by MFG Solicitors LLP) for the **Petitioner**
Mark Grant (instructed by Shakespeare Martineau LLP) for the **First to Third Respondents**
Tony Watkin (instructed by Lodders Solicitors LLP) for the **Fourth Respondent**
The **Fifth Respondent** was not represented

Hearing dates: 19-21 February & 1 March 2024

Written closing submissions filed sequentially by 12 April 2024

(draft judgment sent to the parties' legal advisers by email dated 1 August 2024)

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JUDGMENT

Introduction and background

1. This is my judgment following the trial (liability only) of an unfair prejudice petition presented pursuant to s.994 of the Companies Act 2006 ("***the 2006 Act***") alleging that the affairs of the Fifth Respondent, Brand Evolution Limited ("***the Company***"), have been conducted in a manner unfairly prejudicial to the interests of the Petitioner, Mr Dean Banfield ("***P***"), as a member of the Company.

2. P, Mr Paul Edwards ("***R1***"), Mr Neil Giles ("***R2***"), Ms Emma Fisher ("***R3***") and Mr Bart Cheung ("***R4***") all worked together for several years at Design One Limited ("***DOL***"), which was a graphic design company providing branding and marketing services.

3. With effect from 4 August 2010, DOL was placed into administration and the workforce made redundant. P, R1, R2, R3 and R4 ("***the Founders***") decided to continue to work together by acquiring the business of DOL through the Company, which was incorporated on 5 August 2010.

4. By an agreement dated 23 August 2010, the joint administrators sold the assets of DOL to the Company for the sum of £15,000.

5. The Founders were all appointed directors of the Company.[1]

6. The Founders each contributed working capital of £5,000 save for R3, who contributed £250. The original Articles of Association divided the Company's shares into:

    a. P ordinary shares ("***Ownership Shares***"), which conferred rights to vote and to participate in any income/capital distributions declared on this class of share; and

    b. Alphabet ordinary shares ("***Alphabet Shares***"), which conferred the right to receive income distributions declared on this class of share.

7. Reflecting the Founders' capital contributions, the P ordinary shares were allocated 24.75% each save for R3, who received 1%. Each Founder was also allotted a single Ownership Share (A to E). The Company's former accountant, Bernard Rogers, explained in his written evidence that:

> "[6.] ….. The P shares were the ownership shares, whilst the A to E shares were designed for paying out dividends and a class was allocated to each of Dean, Paul, Neil, Bart and Emma. The shareholders would draw monthly dividends as agreed between themselves. I had no input into this process.

[1] P and R1 were appointed directors on 17 August 2010. R2, R3 and R4 were appointed directors on 28 June 2011.

These monthly dividends were essentially the equivalent of the salaries for the directors and, as I understood, were agreed to reflect the differing contribution and roles of the individuals. The directors did take a salary up to the personal tax allowance as well and this was structured to ensure their record of national insurance payments was maintained."

8. The ownership structure of the Company was such that control could only be exercised by a minimum of 3 of the Founders, and so Mr Rogers recommended that the Founders put in place a shareholders' agreement. Newsome Vaughan LLP Solicitors ("***Newsome Vaughan***") were instructed to draft the shareholders' agreement with P and R1 being the primary points of contact with Newsome Vaughan.

9. The Petition claims that:

> "[14.] At the shareholders meeting on 23rd June 2011, a draft shareholders' agreement drafted by Newsome Vaughan was presented to the meeting for consideration (the "Shareholders' Agreement"). Confirming within an email from the Petitioner to David Lee 12th March 2014 'we are finally agreeing to sign the draft shareholder agreement'.
>
> [15.] At the meeting, the shareholders agreed:-
>
> [15.1.] to direct Newsome Vaughan to make some alterations; and
>
> [15.2.] subject to the above approved the shareholders' agreement.
>
> [16.] The Shareholders' Agreement was not signed by the shareholders at that point or subsequently.
>
> [17.] At subsequent meetings of shareholders and meetings of directors, from October 2011 onwards (at least once a year), the Shareholders' Agreement was referred to and relied upon as a binding agreement, even though it did not bear wet signatures from each shareholder.
>
> [18.] The Petitioner relied upon that common understanding between the parties and therefore did not insist that all shareholders subscribe to the Shareholders' Agreement with a wet signature.

10. Whilst it is acknowledged that there were discussions about the possibility of a shareholders' agreement, R1, R2, R3 and R4 deny that an agreement was ever reached.

11. From 6 April 2016, the Government introduced a new dividend tax regime, which included a tax free annual allowance of up to £5,000. As a consequence of this change, the Company's Articles of Association were amended to re-structure the holdings of the Alphabet Shares as follows:

    a. P's allocation to be held between P, his wife and his son;

    b. R1's allocation to held between R1, his mother, his father and a friend;

    c. R2's allocation to be held between R2 and his wife;

d. R3's allocation to be held between R3 and her son; and

e. R4's allocation to be held between R4, his father and his mother.

12. It is P's pleaded case that:

a. As a result of the breakdown of the personal relationship between him and R1, P began looking for alternative employment and was finally offered a job with Severn Trent Water.

b. P began to negotiate his exit from the Company. "Around early 12 March 2018", the Founders met and it was verbally agreed that –

i. P would sell his shares, which would be offered to his co-shareholders and the Company;

ii. P's shares would be valued using the mechanism set out in the shareholders' agreement;

iii. the sale and purchase of P's shares would take place after the valuation process had been completed; and

iv. P would resign as director forthwith and await the outcome of the valuation process.

13. Whilst R1 - R3 acknowledge that there were some discussions about the possibility of P's shares being acquired, they and R4 deny that there was ever any agreement that they or the Company would do so.

14. On 3 April 2018, P gave notice of his resignation as a director of the Company.

15. On 9 April 2018, P ceased working for the Company and commenced employment at Severn Trent Water.

16. On 10 April 2018, Angelo Moreira ("***Angelo***"), who was already employed by the Company as lead programmer, was appointed a director of the Company.

17. On 25 April 2018, the Company's Articles of Association were again amended to allot Alphabet Shares to Angelo and his wife.

18. On P's instructions, BSS & Co valued P's shareholding as at 30 June 2018 in the sum of £148,200. A copy of that valuation was sent to the Respondents.

19. Mr Rogers was instructed to prepare a valuation on behalf of the Company of P's shareholding, which Mr Rogers valued in the sum of £23,689. Mr Rogers expressed the view that BSS & Co had mistakenly failed, when calculating maintainable profits, to adjust the directors' remuneration to reflect proper commercial/market rates. Mr Rogers again noted in his valuation that:

> "As is common in small companies, [the Company] uses 'alphabet' series of shares as a basis for paying monthly remuneration. The directors and Shareholders each draw an agreed monthly amount which is in effect their

salary. The amounts differ depending on their individual contribution to the success of the company."

20. On 15 February 2019, R4 resigned as an employee of the Company but remained as a director of the Company until 11 October 2019 when he resigned his directorship.

21. The Petition was issued on 22 September 2022.

22. The non-binding estimates of the value of P's shares subsequently filed for the purposes of these proceedings were:

    a. P – £177,840.

    b. R1, R2 and R3 - £26,000.

    c. R4 - £57,000.

23. On those estimates, the amount in dispute appears to be some £150,000. The case was not subject to costs budgeting, and the parties have together incurred disproportionate legal costs well in excess of the amount in dispute. Whilst hindsight is of course a wonderful thing, I consider it unfortunate that this case was not listed for a Chancery Financial Dispute Resolution ("***Chancery FDR***") appointment in an attempt to settle the case at an early stage and before significant costs were incurred. The judge conducting a Chancery FDR acts as both a facilitator (mediation) and an evaluator (early neutral evaluation), which combination is particularly effective in resolving disputes involving parties who previously enjoyed a personal relationship that has now broken down. The Chancery FDR procedure has been copied from the procedure applicable in financial remedy proceedings between divorcing spouses, and unfair prejudice petitions are themselves frequently described as "commercial divorces".

24. The hearing bundles extended to 2240 pages, the legal authorities bundles extended to 1174 pages and the written submissions of the parties' counsel extended to 104 pages. I am unable in the course of this judgment to refer to all the evidence and arguments relied upon by the Founders, but I have taken it all into account in reaching my decision.

Issues for determination

25. At the close of the evidence at trial, P abandoned his claim that, despite the co-Founders having failed to sign it, there was a binding shareholders' agreement. For what it is worth, I consider that was the correct decision having regard to the following:

    a. All the drafts of the shareholders' agreement contained in the hearing bundle are marked 'Subject to Contract'. It is possible for an agreement expressed to be 'Subject to Contract' to become legally binding if the parties later agree to waive that condition. However, in ***RTS Flexible Systems Limited*** v ***Molkerei Alois Müller Gmbh & Company KG (UK Production)*** [2010] UKSC 14, it was observed by the Supreme Court (with my emphasis added) -

        > [56.] Whether in such a case the parties agreed to enter into a binding contract, waiving reliance on the 'subject to [written] contract' term

or understanding will again depend upon all the circumstances of the case, although the cases show that the court will not lightly so hold."

b. Inconsistent with P's primary claim that the Company was a quasi-partnership in which each of the shareholders had an expectation of management, the version of the shareholders' agreement signed by P expressly records that –

> "12.] The Shareholders are not in partnership with each other, nor are they agents of each other."

c. It was P's claim in the Petition that "[35.] By denying that the Shareholders' Agreement is binding, the First, Second, Third and Fourth Respondents have caused detriment to the Petitioner, being that he does not have the benefit of the share valuation mechanism." However, even if the shareholders' agreement was binding it imposed no obligation upon either the Company or the co-Founders to purchase P's shares. Again the version of the shareholders' agreement signed by P provided as follows:

> "[4.2] No Shareholder shall sell, transfer, assign, pledge, charge or otherwise dispose of any share or any interest in any share in the capital of [the Company] without the prior written consent of the Shareholders with at least 70% in nominal value of the issued ordinary share capital with voting rights in [the Company].
>
> [4.3] A Shareholder (Seller) wishing to transfer shares in the [Company] (Sale Shares) shall give notice in writing…. to the other parties (Continuing Shareholders) specifying the details of the proposed transfer ……
>
> ……..
>
> [4.6] ….. A Continuing Shareholder shall be entitled (but not obliged) to give notice in writing ….that he/she wishes to purchase a specified number of Sale Shares….."

26. The remaining issues to be determined are:

a. Was there a quasi-partnership?

b. Was there a binding exit agreement reached in relation to buying out P's shareholding?

c. Have the affairs of the Company been conducted in a manner which unfairly prejudices the interests of P as alleged in the Petition? The allegations specifically pleaded in the Petition are (with my emphasis added) –

> "[38.1] refusing to perform the Exit Agreement by buying the Petitioner's shares on the valuation he put forward…
>
> [38.2.] excluding the Petitioner from the management of the Company on the incorrect assumption that upon resigning as a director the Petitioner would stop being entitled to management information when in equity his right as a

shareholder to participate in the management of the Company continued by reason of there being a quasi-partnership at the outset which still existed up to and also after 9th April 2018;

[38.3.] failing to give the Petitioner notice of any shareholder meetings;

[38.4.] in a resolution dated 25th April 2018 the First, Second, Third and Fourth Respondents resolved to allot more shares without allowing the Petitioner to participate. No notice was given or written resolution sent. That resolution:-

[38.4.1.] had no proper commercial basis;

[38.4.2.] had the effect of diluting the Petitioner' shares to the advantage of the other shareholders; and

[38.4.3.] was in breach of the Duties.

[38.5.] in breach of the Duties, the First, Second, Third and Fourth Respondents have caused the Company to pay to themselves and not the Petitioner, dividends;

[38.6.] in breach of the Duties, the First, Second, Third and Fourth Respondents have caused the Company to pay them an increase in their salaries, which has the effect of extracting wealth from the Company in a way to avoid participation by the Petitioner

27. The "Duties" there referred to in the Petition are earlier defined (at para [11.]) as the duties R1, R2, R3 and R4 owed to the Company in their capacities as directors pursuant to the following provisions of the 2006 Act:

    a. Section 171 - exercising powers for a proper purpose.

    b. Section 172 - promoting the success of the Company.

    c. Section 175 - avoiding placing themselves in a position of conflicting personal interests.

28. A breach of s.171, s.172 or s.175 of the 2006 Act by a shareholder-director "will generally indicate that unfair prejudice has occurred" - ***In re Tobian Properties Ltd*** [2012] EWCA Civ 998 (at para [22], per Arden LJ).

Was there a quasi-partnership?

Applicable legal framework

29. A company is a distinct legal entity separate from its members. In accordance with s.33 of the 2006 Act:

> "The provisions of a company's constitution bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions."

30. S.17 of the 2006 Act provides that a company's constitution comprises the company's articles of association, and any resolutions and agreements that affect the company's constitution.

31. Therefore, in the absence of a binding shareholders' agreement as in the present case, the rights and obligations as members of a company are governed primarily by the company's articles of association.

32. However, in ***Ebrahimi v Westbourne Galleries Ltd*** [1973] AC 360, Lord Wilberforce (at p.379) said this:

> "My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."

33. In ***Fisher v Cadman*** [2006] 1 BCLC 499, Sales J said this:

> "[84] …… It is also clear that the term 'quasi-partnership' is only intended as a useful shorthand label, which should not in itself govern the answer to be given to the underlying question, whether the circumstances surrounding the conduct of the affairs of a particular company are such as to give rise to equitable constraints upon the behaviour of other members going beyond the strict rights and obligations set out in the Companies Act and the articles of association…"

34. In **Ebrahimi**, Lord Wilberforce said that "It would be impossible, and wholly undesirable, to define the circumstances in which [equitable] considerations may arise". However, in **O'Neill v Phillips** [1999] 1 WLR 1092 (at p.1099), Lord Hoffman said this:

> "……. Petitions under section 459 [predecessor of s. 994 of the 2006 Act] are often lengthy and expensive. It is highly desirable that lawyers

> should be able to advise their clients whether or not a petition is likely to succeed. Lord Wilberforce, after the passage which I have quoted, said that it would be impossible "and wholly undesirable" to define the circumstances in which that application of equitable principles might make it unjust, or inequitable (or unfair) for a party to insist on legal rights or to exercise them in particular way. This of course is right. But that does not mean that there are no principles by which those circumstances may be identified. The way in which such equitable principles operate is tolerably well settled and in my view it would be wrong to abandon them in favour of some wholly indefinite notion of fairness."

35. In summary:

    a. A member cannot usually complain of conduct permitted under the articles of association and the 2006 Act, even if that conduct has a prejudicial effect on their interests as a member.

    b. However, equitable considerations may make it unfair for the other members to exercise their strict legal rights in relation to the affairs of a company.

    c. Whilst quasi-partnership is a flexible concept intended to achieve fairness in the particular circumstances of the case, the imposition of equitable restraints on otherwise lawful conduct ought to be by reference to established principles to ensure a degree of consistency/predictability of outcome.

36. In ***Ebrahimi***, Lord Wilberforce gave the following guidance upon the circumstances in which equitable considerations will constrain otherwise lawful conduct:

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

<u>Application of the guidance to the facts of this case</u>

"*an association formed or continued on the basis of a personal relationship, involving mutual confidence*"

37. In his written evidence, P stated:

"[6.] In July 2000, I was appointed as Deputy Creative Director of Design One Limited. I was introduced to Bart Cheung who was employed as a Designer and Paul Edwards who was employed as a Senior Designer.

[7.] In or around 2006, I met Neil Giles when he was interviewed by myself and Paul Edwards for the position of Senior Designer. Mr Giles was employed sometime prior to 2008.

[8.] In or around 2008, I met Emma Fisher when she was interviewed by myself and Paul Edwards for the position of Secretary. Ms Fisher was employed sometime prior to 2010.

[9.] We worked together for many years until we (along with all other employees of DlLTD) were notified that we were to be made redundant with immediate effect (22 July 2010) as the business was insolvent and administrators were appointed on 4 August 2010.

[10.] Due to our close association, myself, Mr Edwards, Mr Giles, Ms Fisher and Mr Cheung met and agreed to jointly purchase the assets of Design One Limited.

[11.] We agreed that we come together to form a new venture and build on the client foundations that we were continuing to manage. We felt, as each with our own individual skill and based on confidence and mutual trust of each other, that we could develop the business and share risk and reward."

38. In his oral evidence, R1 said –

> "Working together a long time with previous company. Leap of faith to participate together in new joint venture. Everyone participated and hopefully make it a success…Everyone invested their own money. Confident get clients. [P] get new business with everyone's support. We all took the decision to participate in risk and reward."

39. In his oral evidence, R2 said:

> "Believed in venture. Everybody contributed. Trust and confidence in everybody contributing."

40. In her oral evidence, R3 said;

> "[P] was a great MD. Leap of faith joint venture, but trust and confidence in each other's abilities to make it a success. We each put money in."

41. Therefore, it is not disputed that the Founders each contributed and placed at risk personal savings by way of working capital for the business. It was a risk that they were willing to take having regard to the trust and confidence they had in each other, which had been built up over several years whilst working closely together in the predecessor business.

"*an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business*"

42. It was agreed that all the Founders were to be shareholders and directors of the Company. There was an agreement/understanding between the Founders that they would receive minimum salaries with the bulk of their remuneration being derived from dividend payments, the levels of which, if any, were dependent upon the overall financial success of the business. The Founders were all personally interested and worked closely together in running the business for their joint benefit consistent with the Company being a quasi-partnership.

43. It was argued on behalf of R1 – R4 that the "management team" that took most of the decisions was in practice P and R1 initially on their own but from 15 July 2011 joined by R2. However:

    a. Article 7 of the Articles of Association provided that "The general rule about decision-making by directors is that any decision of the directors must be either a majority at a meeting or a decision taken in accordance with article 8 [unanimous decisions]". However Article 5 of the Articles of Association also provided that "the directors may delegate any of the powers which are conferred on them…to such person or committee…to such extent…on such terms…as they think fit."

    b. It was the oral evidence of P that taking day to day management decisions was difficult with 5 directors, and so it was agreed that those decisions be delegated to a smaller management team initially comprising him and R1. However, because of the personal difficulties between him and R1, R2 was then elected to the management team. That evidence was corroborated by contemporary documents being –

        i. an email dated 20 July 2011 where P advised Newsome Vaughan that "At the last shareholder meeting it was also decided that we would elect a third director so that the decision making would be easier."

        ii. the minutes of the meetings held on 30 September 2011 and 24 April 2012, which were attended by all the Founders. Those minutes record detailed discussions over a growth strategy and a plan for generating new business.

    c. Therefore, the management team was not imposed upon, but rather agreed by the Founders as a practical arrangement to increase agility in more routine decision-making, and again reflecting the level of mutual trust and confidence shared by the Founders.

44. It was argued on behalf of R1 – R3 that there were numerous other shareholders, who are not suggested to be quasi-partners. In ***Re Edwardian Group Ltd*** [2018] EWHC 1715 (Ch) Fancourt J said (obiter) that, because of the need for mutuality, it was difficult to envisage a company being a quasi-partnership where only some shareholders were alleged to be bound by the "special underlying obligation".

45. However, in ***Re Edwardian Group Limited***, Fancourt J said this (with my emphasis added):

> [130] None of these important authorities addresses an issue that the petitioners' primary case acutely raises. This is whether a quasi-partnership

> can exist (and give rise to equitable constraints of the type identified in the authorities) where some only of the shareholders are said to be within the scope of the agreement or understanding about participation in management. This is a different point from that adverted to in Lord Wilberforce's reference to sleeping partners, which indicates only that some of those within the scope of the understanding and relationship of mutual trust and confidence may be agreed or understood not to be going to be personally involved in managing the business. The petitioners' primary case seems to me to involve something different from that, namely a relationship of trust and confidence and an understanding about management participation that exists only between some, not all, of the shareholders. Of course, if the understanding exists only as between a minority of the shareholders it is unlikely to be of real practical importance, since ex hypothesi the majority is not bound by it. But it is easy to envisage a case where one or more minority shareholders stand outside a relationship and understanding shared by all the other shareholders, perhaps because of a transmission of the shares of an original member."

46. In the present case, the other shareholders were family and friends of the Founders, who were allotted Alphabet Shares solely as part of a tax mitigation strategy after the Government introduced a new dividend tax regime from April 2016. It was understood that the other shareholders were not going to be personally involved in the management or conduct of the business. The Alphabet Shares allocated to the other shareholders did not confer any voting rights. The other shareholders were in the words of Lord Wilberforce no more than "sleeping members". In my judgment, the allocation of Alphabet Shares to the other shareholders would not have caused the Company to cease to be a quasi-partnership.

47. It was argued on behalf of R4 that because P intended to be bound by the shareholders' agreement then his claim that the Company was a quasi-partnership is fatally undermined by the fact that the draft shareholders' agreement expressly stated that "the shareholders are not in partnership with each other…." However, it was the co-Founders' case, now conceded by P, that the shareholders' agreement was never binding. Therefore, I am unable to, and do not, place any weight upon what was or was not stated in a draft shareholders' agreement when considering whether or not there was a quasi-partnership in the context of mutuality.

"*restriction upon the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere*"

48. The original Articles of Association provided:

> "**TRANSFER OF SHARES**
>
> [11.] The Directors may in their absolute discretion and without assigning any reason therefore decline to register the transfer of a Share whether or not it is a fully paid Share."

49. The 2016 Articles of Association provided:

"Share transfers

26. Share transfers: general

……

(5) The directors may at their absolute discretion refuse to register the transfer of a share, whether such share is fully paid or not, and if they do so the instrument of transfer must be returned to the transferee with the notice of refusal unless they suspect that the proposed transfer may be fraudulent."

50. Therefore, the Company's Articles of Association effective prior to P's departure provided that the directors had an absolute discretion to refuse to register any share transfers. The characteristic of being unable to introduce new shareholders without the directors' consent is consistent with a quasi-partnership. In ***Re Edwardian Group Limited***, Fancourt J said:

> "[142.] As part of the restructuring, the articles of the Company were changed…… The express power of the directors to decline to register a transferee was removed. This relaxation indicates a move away from a closely controlled quasi-partnership type company."

Conclusion

51. In my judgment, the Company was a quasi-partnership such that equitable considerations of a personal nature as between the Founders were superimposed upon the corporate constitution.

Was there a binding exit agreement?

Applicable law

52. In summary, P claims that upon being offered a job with Severn Trent Water he met with his co-Founders when an oral agreement was made that his shareholding be bought out after the valuation process had been completed. It is P's primary claim that this agreement was a legally binding contract in that he duly exited the business in reliance on and pursuant to it.

53. In the case of ***Ross Blue v Michael Ashley*** [2017] EWHC 1928 (Comm) the issue to be determined was whether, as a result of a conversation in a public house, a contract was made between the claimant and the defendant under which the defendant owed the claimant £14 million. Leggatt J (as he then was) observed that:

> "[49.] Generally speaking, it is possible under English law to make a contract without any formality, simply by word of mouth. Of course, the absence of a written record may make the existence and terms of a contract harder to prove. Furthermore, because the value of a written record is understood by anyone with business experience, its absence may – depending on the circumstances – tend to suggest that no contract was in fact concluded. But those are matters of proof: they are not legal requirements. The basic requirements of a contract are that: (i) the parties have reached an agreement, which (ii) is intended to be legally binding, (iii) is supported by consideration, and (iv) is sufficiently certain and complete to be enforceable".

54. There is in the alternative a claim of estoppel, although on the facts of this case I do not consider that that the alternative claim adds anything to the primary claim, since P would need to prove for a successful claim in estoppel both (i) a sufficiently clear assurance and (ii) detrimental reliance.

Standard of proof

55. This is not a criminal trial where the standard of proof is beyond reasonable doubt so that I must be sure before making a finding of fact. Rather, I must apply the lower civil standard of proof being the balance of probabilities. In other words, in making a finding of fact, I must be satisfied that more likely than not it is true.

56. It is not seriously disputed by R1 – R3, although denied by R4, that prior to P's departure from the business there was some discussion over P's shareholding being bought out. However, the witnesses have radically different accounts of what, if anything was said, when it was said, for what purpose and with what effect. Ultimately, I must decide, on balance, which of the competing versions of events I prefer on the available evidence as being more likely than the other.

The witness evidence

57. It was P's written evidence that:

> "[57.] Immediately after a meeting on 26 March 2018, held between Bernard Rogers and the other directors/shareholders. I was asked to attend a meeting of Shareholders specifically Emma Fisher, Paul Edwards and Neil Giles were present. I do not recall attendance by Bart Cheung or his reason for not attending. This meeting was chaired by Neil Giles.
>
> [58.] An undocumented conversation took place relating to the purchase of my shares. Neil handed me a set of speculative company financials and asked, *'Had I given any consideration to the value of my shares?*'. I maintained monthly financials, along with Emma Fisher and was aware of the day-to-day financial position of the business. I responded, *'I had no idea of the share value, only indicative based on previous shareholder meetings*.' I confirmed in conte[x]t of that meeting that that I would offer my shares to the business.
>
> [59.] At conclusion of that meeting I believed verbal agreement had been reached by all in attendance that:-
>
> (i) I would sell my shares to the shareholders and/or Brand Evolution Limited, ultimately remaining within the company; the shares would be valued using the mechanism set out in the Shareholders' Agreement;
>
> (ii) That the sale and purchase of the shares would take place after the valuation process had been completed;
>
> (iii) That I would resign as director forthwith and await the outcome of the valuation process which would dictate the sale price.

[60.] At the end of the meeting I recall that we all shook hands, again indicating and representing to me and the others that we had reached an agreement.

[61.] I was relieved - I had reached an agreement with my fellow shareholders which would allow me to resign and move on.

[62.] Immediately after the meeting, I was followed back to my desk by Paul Edwards, unfortunately no other shareholders were present, to witness that conversation. Paul asked, *'Could we come to an arrangement with the sale of your shares, agreeing a tax benefit that would be beneficial to all*.' Adding, *'this process may take some time to finalise.*'

[63.] I was slightly confused as I believed no taxable benefit existed but I indicated I would be amenable to any proposal. As far as I was concerned I had reached an agreement relating to the sale of my shares and my exit from the Company."

58. It was R1's written evidence that:

"[44.] In the Petition Dean says that there was a meeting on 12 March 2018 in which his exit agreement was discussed. I do not recall a meeting on that day and have checked through my timesheets and can see that I had a very busy day and no mention of a meeting which would always be noted….. I have also checked the timesheets of Bart and Neil and can see that Bart had a half day holiday and Neil was working on Core Education, Paragon Veterinary Referrals and some Sadlers Keg Lens Designs and Cask Templates….. I can't remember exactly what date Dean did tell us or what happened when he did tell us, I doubt I was the first person I was most likely the last person he told. The only way I can tell exact dates from that long ago is by looking at my timesheets as everything was recorded.

[45.] I think around 26 March 2018, I recall having a meeting with Dean along with the other shareholders to discuss his departure and we asked him to extend his notice period to 6 April as we knew that both Neil and Emma were due to be on holiday beforehand. Dean agreed to do that. Dean also wanted us to ask Bernard for his opinion on the share valuation and Bernard said he couldn't do that because he was the Company accountant and to advise Dean that he needed to get independent advice, which I understood Dean was going off to do. We would have considered purchasing his shares back if they were a fair price to everyone, but we were under no obligation to do that and did not make any agreement with Dean to do so which I thought he understood – we would definitely not agree to a blank cheque given that we had no idea what the value would be.

[46.] There was no agreement with Dean to purchase his shares back, even if they were valued at an acceptable price."

59. It was R2's written evidence that:

[17.] I do not recall attending a meeting with Dean and the other shareholders on 12 March 2018. Accordingly, I have reviewed my timesheets from this date…. and confirm that it does not note any meeting of the shareholders on this date……..

[18.] I remember that on Friday 16 March 2018, Angelo, Taj and I would go to the local pub on a Friday lunchtime. Unusually on this Friday lunchtime Dean had joined us. So I specifically remember it was this Friday afternoon that he told me he was resigning shortly after we had got back to the office from lunch. Dean took me aside and told me that he was going to be resigning from the Company. It came as a bit of a shock to me.

…….

[21.] I asked Dean if he wanted me to inform the other shareholders that he was resigning. I then proceeded to inform Paul and Bart. I am not sure if they told Emma but I didn't. On Thursday 22nd March, shortly after Dean and I returned from a client meeting with Sadlers Ales, I was asked by the other shareholders to talk to Dean to see if there was anything which could be done to see if he would retract his resignation. In that meeting only Dean and I attended, Dean said he would stay if his salary was increased by £10,000 pa. This had been a tactic used by a former employee called Angelo who would find a new job, accept it and then ask for a pay rise or he would leave. I said to Dean I would ask all the shareholders for their views. It was unanimous that all shareholders agreed to accept his resignation and allow Dean to leave.

……..

[24.] Following Dean's verbal resignation, I recall there being discussions about who would pick up his workload and clients and other handover related items. I do not recall any discussions about the actual value of his shares.

……

[26.] When Dean left, it was my understanding that the Company could possibly consider buying his shares but we were under absolutely no obligation to buy them as nothing was agreed. Nor did we agree to buy them in principle not least because we had no idea what the cost would. We told him he would have to seek independent legal advice as to the value of those shares as Bernard Rogers had advised he could not do this as he was working for the Company.

[27.] Myself and the other shareholders did not collectively engage in any discussions with Dean about the value of the shares as we simply did not know the value. For the same reason, I did not have any individual discussions with him about the value of his shares. I understood that Dean would go and seek independent advice.

[28.] I do not recall any discussions around exit agreements or any agreement that Dean's shares would be purchased by the Company."

60. It was R3's written evidence that:

> "[31.] There was not a meeting of the shareholders/directors on 12 March 2018 as detailed by Dean in the Petition – it was a normal working day. I have looked back through emails and timesheets and can see that Bart took half of the day as holiday as his washing machine had broken and initially he did not know what time the engineer would arrive to fix it…., when he was in the office, I can see from his timesheet that he was working on client matters….. Dean was working on Keg Lens designs and Cask templates for Sadlers Ales, and the Apple Shopify/GSX website for UTL which I can tell from his emails from that day, as Dean never did timesheets.
>
> …..
>
> [32.] Dean informed me verbally on Friday 16th March that he was resigning from the business and would be leaving on Friday 23rd March – giving only one week's notice. I can recall Dean whispering it to me in the upstairs office we shared, whilst Paul, Neil and Bart were all downstairs in the studio……
>
> [33.] After Dean told me, I went outside to call Bernard Rogers to check whether Dean was able to just give one week's notice. I thought it was unreasonable and I thought as we were paid monthly, he should give one month's notice. I spoke to one of Bernard's colleagues, who said Dean could give a week's notice and that we could not stop him. Bernard's colleague said he would arrange a meeting with Bernard for his first day back from holiday on 26 March.
>
> ……..
>
> [35.] Following Dean's verbal resignation, we had various internal meetings without Dean regarding what we were going to do, how clients would be managed and what we would say to clients. We were shellshocked and panicked about our clients who Dean managed. As Neil and I were both booked to be off during the first week of April, we had very little time to agree how clients would be managed, who would take on responsibility for those clients.
>
> ……..
>
> [37.] On 26 March 2018, Paul, Neil, Bart and I attended a meeting with the Company's accountants. We discussed what we were going to do in respect to filling the gap created by Dean's departure. I would step up to be the main point of contact for the clients, Neil and Bart would take over Dean's clients. Bernard told us that he could not provide a valuation for Dean as he represents the Company and that we should advise Dean to seek independent advice. I don't recall anything else being discussed.
>
> [38.] There was no agreement to purchase Dean's shares and no agreement in principle to purchase them dependent on the value, we consistently reiterated that Dean should seek independent advice whenever he

raised this. It was my understanding that Dean would go away and seek that advice but we did not agree to purchase Dean's shares. We are sensible people and would never have agreed to purchase something which we had no idea what the value was.

[39.] Following the meeting with the Company Accountants, Bernard Rogers and David Rogers, on 26 March 2018, Paul, Neil, Bart and myself did meet with Dean to discuss his departure. We asked Dean to extend his notice period to 6 April which he agreed to do. It was during this meeting that we mentioned to him that he needed to seek independent advice as he could not use the Company's Accountant. We told Dean that Bernard could not advise him in respect of a valuation for his shares and he should seek independent advice from his own accountant. At no point was any share value discussed. Otherwise, the meeting served as a handover meeting about Dean's clients, which projects were at which stage, what work was looming and who would take responsibility for those clients – clients do not like change and we were keen to ensure we did not damage existing relationships on Dean's accounts where he had been the key contact….

…….

[45.] Before he left it was agreed that Dean would go and get some independent advice about the value of his shares, which he did and the figure he came back with was ridiculous. We never said we would buy his shares and never said how much they were worth. Prior to Neil and I breaking up for holiday, we all had a meeting (with Paul and Bart too). The main topics discussed were clients and workload - upcoming projects, projects in progress, delivery dates. Dean did ask if we were happy for him to use Bernard to sort out a valuation of his shares. We told him, as per Bernard's advice, that Bernard could not advise Dean and that he should seek independent advice. From my recollections, we did not discuss the value of his shares and we did not suggest we would purchase them.

[46.] I never gave much thought to what would happen with Dean's shares in the Company. I thought it would be better if we had them back but equally the Company wasn't going to pay the amount he asked for. I did think Dean would be more open to negotiation….."

61. Mr Rogers was called as a witness by R1 – R3. It was the written evidence of Mr Rogers that:

"[16.] I was not present at any meetings with the Company on either 12 March 2018 or 3 April 2018.

[17.] However, I recall that sometime in late March 2018 Dean rang me and said he was likely to be leaving the Company and that as part of his departure would need a company valuation. I do not know anything of Dean's discussions with the other shareholders. I was not aware of any agreement in principle for the purchase of the shares being reached.

[18.] Dean said there had been a falling out with the other directors which had left him with no choice other than to leave. I explained that the client was my Company, and that he should seek independent advice as I felt there was a conflict of interest."

62. It was R4's written evidence that:

"[28.] Dean Banfield has said that in March 2018 it was agreed between him, myself and the other Respondents that the Respondents would purchase Dean Banfield's shares and the purchase price would be set using the mechanism contained in the unexecuted Shareholders Agreement.

[29.] I was not involved in any discussion, arrangement or agreement in terms of the sale and purchase of Dean Banfield's shares. I have no knowledge of any such agreement and was not involved in any such discussion. As far as I understood it, Dean Banfield had decided to resign and leave Brand to set up his own business. I had no idea that Dean Banfield was unhappy until shortly before he resigned, when he advised me that he was about to resign and would shortly be setting up his own company."

Assessment of the witnesses of fact in this case

63. In ***Painter v Hutchinson*** [2007] EWHC 758 (Ch) at [3], Lewison J (as he then was) identified a non-exhaustive list of indicators of unsatisfactory witness evidence including:

a. Evasive and argumentative answers;

b. Tangential speeches avoiding the questions;

c. Blaming advisers for documentation;

d. Disclosure and evidence shortcomings;

e. Self-contradiction;

f. Internal inconsistency;

g. Shifting case;

h. New evidence; and

i. Selective disclosure.

64. In my assessment P was an honest but unreliable witness. His witness evidence was tainted to a significant and material extent by indicators of unsatisfactory/unreliable witness evidence. By way of specific examples:

a. Shifting case: P claimed in his Petition that the meeting, when the exit agreement was allegedly made, took place on 12 March 2018, but claimed in his evidence that the meeting took place on 26 March 2018. P was unable

properly to explain his "confusion over the dates" of what was on his own case such a crucial meeting.

b. Self-contradiction: It was P's written and oral evidence that there was a binding shareholders' agreement, which provided that the shares of anyone leaving the business would automatically be bought out. However, it was ultimately conceded on behalf of P that (i) there was no binding shareholders' agreement, and (ii) in any event the various drafts of the shareholders' agreement contained no such mandatory buy-out provisions.

65. Whilst I found Mr Rogers to be an honest witness doing his best to assist the court, the reliability of his evidence was undermined by a significant internal inconsistency. In his written evidence Mr Rogers stated:

> "[11.] The Company kept very good accounting records; they were what I would describe as a 'once a year' client. Once a year they would provide me with their records, both electronically and on paper. I would then prepare the statutory accounts for the Company and send the draft to Emma. I would then meet with all five directors in around September to discuss and approve the accounts. The Company did not require much in the way of additional services — they did not ask for anything and I did not offer.
>
> [12.] There was one exception in the early stage of the Company, I think it would have, following my initial meeting at the Company in May 2011. Because of the flat ownership structure of the Company - at the time the Company only had 6 or 7 employees including all 5 directors and through the P shares, of which 24.75% were held by each of Dean, Paul, Bart and Neil and 1% were held by Emma, control could only be exercised by a minimum of 3 participants - I suggested that putting in place a shareholder's agreement was something which they should address. I referred them to Newsome Vaughan in relation to this."

However, it is clear from the contents of the contemporary documents that Mr Rogers was more heavily involved with the Company than 'once a year'. It appears that he routinely advised on a wide variety of issues as and when they arose during the course of the year. For example, on 12 April 2018, R3 emailed Mr Rogers to ask for his "thoughts" on appointing Angelo as a director of the Company to which Mr Rogers responded:

> "My feeling is that as you promised to make him a Director, this should be communicated to Companies House. The fact he has no ownership shares is irrelevant.
>
> So it's really just a case of setting up the new category of share as you suggest."

66. I did not find R4 to be a reliable or at times a credible witness. His witness evidence was tainted to a significant and material extent by indicators of unsatisfactory/unreliable witness evidence. By way of specific examples:

a. R4 claimed that although he had agreed in principle to day-to-day management decisions being delegated to the management committee, he

was in fact excluded from all management decisions including in particular over salaries/dividends.

b. However –

   i. On 13 April 2012, R1 emailed the Founders, including R4, with agenda items to be discussed at the next meeting including "Salaries (Are we distributing profits/keeping the profits in the company – how do we distribute dividends/pay increases etc)".

   ii. On 10 November 2015, P emailed the Founders, including R4, with an estimate of reserves based on the end of year accounts and requesting "thoughts on dividend payments, if so how much?"

c. Further, R4 claimed in his oral evidence not to have been involved in any discussions over the purchase of P's shares in and by the Company. However, on 29 June 2018, R4 forwarded to R1 – R3 the share valuation he had received from Mr Rogers. R4 marked the email with high importance. R4's explanation for why he was receiving and then circulating urgently a share valuation in respect of a discussion he apparently knew nothing about was at best confused and confusing.

d. Still further, R4 claimed in his oral evidence not to know about any discussions over the distribution by way of dividends of trading profits of £80K after the departure and to the exclusion of P. However, on 24 October 2018, R4 emailed the new Company accountant (David Rogers) –

> "Could you please give me a breakdown of the £80K profit between Emma, Paul, Neil and me based on the P share ownership percentage.
>
> To avoid any dispute and disagreement, it would be better if you could calculate and confirm how much money each of us (exclude Dean) can get from the £80K profit."

R4 sought unconvincingly to distance himself from the contents of this email by claiming that he had been asked by R1 to speak to the Company accountant, and in order to complete that task R4 then drafted the email. Even if that explanation were true, he must have known about the proposed distribution in order to draft the email.

e. When the Company accountant responded to say that he could not advise upon "how dividends be split across the shareholders", R4 sent a follow up email the same day –

> "I understand your position. All the shareholders agreed at the outset that the end of year dividend would be paid on the percentage of ownership of the company. We will pay this dividend via the alphabet shares as we would the salaries. As Bernard advised Emma with different figures yesterday, could Bernard send an email to Emma with the correct ownership percentages and breakdown – this will then be transparent and obviously won't incur the internal upset if we have to now broach this ourselves, I hope you can understand our position – is that possible please?"

R4 sought to distance himself from the contents of this email by bizarrely claiming that it had been drafted by R1, forwarded to R4, copied by R4 and then sent by R4 to the accountant. It was not entirely clear to me why, if true, R1 could not have sent the email he drafted directly to the Company accountant or R4 could not have simply forwarded to the Company accountant the email he received from R1. Again, even if that explanation were true, R4 must have known about the proposed distribution that was being discussed in the email exchanges between him and the Company accountant.

f. Indeed, despite claiming to be no more than a messenger, it was R4, who on 24 October 2018, sent an email to R1 and R2 suggesting his own complicated scheme for distributing the £80K to the exclusion of P:

> "Seeing David [the Company accountant] saying he cannot suggest how our dividends to be split across the shareholders (but Bernard managed to tell Emma the figures), the other option that I can think of is to continue to split the profit share between 5 of us (including Dean) based on David's percentage breakdown, but we increase the total amount by 37.5% and put Dean's portion back to the business.
>
> For example, instead of £80k, we increase the money to £110k. We now know Paul, Neil, Dean and me hold 24.75% ownership of the business while Emma holds 1%, therefore...
>
> Emma gets 1% of £110,000 = £1,100
> Paul gets 24.75% of £110,000 = £27,225
> Neil gets 24.75% of £110,000 = £27,225
> Dean gets 24.75% of £110,000 = £27,225
> I get 24.75% of £110,000 = £27,225
>
> Then we put Dean's £27,225 back to the business.
>
> We will end up sharing: £1,100 + £27,225 + £27,225 + £27,225 = £82,775 (close to the initial £80k)
>
> At the end of the day, Emma needs to remember she only has 1% of the ownership of the business. The only way she can get £4,211 as per Bernard told her is Paul, Neil and me get £104,222.25 each. If that is the case, the company is better off to close down cos it doesn't have £316,886.75 in the bank account, or does it?
>
> Emma shouldn't be speaking to Bernard anymore from now on."

67. I found R1, R2 and R3 to be honest witnesses doing their best to assist the court. Further, I did not find that their evidence was tainted to a material extent by indicators of unreliable witness evidence. That said, they were seeking to recall conversations that took place several years' ago, which necessarily gives rise to particular problems. Apart from the fact that, quite understandably, it is often difficult for witnesses to remember accurately what was said so long ago, witnesses can easily persuade themselves that the accounts they now give are the correct ones.

68. In ***Gestmin SGPS SA v Credit Suisse (UK) Limited*** [2013] EWHC 3560 (Comm), Leggatt J made the following observations about the interference with human memory introduced by the court process itself:

> "[19.] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.
>
> [20.] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events."

69. R1, R2 and R3 cannot be regarded as detached or objective observers. They are parties to and have a financial interest in the outcome of the proceedings. Therefore, they were subject to significant motivating forces and powerful biases such that there is a very real and substantial risk of interference with their memories.

70. For these reasons, I have approached the evidence of all the witnesses of fact with a substantial degree of caution.

<u>Overall approach to the findings of fact in this case</u>

71. In ***The Ocean Frost*** [1985] 1 Lloyd's Rep 1, Robert Goff LJ observed (and which observation was described as "salutary" by Lord Mance in ***Central bank of Ecuador v Conticorp SA*** [215] UKPC 11 at [164]):

> "[57.] …….. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."

72. Similarly, in ***Gestmin SGPS SA v Credit Suisse (UK) Limited***, Leggatt J, having commented upon the unreliability of human memory, concluded that:

> "[22.] In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

73. Therefore, in making my findings of disputed facts in this case, I have had particular regard to the contents of the contemporary documents, the undisputed facts, the inferences properly to be drawn from those undisputed facts, and the overall probabilities including by reference to the parties' motives.

Analysis and conclusion

74. On 19 March 2018, R3 emailed Mr Rogers as follows:

> "I understand from your colleagues that you are on holiday this week – so apologies for interrupting you.
>
> We urgently require your advice as Dean resigned last Friday afternoon, giving us just one week's notice. As you can imagine that was a very big shock, and whilst we are still reeling, we are concerned that we have very little time to deal with this, and also very little knowledge of what we need to do. I believe Connell has booked you in to come over next Monday morning – but given that Dean is leaving on Friday, any interim guidance, assistance you can provide would be very much appreciated.
>
> As you can imagine this is very destabilising for everyone (remaining directors and staff) within the business and I'm sure will be equally so for several clients, some of whom have had Dean as their main/only point of contact for almost 20 years. Would we have to pay for his shares in one lump sum or could we propose staged payments? Depending on the price agreed, it could mean that we have no cash flow if we do have to pay in one go. How do we go about replacing an MD (we do not have the skill set in-house)? As a director, does Dean have any responsibilities (not damaging the company etc)??? Should we start advertising for an account director?
>
> Obviously there will be legal requirements that need to be satisfied, and negotiations over Dean's share valuation.
>
> Your advice and input as to how we should proceed would be greatly appreciated."

75. P places particular reliance upon the contents of this email, which it is argued does not query if the shares had to be purchased, but rather did they have to be purchased in one go. However, I note that in his email reply on 21 March 2018, Mr Rogers sought to reassure R3 that there was no obligation at all upon the Company to purchase P's shares:

> "The first thing to say is that in the absence of a shareholders' agreement (which is something we have discussed each year) is that the company does not have to buy Dean's shares. You will recall he owns 24% of the company but is paid dividends via the alphabet shares. You do not pay dividends via the ownership shares so whilst it would be inconvenient to have a dissenting shareholder owning 24% it could be managed since you would simply pay no dividends to his alphabet shares once he leaves.
>
> I think the major concern is with the clients. Is Dean saying he is going to take what he regards as his clients with him? If so - what is the value of that work? Do you know what he is doing next - is he going to a competitor or set up on his own?
>
> ……."

76. It is clear from the contemporary documents that (i) the Company relied heavily upon Mr Rogers to provide advice and assistance at a critical time for the Company when faced with the unexpected departure of its Managing Director on short notice, and (ii) Mr Rogers was not made aware of any exit agreement at the time of P's departure. If there had been such an exit agreement, it is highly likely if not inevitable that Mr Rogers would have been told about it at the time, but he was not:

    a. From the following exchange of emails in the late afternoon of the 26 March 2018 (being the day P now claims that the exit agreement was reached and after Mr Rogers had earlier met with R1 – R3 to discuss P's departure), it appears that Mr Rogers was not only unaware of any exit agreement he was firmly of the view (no doubt influenced by his discussions with the other directors earlier in the day) that there "may be some disagreement" over P's shares such that P ought "to seek independent representation" -

> "From: Dean Banfield
> Sent: Mon, 26 Mar 2018 16:26:24 +0000 (UTC)
> To: Bernard Rogers
> Subject: Re: RE: CONFIDENTAIL - Shares
>
> Thanks Bernard I have always appreciated your fair and unbiased approach and would have respected your decision. It is unfortunate that things have ended this way, in many ways I do feel I've been the victim of constructive dismissal. The attached notes, under New Business are one of many occasions this was documented. Although I am not keen to progress this course of action.
>
> Are you able to give me an indication of the value of my shares? No other shareholder wishes to engage or discuss at the moment.
>
> Many Thanks Dean

On Monday, 26 March 2018, 17:05:20 GMT+1, Bernard Rogers wrote:

Hi Dean

Thanks for your email.

I do think there may be some disagreement on any settlement and as Brand Evolution Limited is my client rather than any Director personally, I think I will have to advise the company. As such I would have to advise you to seek independent representation.

I have always regarded you as my main point of contact at the company and I am sad things have ended the way they have. I have enjoyed working with you and wish you and your family all the best for the future.

I do hope that you and the company can come to a settlement which is acceptable to all parties.

Kind Regards

Bernard"

b. On 3 April 2018, R1 emailed Mr Rogers as follows -

"Emma and Neil are both away on holiday this week (not good timing).

We had a meeting with Dean last week and asked for a resignation letter with a leaving date. We also asked how much he wanted for his shares, we supplied him with the data which we also gave you and suggested that he should seek independent advice (which you had recommended) - as soon as he did both of these things we could move forward.

To date we have not received either.

We have sat down individually with Dean in the meantime so that he can pass details of the clients and work to date to the relevant people - I will sit down with him at the end of this week so he can pass any other items that have materialised over this week.

We have spoken to Lloyds bank and taken Dean off as a banking signatory. The car insurance has been changed and comes into affect next week.

Have you any advice or suggestions that I need to do?"

c. On the same day, Mr Rogers responded -

"Hi Paul.

It's a bit difficult to know what to say. It seems that Dean is leaving on Friday yet he hasn't agreed settlement terms.

I have to say that the problem is more his than yours. As I mentioned when we met – you could simply offer nothing for his shares and simply leave him with his 24% P shares (the ownership shares) and just not pay any dividend in relation to his A shares. He does have an obscure legal remedy known as "fraud on a minority" whereby a court can order the compulsory purchase of a minority shareholding if the business has been conducted in a way which is prejudicial – but I just don't see it to be so in this case.

I think we just have to wait and see what he comes back with."

77. Indeed, even after P's departure from the Company, Mr Rogers was still being led to believe by all concerned that there was no exit agreement:

    a. On 10 April 2018, R3 emailed Mr Rogers to advise that "[P] left on Friday – [R1] had a meeting with him prior to his departure. [P] has appointed an accountant in Telford who is apparently a 'specialist' at dealing with scenarios such as ours. He will apparently be contacting you directly." Mr Rogers responded the next day -

        "I am surprised [P] did not try and agree a settlement before he left. In failing to do so, he has significantly weakened his bargaining position. It will be interesting to see what his accountant has to say – but so far as I can see [P]'s only saleable asset is the 24% 'P' shares (the ownership shares) – whilst it would be nice to get these back, it's not a huge problem if we don't since they are only of value if the company were to be sold. I think that when he approaches you, we simply ask how much he is looking for and then we agree a figure and if agreement can be reached, I can apply for the clearance from HMRC for the company to purchase his shares."

    b. On 16 April 2018, P emailed the co-Founders and Mr Rogers (with my emphasis) to confirm that -

        "I intend to dispose of all of my shares in Brand Evolution Limited and Design One Limited.

        Although no formal pre-emption procedures apply, <u>I will obviously be open to exploring the possibility of the shares being acquired either by the company, by an individual shareholder or another third party</u>. I have appointed Bill Sahot[a] of BSS & Co (Accountancy Services) Limited of 75 Aston Road, Shifnal, TF11 8DU…….. to act on my behalf in connection with the valuation and sales negotiation. I wish to pursue a negotiated sale and purchase in a fair and equitable manner.

        Please contact Bill Sahot[a], as above, to progress this matter."

    It makes absolutely no sense that, a week after leaving the business, P would be raising in this email only the "possibility" of his shareholding being bought-out, if a buy-out had already been agreed, particularly when P had

allegedly been so anxious to secure such an agreement before exiting the business. In his oral evidence, P sought unconvincingly to explain away the contents of this email by claiming that it had been drafted on advice from the accountant, Mr Sahota, but presumably on P's instructions in which case why ignore the existence of a binding agreement, if there was one.

c. On 17 April 2018, Mr Rogers advised R3 upon the contents of P's earlier email as follows -

> "…….
>
> He doesn't actually own any shares in the dormant company Design One Limited so that can be ignored.
>
> As we discussed – it is really no more than an irritation that he owns 24% of the ownership shares. His alphabet shares are of no value since they confer no ownership rights. In practice the only buyer of those shares is Brand Evolution Limited – I suppose he could try and sell the 24% to an outside party but pre-emption rights will apply in that the existing shareholders would have the opportunity to match any legitimate offer he may receive.
>
> It's up to you as a Board to decide what to do but if I were you, I would write back asking him how much he is looking for to purchase those ownership shares. I think his room for manoeuvre is limited since if the company doesn't buy them, then who will? And then as a Board do you make him an offer or just bide your time and see what happens?
>
> He would still be entitled to receive copies of the accounts each year as a shareholder – don't know if that causes you any issue."

d. On 8 May 2018, Mr Rogers further advised R3 that -

> "I've emailed Bill Sahota back as we discussed. We don't wish to be uncooperative but in the end, it's up to him to produce a valuation – but it's pretty irrelevant since if he comes up with some outrageous figure (which I suspect he will) we will simply say we don't wish to purchase the shares at that price and in practice there is unlikely to be anyone else who will buy them – bearing in mind that you as Directors can refuse to register a transfer anyway."

78. The first documented reference to an exit agreement was when, on 13 August 2018, P emailed the co-Founders and Mr Rogers:

> "Prior to my resignation it was discussed, represented and agreed that following my resignation as a director my shares would be purchased in line with the shareholders agreement. I have now provided you with a valuation, submitted on 28th June 2018 and would be grateful if you could confirm when the sale will complete?"

79. Upon receipt of P's email dated 13 August 2018, Mr Rogers, unsurprisingly queried with the co-Founders "Was it agreed that [P's] shares would be so purchased. You didn't tell me that was so." R3 responded to Mr Rogers the next day:

> "The only thing we discussed with [P] was that he needed to take independent advice, as per your instructions. He wouldn't tell us what he wanted for his shares and wouldn't discuss it prior to his departure. As you know, we have no shareholder agreement in place so I am unsure as to what he is referring to in this regard.
>
> We have not communicated with [P] since he left apart from a text to tell him that one of our clients had died. We did sign for the recorded delivery letter regarding his request for audited accounts – but other than that, we have not acknowledged him or his communications at all.
>
> At the moment we have holidays going on for various directors and in addition, we have a substantial workload, so we haven't even had a conversation about this matter. We hope to do this once everyone is back in September."

80. In my judgment the contents of the contemporary documents are entirely consistent with:

    a. some discussions taking place prior to P's departure from the business over the possibility of P's shares being acquired by the Company, if the price was mutually acceptable, but

    b. no binding buy-out agreement having been reached prior to P's departure because P was simply unable to put a figure on what P thought his shareholding was worth after Mr Rogers declined to provide a share valuation and instead advised P to obtain his own independent valuation, which P duly did albeit only several months after exiting the Company.

81. Further, it makes no commercial sense, and is therefore inherently unlikely, that the co-Founders would have agreed to the purchase of P's shares (i) without even knowing the price to be paid for those shares and (ii) having been specifically and repeatedly advised by Mr Rogers that the Company was not obliged to purchase those shares. P sought to address that particular dichotomy in his oral evidence by saying:

> "[R2] chaired the meeting and asked to purchase my shares and how much I wanted for the shares but I did not know the value. It was agreed I would get the shares valued and come back and offer to sell them. I wasn't expecting an agreement on the value of shares until gone away to obtain a valuation. Agreed to purchase my shares but couldn't agree without knowing the value…… Intention to open negotiation. Obtained valuation. Needed to negotiate valuation. But no opportunity to discuss valuation with them. Unsure of the process. Valuation submitted and heard nothing more…….If I'd come back and valuation not equitable I'd have been open to offers."

P's oral evidence in this regard was also consistent with the contents of the contemporary documents in that it was discussed prior to his departure from the business that P would, after obtaining an independent valuation, offer to sell his shares to the Company, but without any obligation upon the Company to accept that offer come what may.

82. In conclusion, I do not find that there was a legally enforceable agreement or assurance to purchase P's shares. Therefore, P's primary claim in contract and his secondary claim of estoppel are dismissed.

Unfair Prejudice

Applicable legal framework

83. There is no dispute between the parties as to the relevant legal principles, which were helpfully summarised by Arden LJ in ***Re Tobain Properties Ltd*** (in the context of allegations of a director drawing excessive remuneration) as follows:

> "[20] Section 994(1), so far as relevant, provides:
>
> > "(1) A member of a company may apply to the court by petition for an order under this Part on the ground –
> >
> > (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), . . ."
>
> [21] The key phrase in s 994(1), "unfairly prejudicial", comprises two elements, unfairness and prejudice but both of these must be understood in the context of company law. The concept of fairness inherent in this phrase is flexible and open-textured but it is not unbounded. The courts must act on a principled basis even though the concept is to be approached flexibly. They cannot decide whether to grant or refuse relief from unfair prejudice on the basis of palm-tree justice. The impact of the context was explained by Lord Hoffmann in ***O'Neill v Phillips*** [1999] 2 All ER 961, [1999] 2 BCLC 1, [1999] 1 WLR 1092. The editors of **Pettet's Company Law: Company Law & Corporate Finance** (Longman 4th ed 2012) have described his speech as "a state-of-the-art account of the rationale of this area of law". So far as material to this case, Lord Hoffmann held:
>
> > "Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others ('it's not cricket') it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important.
> >
> > In the case of s 459 [predecessor of section 994 in the Companies Act 1985], the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted

> is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.
>
> The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith."

> [22] One of the most important matters to which the courts will have regard is thus the terms on which the parties agreed to do business together. These are commonly found in the company's articles. They also include any applicable rights conferred by statute. In addition, the terms on which the parties agreed to do business together include by implication an agreement that any party who is a director will perform his duties as a director. Primary among these duties are the seven duties now codified in ss 171 to 177 of the Companies Act 2006. Under these duties, a director must act in the way which he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. There is also the well-known duty to avoid conflicts of interest and duty: a director must avoid a situation in which he has an interest which conflicts with that of the company. Six out of seven of these duties are fiduciary duties, that is, duties imposed by law on persons who exercise powers for the benefit of others. Non-compliance by the Respondent shareholders with their duties will generally indicate that unfair prejudice has occurred."

<u>Alleged refusal to perform the exit agreement by buying P's shares on the valuation he put forward</u>

84. In the absence of any binding agreement/assurance to purchase P's shares, there can be no unfair prejudice in failing to honour it.

<u>Alleged exclusion from management information/management of the Company</u>

85. By order dated 24 October 2022, it was directed that P's Petition stand as his points of claim.

86. In **Griffith v Gourgey** [2019] EWCA Civ 2046, Richards LJ emphasised the need for a petitioner's case in a claim under s.994 of the 2006 Act to be fully and properly pleaded, since:

> [35.] ……. The breadth of the court's jurisdiction in such cases makes this essential, both so that the respondents know the case they have to meet and so that the court can keep the proceedings within manageable bounds.

87. In ***Re Tobian Properties Ltd***, Arden LJ observed that:

> "[27] Unfair prejudice proceedings generally raise numerous factual issues entailing examination of events over a considerable period of time. Just as defended divorces used to raise numerous issues, making trials long and complex, so trials of section 994 petitions can be long and complex. Thus a high degree of case management is required if the case is not to get out of hand. Effective case management means that, where possible, the court prevents unnecessary court time being spent on issues that are not capable of giving rise to relief. Thus a court will generally determine the issues necessary to determine whether a buyout order should be made at one hearing ('the liability hearing') and only proceed to a second hearing ('the quantum hearing'), at which evidence would be given relevant to establishing the value of the petitioner's shares, once it has determined that a buyout order should be made. Case management, however, must be consistent with both parties' right to a fair hearing."

88. In his evidence, P accused R1 of "demonstrating narcissistic behaviour", and as a result their working relationship "was acrimonious at best." In his evidence, R1 acknowledged that there had been disagreements, but denied that the working environment was toxic in the manner portrayed by P. It strikes me that P and R1 likely had different management styles and opinions on how to grow the business, which at times led to personal conflict. That no doubt explains why R2 was appointed to the management team effectively to act as reluctant referee. However, I do not consider it is necessary or proportionate to make findings in relation to the allegations made by P against R1 that "His unprofessional behaviour was appalling, continually goading me to the point of provocation." Whilst P may have felt that his working relationship with R1 had irretrievably broken down, which caused him to look for a job elsewhere, there is no express allegation of unfair prejudice arising from P having been forced out of the Company because of the combined actions of the co-Founders:

    a. In his Petition, P stated;

> "[20.] ……. From April 2016 the relationship [with Paul Edwards] risked the Petitioner breaching his duties as director and the Petitioner was forced to conclude that it was in the best interests of the Company if he left.
>
> ……..
>
> [36.] By denying that the Exit Agreement is binding, the First, Second, Third and Fourth Respondents have caused detriment to the petitioner, being that he resigned as director……"

    b. In his written evidence, P stated:

> "[48.] At this point I decided I had to change my job, for my own mental and physical health and the wellbeing of my family. I

> felt my relationship with all other directors, Neil Giles, Bart Cheung and Emma Fisher, to be good or excellent."

89. However, P does expressly allege in the Petition that he has been unfairly prejudiced as a result of having been excluded from the management of the Company on the incorrect assumption that upon resigning as a director he stopped being entitled to management information when in equity his right as a shareholder to participate in the management of the Company continued by reason of there being a quasi-partnership at the outset and which still existed after 9th April 2018.

90. I have already determined that the Company was a quasi-partnership. It is also not disputed that following his resignation as a director of the Company, P was excluded from management of the Company. However, it is R1 – R4's case that whilst the unfair prejudice remedy affords protection to a member of a quasi-partnership company, who has been unfairly excluded from participating in the management of the company, it does not apply where a petitioner has (i) resigned, (ii) made it clear he wants to sever connections with the company, and (iii) starts a job elsewhere. In short, once P resigned his directorship then the Company was perfectly entitled to stop treating P as a director.

91. In ***Phoenix Office Supplies Ltd v Larvin*** [2003] EWCA Civ 1740, it was not in issue by the time of the appeal that the company was a quasi-partnership. Mr Lavin, one of the three shareholders, decided for personal reasons that he wanted to leave the company and move from Sheffield to Manchester to a new home and job. He gave two months' notice of his resignation as an employee, which came as a complete surprise to his co-shareholders, whilst expressing the hope that his shareholding/directorship in the company could be dealt with in a professional manner. Upon termination of his employment, Mr Larvin remained a director/shareholder in the company, but his only continuing involvement with the company were his attempts to secure early repayment of his director's loan account and payment of a sum reflecting the full value of his one-third entitlement in the company. At first instance, Blackburne J held that treating Mr Larvin as if he had resigned as a director, when he had not, by denying him access to the company's financial records was unfairly prejudicial to his interests as a member thereby entitling Mr Larvin to an order that his shares be purchased at an undiscounted value. The Court of Appeal allowed the appeal. In giving the lead judgment, Auld LJ said:

> "[27] …….. it is important to keep in mind that s 459 [predecessor of s. 994 in the 2006 Act] is designed for the protection of the members of companies. It is in that capacity that they seek its protection, not as directors or employees, an important reminder where the provision is prayed in aid by a departing member who may also be a director or employee. And, ……where the member is departing because he has been excluded by other members from his involvement as a director and/or employee, the provision is aimed not at unfairness in such exclusion for its own sake, but at unfairness in his exclusion without a reasonable offer for his shares……
>
> [28] How then is the principle to be applied in a quasi-partnership company where the departing minority shareholder, not the majority shareholders, seeks to put an end to the association for personal reasons and take his investment in it with him, and where, as the judge found, there was no agreement for such a 'no-fault divorce'? I have already indicated the answer

in my summary of Lord Hoffmann's propositions, but here is the place to put it in his own words, ……. :

> 'Mr Hollington's submission comes to saying that, in a "quasi-partnership" company, one partner ought to be entitled at will to require the other partner or partners to buy his shares at a fair value. All he need do is to declare that trust and confidence has broken down …
>
> I do not think that there is any support in the authorities for such a stark right of unilateral withdrawal. There are cases, such **as Re a Company (No 006834 of 1988), ex p Kramer** [1989] BCLC 365, in which it has been said that if a breakdown in relations has caused the majority to remove a shareholder from participation in the management, it is usually a waste of time to try to investigate who caused the breakdown. Such breakdowns often occur … without either side having done anything seriously wrong or unfair. It is not fair to the excluded member, who will usually have lost his employment, to keep his assets locked in the company. But that does not mean that a member who has not been dismissed or excluded can demand that his shares be purchased, simply because he feels that he has lost trust and confidence in the others. I rather doubt whether even in partnership law a dissolution would be granted on this ground in a case in which it was still possible under the articles for the business of the partnership to be continued. And, as Lord Wilberforce observed in ***Re Westbourne Galleries Ltd*** [1972] 2 All ER 492 at 500, [1973] AC 360 at 380, one should not press the quasi-partnership analogy too far: "A company, however small, however domestic, is a company not a partnership or even a quasi-partnership …"
>
> The Law Commission, in the report … ***Shareholder Remedies*** [Law Com No 246 (1997)] considered whether to recommend the introduction of a statutory remedy "in situations where there is no fault" so that members of a quasi-partnership could exit at will. They said, in para 3.66:
>
> > "In our view there are strong economic arguments against allowing shareholders to exit at will. Also, as a matter of principle, such a right would fundamentally contravene the sanctity of the contract binding the members and the company which we considered should guide our approach to shareholder remedies". The Law Commission plainly did not consider that s 459 already provided a right to exit at will and I do not think so either.'

[29] The judge, …… ruled that a consequence of the quasi-partnership here was that Mr Larvin was entitled to the full undiscounted value of his shares. In so ruling, he appears to have proceeded as if it had been Messrs Parish and Ogden who had taken the initiative to sever the association rather than, as was the case, Mr Larvin. True it was that they refused to recognise him as a director or to give him access to certain company information, but that was only after he had made plain that he wanted to sever all relationship with the company and them and to take the value of his shareholding with him. In my judgment, this is not the sort of case that Lord Hoffmann had in

> mind when formulating his propositions applicable to excluded members…… Lord Hoffmann's different treatment of those cases where there is a withdrawal because of a sense of loss of trust and confidence applies a fortiori to a shareholder who, even without such a sense, but for other personal reasons, simply wishes to leave and take his investment in the company with him. Where, as here, the company is small and with only a few shareholders each holding a significant proportion of the company's issued capital, a sudden demand from one of them, for essentially personal reasons, to seek to withdraw his investment could be very damaging, even potentially ruinous, to them and the company."

92. In ***Phoenix Office Supplies Ltd***, Mr Larvin resigned as an employee, but deferred his resignation as a director of the company "until after the purchase and transfer of my shares is completed in full." The situation in the present case is, however, even more stark. P chose to leave the Company to work for Severn Trent Water and, in doing so, immediately resigned as a director of the Company. In his oral evidence, P said that whilst he had resigned as a director he was still interested in seeing director level financial information to check that the Company was being run properly. However, P admitted that he did "not want to be involved in day to day management as not there and not logical." This is not a case where P wished to continue to participate in the management of the Company and was unfairly prevented from doing so by his co-Founders. It was P who wanted to sever his connection with the Company and start a new job elsewhere despite the attempts of at least some of his co-Founders to seek to persuade him to stay. I can see no basis for concluding that, just because the Company was a quasi-partnership, P was entitled to continue to participate in the management of the Company and receive management information as if a director in circumstances where it is plain that he had no intention whatsoever of discharging any of his duties as a director and indeed had specifically resigned his directorship in order to pursue a new career away from the Company.

<u>Alleged failure to give P notice of any shareholder meeting</u>

93. In the Petition and in P's written evidence it is alleged that post-resignation P was not given notice of any shareholder meetings. However, in his oral evidence P accepted that on 11 September 2019 he received notice of the shareholder meeting to be held on 14 October 2019 to consider the removal of R4 as a director of the Company. It was the evidence of R1 – R3 that there were no other shareholder meetings. As a result of this shift in evidence, P's case in closing also shifted to argue that:

    a. A lot of important issues arose following P's departure including in particular the appointment of Angelo as a director and the payment of dividend salaries to directors.

    b. These were matters which necessitated a general meeting.

    c. The deprival of the opportunity to be notified and to vote on the same was unfair and prejudicial conduct.

94. Therefore, P's case developed from a failure to give notice of shareholder meetings to a failure to hold such meetings, which in my judgment constituted an improper departure from P's pleaded case.

95. In any event, as already noted, the concept of unfairness in the context of s.994 of the 2006 Act is primarily founded upon the terms on which the parties agreed to do business together. In the present case, such agreement is to be found in the Company's Articles of Association adopted in 2016 and which were in operation prior to P's departure on 6 April 2018. They provided as follows:

"*Appointment of directors*

17. Methods of appointing directors

(1) Any person who is willing to act as a director, and is permitted by law to do so, may be appointed to be a director:

(a) by ordinary resolution; or

(b) by a decision of the directors.

……

19. Directors' remuneration

(1) Directors may undertake any services for the company that the directors decide.

(2) Directors are entitled to such remuneration as the directors determine:

(a) for their services to the company as directors; and

(c) for any other service which they undertake for the company.

(3) Subject to the articles, a director's remuneration may:

(a) take any form; and

(b) include any arrangements in connection with the payment of a pension, allowance or gratuity, or any death, sickness or disability benefits, to or in respect of that director.

(4) Unless the directors decide otherwise, directors' remuneration accrues from day to day.

……..

Dividends and other distributions

30. Procedure for declaring dividends

(1) The company may by ordinary resolution declare dividends, and the directors may decide to pay interim dividends.

(2) A dividend must not be declared unless the directors have made a recommendation as to its amount. Such a dividend must not exceed the amount recommended by the directors.

(3) No dividend may be declared or paid unless it is in accordance with shareholders' respective rights.

(4) Unless the shareholders' resolution to declare or directors' decision to pay a dividend, or the terms on which shares are issued, specify otherwise, it must be paid by reference to each shareholder's holding of shares on the date of the resolution or decision to declare or pay it.

(5) If the company's share capital is divided into different classes, no interim dividend may be paid on shares carrying deferred or non-preferred rights if, at the time of payment, any preferential dividend is in arrear.

(6) 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.

(7) If the directors act in good faith, they do not incur any liability to the holders of shares conferring preferred rights for any loss they may suffer by the lawful payment of an interim dividend on shares with deferred or non-preferred rights."[2]

96. Therefore, the Articles of Association gave wide powers at the discretion of the directors of the Company to (i) appoint an additional director, (ii) determine the nature and amount of directors' remuneration and (iii) decide upon the amount of any dividend payments. In the circumstances, I do not consider that it is properly arguable that the failure to hold a general meeting to consider the matters complained of was unfair and prejudicial conduct, since they were matters that fell to be considered under the Company's constitution by the directors in any event albeit subject to the Duties.

Allotment of further shares

97. On 25th April 2018, R1 – R4 (holding between them more than 75% of the Ownership Shares) passed a written resolution to allot further Alphabet Shares to Angelo and his wife. P alleges that the allotment of those shares was unfair and prejudicial conduct in that:

    a. It had no proper commercial basis.

    b. It was in breach of the Duties.

    c. It had the effect of diluting P's shares to the advantage of the other shareholders.

98. I do not find that the allotment of further shares was unfair and prejudicial conduct for the following primary reasons:

[2] The Articles of Association adopted on 25 April 2018 following P's departure are, so far as relevant to this issue, in identical terms as those adopted in 2016.

a. From the very outset and thereafter it was recognised that Angelo was a key employee with a valuable/specialist skill set, and who would need to be properly incentivised to retain his worth to the business –

i. The minutes of the meeting dated 30 September 2011 record:-

> "Angelo – we only have one of him and need to sort an agreement with him that he is happy with so that we can contact him if he is away on holiday and perhaps receives a bonus each year to compensate. It was suggested that Angelo trains Bart in how to deal with some of the more straightforward 'usual' problems that arise. Bart agreed that he is happy to do this, but did raise concerns that he may not remember all of it, as unless you are using the systems every day, it is extremely complex. Bart will discuss with Angelo."

ii. The minutes of the meeting dated 19 December 2012 record:-

> "Salaries – Bart raised this in respect to Angelo as his salary is very low and approx £5k below the average. Need to consider this as if Angelo were to leave it would create a lot of problems. Dean said that he has discussed the situation with Angelo and has agreed that a review will take place in March 2013. Bernard suggested that we pay him a Christmas bonus in the interim. Neil said that we need to ensure that we get the most out of Angelo and make him as cost effective as possible. Everyone agreed."

iii. On 19 October 2017, R1 emailed Mr Rogers:-

> "Please may I pick your brain? As you have a considerable amount more experience than we do in business than all of us.
>
> We have an employee who has resigned their position (our lead developer) – we would very much like to retain him, not just from a personal point of view but more importantly from the business side. We have spent the past three weeks looking at recruitment agencies and advertising on recruitment websites – We have interviewed many but we have not seen anyone who is to the standard that we require in maintaining our current standards. The recruitment agencies have said that there is currently a skill shortage.
>
> I have spoken with Angelo and I believe that we could keep him but we need to come up with some options – I'm thinking more long term because of the importance of his role (which is becoming even more important to our business as our work shifts further towards the digital side)……
>
> I can tell you that I've put forward to the others several other options but these were not approved:
>
> - A lump sum, for example, £20k-£30 which would allow him to place a deposit on a home and which would be repaid

over a three/four year period (tying him for that period) out of the increase in salary in which we would be offering.

- A career plan whereby at the end of a set period he would own a percentage of the business.

- A management/director role whereby he would add his ideas into driving the business forward and feel more of an important part of the business.

I don't think this is just down to money, at the end of the day, but the way in which we are growing the business too – so other options which are not monetary would be greatly received."

b. On 20 October 2017, Mr Rogers responded:-

> "I do wonder if he feels a bit "left out" given that pretty much everyone else in your company is a Director and/or a shareholder. As you will recall you have two effective classes of share – the "ownership" shares and the alphabet series for remuneration. Would it make him feel better if he were made a Director (which after all is just a courtesy title) and creating yet another class of alphabet share so he could be paid in the same way as the rest of you?"

Therefore, the allotment of Alphabet Shares to Angelo and his wife was recommended by Mr Rogers to allow Angelo to be paid a salary in the same tax efficient manner as all the Founders.

c. On 25 October 2017, R1 emailed Mr Rogers to confirm:-

> "You will be happy to know that after a meeting with myself, Neil, Dean and Angelo that we have now managed to retain him – and over the longer term. After speaking with him extensively and understanding his concerns we have managed to put together a timeline of changes that will be made to our IT/Development side of the business. Angelo had some great ideas (it's just that we never tapped into them or brought him onboard to understand his ideas, his needs and how that side was developing in the wider world) which I think can only enhance our offering to clients and prospects in a very good way. I think this is what 'we' needed to make fundamental changes.
>
> A combination of an increase in remuneration, a further developer added to the team, a profit share starting from year two (after our initial investment has kicked in), the 'director' title and payment by dividend starting from May (which will automatically increase his salary with no cost implications to us initially). So thank you for your valuable input and for also talking this through – it's been a hard slog over the past month to bring this all to fruition!"

d. Whilst R1 referred in his email to the meeting having taking place between the management committee (including P) and Angelo, P for the first time in his oral evidence sought to distance himself from the contents of the email

by denying that he had or would ever have agreed to the share allotment. However, P's explanation made little commercial sense –

i. P said that he would have agreed to a bonus payment, but "he wouldn't have agreed to dilute the business which already had 5 shareholders."

ii. P acknowledged in his oral evidence that Angelo had "previously threatened to resign to leverage a better package….. Angelo was the lead developer in code software for the websites and the content management systems for those websites…..The CMS was quite complicated…unstable and required constant maintenance…..if [Angelo] was to leave whoever came in would take 3 to 6 months to familiarise themselves with the code….It was a risk to the business if he left….but it was better to manage that risk by documenting the module and how it was constructed rather than retaining [Angelo]."

The allotted Alphabet Shares were specifically not "ownership" shares, but had the effect of increasing Angelo's net salary by way of dividends without imposing any additional cost on the business. It was an effective and efficient method of securing Angelo's continued and critical involvement in the business.

e. In summary –

i. Angelo resigned from the Company.

ii. If Angelo were not retained by the Company, it would have had a significant adverse impact upon the business.

iii. The allotment of Alphabet Shares to Angelo and his wife was made on the recommendation of the Company's accountant. It clearly promoted the success of the Company in the interests of all the Founders by securing Angelo's continued employment at no additional cost to the business and with no loss of ownership.

iv. The allotment of Alphabet Shares to Angelo and his wife was agreed prior to, and likely with the approval of P, prior to P's departure from the business.

<u>Allegedly causing the Company to pay to themselves and not P dividends</u>

99. It is not disputed that following P's departure, dividends continued to be paid to the co-Founders, but not P, under their Alphabet Shares.

100. In his oral evidence P accepted that he "would not expect to be paid a salary after I left, but salary not the same as dividend." However, earlier in his oral evidence P accepted that "salary via dividends until government changed the rules and so family members received dividends up to £5,000 tax free." Ultimately, it cannot be seriously disputed that it was always agreed between the Founders that dividend payments under the Alphabet Shares was the mechanism for paying salaries to the directors in a tax efficient manner. By way of illustration:

a. On 7 April 2016, R4 emailed Mr Rogers –

> "I am sorry to trouble you again. I have another query here and I just wonder if you could give me a clarification please.
>
> In terms of the dividend shares for my parents, does it apply to my monthly dividend payment or only to the annual dividend payment?
>
> Currently, my monthly salary is made up by a basic income plus a dividend payment. Therefore, once I have given my parents 16 dividend shares (80%), will my parents start getting 80% of my monthly dividend payment from Design One?"

b. The minutes of the meeting on 25 April 2016 record -

> "New Dividend Tax Law
> The law has now changed and only the first £5,000 is tax-free. Tax is due at a rate of 7.5% on the balance. Over £43k, tax is at the higher rate of 32.5%. Bernard suggested that it is possible to split shares — anybody can receive £5,000 of dividend payments, tax-free.
>
> Dividends must be paid in proportion to shares held, ie if Dean Banfield and Joanne Banfield have 10 shares each, then dividends paid must be 50:50.
>
> A-E shares are used to pay dividends in respect to salaries. Ownership shares are not relevant to monthly dividend payments which relate purely to salaries. £19 has been paid by all for additional shares. Further classes of shares can be created, ie Dean holds 1 ordinary A share which could become Al, with Joanne Banfield holding A2 etc. A solicitor would be required to draw up the relevant documentation — Bernard is happy to provide details of a suitable one….."

c. On 26 April 2016, P emailed the solicitors instructed to draft the amended Articles of Association to increase the Alphabet Share allocation:

> "I ve been passed James's details by our accountant Bernard Rogers. We have agreed to issue a new classification of share within the business and I would like to ask the process and cost associated with this?
>
> Our current share structure consists of shares A-E one each assigned to each of the five directors, which are used for dividend payments and P shares that detail ownership structure only.
>
> We have agreed to increase the A-E share allocation to A1-A4 etc. allocating a share to each directors spouse. Bernard has the details of this and will be able to clarify the detail."

101. Therefore, there can be nothing unfair in P not receiving a salary by way of dividend payments after he had resigned as a director and was no longer working for the Company. It appears that belatedly P accepted that logic, since in his closing submissions it was instead argued (again without it having been pleaded) that in October 2018 R1 – R4 agreed, after P's departure, to distribute trading profits of

£80,0000 by way of dividends paid on the Ownership Shares but to the exclusion of P.

102. R1 – R3 in their oral evidence accepted that they had discussed the possibility of distributing trading profits of £80,000 to the exclusion of P, but on taking legal advice on the lawfulness of doing so they chose not to pursue that particular course of action.[3] If such a distribution had taken place, it would no doubt have constituted unfair and prejudicial conduct, but it did not take place. Nevertheless, P sought to argue that "even if the payment did not actually take place, the agreement to do so still amounts to unfair and prejudicial conduct." As argued on behalf of R1 – R4, discussing something that was not in fact done can cause no actual prejudice, and so is not sufficient to ground an action for unfair prejudice.

103. Indeed, on 21 August 2012, P emailed Mr Rogers:

> "Sorry can I just ask a quick very private and confidential question?
>
> The D1 business has been given the opportunity to develop a waste trading platform for the government body responsible for recycling WRAP - for and on behalf of The Environment Agency.
>
> The lead contact is a client/business colleague who currently holds a 100% shareholding of the business - www.wasteproducerexchange.com. For Design One to become involved and help develop this offer he has offered us a 49% share - sharing to be decided by myself.
>
> Given the difficulty with the shareholding at Design One I do not wish to keep my share of this enterprise within the D1 business and would rather keep it with myself or held by another ltd company. What would be the most appropriate and advantageous solution?"

104. It is incongruous to make complaint against the co-Founders in connection with a proposed course of action which was not ultimately pursued on legal advice when, in 2012, P had himself been contemplating in breach of the Duties diverting a potentially valuable business opportunity away from the Company so that he could exploit it for his own benefit. P said in his oral evidence that whilst he looked at the possibility, he did not proceed with it because on reflection it would not have been ethical to do so, since the opportunity had initially been presented to the Company.

<u>Allegedly causing the Company to pay to themselves increased salaries, which has the effect of extracting wealth from the Company in a way to avoid participation by P</u>

105. P argues that since his departure in April 2018 the dividend salaries increased significantly until the figures started to decrease for the year ending 2021 (presumably as a result of Covid19). The co-Founders acted in bad faith by not involving P in the salary discussions and by failing to notify him of the proposed excessive increases so that P could object.

106. As already noted:

[3] Although R4 denied ever being involved in those discussions, I find that he very much was and as evidenced by the contents of the contemporary emails quoted earlier.

a. It was always the agreed practice that the directors' remuneration comprise a minimum basic salary topped up by way of monthly dividends paid on the directors' Alphabet Shares.

b. Under the Articles of Association the continuing directors were entitled to determine the amount of the directors' remuneration by way of dividend payments and without being required to consult with P following his resignation from the Board.

107. However, the continuing directors were required to exercise their powers in accordance with the Duties. Payment of excessive remuneration bearing no reasonable relation to the work performed would be a breach of the Duties and unfairly prejudicial conduct. Therefore, the critical issue to be determined is whether R1 – R4 awarded themselves excessive remuneration following P's departure.

108. Each side sought to criticise the other for failing to adduce expert evidence on the proper level of remuneration. However, I do not consider that expert evidence is reasonably required to enable me to determine this issue in the present case. In ***Re Tobian***, and when rejecting the submission that a claim based on excessive remuneration ought to be dismissed in the absence of supporting expert evidence, Arden LJ held:

> "[36] In my judgment, as Blackburne J held in ***Irvine v Irvine*** [2006] EWHC 406 (Ch), [2007] 1 BCLC 349 at 267-268, where the court has to determine the appropriateness of a director's remuneration, it should do so by reference to objective commercial criteria."

109. Adopting the figures in the tables included in P's closing submissions, but reflecting the fact that directors' salaries were also paid via Alphabet Shares held by family and friends, the Founders' dividend salary payments from 2017 to 2019 were:

Name	Y/E July 2017	Y/E July 2018	Y/E July 2019	Y/E July 2020	Y/E July 2021
P	£23,971	£17,966 (part year to April)	0	0	0
R1	£21,649	£26,283	£27,828	£41,470	£36,388
R2	£19,442	£21,144	£26,998	£41,560	£36,626
R3	£13,373	£14,680	£16,671	£22,430	£19,001
R4	£18,520	£19,928	£12,058 (part year to Feb)	0	0
Total	£96,955	£100,001	£83,555	£105,460	£92,015

110. In his oral evidence, P conceded that he was not complaining about the small increase in dividend salary paid to R4 in the period from when P left the business in April 2018 and when R4 left the business in February 2019.[4]

[4] According to the analysis contained in Appendix A to R4's closing submissions the increased dividend salary payments totalled £1,548.10 over the relevant 10 month period.

111. From the above table, it is clear that in the three full financial years following P's departure (2019 – 2021), R1 – R3 awarded themselves substantial increased salaries via dividends when compared to the amounts that they received in the full financial year prior to P's departure (2017). The % increases using the 2017 figures as the base level were:

Name	Y/E July 2019	Y/E July 2020	Y/E July 2021
R1	28%	91%	68%
R2	38%	113%	88%
R3	24%	67%	42%

112. Those % increases as stated appear stark. However, in my judgment it is misleading to consider them in isolation. They must be viewed in their wider context. It is not disputed that P and R4 were not replaced after they each chose to leave the business. As a result, R1 – R3 were required to take on the workloads of P and R4 during the relevant 3 year period. By way of illustration:

a. On 10 April 2018, R3 emailed Mr Rogers:

> "My role has changed quite significantly in the last few months and whilst I have juggled my admin responsibilities with account handling so far, with Dean's departure, I need to free up some more time to get more involved with clients and support the guys. Do you happen to know anyone who may be looking for a part time role (we're thinking 3 mornings per week) as an admin/accounts assistant? It would involve invoicing, purchase orders, answering the phones and general admin duties. I would continue to run payroll etc. Would you also have any idea what kind of salary we would be looking at?

b. Mr Rogers replied:

> "Unfortunately, I don't know of anyone looking for work as you describe. I think you would be looking at paying around £20k full – time equivalent for the right person – so for 3 mornings perhaps £3 – 4,000 per annum."

113. It is in my view more useful to analyse the total dividend salary payments made to the Founders in each of the three full financial years following P's departure compared to the total that was paid in the full financial year prior to P's departure. The % movements again using the 2017 figure as the base level were:

Y/E July 2019	Y/E July 2020	Y/E July 2021
- 13%	+ 8%	- 5%

Therefore, the total dividend salary payments over the relevant 3 year period on average decreased (by 3% per annum) rather than increased compared to the total dividend salary payments in 2017 and even ignoring inflation.

114. It is very likely that the cost to the business of employing others to replace P and R4 would have been substantially more than the salary increases that R1 – R3 awarded themselves to cover the same work:

a. In his oral evidence P accepted that he was the highest paid director reflecting in part his important role as Managing Director.

b. R1 was the second highest paid director. In his oral evidence, R1 said that his market salary was £65,000 per annum, but he had never earned anything close to that figure whilst employed by the Company.

c. Angelo, who was paid a market salary as a programmer, earned £45,000 per annum, but left the Company in 2020 having been offered a substantial pay rise to work elsewhere.

d. In his oral evidence Mr Rogers said "Because the directors' salaries were low, the profits looked artificially high. Had they paid themselves normal commercial salaries then profits would be less."

e. When preparing his share valuation on behalf of the Company in 2018, Mr Rogers undertook the following analysis of the impact upon profitability if the directors were paid market rates -

"**Adjusted Profit Computation**

Year to 31 July 2018

Profit Before Tax		276,129
Add: Directors' Remuneration	40,630	
Salary paid to Angelo whilst an employee	27,623	
NI paid for Angelo	3,061	
		71,314
		347,443

Less: Fair Remuneration

	Gross	Ers NI	Pension	
Dean Banfield	60,000	7,117	1,800	
Paul Edwards	55,000	6,427	1,650	
Bart Cheung	45,000	5,047	1,350	
Neil Giles	45,000	5,047	1,350	
Emma Fisher	35,000	3,653	1,050	
Angelo Moreira	45,000	5,047	1,350	
	285,000	32,338	8,550	
				325,888
Profit after "Fair Remuneration"				**21,555**"

115. It is fanciful to suggest that R1 – R3 should be required to undertake extra work without extra pay. In my judgment, objectively assessed by commercial criteria, the salary increases by way of dividends were not excessive. Indeed, I am satisfied that they were reasonable and entirely justified in light of the amount of extra work that R1 – R3 were required to do as a result of P and R4 deciding to go and work

elsewhere. Essentially, the total dividend salaries paid to Founders on average remained broadly unchanged but was shared amongst the fewer remaining Founders (R1 – R3) to reflect their increased workloads following the departures of P and R4, who were able to earn market salaries elsewhere.

Overall conclusion

116. P's claims are dismissed.