Neutral Citation Number: [2019] EWCA Civ 932

Case No: A3/2018/2504 and A3/2018/2517

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT,
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
Mr Richard Spearman QC (sitting as a Deputy High Court Judge)
CR/2017/006788
AND
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ON APPEAL FROM THE HIGH COURT,
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
Mr Richard Spearman QC (sitting as a Deputy High Court Judge)
CR/2017/006788

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/06/2019

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE LEGGATT
and
LADY JUSTICE ROSE

- -

IN THE MATTER OF SPRINTROOM LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

Between:

EDWIN JOHN PRESCOTT	**Appellant**
- and -	
ARISTIDES GEORGE POTAMIANOS	**1st Respondent**
-and-	
SPRINTROOM LIMITED	**2nd Respondent**

And Between:

ARISTIDES GEORGE POTAMIANOS	**Appellant**
-and-	
EDWIN JOHN PRESCOTT	**1st Respondent**
-and-	
SPRINTROOM LIMITED	**2nd Respondent**

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Rebecca Page (instructed by Moore Blatch LLP) for Mr Prescott
Anthony Pavlovich (instructed by Blake Morgan LLP) for Dr Potamianos

Hearing dates: 2-4 April 2019
- -

Approved Judgment

Lord Justice McCombe, Lord Justice Leggatt and Lady Justice Rose:

1. This is the judgment of the court on the two appeals before us in the matter of Sprintroom Limited ("the Company") to which all members of the court have contributed.

Introduction

2. The appeals are brought from the order of 28 September 2018 of Mr Richard Spearman QC (sitting as a Deputy Judge of the High Court) giving effect to his judgment of 30 July 2018 in two separate sets of proceedings involving these parties. Before saying more, we wish to pay tribute to the judge for the care and industry that he brought to the task of deciding these not altogether straightforward disputes on their facts. Fortunately for him and for us, the underlying principles of law are not complex and are well established.

3. The first action was a claim by Sprint Electric Limited ("SEL"), the wholly owned subsidiary of the Company, against Dr Aristides Potamianos ("Dr Potamianos") and his "service company", Buyer's Dream Limited ("BDL") in respect of certain intellectual property rights in software created by Dr Potamianos (which we will call "the Source Code Claim").

4. The second action was a petition by Dr Potamianos, as minority shareholder in the Company, under sections 994-996 of the Companies Act 2006, claiming that the affairs of the Company were being carried on by Mr Prescott, as majority shareholder, in a manner that was unfairly prejudicial to Dr Potamianos's interests. Dr Potamianos sought an order in those proceedings that Mr Prescott should buy out his minority shareholding at a reasonable price.

5. At the end of the proceedings below, the primary results of the two cases and the relief granted by the order of 28 September 2018 were as follows:

   (1) SEL's claim to ownership of the source code succeeded and Dr Potamianos was ordered to facilitate its delivery up. This, we understand, has been done in compliance with the order and there is no appeal against that part of the judgment.

   (2) On the s.994-996 petition, it was ordered that Dr Potamianos's 40% shareholding should be bought out at a price to be determined by the court. This was to be subject, however, to future determination of the question whether various offers made by Mr Prescott to buy the shares meant that there had, in fact, been no unfairly prejudicial conduct in the affairs of the Company, with the result that the petition should be dismissed. That question was left over to a further trial of matters relating to the quantification of such of Dr Potamianos's claims as might require expert evidence.

   (3) Any purchase of Dr Potamianos's shares should be at full *pro rata* value, without discount for the fact that his is a minority holding in the Company.

   (4) There was to be a "Balancing Payment" to be made by SEL to BDL to reflect payments received by Mr Prescott's service company, Sameaim Limited ("Sameaim"), after the exclusion of Dr Potamianos from management, which had

not been matched by similar payments to Dr Potamianos's service company, BDL. The judge ordered that a Balancing Payment of £4 should be paid to Dr Potamianos's company for every £6 paid to Mr Prescott's company in the relevant period.

(5) Costs were reserved.

(6) The judge granted permission to Mr Prescott and to Dr Potamianos to appeal on most of the grounds upon which they now appeal. Permission to appeal on one further ground was granted in this court.

6. There are, therefore, two appeals before us from the judge's order on the unfair prejudice petition. We return below to the detail of the grounds of appeal advanced by each party.

Background Facts

7. The fuller facts of the case can be found in the judge's judgment below [2018] EWHC 1924 (Ch). It is necessary, however, to set out a shorter summary (mostly taken gratefully by us from the judge's judgment) to introduce the issues on the appeals.

8. SEL was incorporated on 2 September 1987 by Mr Prescott and his previous business associate, Mr David Van Der Wee. Its business was in making small direct current motor drives, called "controllers". This later expanded to include the making of higher power products. Some ten years later, Dr Potamianos, who is a specialist software creator, came to work for SEL, providing his services to SEL through BDL. Dr Potamianos had written a PhD thesis on digital drives and was recruited to help SEL acquire appropriate digital motor expertise. He became a director of SEL in 1999 with the title of Research and Development Director.

9. Both Mr Prescott and Mr Van Der Wee had provided their services to SEL via "service companies" to achieve fiscal advantages to them. When Dr Potamianos joined, Mr Prescott recommended that he too should operate through a similar service company arrangement. BDL was incorporated for this purpose on 11 March 1997. Thereafter, BDL entered into three service agreements with SEL on 8 May 1997, 27 March 2000 and 10 November 2015. Describing the arrangements between the parties at the beginning of his judgment, the judge said this (at paragraph 6):

> "6. …it is clear that the parties were motivated by tax avoidance objectives when they entered into a number of key written agreements which are at the heart of these proceedings. Perhaps unsurprisingly, neither side suggested that the Court's approach to any of these agreements should be coloured by this consideration. However, it is impossible to ignore. Quite apart from any question of whether any of these agreements are tainted or ought not to be enforced according to their terms on these grounds, there is an element of artificiality concerning agreements of this kind which makes it difficult to construe them as if they were not geared to fiscal objectives."

At paragraphs 22 and 23, the judge added:

> "22. Both Mr Prescott and Dr Potamianos state that Dr Potamianos "joined SEL in 1997". That form of words appears to recognise that SEL recruited Dr Potamianos personally.
>
> 23. Mr Prescott further states: "Being a small company we had difficulty competing financially with large corporations when recruiting high level technical people and the personal service company was a tool to enhance the tax efficiency of our remuneration package. The relationship between us was governed by the contracts and [Dr Potamianos] adhered to them". That language, also, appears to recognise that Dr Potamianos was recruited personally, and that the utilisation of a service company was a mere tool for tax purposes, although it also asserts that the contracts were genuine."

10. In 2007, Mr Van Der Wee was looking to retire and thoughts were given to selling SEL's business to an outside buyer. However, in the end, SEL bought back Mr Van Der Wee's shares for £600,000 and Dr Potamianos then bought a 40% holding in SEL for £400,000, leaving Mr Prescott holding the 60% majority.

11. At the same time as these share arrangements were made, Mr Prescott and Dr Potamianos entered into a Shareholders Agreement concerning their participation in the business of SEL. Under this agreement, there was provision for each of the participants to appoint one director for each part of his shareholding that represented at least 20% of the nominal value of the issued share capital of SEL. There was also a provision governing procedure in the event of deadlock arising from equality of votes at either board or shareholders meetings. We mention this because when disputes arose later, Dr Potamianos sought to invoke this deadlock procedure.

12. In 2012, the Company was incorporated as a holding company for SEL and also for the freehold of SEL's business premises at Arundel, a property known as "Peregrine House". Mr Prescott and Dr Potamianos transferred their shares in SEL to the Company, receiving in return 60% and 40% shareholdings in the Company respectively. Both became directors of the Company.

13. In the meantime, in separate developments, on 2 March 2009 Mr Gary Keen was appointed a director of SEL with responsibility for sales. In April 2013, Dr Mark Gardiner was appointed technical operations manager at SEL. He became a director of SEL in June 2014 and of the Company, in circumstances to which we will return, in 2017. In 2013, Mr Prescott explained the move to Dr Potamianos as "…building the succession team".

14. The judge found that, for practical purposes, Dr Potamianos was SEL's sole programmer, but he worked in conjunction with Mr Prescott, Mr Van Der Wee and other members of SEL's staff. The judge has described in detail the nature of Dr Potamianos's work and how he carried it out in developing SEL's product and the underlying software. This analysis was essential to the resolution of the Source Code Claim. However, while that claim forms important background to the unfair prejudice proceedings it is not necessary to enter into the same detail as the judge did on the subject.

15. The seeds of the dispute between the parties can be traced back to February 2014 when Mr Prescott and Dr Potamianos began to discuss further the reduction of their day to day involvement in the management of SEL and to talk again about "succession planning" in the business. By 6 February 2014, Mr Prescott recorded an outline plan for the future in an email to Dr Potamianos, recorded by the judge at paragraph 38 of his judgment, as follows:

> "We have a meeting with Gary and Mark. We explain to them that we are preparing for our eventual retirement and have considered all of our options. These boil down to 3 routes. 1) Find an acquirer for [SEL] 2) Bring in a new management team. 3) Form a management team from within [SEL]. We tell them our favoured option is number 3 and we want to try this first… Comments appreciated as usual."

Meetings took place between Mr Prescott, Dr Potamianos and with Mr Keen and Dr Gardiner in April and May 2014. At paragraphs 42 and 43, the judge found:

> "42. At a "Succession Planning" meeting of SEL on 23 May 2014 it was recorded that:
>
> > "Day-to-day running will be handed over to Gary and Mark but as sole shareholders Aris and Edwin will continue to have a strategic interest. What happens in the longer term depends mainly on how successful Gary and Mark are in running the business. If Sprint continues to thrive then the arrangement will continue.
> >
> > … Both Edwin and Aris will be in Sprint Electric three days a week after handover. They will be engaged purely in technical tasks but, if required, they will be available for consulting on management matters."
>
> 43. At the same meeting, the following timetable was agreed:
>
> "Handover: Wednesday 11-Jun-2104 (internal announcement)
>
> End of transition period: Monday 01-Sep-2014."

16. On 25 June 2014, SEL issued a press release announcing the appointment of Mr Keen and Dr Gardiner as joint managing directors ("JMDs") and stating that they would run the company from 11 June with Mr Prescott and Dr Potamianos remaining "on a part time basis as technical advisers". It seems that both Mr Prescott and Dr Potamianos regarded this press release as having "jumped the gun", having regard to the transition period up to September 2014 agreed at the meeting in May of that year. While Mr Keen and Dr Gardiner are recorded as having apologised for this at a meeting on 15 July, Dr Potamianos expressed himself in strong terms to Mr Prescott in an email later that day as follows:

> "Weakness on Mark's part for spotting things and being thorough, staggering ignorance/bad judgement on Gary's part, totally unacceptable".

17. At the same time, relations deteriorated between the JMDs and Mrs Stephanie Macdonald, who worked as an internal accountant for SEL, seconded to the position by The Martlet Partnership LLP, a firm operated by her husband, Mr David Macdonald, who also provided accounting services through his firm to SEL. In this dispute, Dr Potamianos largely sided with Mrs Macdonald and Mr Prescott sided with the JMDs. The detail need not concern us.

18. At a meeting on 3 October 2014, as the judge records, Mr Prescott and Dr Potamianos had agreed a "Management Framework" as a resolution of what they described as "current problems". The Framework included agreement that the JMDs would be left to run the business within the framework outlined "without day to day interference from the owners".

19. This arrangement did not resolve the internal management problems and the judge found that January 2015 was "an eventful month". On 9 January, Mr Prescott terminated Mrs Macdonald's contract with SEL. After heated exchanges on the subject, a compromise was reached on 16 January whereby Mrs Macdonald would continue to provide her accountancy services but working remotely from SEL's premises. Notwithstanding this, on 20 January 2015 Dr Potamianos sought to invoke the deadlock procedures provided for in the Shareholders Agreement of 2007. The problem inherent in this, as Mr Prescott was to point out later, was that the 2007 Agreement related strictly to the business of SEL only and not to the Company.

20. Mr Prescott and Dr Potamianos met again on 28 January 2015 to discuss options, including that one should buy the other out. A concern of Mr Prescott's, noted at this stage, was that if Mr Prescott was to buy out Dr Potamianos or if there was a third party buyer, there would be "no existing security for the future software support". It was noted that the June 2014 arrangements were not working and that Dr Potamianos had a poor opinion of Mr Keen and Dr Gardiner, thinking they were "stooges" of Mr Prescott. However, the possibility of a new shareholders' agreement was ventilated at that time. At a further meeting on 3 February, the concern of Mr Prescott about Dr Potamianos's control of the software was recorded as "Ed wants a route map to software security". It was this concern that eventually led to the dispute about ownership of the source code and to the Source Code Claim.

21. The judge noted that SEL's case was that Dr Potamianos had "more or less" stopped work on research and development at this stage. However, discussions continued through the Spring and Summer 2015 about a sale to an outside party and advice was taken from accountants, Baker Tilly, on the matter.

22. In September 2015 there were further discussions about Mr Prescott buying out Dr Potamianos; there was an apparent broad agreement in the course of this exercise as to a multiplier on profit of "4", as a basis for share purchase. On 16 October 2015, Mr Prescott offered to buy Dr Potamianos's shares by way of a share buyback for £1.34 million, an offer that was rejected by Dr Potamianos. Thereafter, the judge records Mr Prescott's continued expression of concern about the source code to Mr Macdonald and his perceived need to recruit "2 high level engineers" to work on the software in place

of Dr Potamianos. Later in 2015, Mr Prescott made an offer (orally) to Dr Potamianos to increase the offer of 16 October by a post-sale 4 year contract for BDL at £60,000 per annum on top of the initial offer of £1.34 million.

23. In early 2016, Mr Prescott repeated his concern about Dr Potamianos being the only person at SEL who had access to the source code. He asserted that Dr Potamianos had acknowledged that SEL owned the source code, but Dr Potamianos did not agree that he had done so.

24. On 12 February 2016 Dr Gardiner circulated a draft Business Plan for the growth of SEL. On 19 February, Dr Potamianos said in an email that this was his No. 1 priority and he asserted that he could still be fully relied upon for technical support and that he had no intention of retiring in the short to medium term. By 23 February, Mr Prescott was expressing his support for the Business Plan and for the JMDs. He also wanted a handover of the source code and again proposed the training of a new engineer.

25. The business plan was put to the board of SEL on 22 March 2016 and was approved by a majority of three to one (Mr Prescott, Mr Keen and Dr Gardiner voting in favour and Dr Potamianos voting against). An attempt by Dr Potamianos to have the Business Plan withdrawn failed at a meeting of the Company on 7 April 2016.

26. On 13 April 2016, the majority in SEL engaged Mr William Pearson as a cost accountant, against the opposition of Dr Potamianos. The latter believed that the employment of Mr Pearson was designed to replace or duplicate Mrs Macdonald's function as SEL's "internal" accountant.

27. Dr Potamianos called a board meeting of SEL for 25 April 2016 when, as the judge found, he knew that Mr Prescott would be absent. He told the other directors that there was "deadlock" between Mr Prescott and himself triggering the relevant provisions in the Shareholders' Agreement and that there were potentially "catastrophic consequences" for the company and for the directors personally. He said he "reserved the right" to take action against directors in respect of any financial loss that he might suffer. He complained about the replacement of Mrs Macdonald with Mr Pearson. Finally, he said he could see no alternative "other than exit at a fair price or a nuclear option (for clarification the nuclear option is going to the arbitrator and seeing whatever comes out of it)". (That is a reference to a rather strange "arbitration" provision, to which we were taken, in the 2007 Shareholders Agreement.)

28. The judge records Mr Prescott's subsequent rejection of the view that Dr Potamianos had expressed at this meeting. Mr Prescott contended that the 2007 Agreement had no relevance and, in any event, Dr Potamianos had not triggered it properly in accordance with its terms. Mr Prescott commissioned a "critical review" of the contentious business plan which Dr Potamianos criticised in turn on the ground that it was merely a wasted expense.

29. There was an exchange of messages between Mr Prescott and Mr Macdonald at this time, largely relating to the respective roles of Mrs Macdonald and of Mr Pearson. In a message to Dr Gardiner at this time, Mr MacDonald wrote: "… The atmosphere at Sprint Electric is like a festering open wound which grows more and more gangrenous by the day…". We know, of course, that Mr Macdonald largely took the side of Dr Potamianos in the developing disputes, but we quote it as recording one assessment of

the position at that time from someone who was neither a shareholder nor a director in the Company or SEL. The assessment seems to us to have been realistic.

30. The judge records the continuing animosity between the parties about Mr Pearson's/Mrs Macdonald's roles in SEL and he sets out in paragraphs 91 to 99 of the judgment a number of highly acrimonious messages which were on that subject.

31. With all this in the background, in June/July 2016, the issues regarding the source code re-surfaced and Mr Prescott proposed that Moore Blatch LLP should be engaged to advise on the matter. Dr Potamianos objected to this, perhaps unsurprisingly, on the basis that that firm also advised Mr Prescott personally; he suggested that an independent law firm be consulted on this matter and upon other matters in which he believed "…the directors were not acting in the best interests of the company and against my concerns and objections". He stated his willingness to continue to work on research and development matters, although he complained that much of his time was being taken up by "health & financial monitoring tasks".

32. On 15 July 2016, Mr Prescott informed Dr Potamianos that an invoice submitted by BDL would not be paid. He said that he would also refrain from paying his own service company, Sameaim, pending resolution of the dispute about rights to the source code. Dr Potamianos responded that there were contracts with BDL for delivery of specific projects, which were not related to the dispute.

33. In paragraph 262 of the judgment, upon which Mr Prescott places strong reliance in the appeals, the judge describes a meeting and sets out e-mails between Mr Prescott and Dr Potamianos in August 2016. The problem which had emerged by this point was that the source code files had been "hidden" by Dr Potamianos in domains on the server of which only he knew the location and to which he was not prepared to give other SEL staff access. Mr Prescott was demanding that the source code be made available, particularly to a newly recruited software programmer Dr Fells, whom Mr Prescott wanted to involve in the future maintenance and development of the code. Dr Potamianos acted, the judge found, in a manner which was not "direct, frank or remotely helpful" in batting away Mr Prescott's requests that the source code be made generally available to SEL staff and that Dr Potamianos assist in training Dr Fells to be able to use the code. The judge also found that Dr Potamianos was in these communications using the knowledge that he alone had of what source code had been created and where it was stored for his own ends, "seeking to gain an advantage for himself in his wrangling with Mr Prescott and other SEL personnel." All this, the judge found, was contrary to the fiduciary duties that Dr Potamianos owed to SEL and was detrimental to SEL.

34. On 23 September 2016, in an important move in the context of this case, the board of SEL met (according to the minutes) "to consider and if thought fit to approve the appointment of a committee of the board to consider the difficult issues relating to AP [i.e. Dr Potamianos] *and run the business generally* whilst such issues are ongoing" (emphasis added). Dr Potamianos protested that the proposal unfairly prejudiced his rights. Mr Prescott proposed (as the minutes record) that the Sub-Committee should consist of himself, Mr Keen and Dr Gardiner

> "to act on behalf of the board of directors in relation to the following matters to include (in particular, but not be limited to):

> … the difficult issues surrounding the potential litigation against BDL; and … that for a period of three weeks, or such longer period as the Board shall determine, *the running of the business generally* …". (Emphasis again added).

35. Mr Prescott is recorded as saying:

> "EJP went on to say there is another solution making the proposal unnecessary and that is for AP to confirm that the IPR is owned by Sprint Electric and to make available the latest 6.13 source code with an explanation together with all deliverables of previous contracts by BDL."

Dr Potamianos responded that "it is not relevant to discuss this as it is part of an ongoing process". He also insisted that a minute be made that there had been no answer from Mr Prescott about the prior appointment of legal advisers. Under "Any Other business" the minutes identify as an item "Appointing Moore Blatch" and then state:

> "… AP pointed out that EP had already announced the appointment of MB in an email to AP and the rest of the directors on 15 July 2016 and therefore AP considers this a waste of time in the present meeting and indicative of the haphazard way EP is conducting corporate governance within SEL.
>
> AP, for clarity, incorporates below the email referred to during the board meeting.
>
> > "Dear Directors,
> >
> > Re my email of 7th July I have received unanimous agreement that we should appoint a corporate lawyer to advise the Board, and 3 to 1 that it should be Moore & Blatch.
> >
> > Aris alone thinks it should not be Moore & Blatch as they would be conflicted having worked for me personally. Moore & Blatch have advised me that they would not know anything I don't already know so cannot see there would be conflict.
> >
> > I will advise Moore & Blatch that they are to be appointed.
> >
> > Regards
> >
> > Edwin.""

36. Dr Potamianos's vote was the sole vote against these various proposals, which were duly carried. On 7 November 2016, at a further meeting of the SEL board, the appointment of the Sub-Committee was extended for 12 weeks, Dr Potamianos dissenting again.

37. In the meantime, on 11 October 2016, Moore Blatch wrote on behalf of SEL to BDL requesting the source code and other materials. On 13 October, Blake Morgan wrote on behalf of Dr Potamianos setting out the basis of his claim that he was being unfairly

prejudiced. The crux of Dr Potamianos's complaint was summarised in paragraph 10 of the letter as follows:

> "10. Dr Potamianos became a 40% shareholder of SEL and then the Company on the basis that he would be involved in its management. That is reflected in the Shareholders Agreement. He has however been subsequently excluded. Since January 2015, Dr Potamianos has become increasingly concerned about the manner in which the affairs of the SEL and the Company have been conducted (and his exclusion from management), as set out in further detail below. Some recent examples of conduct, which our client contends are unfairly prejudicial to him as a member of the Company, are set out below. This list is not exhaustive, and Dr Potamianos reserves the right to adduce further instances of unfairly prejudicial conduct should it become necessary to issue a petition. Exclusion of management where participation was part of the bargain between shareholders, and such exclusion is not justified, constitutes inequitable conduct."

In the following paragraphs of the letter complaint was levelled against the replacement of Mrs Macdonald by Mr Pearson, the "Unmeritorious Business Plan" and mismanagement of Peregrine House.

38. On 16 November 2016, Moore Blatch responded to Blake Morgan's letter, contending that Dr Potamianos wished to use the source code dispute as a bargaining tool and had "procrastinated about recruiting a software engineer for succession purposes"; it was further alleged that Dr Potamianos had told Mr Prescott that he would not hand over the source code until Mr Prescott had agreed a new shareholders' agreement. In response to Blake Morgan's paragraph 10 (quoted above), Moore Blatch wrote:

> "10. Your client has always had a small role in management decisions. During the seven years that our client was the Managing Director of SEL he alone made the vast majority of management decisions. The only exception is that company-wide pay reviews were carried out by all directors. During this time SEL was very successful and grew from £1,800,000 to £2,800,000. It was awarded a Queen's award for exports in 2009. The winning of this award was facilitated entirely by our client, as was the hosting of a visit by the Duke of Kent in September 2009. We do not see any basis for asserting that there has been prejudicial conduct, let alone unfairly prejudicial conduct, on the part of our client."

Responses to the further paragraphs of Blake Morgan's letter then followed.

39. At the end of the letter, Moore Blatch said that Mr Prescott remained prepared to purchase Dr Potamianos's share in the Company at an "appropriate price". They listed various "facts" that would have to be reflected in the price to be determined by a jointly instructed expert, including that Dr Potamianos's allegations of unfair prejudice were unfounded and that SEL owned the source code created by Dr Potamianos. Blake

Morgan rejected that proposal stating that it was premature to instruct an expert before various contentious matters had been addressed.

40. On 17 February 2017, Moore Blatch made a further proposal on Mr Prescott's behalf offering either to buy Dr Potamianos's shares for £1 million or alternatively repeating the earlier proposal to appoint an expert to value the shares.

41. On 23 February 2017, Mr Prescott gave notice of meetings of the boards of SEL and of the Company, to take place at the offices of Moore Blatch, on 7 March 2017 at 2 p.m. and 3.30 p.m. respectively. The agenda for each meeting noted as the main item of business "concerns relating to [Dr Potamianos] including his possible removal as a director of [SEL]". By letter of 6 March 2017, Blake Morgan wrote to state Dr Potamianos's willingness to attend the meetings subject to provision of full particulars of "any alleged concerns" being provided to him, the meetings being audio recorded to serve for accuracy of minutes, and that no solicitors should attend.

42. On 7 March 2017 Moore Blatch responded stating that Dr Potamianos was entitled to attend, but that the meetings would proceed whether he did so or not and that he was not "in a position to impose requirements". It was said that if it was resolved to instigate the process to remove Dr Potamianos as a director, the 2006 Act sets out the process for him to be notified and to make representations. On the other points, Moore Blatch wrote:

> "It is sad that it has come to the point where your client requires board meetings to be recorded; it is a clear sign that the board is dysfunctional. However, Mr Prescott has no objection to the meetings being recorded if your client wishes to do so.
>
> We cannot given [sic] any assurances that no solicitors will attend. It is a matter for the boards. If the boards request us to attend then we will be happy to attend."

43. At the meetings on 7 March, steps were taken to arrange for the convening of a general meeting of SEL for the purpose of removing Dr Potamianos as a director. The steps included the appointment of Dr Gardiner as an additional director of the Company. It was also resolved that Dr Potamianos, although at that stage still a director of SEL, should be excluded from SEL's premises and that he was to be given notice to return company property, as specified in a written notification that was to be given to him.

44. By notice of 9 March 2017, notice was given of a general meeting of SEL to be held on 10 April 2107 at the offices of Moore Blatch for the consideration of the resolution to remove Dr Potamianos as a director, amid ongoing disputes between the solicitors as to the procedures in and around what had transpired at the meetings on 7 March.

45. On 23 March 2017, Moore Blatch sent to Blake Morgan the "Written Particulars of Concern" (originally requested by Blake Morgan in their letter of 6 March mentioned above). This document was dated 7 March 2017 and seems to have been drafted by Moore Blatch for the purpose of the meeting that day, although not supplied at that stage to Dr Potamianos. A number of matters were raised, as summarised in paragraph 118(1) of the judgment, which were answered in turn in a letter of 31 March 2017 from Blake Morgan.

46. We do not dwell on the detail of the allegations and the responses, largely because the judge took the view (in our judgment correctly) that the real matter for concern was the source code dispute. He made no findings in respect of the other matters, considering that such findings were not necessary. We return in a moment to what the judge did say about the "Written Particulars of Concern" and the "Written Representations" in response.

47. The general meeting of SEL duly took place on 10 April 2017, with Mr Prescott acting as the corporate representative of the Company. He had been so appointed at a meeting of the Company's board held that day and attended by Mr Prescott and Dr Gardiner as directors. At the Company's board meeting Mr Keen and a Mr Clark of Moore Blatch are recorded as attending. At the SEL general meeting, the minutes record Dr Gardiner as also in attendance. The minutes of both meetings record Dr Potamianos's "apologies".

48. The minutes of the Company's board record receipt of the Written Representations and go on to say that "IT WAS RESOLVED to formally note [sic] the receipt of the Written Representations by the Company in preparation for the General Meeting" of SEL. The minutes of the general meeting of SEL state:

> **"3. WRITTEN REPRESENTATIONS**
>
> 3.1 The chairman confirmed that a letter had been received from Blake Morgan dated 31 March 2017 containing written representations of AP in relation to the proposal to remove AP as a director of the Company [i.e. SEL] (the **Written Representations**). The chairman confirmed that the Written Representations had been circulated to Sprintroom by the board of directors of the Company prior to the General Meeting and EP confirmed, in his capacity as corporate representative of Sprintroom, that such Written Representations had been received by Sprintroom. Further, the Written Resolutions were presented to the meeting.
>
> 3.2 The chairman noted that AP was not in attendance at the General Meeting in order to be heard on the proposed resolution to remove him from office as a director of the Company."

SEL then resolved that Dr Potamianos should be removed as a director.

49. On 22 June 2017, SEL issued the claim form in the Source Code Claim. On 14 September 2017, Dr Potamianos presented his "unfair prejudice" petition.

The Judge's Conclusions

50. The first issue before the judge was "whether the Company is or at any time has been a quasi-partnership" (paragraph 338) in which both Mr Prescott and Dr Potamianos were entitled to participate in management, with the corollary that equitable considerations rendered it unfair for the majority shareholder (Mr Prescott) to use his

voting power to exclude the minority (Dr Potamianos) from management: *O'Neill v Phillips* [1999] 1 WLR 1092, 1102.

51. The judge held that the Company was such a quasi-partnership and continued to be so at all material times. He did so for eight principal reasons set out in paragraph 352 of the judgment. As it is no longer contested that SEL/SRL was/were, at least at the outset, quasi-partnership(s) in nature, it is not necessary to set out all the judge's eight reasons. However, we think it is right to set out relatively fully the judge's reasons (4) to (8) as they affect other issues arising on the appeals. Those reasons were as follows:

> "(4) Fourth, from the time that Dr Potamianos became a shareholder in SEL, Mr Prescott and Dr Potamianos reached agreement as to the form of return that they were each to obtain from the profits of SEL, namely that they would divide those profits in the same ratio as their respective shareholdings, and they implemented this agreement by the invoices raised by their respective service companies.
>
> (5) Fifth, Dr Potamianos undoubtedly participated in the management of the business of SEL, and did so pursuant to an agreement or understanding that he would do so. I do not consider that it is necessary to make findings as to the precise extent of his participation. I suspect that it was less than he would like to claim and greater than Mr Prescott was inclined to accept. I consider that, in broad terms, their respective management roles and inputs were carried over into SRL when SRL was incorporated, and it is plain from the contemporary documents relating to succession management that they each played a significant part in the day to day running of the business of SRL (albeit that they were often not in harmony).
>
> (6) Sixth, Dr Potamianos bore a risk in acquiring shares in SEL, in light of the considerations that (a) SEL might go into liquidation or (b) he might be unable to realise the full value of those shares because Mr Prescott might be unwilling to repurchase them at full value and he might be unable to find a purchaser for his shares in the company because he held a minority shareholding or because if he did find a purchaser Mr Prescott could prevent the transfer being registered.
>
> (7) Seventh, as Mr Prescott accepted in evidence, and as was in any event clear from the evidence before the Court, including the contemporary documents, the business of SEL was conducted informally and on the basis of trust and confidence. A prominent feature of this was the way in which individual work contracts were agreed and performed. As set out above, these

> arrangements had an element of artifice, in that they were priced in a manner that was geared to transferring money from SEL to Mr Prescott and Dr Potamianos at a level which was fixed by them in whatever way they considered was most tax advantageous. However, that does not colour or affect the fact that, in substance, each of these men trusted the other to identify what work needed to be done in their respective spheres of technical expertise, to carry out that work, and to deliver the resulting work product to SEL, all in the interests of SEL, and therefore, in light of their respective stakes in SEL, in their joint interests. That mutual trust and reliance was vital and fundamental to the continuation and success of the business of SEL. Those matters are not affected by the interpolation of service companies, the fact that the two men had frequent disagreements and differences of opinion as to how the business should be run, or the fact that Dr Potamianos adopted a stance with regard to the source code and associated documents that, as I have found, placed him in breach his fiduciary duties as a director of SEL due to his unhelpful and evasive nature, and placed him/BDL in breach of the Contracts discussed above. Nor are they affected by Clause 18 of the Shareholders Agreement, which stipulates that none of the provisions of that agreement shall be deemed to constitute a partnership between Dr Potamianos and Mr Prescott. I agree with Dr Potamianos that this Clause does not preclude a "quasi-partnership" from arising.
>
> (8) Eighth, viewed in the round, these features continued with the formation of SRL. In some respects, Dr Potamianos' claim of "quasi-partnership" is stronger with regard to SRL, because at the time that SRL was formed and he and Mr Prescott became shareholders in the same proportions as they had held in SEL the above state of affairs had existed for several years. This situation therefore falls squarely within Arden LJ's observation that it is "relatively easy" to establish that a relationship between shareholders constitutes a "quasi-partnership" when "a company was formed by a group of persons who are well known to each other and the incorporation of the company was with a view to them all working together in the company to exploit some business concept which they have."

52. The judge continued at paragraphs 355 and 357-8 as follows:

> "355. At the end of the day, I consider that Dr Potamianos is right in submitting that it was the implicit agreement or understanding

> of both Mr Prescott and Dr Potamianos at and after the formation of SRL that Dr Potamianos' rights would not be materially eroded or affected by the formation of SRL, and, in particular, that (a) he would be entitled to a seat on the boards of both SEL and SRL and (b) the later arrangements involving Mr Keen and Dr Gardiner did nothing to affect this implicit agreement or understanding. I detected nothing in the evidence to suggest that it was intended by either of the two men that the formation of SRL would or should produce any fundamental or significant change in the nature of their relationship, and I consider that Mr Prescott's stance as reflected in the contemporary documents positively supports the contrary view.
>
> …
>
> 357. I have no difficulty in concluding that, for purposes of section 994 of the CA, the affairs of SRL included the affairs of SEL, not least because, as he frankly and inevitably accepted in cross-examination, Mr Prescott had and has control over both companies in practical terms and their dealings with one another were plainly not on an arm's length basis. Indeed, as a matter of substance and practicality, the business of SEL was the key business for both Mr Prescott and Dr Potamianos, as that was the business to which they were able to contribute their technical skills and which took up most of their time and effort as regards development, sales, marketing and so forth.
>
> 358. For these reasons, and in accordance with Lord Hoffmann's observations, it seems to me that the starting point in the present case is that it was inequitable for Mr Prescott to use his voting power to exclude Dr Potamianos from participation in the management of SEL without giving him the opportunity to remove his capital on reasonable terms."

53. The judge reached his principal conclusion on Dr Potamianos's exclusion in paragraph 396, where he also commented upon the treatment of the Written Representations from Dr Potamianos by the opposing faction, as follows:

> "396. In any event, Dr Potamianos' removal as a director was not justified by his conduct, and, certainly, the contemporary documents, in particular in the form of the minutes dated 10 April 2017, do not explain why anyone considered that it did: the "Written Particulars of Concerns" had been answered by the "Written Representations", and it was not fair to remove him without determining why, if it be the case, those answers were deficient. As it transpires, in accordance with my findings, the answers given in respect of what was probably the most significant single ground for concern, namely the source code dispute, were misguided. In my judgment, however, Dr Potamianos' stance on that issue did not justify his removal as a director. It was inherent in the Contracts that conflicts of interest

> might arise between SEL on the one hand and Dr Potamianos/BDL on the other, and the history of this litigation and my ruling on the Source Code claim provide ample testimony that there were grounds for dispute that he was in a position to put forward in good faith in the interests of himself and BDL."

Finally, at paragraph 401, the judge said:

> "401. …I do not consider that all the additional matters relied on by both sides either add to Dr Potamianos' case based on his exclusion from management in a manner that I have held to be inequitable, in particular by affecting the date at which his shareholding should be valued, or add to Mr Prescott's case on the basis that they provide grounds for denying Dr Potamianos any relief, or alternatively because they affect the remedy that it is appropriate to grant."

54. The judge's decision to order the making of a "Balancing Payment" by SEL to BDL is explained in paragraph 398 of the judgment in these terms:

> "398. …Dr Potamianos complains that Sameaim has continued to invoice SEL and to be paid by SEL while he and his own service company, BDL, have been shut out from doing so since disputes arose and, more particularly, he was excluded from management. Dr Potamianos asserts that this was in breach of a promise made by Mr Prescott on 15 July 2016 that Sameaim would stop invoicing SEL, and, in any event, that it has allowed Mr Prescott to extract monies from SEL in a way that is prejudicial to Dr Potamianos. In my judgment, the answer to this complaint is that Mr Prescott and SEL should be held to the bargain that was made with Dr Potamianos in or about 2007, to the effect that they would each invoice SEL and be paid by SEL in a manner that was proportional to their respective shareholdings. Accordingly, for every £6 that Sameaim Limited has been paid which is not matched by a payment of £4 to BDL since relations broke down, I consider that BDL is entitled to be paid a balancing payment (save that (a) in so far as the payments that were made to Sameaim Limited were used to pay Dr Fells, that element of those payments should be left out of account, and (b) I will hear submissions as to whether BDL is entitled to charge VAT in light of the fact that, in the events which have happened, BDL has not performed any services for SEL). That may seem like rough justice in light of the fact that BDL and Dr Potamianos have made no contribution to SEL since that time, but, as against that, it is relevant to have regard to my finding that Dr Potamianos was unfairly excluded from management, and to set this decision in the context of my determination of wider issues as to the valuation date and other terms of buy-out discussed below."

The Appeals

55. With the permission of the judge, Mr Prescott appeals against the judge's decision on four grounds, and with permission granted by Patten LJ on one additional and related ground (Ground 3A, see below).

56. First, it is submitted that the judge was wrong to find that the exclusion of Dr Potamianos from management of SEL was unfair, because exclusion was justified by Dr Potamianos's conduct and in particular the findings that he had acted in breach of duty (Ground 1). Secondly, it is said the judge was wrong to find that Dr Potamianos had a right to continue to participate in management of the Company (which the judge held to be a quasi-partnership) after he had committed breaches of duty: it is submitted that the judge ought to have concluded that those breaches of duty brought the quasi-partnership, and thus the right to participate in management, to an end (Ground 2). Thirdly, it is argued that the judge was wrong to direct the Balancing Payment, as Dr Potamianos had brought about his own exclusion (Ground 3). Further, it was wrong in any event to direct the Balancing Payment as BDL was in breach of contract and not ready and willing to perform its obligations and/or in the light of Dr Potamianos's breaches of duty (Ground 3A). Finally, it is said that it was wrong to hold that Dr Potamianos's shares should be valued without any discount, in view of his having acquired them at a discount (Ground 4).

57. Dr Potamianos appeals, also with the judge's permission, on five grounds relating to proposals made by Mr Prescott to buy Dr Potamianos's shares and whether those proposals provide Mr Prescott with a defence to the petition.

58. Both Ms Page (for Mr Prescott) and Mr Pavlovich (for Dr Potamianos) presented their arguments before us, both written and oral, with care and skill. We are grateful to them both.

59. We address Mr Prescott's appeal first. If that appeal succeeds on its principal grounds, then Dr Potamianos's appeal becomes academic.

Mr Prescott's Appeal

Grounds 1 and 2

60. The crux of Mr Prescott's complaint under both these grounds is that, having found as he did that Dr Potamianos was in breach of his fiduciary duties to the company in his attitude to SEL's claim to the source code and his conduct in the face of it, the judge ought to have found that Dr Potamianos was not entitled to relief on his unfair prejudice petition. It is argued that his behaviour brought to an end the relationship of trust and confidence underlying the quasi-partnership and that such quasi-partnership no longer subsisted at the stage when Dr Potamianos was excluded. It is also submitted by Ms Page that this behaviour amply justified the progressive exclusion of Dr Potamianos from participation in the management of SEL; such exclusion, therefore, was not unfairly prejudicial. Further, even if the exclusion would not otherwise have been justified, Mr Prescott, it is said, made a series of reasonable offers to buy out Dr Potamianos's shares which negated any unfair prejudice that might otherwise have arisen.

61. Ms Page argues that, on the judge's findings, Dr Potamianos's conduct with regard to the source code amounted to breaches by him of his duties as a director of SEL under section 172 (to act in the way 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) and section 175 (to avoid a situation in which he has, or can have, a direct or indirect interest which conflicts, or possibly may conflict, with the interests of the company). She submits that such breaches disentitled Dr Potamianos to any benefit from the equitable considerations which normally limit the use of majority voting power in quasi-partnership companies.

62. At paragraph 261 of his judgment, the judge summarised what he saw were Dr Potamianos's duties in the face of the source code dispute. He put it this way:

> "261. When it became apparent that SEL on the one hand and BDL and Dr Potamianos on the other had a difference of understanding as to the rights to the Source Code, and when SEL asked where it was and how SEL could access it, I consider that Dr Potamianos was not entitled to act in a manner that was detrimental to SEL by being evasive or misleading, including by dissembling as to those matters. SEL was entitled to be provided with a candid statement of his position, so that it had an opportunity to decide how to respond to it, for example by working round his denial of rights and access."

Having described the e-mail and other exchanges in August 2016 to which we have referred above, the judge said this at paragraph 262(10):

> "(10) In my opinion, Dr Potamianos is unable to justify acting in this way by relying either on the terms of the Contracts or on any genuine disagreement that he may have had with SEL's stance as to ownership of, and rights of access, to the Source Code. He was in a position to behave as he did because he alone knew what Source Code had been created and where it was stored, and he alone had that knowledge because of the trust that had been placed in him by SEL with regard to those matters. He was using that knowledge, obtained by him in that way, for his own ends, seeking to gain an advantage for himself in his wrangling with Mr Prescott and other SEL personnel. All this was contrary to the duties that he owed to SEL, and was detrimental to SEL for the reasons that I have identified above."

63. It is clear that the judge appreciated that misconduct on the part of an excluded shareholder might justify removal as a director. He stated the position briefly, but entirely accurately, in paragraph 326, as follows:

> "326. If the shareholder agreed to or acquiesced in or was complicit in the conduct complained of, or led those controlling the company to act in the manner complained of, that may affect whether that conduct is unfair, as may misconduct on the part of

> the shareholder, which may justify (for example) exclusion or removal as a director (see *Hollington on Shareholders Rights, 8th edn ("Hollington")* at [7-142] and [7-144]; *Minority Shareholders – Law, Practice and Procedure, 5th edn, ed Joffe ("Joffe")* at [6.158] and [6.161])."

Later, at paragraph 386, the judge quoted the *Hollington* textbook again:

> "There will, however, be cases where the excluded minority has brought his exclusion upon himself by his own wrongful or unconscionable conduct. The courts then have to wrestle with the individual facts of particular cases to determine whether the majority were justified in excluding the minority …"

64. The judge carefully weighed in the balance the respective cases of Mr Prescott and Dr Potamianos in the section of his judgment beginning with the cross-heading, "*The unfair prejudice complained of*", beginning at paragraph 377 and continuing to paragraph 388. Included in that section (at paragraph 380) there is a very full summary by the judge of Dr Potamianos complaints of "failure to consult/exclusion…and alleged resultant mismanagement of SEL and [the Company]…" under twelve headings.

65. At paragraph 385, the judge summarised Mr Prescott's position on this part of the case, as follows:

> "385. For his part, Mr Prescott argues that the rights and wrongs of all the allegations made by Dr Potamianos should be examined in detail on the basis that this is a case in which it is necessary or at least appropriate to investigate whether and to what extent Dr Potamianos is to blame for the events with which those allegations are concerned. This is against the background that, in his witness statement in the Source Code claim, Mr Prescott describes Dr Potamianos as a "textbook sociopath" and the arrangement whereby he allowed Dr Potamianos to acquire a 40% shareholding in SEL as a "Faustian pact" that he had only entered into in order to ensure the future of SEL."

66. In balancing these considerations, the judge acquitted Mr Prescott and his supporters of mismanagement and found that he had acted in good faith in what he saw to be the interests of SEL. Nonetheless, he said, "I do not consider that the fault in this case lies by any means all on one side" (paragraph 393). At paragraph 394-5, the judge said:

> "394. Nor do I consider that Dr Potamianos' conduct was so serious as to justify his exclusion from management altogether, as effectively happened by the formation of a Sub-Committee which although inspired by the need to consider and deal with issues concerning the source code was (in the words of Mr Keen) "formed …to run the business generally whilst such issues were ongoing", and still more by his removal as a director. In fact, unhappy and divided though they may have been in many respects, Mr Prescott and Dr Potamianos (and others) managed to hold things together throughout all the ups and downs

> concerning Mrs Macdonald, the expenditure on Peregrine House, the retention of Mr Van Der Wee, the Business Plan, and so forth, without excluding Dr Potamianos from management. The dispute over the source code represented a more significant issue, and justified the establishment of a Sub-Committee for the purposes initially identified in the minutes dated 26 September 2016 (i.e. "to consider the difficult issues relating to [Dr Potamianos]"). In my judgment, that was sufficient to address that issue, and to enable Dr Potamianos to continue to be involved in management (and, indeed, to provide ongoing programming services) in spite of its existence and while SEL took legal advice as to SEL's position and potential remedies.
>
> 395. In fact, the Sub-Committee assumed a wider role, which had the effect of excluding Dr Potamianos more generally, which I do not accept to have been justified because the source code dispute was "inextricably intertwined" with all of SEL's other business."

We have already quoted in full above paragraph 396 of the judgment where the judge found that Dr Potamianos's removal as a director was not justified by his conduct.

67. We would add that in each party's skeleton argument for this appeal he "puts his best foot forward" in identifying the features of the case upon which he relies to put the other in the worst possible light: see e.g. paragraph 11 of the argument for Mr Prescott and paragraph 5(5) of Dr Potamianos's argument. In our judgment, such paragraphs only serve to support the judge's overall conclusion that fault lay on both sides.

68. Mr Pavlovich's first submission on this part of the case was that we should only interfere with the judge's conclusions on whether there had been "unfair prejudice" in this case if we found that the judge:

> "…ha[d] not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which reasonable disagreement is possible…",

quoting Lord Fraser of Tullybelton in *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, as quoted by Brooke LJ in *Tanfern Ltd. v Cameron-MacDonald (Practice Note)* [2000] 1 WLR 1311, 1317, in turn quoted by Clarke LJ (as he then was) in *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577, 579, paragraph 9.

69. Lord Fraser in *G v G* was saying that it would not be helpful on an appeal to inquire whether different shades of meaning were intended to be conveyed by words such as "blatant error", "clearly wrong", "plainly wrong" or simply "wrong" to describe the circumstances in which an appellate court could interfere with a trial judge's decision. He preferred the concept of "the generous ambit within which reasonable disagreement is possible". If the decision went beyond that generous ambit then the appellate court could interfere.

70. Mr Pavlovich also referred us to a later passage in Clarke LJ's judgment in the *Assicurazioni Generali* case, at paragraph 16, as follows:

> "16. Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way."

71. It seems to us that the argument in this case is directed to the judge's "evaluative" decision as to whether Dr Potamianos's conduct justified his exclusion from the management of the Company and so whether there had been "unfair prejudice" in the conduct of the company's affairs on the basis of the primary facts as he found them to be. While there were disputes below as to the primary facts, his findings on those disputes are not now challenged. We are concerned to assess the judge's "evaluation" of those primary facts leading to his decision that there had been "unfair prejudice" in this case.

72. The question of the room for appellate challenge of such an "evaluative" decision is an area of our procedural law which has attracted much attention from appellate courts in recent years, possibly fuelled by the ever-increasing complexity and detail of some litigation. In such litigation it is very difficult for appellate courts to put themselves in the same position as trial judges in making those decisions, based (as they are) on voluminous documentary and/or oral evidence, which can only be summarised even in an extensive judgment at first instance. In our judgment this is just such a case.

73. The matter was extensively considered by the Supreme Court in *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911. The Court of Appeal sought to draw some threads together, from that case and others, in *IBM United Kingdom Holdings Ltd. v Dalgleish* [2018] ICR 1681, at 1764-5, which was a case concerning alleged breaches of duty by an employer in relation to staff pension funds. Again, the appeal was against a judge's evaluation of whether (by then) undisputed facts gave rise to relevant breaches of duty.

74. In paragraphs 417-420 of the judgment of the court, delivered on 3 August 2017 by Sir Timothy Lloyd, the following was said:

> "417. The submission for the RBs was that an appellate court should only interfere with a trial judge's primary findings of fact, or with his conclusions based upon an evaluation of facts, if it is satisfied that the judge was plainly wrong, exceeding the generous ambit within which a reasonable disagreement over the evaluation of facts is possible. This was said to be justified by the well-known case of *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2003] 1 WLR 577, paras 9–10, 12, 16–17. The RBs also relied upon the decision of the Supreme Court in *Henderson v Foxworth Investments Ltd*

[2014] 1 WLR 2600 in which it was held that, in the absence of some identifiable error, such as a material error of law or the making of a critical factual finding which had no basis in the evidence, an appellate court would not interfere with the factual findings of the trial judge unless it were satisfied that his decision was "plainly wrong" in the sense that it could not be reasonably explained or justified and so was one which no reasonable judge could have reached. We invited the parties' attention, in addition to these cases, to *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911.

418. Reflecting upon the helpful submissions made to us on these authorities, this is not a case in which challenges are made to the judge's findings of primary fact at all. It seems to us that, even if they were put at their highest from the point of view of the RBs, the relevant issues would be largely akin to the question considered by the Supreme Court in *In re B* as to whether the trial judge's evaluation of whether the "threshold" requirements of the Children Act 1989 in that case had been met on the findings of primary fact made at the trial. Lord Wilson JSC characterised the issue as an "evaluative" determination (at para 44) and said: "Like all other members of the court, I consider that appellate review of a determination whether the threshold is crossed should be conducted by reference simply to whether it was wrong." (See also Lord Neuberger PSC at para 61, Lord Kerr JSC at para 110, Lord Clarke JSC at 138, and Baroness Hale JSC at paras 202–203.)

419. In *In re B*, some members of the court said that it is not possible to lay down any single clear rule as to the proper approach to be taken by an appellate court where the appeal is against an evaluation: see e g per Lord Neuberger PSC at para 60 and Lord Kerr JSC at para 110. However, in a case such as the present, as it seems to us, a question such as whether the judge's view that there had been breaches of the *Imperial* duty is to be upheld, should be determined by asking simply whether he was or was not "wrong" rather than whether he was or was not "plainly wrong".

420. In our judgment, *Henderson*, much relied on for the RBs, is not inconsistent with that conclusion, because, when read with care, it can be seen that the appeal involved a challenge to the findings of primary fact made by Lord Glennie, the Lord Ordinary, as trial judge. The issue on appeal was indeed, therefore, whether his decision was "plainly wrong". The significant issue in the case was what was the true consideration for the transaction that was being challenged as having been at an undervalue. That was not a matter of evaluation; it was a matter of finding the primary facts, to be decided on the evidence that the Lord Ordinary, as trial judge, had heard and which the

> Extra Division of the Court of Session, from whom the appeal was successfully brought, had not."

(In this quotation, the reference to the "*Imperial* duty" is to the duty explained in *Imperial Group Pension Trust Ltd. v Imperial Tobacco Ltd.* [1991] 1 WLR 589. The "RBs" were a class of beneficiaries affected by the employer's intended variations to the pension schemes.)

75. A somewhat similar conclusion was drawn by the Supreme Court about a year later (30 July 2018) in *R (on the application of AR) v Chief Constable of Greater Manchester Police & anor.* [2018] UKSC 47 on the question of the appropriate test to be applied in assessing a challenge to a first instance judge's own assessment (sc. evaluation) of the "proportionality" of an administrative decision on the undisputed facts of that case. In this court, we had followed the court's previous decision in *R (A) v Chief Constable of Kent* [2013] EWCA Civ 1706, holding that the court would reconsider the issue of "proportionality" if it found that the first instance judge had made a "significant error of principle". However, the Supreme Court held (in a judgment delivered by Lord Carnwath (with whom the other members of the court agreed)), while dismissing the appeal overall, that that was "too narrow an approach". At paragraphs 64 and 65, Lord Carnwath said this:

> "64. In conclusion, the references cited above show clearly in my view that to limit intervention to a "significant error of principle" is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle - whether of law, policy or practice - which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be "wrong" under CPR 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said (*R (C) v Secretary of State for Work and Pensions* [2016] EWCA Civ 47; [2016] PTSR 1344, para 34):
>
> "… the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong."
>
> 65. It follows that in the present case it was sufficient for the Court of Appeal to consider whether there was any such error or flaw in the judge's treatment of proportionality. If there was not, there was no obligation (contrary to Mr Southey's submission) for the Court of Appeal to make its own assessment."

76. So, on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge

was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion".

77. All this said, when assessing an evaluative decision of the facts found by a trial judge, there can be no doubt that one must also bear in mind the well-known passage in the speech of Lord Hoffmann in *Biogen Inc. v Medeva plc* [1997] RPC 1, 45 where he said:

> "…The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, la vérité est dans une nuance), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation. It would in my view be wrong to treat Benmax as authorising or requiring an appellate court to undertake a de novo evaluation of the facts in all cases in which no question of the credibility of witnesses is involved. Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation."

78. Again, the position is so well summarised by Lewison LJ in his well-known judgment in *Fage UK Ltd. & anor. v Chobani UK Ltd. & anor.* [2014] EWCA Civ 5, at paragraph 114, as follows:

> "114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23 [2007] 1 WLR 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include
>
> i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

> ii) The trial is not a dress rehearsal. It is the first and last night of the show.
>
> iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
>
> iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

79. In the course of their arguments, counsel each drew to our attention short extracts from witness statements, transcripts of oral evidence and a selection of e-mails and other documents. We think this exercise took the character of "island hopping", as characterised by Lewison LJ. However, it was "island hopping" which served to demonstrate clearly to us that the judge had been fully entitled to reach the conclusion that there was fault on both sides in this case and that we could not second guess that conclusion, particularly as the judge had had a far wider view on the evidence as a whole than has been possible for us.

80. The judge found that, while Dr Potamianos had failed to comply with his duty to SEL by being "evasive", "misleading" and "dissembling" with regard to the source code in August 2016, he nevertheless had grounds to dispute SEL's Source Code Claim which grounds he was entitled to put forward in good faith in his own interests and those of BDL. There was no challenge before us to the judge's view that the opposition to the Source Code claim, although ultimately unsuccessful, was a proper one to mount. On the other side, there was the gradual "side-lining" and ultimate exclusion of Dr Potamianos from the management of SEL, a business in which (through his shareholding in the Company) he had a significant stake and to which he had by that time devoted many years of specialist expertise. Ultimately the judge concluded that, although the conduct of Dr Potamianos in relation to the source code dispute justified excluding him from all matters relating to the source code, his conduct was not so serious as to justify excluding him from management altogether and subsequently removing him as a director. The judge also rejected the contention that the source code dispute was "inextricably intertwined" with all of SEL's other business.

81. These were conclusions which, in our view, it was open to the judge to reach. The judge applied the correct legal principles in making an evaluation which, on the basis of his total familiarity with the evidence and ability to view the conduct of Dr Potamianos in the context of the parties' whole relationship, he was peculiarly well placed to make. We do not think it possible to identify any flaw in the judge's reasoning which would justify this court in interfering with his conclusions.

82. We would add that we were referred to a number of cases in which, on other facts, courts have held that exclusion of a participant from management has been held to be justified on the grounds of breach of duty by the excluded party. These were: *Mears v R Mears & Co. (Holdings) Ltd.* [2002] 2 BCLC 1; *Re A Company, ex p. Schwarcz (No. 2)* [1989] BCLC 427; *Grace v Baglioli* [2006] 2 BCLC 70; *Re Flex Associates Ltd., Hussain v Cooke* [2009] EWHC 3690 (Ch); *Kelly v Hussain* [2008] EWHC 1117 (Ch) and *Woolwich v Milne* [2003] EWHC 414 (Ch).

83. We do not consider that any of those cases undermine the judge's assessment of the overall position in this case. All concerned different types of misconduct/breaches of duty, and some were much more serious involving, e.g. dishonesty (including forgery and theft), bribery, secret negotiation with a competitor or diverting business to a rival. All involved secretive and/or dishonest conduct. Here, as already mentioned, Dr Potamianos engaged in an open and bona fide dispute as to ownership of certain intellectual property rights. The position that he took was ultimately held to have been wrong and he was found to have acted at one stage in the development of the dispute in a way that was unhelpful, evasive and in breach of his fiduciary duty to SEL. Ms Page accepted, however, as she was bound to do, that there is no rule of law that every breach of fiduciary duty will necessarily render exclusion from management fair: it is always a question of fact and degree. To show that a different conclusion was reached on the materially different facts of other cases does not advance Mr Prescott's case.

84. Criticism was also levelled at the judge for failing to give any or any sufficient weight to number of individual items of complaint raised by Mr Prescott. They are outlined in paragraph 26 of his skeleton argument. As the judge explained in paragraph 401 of the judgment (which we have quoted above) there were a number of additional matters relied upon by both sides which he did not consider added to the respective cases made or provided grounds for denying Dr Potamianos relief on his petition or affected the remedy to be granted. These are precisely the type of peripheral matters which, in our view, form the "…penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance… of which time and language do not permit exact expression" mentioned by Lord Hoffmann in *Biogen*, but which nonetheless form part of a judge's overall evaluation of a case.

85. Nor is it any part of a judge's function to express a view on every matter in issue that has been canvassed before him. There is more than one passage in this judge's judgment indicating that there were matters raised by each party which he did not find a need to identify individually in order to reach an overall assessment and to explain to the parties his conclusions: see again Lord Hoffmann in *Biogen* quoted above.

86. Casting the issue in terms of whether the conduct of Dr Potamianos in relation to the source code brought to an end the "quasi-partnership" between the parties and thus the right of Dr Potamianos to participate in management is really, in our view, just another way of stating the essential question which the judge had to answer – being whether the conduct relied on made it fair to exclude Dr Potamianos altogether from management and to remove him as a director of SEL. The relevant considerations and the nature of the evaluation are the same whichever way the case is framed. In so far as Ms Page sought to gain traction for Mr Prescott's case by seeking to draw analogies with partnership law and a partner's duty of good faith, we agree with the submission made by Mr Pavlovich that such reliance is misplaced and that partnership law cannot be carried over into the assessment of a relationship which was not one of a partnership.

As Lord Hoffmann observed in *O'Neill v Phillips* [1999] 1 WLR 1092 at 1104 (quoting Lord Wilberforce in *In re Westbourne Galleries Ltd* [1973] AC 360, 380), "one should not press the quasi-partnership analogy too far". Similarly, to recast Dr Potamianos's breach of his fiduciary duties as a breach that involved preferring the interests of BDL of which he was also a director to the interests of SEL does not add anything to the analysis.

87. We find, therefore, that subject to the question of the offers made by Dr Prescott to buy Dr Potamianos's shares, an issue which arises on the second appeal, the judge was not wrong to make a "buy-out" order and it cannot be said that the route to his conclusion was flawed. The judge was in the best position to assess the weight to be given to the rival features of the case, having directed himself quite properly as to the relevant principles. We can see no reason why that assessment was flawed and we reject grounds 1 and 2 of Mr Prescott's appeal.

88. The next logical question, as it seems to us, is the issue raised in ground 4 as to whether the "buy-order" should be at a full *pro rata* value or at a discount.

Ground 4

89. The judge rejected the submission for Mr Prescott that the purchase should be at a discount. We bear in mind that the unfair prejudice jurisdiction has been held to confer on the court the widest possible discretion as to the relief to be granted to a successful petitioner. An appellate court will not interfere with the exercise of the judge's discretion unless it has been demonstrated that that discretion has plainly been wrongly exercised or has been exercised on some erroneous principle of law: see for example *per* Mummery LJ in *Re Full Cup International Trading Ltd* [1998] B.C.C. 58. To challenge this part of the judge's decision successfully, an error of principle has to be identified. It is hard to see that he erred in principle in the exercise of his discretion. Indeed, he followed the guidance given by Lord Hoffmann on this point in dealing with "reasonable offers" in *O'Neill v Phillips* at pp. 1107-8. It will be recalled that Lord Hoffmann said:

> "…In the first place, the offer must be to purchase the shares at a fair value. This will ordinarily be a value representing an equivalent proportion of the total issued share capital, that is, without a discount for its being a minority holding. The Law Commission (paragraphs 3.57–62) has recommended a statutory presumption that in cases to which the presumption of unfairly prejudicial conduct applies, the fair value of the shares should be determined on a pro rata basis. This too reflects the existing practice. This is not to say that there may not be cases in which it will be fair to take a discounted value. But such cases will be based upon special circumstances and it will seldom be possible for the court to say that an offer to buy on a discounted basis is plainly reasonable, so that the petition should be struck out."

90. The judge rejected the submission that the "buy-out" should be at a discount because, on Mr Prescott's case, Dr Potamianos had acquired his shares at a discount. The judge said,

> "…I agree with Dr Potamianos that there is no logic in this argument. If right, it would imply that in a case where a petitioner obtained his shares free of charge, his shareholding should be given no value for purposes of a buy-out. The cases to which I have been referred lend no support to this approach, and it does not accord with the starting point that an interest in a going concern ought to be valued at the date on which it is ordered to be purchased, which seems to me to look at the objective market value of the shareholding, uninfluenced by the price at which it was acquired."

We agree with him.

91. It is right that in *Re Bird Precision Bellows Ltd.* [1984] Ch 419, 431D-F, Nourse J (as he then was), while stating that the general rule was for sale and purchase without discount in quasi-partnership cases, considered the position of an investor who was not involved in management who had acquired his shares at a minority discount; the learned judge said that in such a case a discounted price "might well be fair – I do not know". This view was also expressed by Mr Robin Hollington QC (the author of the major text to which we have already referred above), when sitting as a Deputy Judge of the High Court in *Re Blue Index Limited* [2014] EWHC 2680 (Ch).

92. In our view, however, the judge in the present case was quite entitled in the exercise of his discretion not to be deflected from the general rule stated by Lord Hoffmann (and recognised in other authorities, including *Blue Index*) that the normal order in cases such as the present is for purchase without discount.

93. The price paid by Dr Potamianos for his shares, many years previously, may have been less than might have been obtained for such a holding on the market at that time, but it does not seem to have been pitched as it was because the holding was a minority one. It seems (from paragraph 352(2) of the judgment) that the judge thought it likely that the sum paid by Dr Potamianos was merely the equivalent of that paid by SEL for Mr Van Der Wee's shares and was not a purely commercial price. Dr Potamianos was not a mere investor; he was a managing partner and had been a director of SEL for eight years when the shares were acquired. When the shares in the Company were acquired in turn in place of shares in SEL, he had been in his management role for a further five years.

94. In parts of the argument on this point, Ms Page sought to reintroduce the "breach of duty" points which she raised under grounds 1 and 2. We do not think that this can be right. The judge rejected misconduct as a ground for refusing relief and saw no reason to order purchase at a discount on that basis. Once the misconduct alleged or found was held to be no bar to relief, we cannot see any basis, in this case, for resurrecting the issue at this second stage.

95. We, therefore, reject ground 4.

96. We turn to grounds 3 and 3A.

Grounds 3 and 3A

97. The factual basis upon which the judge reached his decision about the Balancing Payment was summarised by him in paragraph 352(4) and (7) of the judgment, which we have already quoted above. We have also quoted his decision on the substance of this issue, given by him in paragraph 398 of the judgment.

98. Grounds 3 and 3A seek to challenge the judge's decision on two alternative hypotheses. The first (Ground 3) argues that the Balancing Payment should not have been ordered because the exclusion of Dr Potamianos from SEL was justified and the purpose of the Balancing Payment was to compensate Dr Potamianos from having been unfairly excluded from SEL.

99. Ground 3 obviously fails in view of our rejection of grounds 1 and 2. We have held that the judge was entitled to find that the exclusion of Dr Potamianos from SEL was not justified. Accordingly, only Ground 3A survives. This is the contention that the judge was wrong to order the Balancing Payment in any event because the payments made to Sameaim since 2016 were in return for services provided by Mr Prescott on behalf of Sameaim to SEL and no corresponding services were provided by Dr Potamianos, who stopped doing work for SEL. It is argued that, as BDL was in breach of contract and not ready and willing to perform its contractual obligations to undertake work for SEL, it is not entitled to any Balancing Payment.

100. The rival contentions about the nature and purpose of the invoices submitted for payment by Sameaim and BDL were dealt with only briefly in the parties' pleaded cases. In the petition, paragraph 55, Dr Potamianos had pleaded as one of his elements of alleged unfair prejudice, Mr Prescott's initial agreement in July 2016 (when payments to BDL were stopped) to suspend invoicing by Sameaim, pending resolution of the dispute about the source code, alleging that he had resumed the making of payments to Sameaim in October 2016. Payments said to amount to £135,000 were alleged to have been made.

101. In the Points of Defence (paragraph 105), the answer given was as follows:

> "105. As to paragraph 55:
>
> (a) Mr Prescott had hoped that after he had informed BDL that it would not be getting any more contracts from SEL without handing over the source code a consensual solution to the issue would be reached. Mr Prescott therefore suspended Sameaim from invoicing SEL so [as] not to inflame the situation and in the interests of SEL resolving its dispute with the Petitioner and BDL. When it became apparent that BDL and the Petitioner did not intend to hand over the source code, there was no reason for Sameaim to continue to suspend its invoicing.
>
> (b) Mr Prescott is unable to admit or deny the figure of £135,000 absent proper particulars of the time period over which it is alleged that payments totalling this amount were made to Sameaim.

(c) Save as aforesaid, paragraph 55 is denied."

We were told the matter was raised briefly by Mr Prescott in his first witness statement but it does not appear to have been explored in any detail at trial.

102. Mr Pavlovich relied on the judge's findings that the payments to the service companies were made pursuant to an agreement reached between Mr Prescott and Dr Potamianos in 2007 that they would each receive a return from the profits of SEL in proportion to their respective shareholdings, and that the schedules of work which they produced were a means of allowing their service companies to issue invoices for amounts in the same ratio as their shareholdings. There was, the judge found, "an element of artifice" in these arrangements in that the work contracts evidenced by the schedules were priced in a manner that was geared to transferring money from SEL to the two participants at a level fixed by them to achieve fiscal advantage. Each trusted the other to deliver the work that was required by SEL. All this was unaffected by the interpolation of the two service companies. Mr Pavlovich submitted that in these circumstances, the judge was right to find that Mr Prescott and (as a result) SEL should be held to the bargain made with Dr Potamianos in 2007 that they would each invoice SEL and be paid in proportion to their respective shareholdings.

103. Ms Page, for her part, emphasised the judge's finding that BDL was in breach of contract and hence liable in damages to SEL for failing to perform work described in one particular schedule (No 200815): see paragraph 310. She submitted that this makes it clear that, even though the amounts invoiced for the work were fixed by reference to the parties' shareholdings, the judge still found that the underlying bargain was based on the shareholders actually providing services to SEL via their services companies. It was not part of the arrangement that they would receive sums for doing nothing.

104. We accept that the judge, although rightly describing the mechanism adopted by the parties for extracting money from SEL as involving "an element of artifice", did not go so far as to find that the arrangements were a sham. He recognised that BDL's contractual right to receive payments was conditional on the provision of (or upon Dr Potamianos being ready and willing to provide) services to SEL. That was why the judge observed that his order requiring the Balancing Payments to be made might "seem like rough justice". Nevertheless, the judge was entitled to have regard to the underlying rationale and objective of the payments and to take the view that, in all the circumstances, it was fair that, for as long as Dr Potamianos was participating in the management of SEL or was ready and willing to do so, he should continue to receive his agreed share of the profits of SEL. The judge took account of the fact that Dr Potamianos stopped providing programming services to SEL by excluding from the calculation of the Balancing Payments the sums which Sameaim invoiced to SEL for the cost of employing Dr Fells to provide such services. The judge also properly had regard to his finding that the reason why Dr Potamianos ceased to participate in the management of SEL was that he was unfairly excluded from doing so.

105. Accordingly, the judge was, in our view, entitled to find that (in the face of the exclusion) the appropriate relief includes an order that Dr Potamianos be paid Balancing Payments calculated in the manner agreed.

106. Ms Page raised on the appeal a further argument that does not seem to have been advanced below, namely that any Balancing Payment that otherwise might have been

due to Dr Potamianos should be forfeited by analogy with the principle that a fiduciary's remuneration may be forfeited for breach of fiduciary duty: *Hosking v Marathon Asset Management LLP* [2016] EWHC 2418 (Ch). Of course, such forfeiture can be refused if it is considered to be disproportionate and inequitable.

107. We consider that the new argument must be rejected. The judge was exercising the statutory duty to remedy unfair prejudice. He reached his decision on the basis of well-known principles governing such cases with regard to quasi-partnership companies as he held SEL/the Company to be. He found Dr Potamianos to be in breach of his fiduciary duty, but ordered the making of the Balancing Payment in exercise of the statutory jurisdiction, in the light of the exclusion that he found to be unjustified and in the light of the agreement as to payments from SEL which he found that the parties had reached at the outset. The essential rationale for the payments was not to afford remuneration to Dr Potamianos for service as a fiduciary but to reflect his joint ownership of the business. We therefore cannot but think that the judge would have rejected this argument too, had it been raised before him. We reject it as providing no sufficient reason to undermine the judge's overall conclusions as to unfair prejudice and the remedies to be afforded for it.

108. For these reasons, we reject grounds 3 and 3A.

109. In the result, Mr Prescott's appeal fails on all grounds. We turn to Dr Potamianos's appeal.

Dr Potamianos's Appeal

110. In his defence to the unfair prejudice petition, Mr Prescott relied on the four proposals he put forward to buy out Dr Potamianos's shares in the Company. He submitted that these offers were made on fair and reasonable terms and that Dr Potamianos's rejection of the offers was therefore unreasonable. The effect of Dr Potamianos's unreasonable rejection of these offers was, he argued, that the unfair prejudice petition should be dismissed. The judge held that he could not determine whether the prices offered to Dr Potamianos for his shares were reasonable on the basis of the evidence before him at trial and he could not therefore come to a final conclusion as to whether Dr Potamianos's petition should succeed. He directed that this issue ('the Offers issue') should be considered at a second hearing, along with the valuation of the shares for the purposes of the buy out in the event that the Offers issue was resolved in Dr Potamianos's favour and his petition succeeded.

111. By his appeal, Dr Potamianos challenges those parts of the judge's order that postpone the determination of the Offers issue to the second hearing. He argues that there is no need for a further hearing of that issue because the judge ought to have concluded at the end of the trial that the offers were not fair or reasonable and Dr Potamianos's petition should have succeeded. The second element of the order which Dr Potamianos challenges is the direction which makes the calculation and payment of the Balancing Payments discussed above contingent on the resolution of the Offers issue. Again, if he is right that the Offers issue could and should have been resolved by the judge at trial, the contingency disappears and there is nothing to prevent the calculation and payment of the Balancing Payment taking place as soon as possible. Dr Potamianos argues that even if there does need to be a further hearing to determine the Offers issue,

the judge still erred in deciding to postpone the making of the Balancing Payment to that later date.

112. Dr Potamianos's grounds of appeal assert:

i) *Ground 1* The judge should have found that as a matter of law, offers to purchase a minority shareholder's interest cannot remedy future unfair prejudice. All the offers relied on by Mr Prescott predate Dr Potamianos's exclusion from the Company and should have been disregarded for that reason.

ii) *Ground 2* The judge was wrong to reject the submission that to be reasonable, an offer must be capable of becoming legally binding as soon as it is accepted by the minority shareholder. None of the offers made was in this form and hence, he argues, they should have been disregarded.

iii) *Ground 3* The judge was wrong to find that an offer at a fixed price rather than an offer to submit to an expert valuation can constitute a reasonable offer if it transpires that the fixed price was fair.

iv) *Ground 4* The judge was wrong to postpone consideration of the Offers issue to the second hearing and to make the buy out order contingent on that consideration; and

v) *Ground 5* The judge was wrong to defer the computation and payment of the Balancing Payment until the Offers issue had been determined.

The offers

113. The proposals made by Mr Prescott to buy Dr Potamianos's shares were as follows:

i) an offer of £1.34 million made on 16 October 2015 (the "October 2015 Offer");

ii) an increased offer made in November 2015 of £1.34 million together with a four year service contract for BDL at £60,000 a year ("the Increased Offer");

iii) a proposal made by letter of 16 November 2016 from Moore Blatch to appoint an independent joint expert to produce certain valuations of the shareholding based on assumptions set out in the letter ("the November 2016 proposal"); and

iv) an offer to purchase the shares for £1 million made in a letter dated 17 February 2017, together with a renewal of the earlier proposal to appoint an independent expert ("the February 2017 offer").

114. The circumstances in which the October 2015 Offer and the Increased Offer were made were described by the judge at paragraphs 62 to 68 of his judgment. At the hearing of the appeal, we were also taken to the relevant contemporaneous documents. Throughout the Spring and Summer of 2015, Mr Prescott and Dr Potamianos explored the sale of the business to a third party. An email from Dr Potamianos to Mr Prescott dated 23 September 2015 records that Dr Potamianos had told an adviser at Baker Tilly that "our business is being affected by 10 to 15% down (being conservative)" and that the adviser had immediately replied that this would affect the selling price. Mr Prescott's evidence was that Baker Tilly advised not long after this that they would struggle to sell the

business at all, and that if they did manage to do so, it would be for no more than £2.5 million. Mr Prescott and Dr Potamianos met on 30 September 2015 to discuss three possible changes to the group's structure: (a) Mr Prescott might buy Dr Potamianos's shares in the Company; (b) Mr Prescott might buy SEL from the Company; or (c) Mr Prescott might buy SEL from the Company and Dr Potamianos also buy Mr Prescott's share in Peregrine House. They agreed that they would do their best to agree a fair value for whatever solution was deemed appropriate. Dr Potamianos suggested 4 as the appropriate multiplier on profit for valuing SEL and Mr Prescott thought that "seemed right". Another point discussed was that to arrive at a fair value they would need to take account of higher performing years in the past rather than base the price only on more recent but less profitable years. The notes of the meeting state that they agreed that "they both wanted to do a deal that resulted in ongoing goodwill between them". Mr Prescott's worries about software issues were discussed and there was, according to the notes, "a good feeling of an emerging consensus on a format for dealing with them".

115. Between that meeting and 16 October 2015, Mr Prescott carried out his own calculations which arrived at a value for the combined business of SEL and the Company of £3,359,000. On Friday 16 October Mr Prescott emailed Dr Potamianos to say that he was close to a figure; he had "opened up communication with Barclays" and had a legal team ready to go. His plan was to email Dr Potamianos the offer that evening and give him the weekend to think about it. Later on the evening of 16 October 2015, Mr Prescott emailed Dr Potamianos to say he was now in a position to make an offer for Dr Potamianos's shares in the Company "i.e. for both companies". He said that his methodology had been guided by their previous discussions and the offer was £1.34 million cash for his shares using a share buyback method. He added: "I believe I can deliver this myself and I think the timescale to completion would mainly be dictated by the bank and hmrc on my side".

116. Dr Potamianos wrote back on Monday 19 October 2015 rejecting the offer without giving detailed reasons. Mr Prescott responded that it was Dr Potamianos's turn to tell him what he was looking for so that they could decide whether they were too far apart for it to be worth talking further. Dr Potamianos demurred, saying he would be willing to raise £2 million to buy out Mr Prescott's shares. He asked Mr Prescott to let him know if it was worth discussing this option before he expended any effort on it. He declined to say what price he would accept for his shares. He added: "At the end of the day, neither of us has to sell to the other one and we can go back to trying to test the market".

117. Following some further exchanges between the two men, Mr Prescott wrote to Mr McDonald in November 2015 seeking advice as to how he could buy out Dr Potamianos. Mr Macdonald described Mr Prescott's offer to Dr Potamianos as "a wee bit too low". In an email of 13 November 2015 to Mr MacDonald, Mr Prescott proposed a possible increase in the offer to include a technical consultancy project for BDL with payment of £240,000 over four years. The other alternative he was considering was that "Aris remains invested". He did not rule that out but said that the conditions which Dr Potamianos had set for this were not satisfactory. He described himself as on good speaking terms with Dr Potamianos at that moment but he foresaw "a major bust up" if they did not manage to arrive at a deal. Although that email between Mr Prescott and Mr Macdonald is the only documentary record of the addition of a consultancy agreement to the October 2015 Offer, the judge found that the Increased Offer was

proposed orally to Dr Potamianos and was also rejected by him and there is no appeal from that finding.

118. There was then a break in discussions about possible buy outs. Following the meetings of the SEL board in September 2016 at which the Sub-Committee was formed and in November 2016 at which the remit of the Sub-Committee was extended, discussions resumed. On 16 November 2016 Moore Blatch wrote on behalf of Mr Prescott to say that he was prepared to purchase Dr Potamianos's shares in the Company "at an appropriate price":

> "30. …Such a price would have to reflect:-
>
> a. the fact that your client's allegations of unfairly prejudicial conduct are unfounded;
>
> b. the fact that it appears from your letter to this firm dated 24 October 2016 that SEL will have to take legal proceedings against [BDL], the company owned by your client and his wife, to obtain delivery up of the source code …
>
> c. the fact that in any event SEL has concerns about the quality of the source code it will ultimately obtain; and
>
> d. the fact that your client is a minority shareholder; and
>
> e. the fact that your client's shares have very limited marketability.
>
> 31. Our client proposes that the parties jointly instruct a share valuation expert with experience in valuing companies owning intellectual property to prepare a formal, CPR-compliant report.
>
> The report would need to set out:-
>
> - The value of your client's shares on the basis of his 40% holding without applying any discount; and
>
> - The value of the minority discount to be applied, in the event that it is to be applied.
>
> This proposal is on the basis that the parties agree to be bound by the valuations. It will clearly be for the parties to agree or the Court to decide whether the minority discount is to be applied.
>
> This proposal is also on the basis that the parties agree the contents of the instructions to the expert and share the cost of the report."

119. That was the November 2016 Proposal. Dr Potamianos did not take up the offer to instruct an expert valuer on that basis. In January 2017 Blake Morgan acting for Dr Potamianos responded to the allegations that had been made against Dr Potamianos. They said (among other things) that Dr Potamianos (as quoted by the judge) "has never

had a wish to sell his shares in SEL [sic] and has made that clear to you [sic] client on many occasions. However, he has been forced to explore the possibility because of your client's blatant abuse of [his] rights as a shareholder". The letter also stated that it was premature to instruct an expert until Mr Prescott had made "a properly calculated offer" and "before our client's legitimate concerns concerning Sameaim's invoices totalling £135,000…are addressed".

120. Finally on 17 February 2017, Moore Blatch wrote to Dr Potamianos's solicitors making the final offer to purchase Dr Potamianos's shares. The letter stated:

> "… our client sets out in this letter his offer to purchase your client's shares, subject to contract:-
>
> 1. Our client is prepared to pay £1,000,000.00 for your client's shares;
>
> 2. Your client would be required to provide the usual warranties and indemnities;
>
> 3. Each party would bear their own costs in relation to the dispute and the share sale.
>
> This offer is a generous offer, calculated on a commercial basis and reflecting our client's preference to resolve this dispute as quickly and as cost-effectively as possible. As such, it is open for acceptance, subject to contract, for 21 days from the date of this letter, after which the offer is automatically withdrawn.
>
> In the event that this offer is not accepted, our client repeats his proposal that the parties jointly instructed a share valuation expert with experience in valuing companies owning intellectual property to prepare a formal, CPR-compliant report.
>
> The report would need to set out:-
>
> - the value of your client's shares on the basis of his 40% holding without applying any discount; and
>
> - the value of the minority discount to be applied, in the event that it is to be applied.
>
> This proposal is on the basis that the parties agree to be bound by the valuations. It will clearly be for the parties to agree or the Court to decide whether the minority discount is to be applied.
>
> This proposal is also on the basis that the parties agree the contents of the instructions to the expert and share the cost of the report.
>
> Our client proposes that an expert at either BDO, RSM, Smith & Williamson or Mazars be appointed.

> We have to say that we do not understand why your client is so reluctant to obtain a share valuation report."

121. The letter went on to state that if the offer was not accepted, Mr Prescott repeated the offer that the parties jointly instruct an expert to value the shares as had been proposed in the 16 November 2016 letter. This was the February 2017 Offer. It was rejected by Dr Potamianos.

The judge's assessment of the offers

122. The approach of the judge to the Offers issue was dictated in part by earlier case management directions, in particular the order of Snowden J made on 17 November 2017 shortly after the Source Code Claim and the unfair prejudice petition had been issued. Snowden J directed that the trial of the issues listed in a schedule to the order take place at the same time as the trial of the Source Code Claim. Any remaining issues arising in the petition would be determined at a further trial. The schedule to the order provided that the first trial would determine whether the Company was a quasi-partnership and whether Mr Prescott had conducted the affairs of the Company in an unfairly prejudicial way, but with the proviso:

> "Save that any question concerning the reasonableness of Mr Prescott's offer(s) for the Petitioner's shares shall, in so far as that question requires expert valuation evidence, be determined at any further trial; and all matters consequent on such questions … shall also be determined at any further trial".

123. The judge addressed the significance of Mr Prescott's offers at paragraph 360 onwards. He said that before considering the allegations of unfairly prejudicial conduct, there was a "logically antecedent question" which needed to be addressed, namely whether Mr Prescott had made a reasonable offer to buy Dr Potamianos's shares. He noted Dr Potamianos's submission that a reasonable offer can only cure unfair prejudice that has already been suffered and cannot cure unfair prejudice that has yet to occur. He said that these submissions had not loomed large in the arguments that were presented to him and were only made by way of a brief addition to Mr Pavlovich's closing submissions. He described the offers that had been made and Dr Potamianos's contention that, even if it were subsequently to transpire that the price offered exceeded the true value of the shares as at the date of the offer, the offers should still not be considered reasonable. He recognised the awkwardness of the effect of the case management direction which resulted in an issue on liability being left over to the second trial. He rejected the submission that the October 2015 Offer of £1.34 million was "inescapably unfair or unreasonable simply because it was made at a fixed price": paragraph 369. As regards the October 2015 Offer he noted that Mr Prescott had not shared his contemporaneous workings with Dr Potamianos at the time and had not been asked to share them but he accepted that Mr Prescott had made the offer in good faith and in pursuit of the objective that the two men do their best to agree a fair value. He considered it was unhelpful for Dr Potamianos to have responded to the offer as he did, without putting forward any indication of the price that would be acceptable to him and offering instead to buy out Mr Prescott's share. He went on:

> "However, I am in no position to decide whether this offer, or for that matter whether the increased offer of this amount plus a

> post-sale 4 year contract for BDL at £60,000 pa on top, was fair and reasonable. On the contrary, I consider that the resolution of those issues requires expert valuation evidence. Therefore, in accordance with the Order made on the CMC, they fall to be determined at a further trial."

124. He also rejected the argument that the October 2015 Offer was self-evidently not reasonable because it was subject to drawing up a legally binding contract at a later date: paragraph 373.

> "I was not referred to any authority in support of this proposition. Ultimately, when considering unfair prejudice, the central concern of the court is to determine what is fair, just and equitable. It is inimical to that exercise to introduce a restrictive requirement that an offer which is not so formulated that it can be converted into a comprehensive legally binding contract by a bare acceptance is incapable of preventing conduct that would otherwise be unfairly prejudicial from having those characteristics."

125. Turning to the November 2016 Proposal, he held that the 16 November 2016 letter did not contain any offer to purchase Dr Potamianos's shares. It envisaged only that an expert would be instructed to produce a binding report valuing the shares with and without the minority discount but that the matter would still need to go to court if the parties could not agree as to whether a minority discount should be applied. Although the judge did not refer to the February 2017 Offer, save very briefly in paragraph 374, it can be assumed that he felt unable to assess the reasonableness of the £1 million valuation and that the reiterated proposal to instruct an expert did not count as an offer to purchase Dr Potamianos's shares for the same reasons as the November 2016 Proposal. He concluded at paragraph 376:

> "376. In these circumstances, I am unable to conclude on the material at present before me that Mr Prescott made an offer for Dr Potamianos' shares that was so manifestly fair and reasonable as to have the consequence that whatever conduct Dr Potamianos succeeds in establishing was not unfairly prejudicial. It is therefore necessary to consider the unfair prejudice complained of. At the same time, it may transpire that, once expert valuation evidence is obtained, one or more of Mr Prescott's offers was, in fact, fair and reasonable so as to have that consequence. It follows that (on the basis that the point about the timing of his offers is not being conceded by Mr Prescott) the question of liability for unfair prejudice and, accordingly, whether relief for unfair prejudice is appropriate (i.e. whether any buy-out order is appropriate) must depend on the determination of these issues at the further trial. This is unfortunate, but seems to me to be the inevitable consequence of the split trial that was ordered on the CMC."

126. The reference in that paragraph to Mr Prescott not conceding "the point about the timing of his offers" is a reference to Mr Prescott not accepting Dr Potamianos's submission

that as a matter of law, an offer cannot defeat a petition if it predates the alleged unfairly prejudicial conduct.

The case law on the effect of offers to purchase a petitioner's shares

127. The leading authority on the effect on an unfair prejudice petition of an earlier offer by the majority to purchase the minority shareholding is *O'Neill v Phillips*, cited earlier. Lord Hoffmann held that there had in fact been no unfairly prejudicial conduct in that case. He went on to consider, *obiter*, the effect of the offer by Mr Phillips to buy the shares at a fair price since the effect of such an offer as an answer to a petition was a matter of great practical importance. In that case the offer had been made to Mr O'Neill when the petition proceedings had already been underway for almost three years. The offer was to buy the shares at a price to be agreed or in default of agreement to be fixed by a chartered accountant as valuer, on a non-discounted basis. Lord Hoffmann agreed with the Court of Appeal that Mr O'Neill had been entitled to reject the offer because it did not include his legal costs. He went on to encourage parties, where at all possible, "to avoid the expense of money and spirit inevitably involved in such litigation by making an offer to purchase at an early stage": page 1106H. The way he proposed was for the majority to make an offer to buy which was plainly reasonable so that if the minority rejected it, the majority could apply to strike out any petition he subsequently lodged. Unfairness, Lord Hoffmann said, did not lie in the exclusion from management alone but "in exclusion without a reasonable offer":

> "If the respondent to a petition has plainly made a reasonable offer, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out. It is therefore very important that participants in such companies should be able to know what counts as a reasonable offer".

128. Lord Hoffmann then set out the features of a reasonable offer. The first is that it must be to purchase the shares at a fair value. That will normally be a valuation without a minority discount. Although there may be special circumstances in which it is fair to take a discounted value, it will seldom be possible for the court to strike out a petition based on such an offer. The value, if not agreed, should be determined by a competent expert acting as an expert consistent with the objective of economy and expedition "even if this carries the possibility of a rough edge for one side or the other". The offer should also provide for equality of arms between the parties in the sense that both parties should have access to information about the company which bears upon the value of the shares and both should have the right to make submissions to the expert. Where the offer is made after a long period of litigation it should include an offer of costs, although the majority shareholder should be given a reasonable opportunity to make the offer, including time to explore the question of how to raise finance, before he becomes obliged to pay the petitioner's legal costs as part of the offer.

129. In later cases where the parties have cited the guidance in *O'Neill v Phillips*, judges have counselled against treating the reasonableness of an offer as being a trump card in the hands of the respondent majority shareholder. In *Harborne Road Nominees Ltd v Karvaski and another* [2011] EWHC 2214 (Ch) ('*Harborne*'), the respondent applied to have an unfair prejudice petition struck out on the grounds that he had made a series of offers to purchase the shares of the complainant and those offers had been unreasonably refused. HHJ David Cooke noted at paragraph 26 that the parties had

approached the matter as if what had to be considered was the extent to which the offer made complied with the guidance of Lord Hoffmann in *O'Neill v Phillips* and that if a sufficient degree of compliance was achieved, the respondent was inevitably protected from any petition that the complainant might issue. That approach, he held, would be a cardinal error. The guidance given by Lord Hoffmann was widely accepted as providing a basis on which many shareholders' disputes could be resolved without the notoriously high cost of litigation by way of unfair prejudice petition. He went on, however, to stress that the guidance though detailed, did not have the status of legislation:

> " … The question for the court is always whether in all the circumstances of the case the applicant has satisfied the conditions required to have the petition struck out, or summary judgment in his favour given on it. These [counsel] accurately summarised as being that it must be shown that the continued prosecution of the petition after the making of the offer amounts to an abuse of process, or was bound to fail. The issue is highly sensitive to the facts and circumstances of each case, the consideration of the nature and terms of any offer made can only ever be an intermediate step in the process".

Grounds 1, 2 and 3

130. The terms of any offer made by the majority to purchase the petitioner's shares, the circumstances in which the offer was made and the reasons why it was rejected are one aspect of the overall consideration by the court of whether an unfair prejudice petition should succeed. We do not agree that they are a "logically antecedent question" as the judge said because the factors that indicate the reasonableness or otherwise of the offer will often be closely bound up with the behaviour that is alleged to be unfairly prejudicial. The answer to each of the first three grounds of Dr Potamianos's appeal is therefore broadly the same. There is no one feature of an offer which will automatically make it either a reasonable or unreasonable offer for this purpose. In *Maidment v Attwood & ors: Re Tobian Properties Ltd* [2012] EWCA Civ 998, [2013] Bus LR 753 Arden LJ (with whom Aikens and Kitchin LJJ agreed) said that the dominant characteristic of the unfair prejudice remedy is its adaptability, enabling the courts to produce a just remedy where minority shareholders can show wrongdoing that prejudices their interests. The case law in this area has consistently declined to introduce 'bright lines' and the assessment of an offer to purchase is no exception to this flexible approach. We will not attempt an exhaustive list of the factors relevant to the court's assessment of the reasonableness of the offer and the petitioner's rejection of it. Some factors will be relevant in most cases and we discuss these below.

131. First, the value offered or the means proposed for arriving at that value will, of course, be important. An offer inviting the petitioner to join in the appointment of a mutually acceptable independent expert who will be given full access to relevant company documents and whose decision on the value will be binding on the parties is more likely to be a fair offer than a fixed figure presented on a 'take it or leave it' basis. But the offer of a fixed figure is not necessarily unfair. For example, if the fixed figure is based on recent approaches by third-party buyers for the whole of the company's share capital, then a court may find that a pro-rata valuation of the petitioner's holding was a fair valuation. Similarly, if the parties agree between themselves a method for valuing

the shares and the offer is presented with a full and transparent explanation to the petitioner of how the figure has been arrived at, again a fixed figure may well be fair. In *CVC/Opportunity Equity Partners Ltd and another v Demarco Almeida* [2002] UKPC 16, [2002] 2 BCLC 108 Lord Millett, giving the judgment of the Board, described three possible bases for the valuation of the petitioner's shares: (i) as a rateable proportion of the total value of the company as a going concern without any discount for the fact that the holding in question is a minority holding; (ii) as before but with such a discount; and (iii) as a rateable proportion of the net assets of the company at their breakup liquidation value: see paragraph 38. Which of these should be adopted depends on all the circumstances and the choice must be fair to both parties. The offer made in that case was based on the company's breakup or liquidation value. The Board held that it fell far short of a fair offer and failed to remedy the petitioner's complaint: see paragraph 49.

132. The ability of the petitioner to be able to satisfy himself that the figure offered is reasonable before he has to decide whether to accept or reject the offer is an important factor. Any offer is likely to be made at a time when the relationship of trust and confidence between the quasi-partners has already come under strain. Suspicion and mutual recrimination may already characterise their relationship. When considering the fairness of a fixed figure, the point is not only whether it may ultimately be shown to have been a fair reflection of the value of the shares from the majority shareholder's perspective but whether that fact was reasonably apparent to the petitioner at the time the offer was made. A fixed price offer will rarely be fair if the minority shareholder or his advisers are not provided with access to company documents necessary to see how the price has been arrived at and to determine whether it is a reasonable valuation. Similarly, an offer to instruct an independent expert will not be reasonable if the majority is not prepared to open the company's books to that expert.

133. The fairness of the value may also be linked with the substance of the unfair prejudice allegations. HHJ Cooke noted in *Harborne* at paragraph 31 that where the minority shareholder alleges that the majority have diverted business from the company or misapplied company assets, it may not be just to expect the minority shareholder to accept an expert valuation for his shares without an authoritative determination of the claim. This was also an important factor in *Re Woven Rugs Ltd* [2010] EWHC 230 (Ch). In that case, David Richards J (as he then was) held that some of the offers made to buy the minority's shares were made after the majority had procured two transactions which were alleged by the petitioner to have been detrimental to the company and which were part of the unfairly prejudicial conduct alleged: see paragraph 168. Any offers based on assessing the value of the company as diminished by those transactions could not be considered reasonable. In our view, disputes between the parties over matters which materially affect the valuation of the company may be relevant to the reasonableness of an offer even where ultimately the court decides the dispute against the minority shareholder. It may be unreasonable to expect the petitioner to accept an expert valuation based on an assumption that those disputes will or might be decided in a particular way.

134. The second factor, after price or value, is the likelihood of the majority shareholder being able to implement the offer made. We reject Dr Potamianos's submission that an offer is only reasonable if it can become binding immediately upon the petitioner's acceptance. However, the reasonableness of the offer and the petitioner's response to it

may be affected by how likely it appeared at the time that the majority shareholder would follow through. In *Re Flex Associates Ltd* [2009] EWHC 3690 (Ch) the majority made an offer, expressed to be made pursuant to the guidelines in *O'Neill v Phillips*, to purchase the shares at fair value to be determined by an independent expert. That offer was expressed to be "subject to affordability". David Donaldson QC (sitting as a Deputy High Court Judge) found that there had been no unfairly prejudicial conduct but went on to consider the relevance of the offers if he had otherwise been persuaded to grant the petition. He said that the fact that it was conditional upon affordability meant that the defendants "would have no obligation to buy at all, let alone at the price fixed by the expert": see paragraph 74. The offer would not have entitled the defendants to have the petition struck out and would not have provided a defence to a claim based on exclusion, had that claim otherwise been sound.

135. A similar point was made by Peter Leaver QC (sitting as a Deputy High Court Judge) when dismissing an application to strike out a petition in *West v Blanchet and another* [2000] 1 BCLC 795. Both parties in that case had made an offer to purchase the share of the other and each criticised the other's offer. The judge was satisfied that each of the offers complied with the spirit of the guidelines in *O'Neill v Phillips* but it was necessary to consider the practicality of each offer: (page 803):

> "It would, after all, be too easy for a party to make an offer which apparently complied with the guidelines but which it had little or no realistic possibility of satisfying. In order to be a reasonable offer, there must be a realistic prospect, a reasonable likelihood, that the offer all will be able to pay the price likely to be decided upon by the independent expert appointed to value the shareholding."

The Deputy Judge in that case held that there was a fundamental distinction between the offers. The respondents had funds readily available to purchase the petitioner's share but the petitioner had no such funds. The petitioner's offer was not reasonable because it could be characterised as a hope that funds would be available and was thus too vague to be considered a reasonable offer. The petition was struck out because a reasonable offer had been made for the petitioner's share. He had unreasonably rejected the offer so that the petition was bound to fail.

136. A third factor is the proximity of the offer to the unfairly prejudicial conduct complained of. One of the offers relied on by the defendant in *Re Woven Rugs* to defeat the petition had been made some years before the unfairly prejudicial conduct. David Richards J said that "it cannot be relied on as a remedy for conduct yet to occur". He commented that the defendant in that case "appears to think that such an offer gives him carte blanche to behave in future as he wishes": paragraph 166. We do not accept, as Mr Pavlovich submitted, that there is a strict principle that an offer cannot render subsequent prejudicial conduct fair if it would otherwise be unfair. However, the timing of the offer may well be significant, depending on the nature of the prejudicial conduct alleged. Where the prejudicial conduct amounts to the exclusion of a quasi-partner from the management of the company, the question for the court is whether the offer made to purchase his shares means that the petitioner cannot then complain about that exclusion. That will depend on whether, at the time the offer was made, all the petitioner could reasonably expect was that he should be bought out so that he and his former business partners could go their separate ways. Where an offer is made before the

relationship has broken down, the petitioner may act reasonably in refusing the offer if, for example, he still harbours a legitimate hope that the business can be got back on track and the quasi-partners can find a way of working together for the future. Similarly, his refusal may be reasonable if there is a prospect that the business can be sold to a third party for a sum larger than the value he is being offered. The acceptance of the offer amounts to the acceptance by the petitioner that he must walk away from a business that has been his full-time occupation and in which he has usually invested years of effort and skill. The fact that, with hindsight, the quasi-partners were unable to resolve their differences and the price he was being offered was fair, does not mean that an offer made before this in fact became apparent should have been accepted by the petitioner.

137. None of the three matters raised by Dr Potamianos provides a silver bullet to knock out the offers made by Mr Prescott. We therefore reject Grounds 1, 2 and 3 of Dr Potamianos's appeal.

Grounds 4 and 5

138. We turn to consider whether the judge was nevertheless right to conclude at paragraph 376 that he was unable to determine the Offers issue without expert valuation evidence and hence that the Offers issue had to be postponed. We intend no criticism of the case management of these complicated proceedings. The direction splitting the issues at an early stage no doubt seemed to everyone to be a good idea at the time. In our view, however, it will in most cases be better for the trial judge to consider any offers at the liability stage of the case. As is apparent from the multiplicity of factors described above, there will be many cases in which the significance of the offers does not turn on an expert valuation of the company as at the time the offer was made. There may be other factors present that mean that, even if such an expert were to conclude that the price had indeed reflected the value at the time, it would be unfair to treat the offer as defeating the petitioner's claim. If it is necessary to have some expert valuation evidence for an assessment of the offers, that does not mean that the issue should be postponed to the quantum stage. The valuation exercise needed for the implementation of any buy out order and the valuation exercise appropriate for assessing the reasonableness of an offer are very different and should not be conflated. The material properly to be considered by the experts may be different. The appropriate date for valuation for the buyout may be, as in this case, the date of the order following the conclusion of proceedings, some years after the offer was made and rejected.

139. When considering the proper case management of a petition, the court should also take into account that the effect of a reasonable offer is not binary in the sense that either it leads to the petition being dismissed or it is to be disregarded altogether. Once the court has considered the reasonableness of an offer, it may take one of four courses. If the offer made was entirely reasonable and the petitioner acted unreasonably in rejecting it, it is open to the court to conclude that the unfair prejudice petition fails. The court should bear in mind the potentially draconian effect of that conclusion if the petitioner is then forced indefinitely to remain a minority shareholder in a business in the management of which he is no longer involved. Secondly, it is open to a court to conclude that the unfair prejudice petition succeeds but that the appropriate remedy is an order directing the buy out of the shares at the price that was offered, perhaps subject to adjustments to take account of the passage of time and changes in the market or to redress the impact of the unfairly prejudicial conduct on the value of the company. This

course would have the advantage of avoiding the delay and expense of a subsequent hearing and the instruction of experts to value the shares. Thirdly a court may conclude that the fair response is to treat the offer as a factor relevant to the award of costs following the conclusion of the proceedings. It may be appropriate in some cases to modify an order that costs follow the event so as to recognise the making and rejection of the offer. This is an approach recognised by Lord Hoffmann in *O'Neill v Phillips*: see p. 1106E - H. Fourthly, of course, the court could conclude that the making of the offer has no effect on the success of the petition, the appropriate method for valuing the shares for the buy out order or the petitioner's entitlement to his costs of the proceedings.

140. Applying those principles to the present case, we have concluded that the judge erred in deciding at paragraph 376 that he could not assess the reasonableness of the offers and of Dr Potamianos's response to them without expert valuation evidence and hence that the issue had to be postponed to the second hearing in accordance with the order of Snowden J. In our judgment there was sufficient material to establish that the making and rejection of the offers were not factors that defeated Dr Potamianos's petition by making his exclusion from the Company fair.

141. The October 2015 Offer and the Increased Offer were made at a time when it was not apparent that the quasi-partnership had irretrievably broken down. Mr Prescott was still offering to negotiate a new shareholder agreement with Dr Potamianos in January 2016: see the email quoted at paragraph 69 of the judgment, and he was urging Dr Potamianos to cooperate with the development of the software. Dr Potamianos was fully engaged in discussions about the validity of the contentious business plan and in trying to redirect the business of the Company for several months after those offers were made and rejected. It was also not clear whether the ultimate outcome might be that Dr Potamianos would buy out Mr Prescott rather than the other way around. The ability of Mr Prescott to obtain funding for the offer of £1.34 million was in doubt and there was a possibility of offering the business to a third party buyer.

142. As to the proposal in November 2016 that an expert valuer be appointed to determine the price, one condition set by Mr Prescott was that the valuer would be instructed to assume that all Dr Potamianos's allegations of unfairly prejudicial conduct were unfounded and that SEL owned the source code and was entitled to insist that BDL deliver it up. By that time the issue about the ownership of the Source Code, the outcome of which would clearly affect the value of the Company's assets, was thus already joined. Even though Dr Potamianos ultimately failed in the Source Code Claim, the judge found that the claim had been put forward in good faith and that Dr Potamianos had been entitled to dispute SEL's claim to the code. That was an issue which needed to be determined before a proper valuation of the Company could be calculated.

143. The price of £1 million offered in February 2017 was put forward without any explanation as to why it was substantially less than the Increased Offer. If the reduction was intended to reflect the possibility of a minority discount being applied at the end of the legal proceedings, then we have held that such a deduction would have been inappropriate. The Source Code Claim was still hotly disputed between the parties. The offer of £1 million was a "take it or leave it" one, open for 21 days only. Six days later (23 February 2017) notice was given of the meetings of the Boards on 7 March 2017 to consider the possible removal of Dr Potamianos as a director of SEL in the light of

"concerns" relating to him which were not particularised until 23 March. We have related above the outcome of those meetings and the subsequent events. The offer expired only 2 days after the 7 March meetings. Given what had passed, we do not consider that Dr Potamianos's failure to accept this final offer can be judged with hindsight to have been so unreasonable to result in denial to him of any relief upon his petition to which he might otherwise be entitled.

144. An evaluation of all the circumstances surrounding the offers shows that none of them rendered Dr Potamianos's exclusion from the Company fair. They could not be relied on to defeat Dr Potamianos's petition and it would make no difference to that conclusion that an expert might now value the shares as at the time the offers were made at less than the £1.34 million or £1 million offered.

145. We therefore uphold the fourth ground of appeal. With respect to the judge, we consider that he was wrong to defer the Offers issue and the question whether a Balancing Payment should be made to the second trial. We do not think that the expert evidence of valuation, whatever its result, will be capable of producing a result that would deny Dr Potamianos any relief upon his petition. That is not to say that the offers made may not have some bearing upon costs questions, depending upon the outcome.

146. Under the fifth ground of appeal, Dr Potamianos has asked this court to set aside the judge's order that the period and total amount of the Balancing Payment should be decided at the second trial and to give directions ourselves for the quantification and payment (without set off) of the sum due. The mechanism proposed is an order requiring the parties, following disclosure of relevant documents, to attempt to reach agreement as to the sum payable and for the agreed sum to be paid, with liberty to apply if agreement is not reached. It is already apparent, however, that there are issues between the parties as to the sum payable which will need to be resolved. In particular, there is an issue as to the period by reference to which the Balancing Payment should be calculated, as well as a question whether interest should be awarded. If BDL has the right to receive the Balancing Payment as soon as it is quantified, there would be much to be said for deciding these issues without waiting for the second trial. However, in the Source Code Claim the judge directed that there should be an inquiry into damages suffered by SEL and payment by BDL to SEL of all sums as may be found due on taking such inquiry. He also reserved the costs of the trial of the issue of liability in the Source Code Claim, on which SEL succeeded, pending judgment in the inquiry or further order, and gave SEL permission to apply for an interim payment on account of costs in the event that an order is made on the unfair prejudice petition which requires SEL to pay any sums to BDL. An order requiring SEL to make the Balancing Payment to BDL would therefore trigger a cross-application by SEL for an interim payment on account of costs. There is also scope for argument about whether it is appropriate for any money to change hands before any damages payable by BDL to SEL in the Source Code Claim have been quantified and/or liability for costs has been determined.

147. This court is not in a position to resolve these matters, which are properly matters for the judge who is dealing with both actions. In these circumstances, without prejudice to any future application which any party may make, we consider that we should leave in place the judge's order that the period and total amount of the Balancing Payment should be decided at the second trial.

Result

148. For the reasons given, we dismiss Mr Prescott's appeal in its entirety and allow the appeal of Dr Potamianos to the extent that we have indicated.