Neutral Citation Number: [2019] EWHC 46 (Ch)

Case No: CR-2016-007340

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

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 29/01/2019

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

IN THE MATTER OF AMT COFFEE LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

Between :

(1) Lucy Jane McCallum-Toppin **(2) Julie Bryan**	**Petitioners**
- and -	
(1) Alistair Bruce McCallum-Toppin **(2) Allan Andrew McCallum-Toppin** **(3) Bertha Anne McCallum-Toppin** **(4) AMT Coffee Limited**	**Respondents**

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Nigel Dougherty and Chantelle Staynings (instructed by **BDB Pitmans LLP**) for the **Petitioners**
Thomas Elias (instructed by **Forsters LLP**) for the **First Respondent**
Matthew Morrison (instructed by **Blake Morgan LLP**) for the **Second Respondent**
Timothy J Walker (instructed by **Freeths LLP**) for the **Third Respondent**
The Fourth Respondent did not appear, and was not represented

Hearing dates: 19-30 June, 3, 20 July 2018

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Approved Judgment

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

....

HHJ Paul Matthews :

Introduction

1. This is my judgment on the trial of the petition in these proceedings under s 994 of the Companies Act 2006, complaining of conduct unfairly prejudicial to the interests of the petitioners. In the petition, the petitioners seek an order for the purchase of their shares in the fourth respondent, AMT Coffee Limited ("the Company"). The petition is based in particular on allegations that the first three respondents (the only surviving directors of the Company) have been paid excessive remuneration, that the Company has failed to give consideration to payment of any or any adequate dividends, and that the first two respondents have enjoyed substantial interest-free and unsecured credit facilities. The petition is defended on its merits.

2. This is a family company, and all the family members have the same surname, McCallum-Toppin. So, for speed and clarity, but without intending any disrespect, I will generally refer to those family members by their given names. The Company was incorporated on 28 September 1993. Four ordinary shares were issued, one each to three brothers, Angus, Allan (the second respondent) and Alistair (the first respondent), and one to their father, Alexander. Alexander died in February 2001, when his share vested in his widow Anna (the third respondent). In April 2003, three new "A" ordinary shares (non-voting) were allotted, one each to Angus, Allan and Alistair. Those seven shares remain the only shares in issue.

3. In December 2006, tragically, Angus died of cancer at the age of only 45 years. He was married to Lucy, the first petitioner, and they had two small children, Alexander and Abbi. His will appointed Lucy and Allan as his executors and trustees, and gave his shares in the Company directly to Lucy and his children equally, but contingently on their attaining the age of 25 years. (The children were then and are still minors.) The residue of his estate was given on certain trusts. Lucy and Allan obtained a grant of probate to Angus's estate in May 2007.

4. In October 2014 Master Teverson in this Division of the High Court made an order under s 50 of the Administration of Justice Act 1985, removing Allan as an executor and appointing Philip Weaver, a partner in the firm of Pitmans LLP, then acting for the Company, as personal representative in his place. But in July 2015 a deed of appointment and removal of trustees was executed, whereby Mr Weaver was to retire as a trustee of the will of Angus, and a family friend, Julie Bryan, was appointed as a trustee of the will trusts in his place. Finally, on 15 June 2018, Morgan J made another order under section 50, removing Philip Weaver as personal representative and appointing Julie Bryan in his place. On 20 June 2018 I held, on an application by the petitioners to re-re-amend the petition, that the action was properly constituted and the petitioners had standing to bring it. I therefore gave permission to the petitioners to amend their petition further to reflect the current position.

5. The petition was originally issued on 8 November 2016, amended pursuant to the order of Chief Registrar Baister dated 10 April 2017, and then re-amended pursuant to the order of Mr MH Rosen QC dated 21 March 2018, and re-re-amended following my own order of 20 June 2018. From the beginning, the petitioners have been Lucy

and Julie Bryan. In the opening words of the petition as re-re-amended they are now stated to be acting "in their capacity as the Trustees of Angus McCallum-Toppin's Will Trust, which incorporates their status as both executors and trustees of the Will". Paragraph 3 of the petition in its final form states at the end that

> "References in this Petition to 'the Trustees' are to the executors and/or Trustees of Angus's Will Trust at the relevant time".

And paragraph 3.5, inserted on re-re-amendment, states as follows:

> "By an Order of the High Court dated 15 June 2018 (and with immediate effect), the second Petitioner was appointed as joint personal representative in place of Mr Weaver."

6. Section 994 of the Companies Act 2006 relevantly provides as follows:

> "(1) A member of a company may apply to the court by petition for an order under this Part on the ground–
>
> (a) that the company´s affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
>
> (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.
>
> (2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company.
>
> […]."

7. Angus during his life was a member of the Company. He accordingly would have had standing to present a petition under s 994(1). After his death, the shares still being registered in his name, the executors of his will (Lucy and Allan) were not without more members of the Company. But Angus's shares had been transmitted to them as such executors by operation of law. They therefore had standing to present a petition under s 994(2). However, Allan was then replaced by Mr Weaver by order of this court under s 50 of the 1985 Act. And Mr Weaver himself has now been replaced as personal representative by Ms Bryan (the second petitioner). In my written judgment on the petitioners' application to re-re-amend ([2018] EWHC 1562 (Ch), [2018] WTLR 531), I held that the estate of Angus had been transferred ultimately so as to be vested in Lucy and Julie Bryan. The trial has proceeded on that basis.

Witnesses

8. At the trial of this petition, the following witnesses who had made witness statements (or expert reports) were tendered for cross-examination: Lucy McCallum-Toppin, Philip Weaver, Alistair McCallum-Toppin, Allan McCallum-Toppin, Anna McCallum-Toppin, David Brooks, Stuart Baxter and Paul Norris. In addition, I also had a witness statement from Catherine McCallum-Toppin (Allan's wife), without her

being tendered for cross-examination. A hearsay notice was served in respect of this statement.

9. I give here my impressions of the witnesses who were cross-examined before me.

10. The first petitioner, Lucy McCallum-Toppin, found it hard to give evidence. She was slow and quiet, and quite often reluctant to answer questions. It was clear that she had forgotten about a considerable number of the events in which, according to the documents produced, she had been concerned. She was often confused, and changed her evidence from one sentence to another. At the same time, there were matters that she remembered with great clarity. She was prepared to agree with the position as shown by the documents to which she was referred. In my view, she was trying hard to tell the truth as she recalled it. However, where there were no documents to corroborate her evidence, I do not think I can place much reliance on her memory by itself.

11. Philip Weaver, a practising solicitor since 1982, specialising in commercial and corporate law, was a business-like and straightforward witness. He gave his evidence in a calm and clear way, and cross-examination made little impact on his evidence, which was precise and to the point. Of course, his involvement in this matter dates only from 2011, but I am satisfied that he was telling the truth in what he told me.

12. The first respondent, Alistair McCallum-Toppin, was a self-confident, urbane and intelligent witness. He did not argue with the documents placed before him, or take silly points. There was no beating about the bush with him. When he thought he had done something wrong in the past, he said so. When he thought he had been right, he said that too. That was, in fact, most of the time. Despite frequent protestations that he was neither a lawyer nor an accountant, and that he relied on professional advice in taking the steps that he did, he nonetheless gave the impression of being in complete control. Cross-examination made little impression on him. In my view he told me what he thought was the truth throughout. But I think he has convinced himself that he was in the right, and sees past events in that light. As a result, I cannot rely on everything he says.

13. His brother Allan, the second respondent, was quite different. Where Alistair had been sure he was right, Allan was now very sorry for what he had done wrong, or for what he had been unable to do that in his view he should have done. Allan gave me the impression of being a textbook middle child, seeking always to reconcile the quite different visions of the eldest and the youngest, and blaming himself for any failure to agree. But once more I have to record that I consider that Allan was trying to tell me the truth as he saw it. Even though I do not think that his view of past events was always the right one, I had no sense of any attempt to tell me a deliberate untruth.

14. Their mother, Mrs Bertha Anne (but called "Anna") McCallum-Toppin, was unfortunately a poor witness. In the first place it was clear when she was first called that her command of English, though no doubt sufficient for everyday domestic purposes, was not good enough for the purpose of giving evidence in this case. This was not because she was unable to express her ideas clearly in English (though sometimes she understandably fumbled for words), but rather because her ability to read and absorb material in English was weak and therefore slow, and similarly her ability to understand counsel's questions of anything other than the simplest nature. It

was therefore necessary to obtain the services of an interpreter to assist her. I do however record that most of the interpreting was of questions and documents put to her, and that often she replied directly in English.

15. As to the substance of her evidence, I am afraid I must record that she was very confused throughout. Her short-term memory during the time she was before me was poor. Her answers were often difficult to follow. She would sometimes answer a different question from the one being asked, and ramble off into material unrelated to the subject-matter of this claim, but, I have no doubt, important to her.

16. In any event, however, she candidly informed me that she had little or no memory of company affairs, perhaps only 10 %, and had little or no memory at all of dates and meetings. Indeed, she told me that many of the documents sent to her about company matters she had never even opened. She was however clear that over the years many documents had been put in front of her in connection with the business of the Company and that she had signed them without understanding them. Her ability to read English was weak. I expect that her lawyers prepared her witness statement in draft on the basis of an examination of the documents she signed and of detailed conversations with her, and she then simply signed it. However, for the reasons given above, I am unable to place much reliance on it, or indeed on the bulk of the evidence which she gave orally before me, where that evidence is not supported by other reliable evidence.

17. Of three things, however, I am in no doubt. One is the immense sadness that she feels at the early death of Angus, her eldest son. This pervaded the whole of her evidence. The second is her understandable desire to see an end to the constant feuding between her two surviving sons, whom she loves equally, and her similarly understandable desire no longer to be involved in their struggle. The third is that Anna was trying as best she could to tell the truth and to help the court.

18. The three expert witnesses, David Brooks (for the petitioners), Stuart Baxter (for the first respondent) and Paul Norris (for the second respondent), gave evidence before me concurrently, in a so-called “hot-tubbing” exercise, though that exercise in fact began (after they were each sworn) with a rather lengthy excursus concerning Mr Brooks and Mr Morrison, counsel for the second respondent, alone.

19. In my view each of the experts was seeking to assist the court to the best of his ability and giving his honest professional opinion in doing so. Each of the experts came at the subject-matter of the claim from a slightly different perspective, both of experience and current employment. But I do not think that the views of any of them are entitled to be preferred to the others by reference to any general quality (or lack of such quality) of that one. Where I have preferred the views of one expert or experts to the views of another or others, it is because, taken as a whole, the evidence so persuades me.

Facts found

20. As a result of the evidence given, and the other material to which I may properly have regard, I find the following facts. The company was incorporated on 28 September 1993, to carry on a retail coffee vending business formerly carried on as a partnership by Angus, Allan and Alistair. Coffee made using a Gaggia espresso coffee machine

was sold from a specially adapted cart in the street outside a shopping centre in Oxford. At that time the espresso coffee retail business in the UK was in its infancy. As I have already said, four ordinary shares in the Company were issued, one each to Angus, Allan and Alistair and one to their father Alexander. On incorporation, Angus and Allan were appointed directors, although Alistair was also appointed a director two weeks or so later. Alexander was a director from 1995 until his death in 2001. Their mother Anna was appointed a director in September 1997.

21. It is a feature of the history of this business and this company that the three brothers, although agreed on running the business together, disagreed frequently and strongly amongst themselves as to how to do it. But somehow they stuck together, and the business prospered. Further carts and sites were acquired, in the Cornmarket and at the railway station in Oxford, and then in 1995 in Marylebone Station in London. Eventually, there were sites in many major national rail stations. By 1999 the Company's turnover was approximately £10 million per annum. The key feature of the Company's business model was the emphasis on stalls and kiosks, smaller and more easily portable than shop installations, but potentially no less profitable.

22. As I have already said, Alexander died in February 2001, when his share vested in his widow, Anna, though apparently without the pre-emption provisions in article 6 of the articles of association being operated. This meant that Anna now had 25% of the voting rights in the Company and was frequently involved in the debates between her three sons as to how the Company should be run. Eventually the three brothers agreed that it would be better for their mother to be put in a non-voting position so that she could not be dragged into their disputes, whilst leaving her right to benefit from one quarter of the equity in the Company untouched. Solicitors were instructed to deal with the matter. For some reason, however, what was done did not solve the problem.

23. What happened was that, in April 2003, pursuant to a special resolution passed at an EGM of the Company, three new "A" ordinary shares (non-voting) were allotted, one each to Angus, Allan and Alistair. This actually had the opposite effect to what was intended. Anna's equity share in the Company, instead of remaining untouched, was diluted from one quarter to one seventh. But her voting rights, instead of being taken away completely, remained intact at 25%. Meanwhile each of the three brothers' equity shares was increased from one quarter to two sevenths, whilst their voting rights remained the same.

24. This was pointed out to the Company by a lawyer in February 2006. But it was not until after Angus's death that the parties focused on what had actually happened. Although there was some discussion about putting it right, for various reasons nothing was done. In March 2007 it appears to have been agreed at a board meeting that the matter would be left in abeyance until (as was then contemplated) the Company had been sold. I return to this question later.

25. In 2002 the three brothers took part in a BBC television programme presented by the businessman Gerry Robinson, called "*I'll show them who's boss*". I have been shown a transcript of this programme. Lucy described this programme as "disastrous". It presented the three brothers as dysfunctional and unable to work together in the company which they had created. Gerry Robinson recommended during the programme that Allan should be given the role of managing director, because he had the quality of peacemaker and was able best to reconcile his older and younger

brothers. The three brothers certainly accepted the necessity for one of them to run the Company and the others to step back.

26. However, they did not follow Gerry Robinson's recommendation. Instead in 2003 they decided to appoint Alistair as managing director, Angus as operations director and Allan as personnel/HR director. Yet Angus and Allan were still able to outvote Alistair on a number of issues. One was the appointment of Lucy and of Allan's wife Catherine as directors though without active duties to perform, so as to make full use of their individual tax allowances. (Both eventually resigned as directors on 30 January 2005.) Another was to replace the firm of accountants which audited the Company's accounts with Grant Thornton. A third was a dispute about dismissing the finance director, Fred Edwards.

27. Alistair introduced an American merchant banker called Michael Wellman to the Company. With his assistance the three brothers succeeded in negotiating and agreeing a written management agreement in March 2005, which set out the principles upon which the company would be run for the next year or so, until a more permanent solution could be agreed. The main points were that Alistair would be managing director at least for a further year, and that Allan and Angus would have no executive role. They would continue as directors, receiving business information and attending board meetings. They would also be bound by non-competition clauses. All three brothers would receive an agreed annual salary of £120,000 (to be reviewed at the end of one year) and bonuses of 7% of the Company's earnings before interest, tax, depreciation and amortisation ("EBITDA") up to £100,000 each, plus a dividend of one third of the "undistributed annual net after tax income, following deduction of statutory reserve of at least 40% of after tax income".

28. In my judgment, this agreement was designed to ensure that the three brothers shared the profits made by the Company equally, rather than to regulate directors' remuneration. That was the only basis on which Allan and Angus would allow Alistair to run the Company by himself. To be fair to Alistair, he was content with that. The non-competition provisions were really not important in the way that they might have been in a non-family context.

29. It is to be noted that neither Anna nor the Company was a party to this agreement, and there is no evidence that either of them ever ratified it thereafter, whether by words or conduct. Anna was not involved in management issues, and there is no evidence that the Company evinced an intention to become a party. In any event, it was a temporary expedient, to be reviewed after about one year, and not a permanent solution. In addition, in my judgment, it was made on the basis that all three brothers remained alive, and therefore came to an end (at the latest) on the death of Angus in December 2006.

30. In February 2006 the skin cancer which Angus had suffered from some years before, and which had been treated, unfortunately returned. He went to Boston in America for specialist treatment. During this time the three brothers were attempting to negotiate the next management agreement. At the trial, it was common ground that no revised management agreement had ever been *signed*, but there was an issue as to whether any such revised management agreement ("RMA") had ever been *agreed* between the brothers. I was referred to a number of documents, including a draft RMA sent by Allan to Angus on 2 August 2006, a further draft of about 16 October 2006, and

another draft appended to Reed Smith's letter of 11 August 2015, as well as emails passing between the brothers and their advisers, in particular Michael Wellman. I also heard from Alistair and Allan about this.

31. It appears from an email sent by Allan to Mr Wellman on 2 September 2006 that in his view, by then, the RMA was agreed "in principle". In another email from Allan to Mr Wellman dated 16 October 2006 it was said that the RMA was "agreed", but still unsigned. But then in an email from Mr Wellman to Allan dated 31 October 2006 the sender attached "what I hope will be final versions…" The problem is that all these versions are different from each other, in material ways. Allan's evidence was that the "agreed" version of the RMA was the former. Alistair's evidence was that it was the latter.

32. Moreover, it is simply not clear that any (and if so which) version was "agreed" by Angus, nor indeed by what means he "agreed it". By then Angus was very ill. And in an email dated 3 January 2007 to Alistair, almost a month after the death of Angus, Allan says that there were "issues still to be worked out". As a result, I am not satisfied that *any* version of the RMA was ever unconditionally agreed by all three brothers. Even if one were, and it were possible to identify it, neither Anna nor the Company was ever a party to it or ratified it, for the same reasons as I have given in relation to the original management agreement.

33. The drafts of the revised agreement all included terms that Alistair would continue as managing director of the Company, and that Angus and Allan would continue as directors without executive responsibility, though receiving business information and attending meetings. They were also to be subject to non-competition clauses. But the terms as to salary and bonus varied from one version to another. Some of the changes were cosmetic. But others were of real substance. In earlier versions Allan and Angus were to receive annual salaries of £125,000 plus a bonus of 7 to 10% of EBITDA, whereas Alistair's annual salary was to be £150,000 plus a bonus of 7 to 15% of EBITDA. In later versions Alistair's annual salary was to be £175,000, and the increment points for the bonus were different. It is clear that the draft RMA breached the principle of equal treatment for the three brothers. It would result in Alistair receiving more than Allan or Angus.

34. At this time, however, and as I have already said, Angus was seriously ill. He went into a hospice in late November 2006, and died on 6 December 2006. As already stated, under Angus's will Allan and Lucy were appointed executors. They obtained probate of his will on 14 May 2007. The shares that Angus had owned in the Company were left in his name, presumably so as not to trigger the pre-emption provisions contained in the articles of association. This meant that, according to those articles, the shares became non-voting shares (see regulation 31 of the Companies (Tables A to F) Regulations 1985, as amended, incorporated into the articles of the Company by article 1(a)). That altered the balance of power in the company. In particular, it meant that, if (as frequently happened) Alistair and Allan disagreed, their mother Anna would hold the balance of power. This made her very uncomfortable.

35. After Angus's death, on 28 December 2006 Allan announced that he would be coming back to work at the Company. Given the terms of the RMA put forward by the respondents in this case this could only be on the basis that either (i) there was no RMA, (ii) there was an RMA but it did not apply now that Angus was dead, or (iii)

there was an RMA and Allan was simply ignoring its terms. Allan's oral evidence at the trial was that the RMA would not have been for the long term anyway, but would have been reviewable. As I have said, in an email dated 3 January 2007 to Alistair he said that there were "still issues to be worked out". In fact Allan returned to work at the Company as operations director on about 25 September 2008. I return to this below.

36. On the evidence before me, the actual role carried out by Allan, whilst called 'operations director', did not appear to be as substantial as the title would indicate. First of all, area managers were in fact responsible for the operations in their areas. Secondly, the role did not include responsibility for finance. The Company did not have a finance director, but there was a finance team which covered this aspect of the corporate activity. Thirdly, Allan's own evidence was that what he provided was a human aspect to the business of selling coffee to retail customers. He was evidently good at getting the best out of employees, both by teaching them how to do their job and by encouraging them. Fourthly, in more recent times he has been excluded by Alistair from management meetings and lost many of his responsibilities.

37. All in all, this amounts to rather less than a normal executive director of a substantial business would expect to undertake. Alistair's evidence in substance was that Allan was "fantastic at … hands-on operational work", but not sufficiently commercially-minded, and was probably overpaid for what he did. Allan was also company secretary, but in practice this role was covered by the Company's accountants and solicitors, and Allan accepted in evidence that it was purely nominal.

38. A number of payments were made by the Company in 2007 by way of dividend declared to the estate of Angus. On 27 February 2007 a final quarterly bonus was paid of £68,097.06, together with the sum of £9,935.91, representing Angus's salary for December 2006, and £10,416.67, representing Angus's salary for January 2007, thus making a grand total of £88,449.63. On 12 March 2007 the sum of £10,416.67, representing Angus's salary for February 2007, was paid. On 1 May 2007, the sum of £20,833.34, representing Angus's salary from March and April 2007, was paid. And on 11 July 2007 a first-quarter bonus of £66,922.74 was paid. The grand total of all of these sums is £186,622.38. All of these sums were received by Angus's estate as declared dividends, however they were actually described.

39. It appears that these payments were made on the basis that, following Angus's death, Lucy needed liquid funds with which to pay family expenses. In each case the other shareholders in the Company waived their rights to similar dividends. Allan was the prime mover in ensuring that the Company did this. Lucy considered that these payments were in substance the continuation of the remuneration rights of Angus which had been previously paid to the three brothers as major shareholders in the Company. However, although Allan considered that he had agreed with Alistair that Lucy be paid Angus's salary of £125,000 for one year, and it would then be reviewed, Alistair in particular objected to this. No payments representing salary or other benefits which Angus would have earned were paid after July 2007. But there was a payment of £121,000 made in April 2008 from the AMT pension scheme to the Company, which the Company passed on to Lucy as a beneficiary of the scheme.

40. From 2007 onwards there were discussions about selling the Company and negotiations with a number of interested persons. Offers to purchase the Company,

but always based on a number of important assumptions, and always subject to due diligence and to contract, were received from a number of third parties. These included Close Growth Capital on 19 April 2007 (£23 million, but later revised downwards to £15.5 million), Gresham on 20 April 2007 (£21 Million), the Restaurant Group on 26 April 2007 (£22 million) and Bowmark Capital on 27 April 2007 (£25 million, but increased to £30 million on 25 May 2007). In all of these cases the offers were conditional on Alistair remaining in the business.

41. One aspect of the possibility of a sale of the Company was whether and how far to seek to sell the Company to a trade buyer. Alistair was against negotiations with any such buyer, on the basis that sensitive commercial information would have to be supplied to what was in effect a competitor. So, for example, Alistair was against negotiations with Caffe Nero, but he was outvoted, and they took place, although they came to nothing. In June 2007 the Company lost some valuable railway sites to Caffe Nero. This caused a significant loss of turnover and hence profit. Alistair blamed that on having made available commercial information to Caffe Nero. Allan's evidence, on the other hand, was that Alistair had taken too hard a line with Network Rail in negotiations, and had also offended the Head of Retail at Network Rail. On the material available to me I am not persuaded that Alistair is right to blame the making available of commercial information to trade competitors, but in any event it would not be material to any of the questions which I have to answer.

42. The offer from Bowmark was the most attractive to the shareholders of the Company. But as I have said, it was made on the basis of various assumptions which would have to be verified. During June, as further information became available, this was revised down in stages, and the heads of terms were signed only on 12 July 2007. This provided for Bowmark to purchase the Company for £20 million. Of that sum £4.25 million would be paid in cash to the estate of Angus, and £750,000 would be paid to the estate in the form of loan notes bearing interest at 6%. The deal was further revised downwards by November 2007 to £18 million in total (of which £3.5 million cash and £1 million in loan notes would be paid to the estate). This was because of a deterioration in current trading (including the loss of Network Rail sites) and current EBITDA. In addition, the economic situation generally was deteriorating by reason of the so-called "credit crunch" which began in August 2007. This led to a restriction on funds in the market which might otherwise have been available to prospective purchasers of the Company. Ultimately Bowmark withdrew by February 2008.

43. There was then a management buyout negotiated with Alistair by June 2008. This was signed by Allan and Anna on 30 May 2008, by Lucy on 2 June 2008 and by Alistair on 11 June 2008. The terms of this transaction were much less favourable to the shareholders than the Bowmark offer. The management buyout involved only a small amount of cash being available on completion, and the vast bulk of the purchase price being provided in the form of loan notes, repayable over a three-year period starting from the end of the 3rd year from the transaction. So it would take six years for the purchase price to be paid in full. Moreover, this transaction depended on independent bank finance being available.

44. The Company's bank, Royal Bank of Scotland, was approached. The bank commissioned a report from accountants Shipleys LLP, which became available in September 2008, and was however unfavourable to the transaction. They recommended that the bank not proceed to finance the MBO. The offer of bank

finance was accordingly withdrawn, and the management buyout did not proceed. In a separate exercise, on 18 September 2008 Shipleys also valued the Company at between £8.75m and £9.62 million.

45. Internal politics at the Company continued to dominate. I have already recorded that Allan wished to return to full-time working in the Company. By September 2008 the Company had significant cash flow problems, and had failed to make payments to the tax authorities. What was worse was that on 19 September 2008 the bank declined to lend a further £250,000 for working funds, to deal with a cash flow crisis, and suggested that the shareholders provide the necessary funds. So the Company faced running out of cash in October 2008. This precipitated a crisis in its affairs. On about 24 or 25 September 2008 Allan returned to work full-time, and on about 26 September 2008 he and Anna his mother acting together as directors removed Alistair as managing director of the Company, and appointed Michael Wellman as company chairman.

46. However, on Sunday, 28 September 2008, Allan and Alistair had a meeting at the home of Alistair's parents-in-law, Dr Edward and Mrs Mary Locker-Marsh, and agreed to resolve their differences. At a later stage Alistair insisted that on this occasion Allan had agreed with him on certain crucial points which were to be taken forward in due course. What happened immediately, however, was that Alistair was reinstated, Michael Wellman was sacked by Alistair on the grounds that he had paid himself bonuses to which he was not entitled, and Dr Locker-Marsh agreed to lend the company £200,000, at this stage unsecured. In addition, Alistair and Allan, and also Allan's parents-in-law, all agreed to make loans (of smaller amounts) to the Company. Lucy was also asked, but was unable to assist because she did not have the money.

47. As a footnote to the making of the Locker-Marsh loan, I record that, on 31 March 2009, Alistair and Allan, who were joint legal and beneficial owners of the cottage in which their mother Anna lived, charged it to Dr Locker-Marsh to secure the loan he had made to the Company. Anna was not a party to the charge. This followed a promise to that effect made by Allan at the meeting on 14 February 2009 referred to below.

48. In early 2009 Alistair personally took advice from Gardner Leader solicitors concerning a revised shareholders agreement. He was concerned that Allan was preventing private equity deals from succeeding, by placing unrealistic values on the Company. But the Company was in a weak financial position, being dependent on bank funding (secured in a part by a personal guarantee from Alistair for £500,000), and the loan from Dr Locker-Marsh of £200,000 (which the Company would not be able to repay at present). He considered that, if he walked away, terminating his guarantee, and his father-in-law sought repayment of the loan, the Company would not survive. So he reasoned that the other shareholders had to accommodate his desire for greater control. Gardner Leader drafted a new shareholders' agreement and new articles with that aim in mind.

49. There was then a meeting between the shareholders and also Alistair's and Allan's parents-in-law on Saturday, 14 February 2009. It was clear that Allan was unhappy with Alistair's plans to obtain greater control. Indeed, at one point he left the meeting abruptly, only returning some 45 minutes later. Alistair asserts that Allan agreed at the

meeting that Alistair's loan account would be written off. I am not satisfied that Allan ever agreed this. But, even if Allan did agree it, it was never implemented.

50. Following the meeting, Gardner Leader produced revised drafts of the shareholders' agreement and articles of association for Alistair. These were more balanced than the first versions as between Alistair and Allan. Nevertheless Allan in sending copies to Lucy on 3 March 2009 described them as being "very much on Alistair's side". On 17 April 2009 there was a shareholders' meeting at the offices of Morgan Cole (retained by the Company) in Oxford. Alistair, Allan, Anna and Lucy were all present, as was Lucy's brother Mark Minns, Dr Locker-Marsh, Lanoma Perrott from the Company, and Michael Stace from Morgan Cole and Derek Rodgers from Gardner Leader. There was discussion of the draft shareholders' agreement and articles of association. There was some agreement (for example, that Alistair should have *operational* control), but fundamental disagreements still existed. For example, Allan insisted that voting rights should remain 50:50 as between Alistair and himself.

51. The impasse continued, with proposals being put forward to resolve it. On 3 June 2009 Alistair's lawyer Derek Rodgers wrote to Michael Stace, the other shareholders' lawyer at Morgan Cole, offering for Alistair to consent to the registration of the estate's shares in the names of the trustees in exchange for other shareholders' consent to a gift of Anna's share to Alistair plus revised articles and a shareholders' agreement to give Alistair operational control and a casting vote. The effect would be to give Alistair about 43% of the equity and 50% of the votes. This was not acceptable to Allan.

52. On 11 June 2009 Michael Stace made a different proposal to Derek Rodgers, which would give Alistair 40% of the equity and 45% of the voting rights, and there would be no casting vote at any level. This was not acceptable to Alistair. But in any event both these proposals were undermined by a letter from Michael Stace to Derek Rodgers dated 24 June 2009, following a meeting which he had had with Anna that morning, in which he stated that Anna did not wish to hear further any suggestion that she give her share to Alistair alone, and that she would give her share *only* to Alistair and Allan in equal shares.

53. The resolution of the impasse came in another boardroom coup. On about 15 July 2009 Allan and Anna his mother acting together as directors once again removed Alistair as managing director of the Company. This time he remained out of the business for about 20 months until March 2011 (although he remained a director and shareholder). That created an anomaly, in that Alistair, out of the Company, continued to earn a base salary of £175,000 per annum, whereas Allan, running the Company, continued to earn a base salary of £125,000 per annum. As I say below, in December 2010, Allan increased his own salary (and introduced a salary for his wife, Catherine) in order to match that of Alistair.

54. In October 2009 Alistair brought a claim for unfair dismissal and unpaid salary against the Company in the Employment Tribunal. This claim was settled on 16 August 2010 by an agreement between Alistair and the Company, by Allan acting on its behalf. This provided (amongst other things) for the Company to pay Alistair £89,000, for the Company and/or shareholders to offer Alistair market value for his shares within 3-4 months, and for Alistair to be paid his current salary (£175,000 per

annum) until he no longer had any interest in the Company. It did not however provide for his reinstatement in any executive position.

55. On 3 June 2010, during the currency of the unfair dismissal claim, Alistair also presented a petition under the Companies Act against Allan, Anna and Lucy, for conduct unfairly prejudicial to his interests. It sought an order for a share-buyout (either of Alistair's shares by the others, or the reverse), or alternatively a demerger of the Company and its business, sharing the demerged business between Alistair and the others.

56. On 30 October 2010, Anna signed what purported to be a memorandum of gift of her share to her two surviving sons in equal shares. She stated that she was doing this in order "to remove myself from the company and its interest." This document was not witnessed, not executed as a deed, and was not in the form needed to transfer her share. It appears never to have been formally implemented. But it does demonstrate that in the then current situation Anna was feeling very much under pressure.

57. That pressure cannot have been lessened by a letter to Allan written by solicitors acting for Alistair's wife Esme, dated 8 February 2011. The cottage in which Anna was living, rent-free, belonged to Alistair and Allan jointly, subject to the charge in favour of Esme's father, Dr Locker-Marsh. On 18 May 2010 Alistair had by notice severed the beneficial joint tenancy and on the same day had also declared that he held his half share in equity on trust for Esme. Now Esme sought to realise her interest in the property and sought Allan's co-operation in selling the property.

58. It was clear that matters could not continue as they were. The unfair prejudice proceedings were in substance settled at a meeting on 22 March 2011 at The Bear Hotel in Woodstock (at which Lucy was not present). The handwritten agreement in note form made at that meeting was replaced by a typed agreement dated 24 March 2011 entered into between the Company (represented by both Alistair and Allan), Alistair, Allan and Anna, but not Lucy. Under this agreement, Alistair was to be reinstated as managing director at his previous salary, and it was expressly provided that neither Alistair nor Allan should be dismissed from their employment against their will and that their remuneration should be maintained. It was agreed between the parties that the shareholdings in the Company should be restructured. It was also agreed that Anna would be paid £50,000 per annum until she ceased to be a shareholder, and that Angus's estate should receive "up to £60,000 per annum from the Company" until it ceased to hold shares in the Company. Alistair returned to work almost immediately, on 1 April 2011.

59. The unfair prejudice proceedings were not however formally terminated immediately. It appears that Lucy refused to sign a consent order unless and until provision was made for her legal costs. This happened only some months later, when Allan agreed to pay them, and so it was only on 7 February 2012, that Registrar Barber made the order by consent of all parties (including Lucy). Although the trial bundle appears not to contain that part of the court order which sets out the agreed terms, I proceed on the basis that they are the same as those contained in the written agreement of 24 March 2011. However, no payments were made to Angus's estate as contemplated by the agreement, or at all.

60. I should mention at this stage that Anna, still being a director of the Company and the owner of her share, on 1 April 2011 executed a power of attorney in relation to her voting rights in her share. The power was stated to be conferred on Alistair and Allan *jointly* (and not severally). This appears to have been part of a defence mechanism to prevent either Alistair or Allan from using their mother to spring a further coup on the other. The trial bundle also contains a further document, expressed to be a deed, dated only "2010", and signed by Anna, Alistair and Allan. Under this document Anna is expressed to *revoke* the power of 1 April 2011 (so it is clear that it was not signed in 2010).

61. But it appears from further documents in the bundle that Chris Wallworth, a private client solicitor, who had prepared the original power of attorney, drafted the revocation deed prior to 2 November 2011, together with a further power of attorney in favour of Alistair alone. Both were intended to be left undated, to be held in escrow pending confirmation that the estate's share had been registered, when he would date them, and they would come into effect. They were signed in a meeting with Mr Wallworth on 2 November 2011 by Anna, Alistair and Allan.

62. On 20 December 2011 Alistair and Allan signed (before witnesses) a shareholders' agreement that (in substance) each of them would procure that neither be removed from his directorship and that the Company would comply with its obligations under their contracts of employment.

63. After Alistair's return to work at the Company, there were attempts to sell the shares belonging to the estate to the Company itself. On 17 May 2011 the Company offered to purchase the estate shares for £3 million in total, being £1 million in cash and £2 million in loan notes. There was then a negotiation between the two sides. Counter-offers were rejected, and then the Company's offer was withdrawn on 21 July 2011. Further attempts to sell the estate shares to the Company took place in 2012, 2013 and 2014, but none was successful. However, the negotiations in 2014 progressed far enough to persuade Allan of the necessity of applying for an order that he be replaced as personal representative of the estate of Angus, as already set out above at [4].

64. In March 2013 Alistair and Allan entered into a fresh shareholders' agreement. It is not dated, but it appears that they signed it on or about 15 March 2013. Neither Anna nor Lucy was a party. The agreement required the parties to carry on the business of the Company in accordance with a business plan which was, however, not included in the annexes to the agreement. It allocated the roles of Managing Director and Operations Director to Alistair and Allan respectively, giving detailed job descriptions and responsibilities for each role. It set out a number of matters requiring the consent of both Alistair and Allan, including changes to the company itself or its business and changes to the remuneration or employment of any director. It contemplated the making of further agreements, called a cross option agreement and a put and call option agreement respectively, and required the parties to negotiate in good faith to enable them to agree and execute these agreements.

65. Allan complains that although he has performed as required by the job description he has not been able to fulfil certain responsibilities because of the actions of Alistair. For the purposes of this claim it is not necessary for me to go into these matters. But the complaint is symptomatic of the dysfunctional relationship of this family: "it is never my fault that things have gone wrong, but always someone else's". In giving

evidence, Alistair himself described his family as dysfunctional, although Allan said it was merely a difficult, rather than a dysfunctional, relationship. I am afraid that I agree with Alistair's assessment.

Directors' loan accounts

66. The evidence in this case is clear that, from the early days, the directors (including Angus) maintained loan accounts with the Company. They each procured the Company to pay personal expenses, leaving the amount outstanding on loan account. These loan accounts were entirely informal (*ie* there was no documentation), and, as Alistair and Allan admitted in evidence, did not bear interest, and were not subject to any agreed repayment plan or terms. Alistair, Angus and Allan were aware that each of them was doing this, and no complaint appears to have been made by any of them as a result. Anna was not aware of them however until the meeting of directors and others which took place on 14 February 2009, when she is recorded as suggesting that they move forward, as "we have to forget about the loan accounts and the money that has been spent".

67. In the early days, however, outstanding loan accounts appear to have been repaid or at any rate reduced by the payment of bonuses to the directors at the end of each year. At the time of Angus's death, his loan account stood at a little under £13,000, which Alistair and Allan decided should be written off, rather than ask Lucy to repay it. In contrast, in February 2009 Alistair's loan account stood at some £166,459. Alistair says that it was agreed that this would be forgiven by an appropriate bonus (to include the tax element). But when Allan took over the management of the Company in July 2009 this did not happen.

68. As at the end of 2015, the Company's accounts show that Alistair and Allan between them owed the Company a total of £1,091,091, but do not break this down between them. The accounts for 2014 however show that Alistair owed the Company £660,091, and that Allan owed the Company £431,000, making the total of £1,091,091. This represents a significant credit risk to the Company. Alistair's evidence was that he did not know how long it would take him to repay this sum. Indeed, in the Employment Tribunal proceedings brought by Alistair after he was excluded from the Company, Allan's witness statement says that Alistair had said he "could not afford to repay the amounts he owed". Allan's evidence was that it would take him personally 3 to 5 years to repay his loan account.

69. It is clear that, during the time that they have controlled the Company after the death of Angus, Allan and Alistair have used the company as a "piggy bank" to make personal expenditure at a high level on their behalf. This includes a deposit on a house purchase for Alistair, expenses of improving a house for Allan, and payment by Allan of the costs incurred in relation to Alistair's unfair prejudice petition. But there are a huge number of small personal expenses too, such as purchases from department stores, medical and dental care costs, cinema tickets, personal air travel, and telephone bills.

70. Using the Company's cash in this way withdrew capital from the Company which would otherwise have been available either to keep down debt or to enable further projects to be undertaken. The report by Shipleys in September 2008 criticised Alistair's loan account as detrimental to the cash flow of the Company. Moreover, as

Alistair accepted in evidence, the directors' loan accounts have had adverse corporation tax consequences for the Company (see the Corporation Tax Act 2010, s 455). Indeed, both Alistair and Allan accepted in evidence that the loan accounts were not in the best interests of the Company. Yet no action was taken at any time by the directors to obtain shareholder approval.

71. I have no doubt that each of Allan and Alistair was aware of the loan account of the other and can be said to have consented at least impliedly to the existence of that loan account. Anna also benefited from Allan's director's loan account to the extent that it dealt with her costs of the unfair prejudice proceedings brought by Alistair against the Company at the time of his removal from office. As I have already said, she was not aware of the loan accounts of her sons until the meeting on 14 February 2009 when (as I have already said) she suggested that they forget all about them. As for Lucy, she knew that there were directors' loan accounts at the time when Angus was alive, which were paid down by the award of bonuses, and was aware of their continued existence in principle thereafter. However, I find that she did not know of the scale which they had reached by 2015 until she saw the Company's accounts for that year.

Directors' remuneration

72. During the time that all three brothers were alive and contributing, or at any rate being available to contribute, to the economic success of the Company, both as directors and as employees, it did not matter very much whether the profits that the Company made were paid out to the brothers by way of remuneration for services (including bonuses) or by way of dividend to themselves as the shareholders. But, once Angus had died, and there was no question of Lucy playing a part in the running of the Company or otherwise contributing to its success, it mattered much more to all of those interested how the Company remunerated its directors. Sums paid to those who worked in the Company would reduce the available profits for distribution to members. With the single significant exception (already mentioned) of payments made to Angus's estate after his death, which were made by the declaration of dividends by the Company (but which were waived by the other shareholders), the Company has throughout its life rarely paid dividends, but instead has distributed the available profits by way of salaries and bonuses.

73. The evidence as to amounts of remuneration paid to the directors is conflicting. None of the witnesses put forward figures which were completely the same as those of the others, and neither did they match the figures in the Company's audited accounts. But, taking all the evidence together, I find that the following (approximate) amounts were paid in total as salary and bonuses to Alistair, Allan and Anna during the periods stated:

Year ended 31 January 2008: Alistair £488,678; Allan £345,033; Anna £50,000. This makes a total of £883,711 (audited accounts: £883,710).

48 weeks ended 28 December 2008: Alistair £201,126; Allan £141,714; Anna £45,833. This makes a total of £388,673 (audited accounts: £435,683). The figure for Alistair is taken from the audited accounts, as the amount received by the highest paid director. Allan's figure for his own remuneration is less than that given for him by Alistair because Allan was not paid any salary instalment in September 2008.

Year ended 27 December 2009: Alistair £175,000; Allan £114,583; Anna £27,083. This makes a total of £316,666 (audited accounts: £300,000). Allan's figure for his own remuneration is once again less than that given for him by Alistair because Allan was not paid any salary instalment in April 2009.

Year ended 25 December 2010: Alistair £116,667; Allan £168,542; Anna £25,000. This makes a total of £310,209 (audited accounts: £322,500). Included in Allan's figure, and paid in December 2010, was the sum of £31,250, representing the two missed monthly salary instalments in September 2008 and April 2009, and one month's holiday pay.

Year ended 26 December 2011: Alistair £175,000; Allan £167,290; Anna £56,250. This makes a total of £398,540 (audited accounts: £342,290).

Year ended 24 December 2012: Alistair £175,000; Allan £147,500; Anna £50,000. This makes a total of £372,500 (audited accounts: the same figure).

53 weeks ended 29 December 2013: Alistair £510,754; Allan £467,096; Anna £50,000. This makes a total of £1,027,850 (audited accounts: the same figure).

Year ended 28 December 2014: Alistair £357,000; Allan £333,500; Anna £50,000. This makes a total of £740,500 (audited accounts: the same figure).

Year ended 28 December 2015: Alistair £454,150; Allan £441,800; Anna £50,000. This makes a total of £945,950 (audited accounts: £1,082,092).

Year ended 25 December 2016: Alistair and Allan both admit to receiving a base salary of £235,000 each, but the audited accounts say that the total director remuneration was £647,057 and the highest paid director (whom I assume to have been Alistair) received £322,616. Anna accepts that she received £50,000, so that Allan must have received a total of £274,441, rather than the £237,350 stated in the revised remuneration appendix to his closing submissions. In giving evidence neither Alistair nor Allan could explain the discrepancies between the figures they put forward and those stated in the audited accounts. On this point I prefer the audited accounts of the Company, approved and signed by both Alistair and Allan, to the evidence of the payslips produced and relied on by Allan.

In relation to Year ended 26 December 2011, the difference between the total I have found and the figure in the audited accounts appears to be that Anna's remuneration was not included, although she was a director.

74. In addition, the Company's accounts show that payments have been made in most of the same periods to Allan's wife Catherine. They are relevant because, although Catherine was not then and is not now a director, such payments may amount to a further benefit to Allan, in that (to that extent) they relieve him of the burden of supporting his wife, and moreover they are subject to a reduced rate of income tax in her hands. In his witness statement Allan seeks to justify these payments by asserting that Catherine worked for the Company as his PA during this period.

75. In her own witness statement Catherine says that, before getting married and having a family, she worked for a number of banks, ultimately as a sales executive. In 2008-

2009 she assisted Allan "in a PA role", but was not paid for it. She further says that she

> "assisted Allan with mileage and expense claims, booking accommodation and travel, sending emails on Allan's behalf and managing his diary".

She goes on to say

> "during this time when Allan was running the business in Alistair's absence, I also stepped up my PA work for Allan in order to make his job more manageable."

But this time she was paid for what she did.

76. Yet the Company already had such resources to support Allan. It did not need to pay for more. And Catherine had two small children, born in March 2004 and September 2006. In 2010 they would have been aged 6 years and 4 years respectively. I accept that Catherine did indeed do "PA work". But in my judgment it is unrealistic to suppose that Catherine, as the wife of a senior executive and shareholder in the business, could have worked anything like a full-time job as a PA at this time. I regard what she did as modest (if useful) work which took up a limited amount of time. The fact that she had a more demanding role as a sales executive before having a family does not justify paying excessive remuneration for a part-time PA.

77. Moreover, in his oral evidence, Allan admitted (and I accept) that these payments began at a time when he wished to increase his own salary to match that of Alistair, but wished to do it in a tax-efficient way. Catherine did not have other earnings to use up her personal tax allowance and basic rate tax band. So, according to his email to Alistair of 27 April 2017, Allan increased his own salary to £147,000 per annum and arranged for Catherine to be paid at the rate of £27,500 per annum, so making £174,500. But in fact the Company's books do not show exactly that sum being paid every year.

78. The payments are as follows:

Year ended 26 December 2010: £2,292.

Year ended 26 December 2011: £18,333.

Year ended 24 December 2012: £22,500.

53 weeks ended 29 December 2013: £30,000.

Year ended 28 December 2014: £12,500.

79. As I have already said, under the written management agreement between the three brothers entered into in March 2005, each brother received an agreed annual salary of £120,000 and bonuses calculated according to a formula. I have also discussed an alleged revised management agreement (dating from the period August to October 2006), and concluded that no such agreement was ever agreed by all three brothers. Nevertheless, the salaries of Alistair and Allan and (while they lasted) the payments to

Lucy representing Angus's salary were based on elements in one or other of the drafts of the revised management agreement.

80. During 2008 – 2009 there was a cash flow crisis, and salary instalments were not always paid. Indeed, Anna's salary was formally reduced from £50,000 to £25,000 per annum in February 2009. But confidence grew again and in December 2010 Allan, with Anna's approval, increased his own salary (and paid his wife a salary) in order to match Alistair's. At about the same time Allan also (at Anna's request) directed that Anna's salary be restored to £50,000 per annum. When Alistair returned to management in the Company in 2011 (after his exclusion) he and Allan agreed that they would receive the same annual salary.

81. As will be seen later, there was a further shareholders' agreement on about 15 March 2013 setting out the responsibilities of each brother and superseding earlier agreements. This agreement did not lay down salary levels, but rather introduced negative controls, under which both Alistair and Allan had to agree any changes to be made to their salaries. Then, in November 2013 Alistair proposed and Allan evidently accepted (because the increase was paid and accepted) an increase in that annual salary of £60,000, from £175,000 to £235,000, for 2014 and subsequent years.

82. The evidence of Anna (which I accept, with the two reservations mentioned above, and one further one) was that she was not involved at all in deciding how much staff or the directors (including herself) should be paid, nor whether or not dividends should be paid to shareholders. Nonetheless, however, she must have provided the same waiver of dividends in relation to the payments made to Angus's estate, as the other shareholders did. Also, she accepted remuneration at the rate of £50,000 per annum agreed on by the three brothers in August 2006. The third reservation is that Anna appears to have approved or agreed with Allan's decision to withhold Alistair's salary from him in the period December 2010 to March 2011.

83. The question arises whether the remuneration drawn by the respondents was authorised by the Company's constitution. Regulation 82 of Table A, incorporated into the Company's Articles of Association, required remuneration paid to directors in a non-executive capacity to be fixed by the Company by ordinary resolution. Regulation 84 of Table A required remuneration paid to directors in an executive capacity to be fixed by the board of directors.

84. Yet (as I have said) the evidence of Anna was that she was not involved in or party to the making of any of the decisions by the directors as to their remuneration. That evidence was unchallenged, and I accept it, with the three reservations which I have already referred to: Allan's increase in salary in December 2010, Anna's increase in salary at the same time, and the withholding of Alistair's salary in the period December 2010 to March 2011.

85. There is no evidence that the board of directors took any decision regarding remuneration at properly convened board meetings. Subject to the three reservations concerning Anna's role, all such decisions were taken by Allan and Alistair alone, and sometimes only one of them, the other agreeing or ratifying subsequently. Even in the three cases where Anna agreed, she sided with Allan; Alistair did not consent. The power of attorney dated 1 April 2011 obviously could not apply to decisions taken earlier. In relation to decisions taken later, it is not expressed, and cannot apply, to

decisions taken *as director*. But after April 2011 all the remuneration with which we are concerned is that paid to directors in an executive capacity, which (as pointed out above) was to be fixed *by the board of directors*. The power of attorney did not permit Alistair and Allan jointly to function as the board of directors. All such remuneration was therefore unauthorised.

86. There is also the question of the agreements made by Alistair with the Company to settle the employment tribunal proceedings, and with the other shareholders and the Company to settle the unfair prejudice petition. Each of these makes reference to Alistair's entitlement to remuneration. The agreement of 16 August 2010, settling the tribunal proceedings, contemplated that Alistair would be bought out of the Company within the following few months. So, although the agreement defines the duration of the entitlement to remuneration as the length of time during which Alistair continues to be a shareholder, it is clear that all the parties thought that this would be a limited period. But if it is not possible to construe the agreement so that it refers only to a period of a few months after August 2010, then, to the extent that the remuneration paid to Alistair pursuant to this agreement thereafter was excessive, and that such excessive remuneration amounts to unfairly prejudicial conduct, then entering into such an agreement on behalf of the Company so as to bind it to pay it must also amount to unfairly prejudicial conduct.

87. The agreement of 22 March 2011, settling the unfair prejudice petition, includes a provision that Alistair's salary is "to be reinstated with immediate effect…". But this does not provide that the salary is to continue forever. It is not a promise by the parties (other than Alistair) that he will always receive these payments. It is simply putting Alistair back in the position where he was before. So on its true construction, I do not consider that this agreement helps Alistair's argument. Even if I were wrong on that, the same point can be made about this agreement as about the earlier agreement to settle the tribunal proceedings. To the extent that the remuneration was excessive and constituted unfairly prejudicial conduct, then entering into the contract must also constitute such conduct.

88. It is necessary (as I say later) to consider whether it was appropriate in amount. For this purpose I must first consider the expert evidence on remuneration given at the trial. I record here that, as a preliminary matter, after questions put to the experts, I was satisfied that the question of what remuneration was appropriate for senior executives such as Alistair and Allan were and are was a proper subject of expert evidence.

89. In the words of Evans-Lombe J in *Barings plc v Coopers & Lybrand* [2001] PNLR 22, [45], it was

> "a recognised expertise governed by recognised standards and rules of conduct capable of influencing the Court's decision on any of the issues which it has to decide".

Moreover, I was also satisfied that each of the three expert witnesses satisfied me

> "that he has a sufficient familiarity with and knowledge of the expertise in question to render his opinion potentially of value in resolving any of those issues".

90. But this does not mean that the expert evidence which the parties have sought to adduce satisfies CPR rule 35.1:

> "Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings."

91. In *British Airways plc v Spencer* [2015] EWHC 2477 (Ch), Warren J declined to accept

> "the proposition that, because expert evidence may prove of assistance, it should be admitted. A judgment needs to be made in every case and, in making that judgment, it is relevant to consider whether, on the one hand, the evidence is necessary (in the sense that a decision cannot be made without it) or whether it is of very marginal relevance with the court being well able to decide the issue without it, in which case a balance has to be struck and the proportionality of its admission assessed. In striking that balance, the court should, in my judgment, be prepared to take into account disparate factors including the value of the claim, the effect of a judgment either way on the parties, who is to pay for the commissioning of the evidence on each side and the delay, if any, which the production of such evidence would entail (particularly delay which might result in the vacating of a trial date)."

92. I must therefore consider the expert evidence which was tendered. The experts agreed in substance on few matters, although the "benchmarking" process was one of these. This is the process by which the relevant function or functions within the company are identified and then the appropriate benchmark companies are found, and relevant information about remuneration is extracted. Appropriate comparators for a private company such as AMT are not easy to find, and the data may not always be reliable. Many disputes between the experts were concerned with which were the appropriate comparators, and with whether the data was indeed reliable. This has made the assessment of the expert evidence particularly difficult in the present case.

93. I note first of all that there were significant differences in the approaches taken by the three experts. First of all, Mr Brooks (for the petitioners) relied on a proprietary database called the "Meis database" (after the company Meis Ltd, which he co-founded). This is a live database, updated on a daily basis by reference to the latest publicly available annual accounts, from which Mr Brooks used a data sample of 26 companies. It is thus not possible to use this database to refer directly to historic positions, as it always shows the most up-to-date position. Accordingly, at the time of his report, Mr Brooks could only use the 2016 data. So, in order to reach a position for any given year before 2016, Mr Brooks discounted the then current data (for 2016 at the time of his report) by 2% for each year preceding.

94. To my mind, there are at least two problems with this approach. The first is that there is no evidence to show that 2016 was a "normal" year, which can or should bear the burden of operating as a "baseline" from which to calculate appropriate figures for other years. If it was an outlier (either exceptionally high or low in remuneration terms) then self-evidently it would not be a suitable year to use as such a baseline.

95. The second problem is that the calculation for earlier years than 2016 is entirely arbitrary. There was no evidence to show that the historic figures for remuneration in

earlier years stood in relation to that in the year 2016 in the order of 2% less, year on preceding year. Nor does the court have any *a priori* basis for so assuming. Remuneration figures for 2015 and earlier years *do* exist (as the reports of the other experts show), but Mr Brooks has not looked for them. Instead he has in effect made up figures by assuming a discount for inflation at a constant rate (for which no evidence is given in support) backwards from 2016.

96. There are further problems too. One is that the Meis database was not available for scrutiny by the other experts. This makes it harder for the court to take it seriously. That which is tested and found to be without weakness is generally treated as more reliable than that which is not tested at all.

97. Another is that the 2016 figures originally given by Mr Brooks were themselves not always appropriate. Thus, in two of the companies used, remuneration paid to directors was stated to be either nominal or nil. This is of little use for the purpose of assessing what would be the market rate to remunerate directors. No-one ever recruits a director on the open market for nil or nominal consideration. Moreover, in two other companies used in the database there were errors (later corrected) showing unduly low remuneration.

98. Further, Mr Brooks relied on having made a cross check from three other data sources. These were data from coffeeshop businesses, from the Alternative Investment Market, and from the Inbucon Remuneration Report, 53rd edition 2015. The problem with the first of these is that there were only three companies involved, all a very different size to AMT. As to the 2nd of these, Mr Brooks provided no underlying information, but merely said that the data came from the Meis database. As to the 3rd of these, the use of the 53rd edition seems irrelevant, given that the data which it gives do not relate to 2016, but instead to 2015, and even arbitrary, given that, by the time that the report was prepared, later editions were already available, which apparently Mr Brooks did not consult.

99. Secondly, Mr Brooks used a "single figure" remuneration approach, to cover the *total* remuneration received, including base salary, bonuses and options. Thirdly, he took data relating to *two* different company size indicators, namely turnover and market capitalisation, and then *averaged* the total of the data for each of these. The market capitalisation figures used were those for companies worth up to £30 million. Fourthly, Mr Brooks used *quoted* company data, rather than private or AIM company data.

100. Fifthly, he applied a 20% discount to the quoted company data, in order to arrive at what he said were figures appropriate for a private company, although he also said that he would not always apply a private company discount and that it was not appropriate to apply a mathematical approach. On the question of the discount, Mr Baxter, however, said that there should be no discount, because all companies, whether quoted or private, were fishing in the same pool for talent. Indeed, there were factors affecting public companies which actually acted to depress remuneration. These were: the existence of pay committees, external parameters, the public disclosure of remuneration, and shareholder votes. Moreover, private company directors may have taken more risk, as for example where they personally provide bank guarantees, and thus require a higher compensation for that risk.

101. Mr Baxter (for Alistair) used remuneration surveys by Manifest/MM&K. These were said to be annual, although in fact some of the data used in years since 2012 had been amalgamated with that of other years, in order to prevent sample sizes becoming too small. In addition, the Manifest surveys were criticised for not identifying the underlying companies, so that it was not possible to see if they constituted appropriate comparators. Mr Baxter looked at Alistair's remuneration over the entire 10 year period, instead of specific years. Thirdly, he used only one of four data cuts, that is, the one for turnover (following the advice of Manifest). This was because such companies, not being quoted, had no market capitalisation, and turnover was the best and most reliable proxy for that. Mr Norris also agreed with this approach.

102. Mr Norris (for Allan) used two separate data cuts: (1) private company data, (2) AIM companies' data. The first is of course highly subjective; which companies you choose can make a big difference to the result. In addition these are generally less transparent and less stable companies. The 2nd group consists of companies which have largely come only recently to market. Over time, some of these companies will fail and drop out, and others of them will grow and step up to the main market. Lastly, Mr Norris compared Allan to the 2nd highest-paid director in 2008 – 09 and then the highest-paid director later.

103. So far as positioning the respondents against the data was concerned, there was first of all the question as to what were the skills brought by the respondents to the Company. None of them had an appropriate professional qualification, and none of them had had a substantial career in management of any other company of this size. In my judgment, the inference from these primary facts is that, assuming that they would be hired at all by a company like AMT, they would have commanded salaries in the lower quartile of the remuneration scales put forward by the experts (assuming that I was able to rely on the figures). There was certainly no evidence to show any job offers from other companies which would rebut that inference.

104. There was limited evidence to show that at least some of the potential purchasers of the Company would have wished to retain Alistair's services for at least some period after buying it. But that relates more to questions of continuity, and in particular ensuring the continued value of what has been bought. It does not mean that any of those companies (not taking over the Company) would have hired Alistair as a collateral "buy-in" for his own skills. In the case of a takeover, the purchaser is in effect in the position of a special purchaser and will pay a price for a service which it would not otherwise pay. A final point is that this limited evidence relates only to Alistair; it does not relate to Allan at all.

105. Looking at the roles of Alistair and Allan in summary, after Angus's death and before 24 September 2008, Alistair was managing director of the Company, and Allan was a non-executive director. Between 25 September 2008 and 15 July 2009, Alistair continued as managing director and Allan was operations director. From 16 July 2009 to 31 March 2011 Allan was managing director and Alistair was a non-executive director. From 1 April 2011 onwards, Alistair has reverted to managing director, and Allan to operations director. At all material times, Anna has been a non-executive director.

106. The conclusions which I reach on the expert evidence as presented to me are these. First of all, I can place no reliance on the figures produced by Mr Brooks in relation to

years earlier than 2016, because they are produced by a mechanical process which is unsupported by the evidence. They are just not real figures, produced by reference to real cases, for the years concerned. Even in relation to 2016, the figures are suspect because of the errors to which I have referred and also because they are averaged between turnover and market capitalisation, derived from *quoted* company data, and applying an arbitrary 20% discount without any sufficient justification. In addition, it was impossible for the other experts to check the database used by Mr Brooks and thus provide it with any degree of robustness. I have therefore concluded that I should ignore Mr Brooks' figures altogether. Because it is not helpful, his evidence cannot be "reasonably required to resolve the proceedings" within CPR rule 35.1.

107. Mr Baxter's figures were suspect for quite different reasons. Firstly, and most importantly, although the data was presented as if it were in respect of separate years, it is clear that some of the data in some of the years has been amalgamated with that of other years. It is therefore not possible to rely on his figures for individual years, at least after 2012. Secondly, Mr Baxter has looked at Alistair's remuneration over the *entire* 10-year period, rather than the individual years. This does not help me when I am considering whether in any given year Alistair's remuneration was excessive. (Alistair argued that the three experts had agreed, at para 4.5 of their joint statement, that such an amalgamation was needed, but I reject that view.) Thirdly, the underlying companies in the surveys were not identified, which robs the report of robustness. On the other hand, I do not object to Mr Baxter's decision to use only the turnover data cut. That seems to me justifiable for the reasons given. However, I am afraid that the other problems mentioned prevent me from placing any reliance on Mr Baxter's figures. The same conclusion therefore follows as with Mr Brooks's evidence.

108. As for Mr Norris, his data came from (i) private companies and (ii) AIM companies which have recently come to market. Each of these creates difficulties, to which I have already referred. The private company data depends of course on which companies have been selected. Two of those companies are Costa Ltd and Caffe Nero Group Limited. Although they operate in the same market as the Company (retail coffee shops and stalls) they are much larger, and the former company is owned by a public company. I agree with the petitioners that neither is an appropriate comparator for the Company. Another company in the private company data cut had significant variations in the remuneration awarded in successive years, in fact amounting to over £1 million for the remuneration of the highest-paid director between 2010 and 2013.

109. The comparators used for the AIM data cut are very few, with the result that a single outlying company has a significant distorting effect. In addition, AIM companies have been brought to market, and typically are very successful in growing (otherwise they will not be brought to market). Those which have been recently brought to market will therefore be unrepresentative of the market as a whole.

110. A further problem with Mr Norris's evidence is that he has compared Allan to the second highest-paid director for the period 25 September 2008 to 15 July 2009. He has also sought to compare him to the highest-paid director following Alistair's return as managing director. But in each case Allan was the operations director (in the rather unusual and restricted sense which I have already described). He was not the finance director (this function being carried on at the Company by a combination of salaried individuals). I am not satisfied that Allan is properly benchmarked in that way. For

these reasons, I do not place any reliance on Mr Norris's evidence either. Likewise therefore it is not "reasonably required" for the resolution of these proceedings.

111. I have therefore concluded that I cannot rely on any of the expert evidence tendered, and that none of it is admissible. That leaves the court in a difficulty. However, this is not a case where, without expert evidence, the court cannot reach a decision at all. The court may simply take the decision as to the appropriateness of remuneration on the basis of the factual evidence available, without any expert evidence at all.

Dividends

112. As I have already stated, no dividends have been paid to shareholders since 2007, when they were paid to Angus's estate alone (all other shareholders waiving their right to them) as a means of paying to the estate what Angus would have been entitled to by way of remuneration had he lived. Dividends may lawfully be paid only out of profits or other potentially distributable reserves. However, in recent years the Company has enjoyed substantial accumulated balances on its profit and loss account. In the years 2014 and 2015 the accumulated balance on this account was over £2.5 million in profit, although down to £1.87 million at the end of 2016.

113. I set out below a table showing the figures for the accumulated balance of the profit and loss account for the Company (and not, where applicable, to the Group) at the end of relevant financial years:

Year ended 31 January 2008: £1,805,961

Year ended 28 December 2008: £1,211,949

Year ended 27 December 2009: £790,578

Year ended 26 December 2010: £1,276,546

Year ended 26 December 2011: £2,285,553

Year ended 24 December 2012: £2,887,642

Year ended 29 December 2013: £2,116,506

Year ended 28 December 2014: £2,507,359

Year ended 27 December 2015: £2,598,982

Year ended 25 December 2016: £1,874,560

This does not mean that the Company made a profit in every year. In particular, losses were made in the following years or periods: period to 28 December 2008, Year to 29 December 2013, and Year to 25 December 2016.

114. Alistair's witness statement said that his preferred policy was to reinvest profits to allow the Company to grow, so that the shareholders would exit at some point in the future with a bigger capital gain. In court his evidence in relation to the declaration of dividends was that no professional adviser had ever told him that he had to consider

declaring dividends, so that as a result he did not. Indeed, he went so far as to say at one point that "dividends are the very last thing on my mind". He refused to treat the estate holding Angus's shares in the same way as he would have considered Angus himself. Moreover, there is evidence that he saw Lucy as a "gold-digger" and did not want to declare dividends that would benefit her. I accept that he did not want to declare dividends that would benefit her.

115. In his witness statement, Allan repeated the point made by Alistair about ploughing profits back into the growth of the business, though he at least accepted that some of the profits were paid out as bonuses to directors and staff. Allan's evidence was that he relied on the Company's historic policy of not paying dividends as a reason for not doing so in the future. Anna's position was that she was never a party to decisions as to the payment of dividends.

116. On the evidence as a whole, I do not accept that there was a decided policy of not distributing profits in order to concentrate on growth. In my judgment, this is window dressing after the event. Instead, after Angus's death, Alistair and Allan made ad hoc (and sometimes inconsistent) decisions about how best to reward themselves out of the profits, without regard to the interests of Angus's estate, a major shareholder without representation on the board. Anna however played simply no part in this. But she never raised it either. I therefore find that none of the three directors made a *bona fide* decision not to declare dividends. All three of them failed properly to consider whether to do so.

117. The question of any conflict between the interests of Allan as a shareholder (with his own personal interests) and director of the Company (with fiduciary interests for the Company) on the one hand and his position as an executor of the estate of Angus on the other appears not to have struck either Allan or his co-executor Lucy at first. Indeed, it is clear that initially Allan and Lucy were happy not only for him to represent the estate's interests as against third parties (*ie* possible purchasers of the Company), but also as against the Company and the other shareholders as well. But from 2011 onwards, once there were discussions as to whether the Company would acquire the estate's shares and if so at what price, the potential for conflict was obvious. The negotiations between the two sides were in fact largely conducted by Alistair for the Company and Lucy for the estate, with Allan mostly taking a back seat.

118. But during 2014 Allan had decided that he could not manage the potential conflict and continue as an executor of the estate. So, in July 2014 he brought a claim for an order that he be removed and that another personal representative be appointed to act with Lucy in the estate. Lucy did not contest the claim. As already stated in paragraph [4] of this judgment, on 2 October 2014 Master Teverson made the order sought, removing Allan and (apparently on the suggestion of Lucy herself) appointing Philip Weaver of Pitmans LLP in his place.

The petitioners' case

119. The petitioners' complaints are in essence threefold. First, the directors paid themselves excessive remuneration. Second, the Company failed to give consideration in good faith to the payment of dividends despite its accumulated profit and loss

account. Thirdly, the directors benefited from loans from the Company at favourable rates.

Excessive remuneration

120. As to excessive remuneration, it is clear that the question of remuneration of company directors is, subject to the constitution of the company concerned, a commercial decision for the board of directors, with which the court will not generally interfere. If there is a genuine decision to pay sums to directors in the character of directors' remuneration, there is no additional requirement to be satisfied that the payments also confer a real benefit on the company: see *eg Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016.

121. However, in the present case, I have already found that the remuneration paid to Alistair, Allan and Anna was not authorised by the constitution of the Company, nor by the shareholders under the *Duomatic* principle. Accordingly, as Blackburne J put it in *Irvine v Irvine (No 1)* [2007] 1 BCLC 149, [267]-[268]:

> "267. In the absence of any actual consideration and fixing (except by himself) of Ian's remuneration in accordance with the procedures laid down by CIL's articles of association, the court has to determine whether what Ian drew was appropriate in amount. In her opening, Miss Roberts referred to the observations of Sir Richard Scott V-C in *Re A Company (No 004415 of 1996)* [1997] 1 BCLC 479 where the petitioners, seeking relief under sections 459 and 461 affecting three companies, challenged the amount of the remuneration drawn by the respondents. There was also a challenge to the dividend policy of the companies in question. In his judgment on an application by the respondent directors to strike out the petition, the Vice-Chancellor said this (at 492g-h):
>
>> 'If the respondents are unable to justify by objective commercial criteria that the companies' dividend policy was a reasonable one and that the remuneration the … directors were paid by the companies was within the bracket that executives carrying the sort of responsibility and discharging the sort of duties that they were carrying and discharging would expect to receive, the petitioners will, in my opinion, have succeeded in establishing their s 459 case.'
>
> 268. According to that decision, therefore, the test is whether, applying 'objective commercial criteria', the remuneration which Ian took was within the bracket that executives carrying the sort of responsibility and discharging the sort of duties that Ian was, would expect to receive."

122. It is clear from this quotation that the burden of showing appropriateness of remuneration in such a case lies on the respondents. Since I have excluded all the expert evidence tendered to me by the parties, I am left with such factual evidence as I can properly have regard to, and of course such facts as I am able to take judicial notice of. If on this basis the respondents do not satisfy me that the remuneration received by them was appropriate, I must conclude that it was inappropriate. So I take note of the agreed evidence that the three brothers agreed to pay themselves £120,000 per annum as directors of the Company, plus bonuses.

123. Moreover, a judge can decide a question of evaluation without having expert evidence adduced. Judges decide daily whether a road driver was negligent without hearing evidence from expert road drivers, and whether a pedestrian slip on the pavement was caused by the fault of the highway authority without hearing from civil engineers. As Dr Johnson once said, you do not need to be a carpenter to know when someone has made a table badly. Judges know about the value of work and what ranges of earnings may be expected in particular fields of endeavour in our society. And I heard a lot of evidence, from Alistair and Allan in particular, as to what they actually did.

124. I should also say something about commercial criteria used in decision-making. In my judgment, the approach taken to remuneration in the Company has been based on anything but commercial factors. Instead, it has largely been based on ties of blood and on happenstance. As appears from the facts that I have found earlier in this judgment, during Angus's lifetime, the three brothers paid themselves equally although they were unable to work together, and in the last few years of Angus's life Alistair in fact ran the Company. Angus and Allan had little executive responsibility even though they were directors. Once Angus had died, his estate was largely ignored, and his widow, Lucy, excluded. There were then incessant squabbles between Alistair and Allan, umpired largely, if unwillingly, by Anna. There were boardroom coups by one brother against the other.

125. Allan's contribution to the Company, whilst by no means negligible, was not on any commercial basis equal to that of Alistair. He would not have been retained in an executive capacity on any sale of the Company to an outside purchaser. But they began by being paid the same under the 2005 agreement, and he ultimately insisted on being paid the same as Alistair, and (amongst other things) organised payments to his wife in order to help bridge the gap. On the other hand, Alistair had an exaggerated sense of his own worth, saying at one point that he would have had to pay someone from outside £1 million a year to do his job. In the context of this company, that is absurd. In three of the ten years under consideration, the Company made a loss before tax. In only one year (2011) did it make a profit before tax exceeding £1 million. Their mother Anna had no actual executive responsibility, and contributed only occasional visits to bars. In reality, her director's remuneration enabled her to live without the necessity of Alistair and Allan supporting her out of their own pockets (which, I may say, I am sure that they would have done, had it been necessary).

126. The brothers used directors' loan accounts to finance their personal expenditure, without regard for the Company's cash flow needs or indeed for obtaining shareholder consent, and in particular the consent of Angus's estate. After Angus's death, directors' remuneration (including all forms of beneficial payment to directors) was fixed on an ad hoc basis, depending on who held the whip hand at the time. No enterprise run on commercial principles would have organised the remuneration of its directors on such chaotic lines.

127. I turn to consider the amounts paid to the directors. In the discussion that follows I think it is right to bear in mind both the turnover and the profits and losses before tax of the business from time to time. But they are only factors. The Company is not necessarily constrained in what it pays its executives by what it earns (gross and net) from time to time. For example, an executive brought in from outside to turn a company round when its financial fortunes are at a low ebb, but which is considered to have a future, may have to pay handsomely to gain that executive's services and

thus (if successful) overcome its difficulties. But it is right to take into account how the business is doing, both in turnover and profitability, as a factor in considering whether the remuneration received is or is not appropriate. The size of the business, and its profitability, are at least rough indicators of the degree of responsibility taken by the directors.

128. The Company's turnover and profit (or loss) before tax are set out as follows:

Year ended 31 January 2008: turnover £15,112,018; profit before tax £308,477 (2.04% of turnover);

48 weeks to 28 December 2008: turnover £14,025,480; *loss* before tax £551,904;

Year ended 27 December 2009: turnover £17,950,292; profit before tax £302,630 (1.69% of turnover);

Year ended 25 December 2010: turnover £21,002,819: profit before tax £725,579 (3.45% of turnover);

Year ended 26 December 2011: turnover £22,952,357: profit before tax £1,377,962 (6% of turnover);

Year ended 24 December 2012: turnover £22,898,344: profit before tax £757,120 (3.31% of turnover);

53 weeks ended 29 December 2013: turnover £20,265,888: *loss* before tax £179,092;

Year ended 28 December 2014: turnover £19,486,041: profit before tax £432,333 (2.22% of turnover);

Year ended 28 December 2015: turnover £19,715,428: profit before tax £290,456 (1.47% of turnover).

Year ended 25 December 2016: turnover £20,289,947; *loss* before tax £985,513.

129. First, I deal with Alistair. He was managing director of the Company from Angus's death in 2006 until 15 July 2009, and again from 1 April 2011 onwards. As managing director Alistair was (until comparatively recently) paid a base salary of £175,000 per annum, plus a bonus intended to share out the profits of the Company between him and Allan.

130. In the year to 31 January 2008, he was paid £488,678. This compares with the sum of £201,126, which he was paid during the following accounting period of 48 weeks to 28 December 2008. Remuneration of £488,678 in the year to 31 January 2008 (when the Company made a profit before tax of £308,477, on a turnover of £15,112,108) is plainly excessive, and cannot be justified by any commercial considerations. In the following accounting period the amount paid was less than half the earlier sum. Nevertheless, in my judgment even that is still excessive, in a period when the Company made a loss before tax of over half a million pounds. In the year to 27 December 2009, Alistair received £175,000, and the Company made a profit before tax of some £300,000, on a turnover of £17,950,292. Alistair was managing director until July (about seven months), and then a non-executive director for the rest of the

year. That seems to me to be high, because the five months as non-executive director do not justify payment at anything like the same rate as the seven as managing director, but nevertheless I am satisfied that it lies just within the limits of appropriateness. In the year to 25 December 2010, Alistair received £116,667. He was a non-executive director throughout the year. In that year the Company made a profit before tax of more than £725,000, on a turnover of just over £21 million. Despite the profit made, that seems to me to be far too high for a non-executive director. In the year ended 26 December 2011, Alistair was a non-executive director until the end of March (just over three months), and then managing director for the rest of the year. He received £167,290 during that year. The Company made a profit before tax of nearly £1.4 million, on a turnover of nearly £23 million. I do not consider this remuneration to be inappropriate. In the year ended 24 December 2012 (and indeed all years since then), Alistair has been managing director. In that year he received £175,000. The Company made a profit before tax of just over £750,000, again on a turnover of nearly £23 million. I do not consider this remuneration to be inappropriate. In the year ended 29 December 2013, Alistair received £510,754. The Company made a loss before tax of just over £179,000, on a reduced turnover of over £20 million. Even for the managing director of a company like this one, in the context of a poor year, with no explanation for such a high figure, in my judgment that is excessive remuneration. In the year ended 28 December 2014, Alistair received £357,000. The Company made a profit before tax of some £430,000, on a further reduced turnover of nearly £19.5 million. Again, for the managing director of such a company that is in my judgment excessive remuneration. In the year ended 28 December 2015, Alistair received £454,150. The Company made a profit before tax of some £290,000, on a turnover of some £19.7 million. Again, in my judgment that is excessive for this role in this Company. In the year ended 25 December 2016 Alistair received £322,616. The Company made a loss before tax of £985,000 on turnover of £20.3 million. Again, in my judgment this remuneration is excessive.

131. Accordingly, I find that Alistair has received excessive remuneration in seven of the ten years which I have considered from 2008 to 2016.

132. Next, Allan. He was a non-executive director from Angus's death until 25 September 2008. From then until 15 July 2009, and again from 1 April 2011, he was operations director. From 16 July 2009 to 31 March 2011 he was managing director. As a non-executive director Allan was paid a base salary of £125,000 per annum, plus a bonus out the profits of the Company. In relevant years, I mention also the salary paid to his wife Catherine. In all the circumstances it seems appropriate to aggregate their salaries for present purposes: *cf Re a Company, ex p Burr* [1992] BCLC 724, 735 (affirmed on appeal *sub nom Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14).

133. In the year to 31 January 2008, Allan was paid £345,033. This compares with the sum of £141,714, which he was paid during the 48 weeks to 28 December 2008, for most of which he was a non-executive director, but also covering some three months during which he was operations director. The sum of £345,033 for a non-executive director in the year to 31 January 2008 (when the Company made a profit before tax of £308,477, on a turnover of £15.1 million) is plainly excessive, and cannot be justified by any commercial considerations. In the following accounting period, the 48 weeks to 28 December 2008, the amount paid was less than half the earlier sum. Nevertheless, in my judgment it is still excessive, because even if a substantial annual

salary of (say) £120,000 per annum (the base salary agreed for each brother in 2005) is paid for an operations director, so contributing £30,000 remuneration over three months, that still leaves over £100,000 paid for nine months as a non-executive director (in a period when the Company made a loss before tax of over half a million pounds). In the year to 27 December 2009, Allan received £114,583, and the Company made a profit before tax of some £300,000, on a turnover of nearly £18 million. Allan was operations director until July, and then managing director for the rest of the year. That does not seem to me to be inappropriate. In the year to 25 December 2010, Allan received £168,582, and his wife Catherine an additional £2292. Allan was managing director throughout the year. Catherine is claimed to have acted as his PA for part of the year. In that year the Company made a profit before tax of more than £725,000, on a turnover of just over £21 million. Once again that seems to me to be within the limits of appropriateness. In the year ended 26 December 2011, Allan was managing director until the end of March, and operations director for the rest of the year. He received £167,290 during that year, and his wife £18,333. The Company made a profit before tax of nearly £1.4 million, on a turnover of nearly £23 million. I do not consider this remuneration to be inappropriate. In the year ended 24 December 2012, and indeed all years since then, Allan has been operations director. In that year he received £147,500, and his wife £22,500. The Company made a profit before tax of just over £750,000, on a turnover of nearly £23 million. I do not consider this remuneration to be inappropriate. In the year ended 29 December 2013, Allan received £467,096, and his wife £30,000. The Company made a loss before tax of just over £179,000, on a turnover of over £20 million. For an operations director of a company like this one, in the context of a poor year, with no explanation for such a high figure, in my judgment that is excessive remuneration. In the year ended 28 December 2014, Allan received £333,500 and his wife £12,500. The Company made a profit before tax of some £430,000, on a turnover of £19.5 million. Again, for an operations director of such a company that is in my judgment excessive remuneration. In the year ended 28 December 2015, Allan received £441,800. The Company made a profit before tax of some £290,000, on a turnover of £19.7 million. Again, in my judgment that is excessive for this role in this Company. In the year ended 25 December 2016 Allan received £274,441, when the Company made a loss before tax of £985,000 on turnover of £20.3 million. Again, in my judgment this is excessive for his role.

134. Accordingly, I find that Allan has received excessive remuneration in six of the ten years which I have considered from 2008 to 2016.

135. Lastly, Anna. She has been a non-executive director throughout the period in question. It is true that she sometimes visited bars, and made comments about what she found, but that cannot justify being remunerated at the rate appropriate for an executive director. Moreover, even as a non-executive director, Anna took – as she candidly admitted – no part in the decision-making of the Company (except for the rare occasions when she sided with one of her sons against the other). Frankly it is difficult to see how she can be entitled to anything more than a nominal sum for her services. Yet she was paid at the annual rate of at least £50,000 in eight of the ten years, and at the rate of £25,000 in two (and that only because of the poor financial position of the Company). In my judgment £50,000 per annum is plainly excessive, and even £25,000 is excessive for what she actually did for the Company.

Dividends

136. As to dividends, it is clear law that, as Mr Michael Furness QC said in *Re McCarthy Surfacing Ltd* [2009] 1 BCLC 622,

> "69. … the mere absence of the payment of dividends to shareholders cannot of itself constitute unfair prejudice, even if the failure to pay dividends continues for years on end. The articles in Table A, which apply to the company, do not confer a right on members to have profits distributed. The declaration of dividends is in the discretion of the directors. If the directors consider that no dividends should be paid for any particular period, and do so bona fide in the best interests of the company, it is not for the court to ''second guess'' the directors reasoning, or substitute its own view of what the directors ought fairly to have done."

137. But the deputy judge went on:

> "70. That is not of course to say that directors' decisions on dividends are immune from challenge. The court must consider whether the directors did genuinely take a decision on the payment of dividends, and must consider whether the reasons now advanced for not having done so were genuinely the rationale for the decision at the time."

138. I was referred to the well-known passage in the judgment of Harman J in *Re a Company (No 00370 of 1987), ex p Glossop* [1988] 1 WLR 1068, 1076C-F:

> "On that basis, … it is, in my judgment, right to say that directors have a duty to consider how much they can properly distribute to members. They have a duty, as I see it, to remember that the members are the owners of the company, that the profits belong to the members, and that, subject to the proper needs of the company to ensure that it is not trading in a risky manner and that there are adequate reserves for commercial purposes, by and large the trading profits ought to be distributed by way of dividends. No doubt in practical terms shareholders will have a difficult case to make if directors, not considering their own personal pocket, not benefiting themselves in some capacity (e.g. by paying out to themselves remuneration in excess of that which should legitimately be paid so that their remuneration is limited to that which would be paid to ordinary people in the market performing those functions), simply pile up profits in the company and do not distribute them by way of dividend. Nonetheless members can, in my view, if those facts were adequately proved, make the company the subject of a petition for a just and equitable winding up; because the proper and legitimate expectations of members have not been applied, but have been defeated."

139. And later the judge added this (1077A-B):

> "If it were to be proved that directors resolved to exercise their powers to recommend dividends to a general meeting, and thereby prevent the company in general meeting declaring any dividend greater than recommended, with intent to keep moneys in the company so as to build a larger company in the future and without regard to the right of members to have profits distributed so far as was commercially possible, I am of opinion that the directors' decision would be open to challenge."

140. The judge earlier held that an allegation of non-declaration of dividends by itself was not sufficient to found an *unfair prejudice* petition, as opposed to a *just and equitable* petition. This was because in the absence of special circumstances a no-dividend policy affected all members equally, and the provision as it was then in force (Companies Act 1985, s 459) required that the conduct complained of be unfairly prejudicial to "the interests of *some part* of the members" (emphasis supplied).

141. But that decision was doubted (as not giving full effect to the word "interests") and not applied in two later cases: *Re Sam Weller and Sons Ltd* [1990] Ch 682; *McGuiness v Black* 1990 SC 21. Then the wording of the section was subsequently changed, by the Companies Act 1989, so that for the future it was expressed to cover conduct unfairly prejudicial to the interests of *members generally*, as well as to those of some part of the members. So the judge's view as to the propriety of a just and equitable petition in response to a no-dividend policy may now be applied also to an unfair prejudice petition.

142. In that respect the judge considered that a petition might properly be presented where the directors paid themselves excessive remuneration and as a result did not declare dividends. So in the present case the non-payment of dividends is to a considerable extent the obverse of the remuneration question. The more that profits are lawfully paid out to directors and others in remuneration, the less there is available to be paid out to shareholders by way of dividend. Where all the shareholders work in the business, this matters less than the case (which is the present case) where a large shareholder – Angus's estate – is not working in the business.

143. The decision whether to declare dividends is one to be made in good faith in what the directors consider the best interests of the company, and the court will give weight to their commercial judgment: *Corran v Butters* [2017] EWHC 2294 (Ch), [239]. And I accept that directors do not have to keep on meeting to discuss a matter when it is obvious that the decision would be the same: *cf Re Sunrise Radio* [2010] BCLC 367, [141]. But here, my decision is that the directors made no bona fide decision not to pay dividends.

144. In my judgment, the failure to make a decision in good faith on this subject, when the Company (1) had sufficient reserves to declare dividends; (2) paid out large sums by way of 'bonuses' to two of the directors, thereby paying out significant parts of the profits to them; and (3) had lent large sums of money to those directors on loan accounts to pay personal expenditure, leaving the Company with less cash to pay dividends, amounts to conduct unfairly prejudicial to the petitioners.

Loan accounts

145. The directors' loan accounts have damaged the Company in a number of ways. It is simply wrong to argue that, because the Company has the right to recover the debts, it has suffered no loss. First of all, the loans have exposed the Company to significant credit risk, most recently in the order of £1 million, because they were unsecured and the directors admitted that they would find it difficult to pay them off within a reasonable time. Secondly, they have deprived the Company of the use of the money which it ought to have had, so that it may have to borrow (at a cost) in order to fund legitimate objects of its activity or alternatively not pursue them at all. Indeed, the lack of cash to pay debts falling due led to the Company being fined about £36,000 in

2008-2009 for non-payment of VAT and PAYE. I accept that Alistair and Allan lent money to the Company in 2008, but (at least in Alistair's case) this was only a part of the money that he had taken out, and in any event they have taken out much more by way of loan account since then. A third problem caused by the loan accounts has been that they have led to charges on the Company for additional corporation tax.

146. There has never been any formal authorisation for these loan accounts (a breach of section 197 of the Companies Act 2006), and I am satisfied that there has been no informal ratification by way of the *Duomatic* principle, if only because Anna has never authorised them. In permitting these loan accounts to exist, the directors have breached other provisions of the Companies Act, namely section 171 (in failing to act for the proper purposes of the company), 172 (in failing to act as they considered in good faith would be most likely to promote the success of the company for the benefit of the members), and 174 (in failing to exercise reasonable skill, care and diligence). My conclusion is that allowing these loan accounts to exist on such a scale and for such a long period amounts to conduct unfairly prejudicial to the petitioners.

Defences

Standing

147. A number of points were raised by way of defence to the petition. One of these was that the petitioners did not have standing to bring the proceedings at all. I dealt with this point at the outset of the trial, when dealing with an application by the petitioners to re-re-amend their petition. I held in a written judgment ([2018] EWHC 1562 (Ch), [2018] WTLR 531) that the petitioners did have standing to present the petition. This was based on the view that the estate of Angus was vested in Lucy and Mr Weaver until the order made by Morgan J on 15 June 2018, by which it became vested in Lucy and Ms Bryan as personal representatives.

148. The amendments to the petition made clear that the petitioners claim to be personal representatives (as well as trustees), which satisfies the requirement of section 994 (2). But in any event Lucy has been a personal representative since the death of Angus, and therefore even though the claim was vested in two personal representatives, but only one was a party, the petition was not a nullity, but at worst an irregularity needing to be dealt with. So far as I am aware, my decision has not been appealed. Accordingly, I do not deal with that matter further in this judgment.

Knowledge, consent and acquiescence

149. A second point relates to the three inter-related concepts of knowledge, consent and acquiescence. As the first respondent pointed out in written submissions, in *Re KR Hardy Estates Ltd* [2016] BCC 367, the deputy judge, Martin Mann QC, said:

> "59. … Obviously, prejudice which directly or indirectly arises because of a course of conduct to which a member or class of members of a company has consented is by definition not relevantly unfair and cannot be relied on."

The first respondent goes on to say that in the present case consent and acquiescence "arise in three ways: through Angus while he was alive; through Allan as executor

and trustee; and through Lucy." I shall have to say something further about the concept of acquiescence later on in this judgment.

150. *The role of Angus*: The first aspect of this argument therefore looks at the role of Angus while he was alive. There is no doubt, on the facts I have found, that Angus consented to the payment of remuneration in accordance with the 2005 management agreement (though not the 2006 revised management agreement), the payment to Anna at the rate of £50,000 a year, the policy of not paying dividends to shareholders, and permitting directors to operate loan accounts. The first respondent argues that Angus's estate would need to give reasonable notice that his previous consent was withdrawn before any action formerly carried on with his consent would become unfair.

151. I reject this argument. The death of Angus changed everything in the Company. Suddenly there was a shareholder (Angus's estate) which was not capable of playing a part in the Company and, indeed, because of the operation of the articles of association in the events that happened was not entitled to vote either. The policies which the Company might follow before Angus's death would not necessarily be the right policies to follow in the period after his death. More importantly, actions taken before his death which might not then cause unfair prejudice to a member could nevertheless do so when taken after his death. It is not right to treat Angus's consent given before his death as though it applied in perpetuity thereafter unless positively withdrawn. Moreover, the actions taken, such as payment of remuneration to directors, the policy of not paying dividends, and allowing directors to operate loan accounts, are matters which arise again and again in the life of the Company, not once only.

152. What matters in this case is whether the actions taken after the death are unfairly prejudicial to a member or members, and the fact that Angus consented to similar actions being taken before his death does not automatically make those same actions carried out later not unfairly prejudicial. The need for a withdrawal of any consent previously given does not arise, and its presence or absence is irrelevant. So I need not consider whether the estate can be said to have withdrawn such consent.

153. *Allan as executor*: The second aspect is the fact that Allan was an executor of the estate of Angus from the time of his death in December 2006 until he was removed by the order of Master Teverson in October 2014. During that time, Allan was both aware of what the Company was doing and was actively participating in most of the decision-making. I have described his actions above. Accordingly, there is a question as to how far he as an executor carried out or at least acquiesced in what is now complained of by the petitioners, and whether that bars the claim now made.

154. The first respondent argues that the "acts of one executor in consenting or acquiescing to the matters now complained of are the acts of all executors, and bind the estate". He relies on the decision of Newey J in *Birdseye v Roythorn* [2015] EWHC 1003 (Ch), where the question was whether one of two executors could waive the legal professional privilege in certain communications belonging to both of them. The judge held that he could, and indeed had.

155. His essential reasoning appears from the following passage in his judgment:

"30. In support of her submission, Miss Reed took me to *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (20th ed.). This explains (in paragraph 54-69):

> "[C]o-executors, however numerous, are regarded in law as an individual person. The same principle applies under a joint grant of administration. Thus, as a general rule, the act of one of joint representatives is regarded as the act of all and is binding unless the case falls within one of the exceptions considered later in this section."

31. The principle that "the act of one of joint representatives is regarded as the act of all and is binding" was recognised in, for example, *Fountain Forestry Ltd v Edwards* [1975] Ch 1, in which there was extensive discussion of the case law. Implicit acknowledgment of it is also to be found in the Administration of Estates Act 1925, section 2(2) of which provides that, "[w]here as respects real estate there are two or more personal representatives, a conveyance of real estate devolving under this Part of this Act or a contract for such a conveyance shall not be made without the concurrence therein of all such representatives or an order of the court". It would not have been necessary to say this but for the general rule that a single executor can act alone.

32. The law relating to executors thus differs in this respect from that relating to trustees, who have to act together. It is not even possible for a majority of (non-charitable) trustees to bind a minority: see e.g. *Luke v South Kensington Hotel Company* (1879) 11 Ch 121, at 125-126. The basis for the rather curious distinction between executors and trustees is presumably to be found in the fact that the 'origins of the two roles are quite different–one being derived from the jurisdiction exercised by the ecclesiastical courts, the other from the courts of Chancery' (Williams, Mortimer and Sunnucks, at paragraph 57-06).

33. Mr Halpern described the principle that 'the act of one of joint representatives is regarded as the act of all and is binding' as anomalous. That may be so, but it is deeply entrenched, and it plainly is not open to me to gainsay it."

156. Whether or not the probate rule derives from the ecclesiastical jurisdiction, and is or is not anomalous (as to both of which I say nothing), it is nonetheless exemplified in many other cases too, for example *Attenborough v Solomon* [1913] AC 76, in the House of Lords. It is plainly binding on me as it was on Newey J. But there are two distinct points to make about it. The first is that Allan ceased to be a personal representative in October 2014, and I have held that conduct otherwise unfairly prejudicial, such as excessive remuneration paid to directors, failure in good faith to decide not to pay dividends and continued use of directors' loan accounts, continued after that date. The same point can accordingly be made as I have just made in respect of the consent of Angus during his lifetime. This is, that that was then and this is now. The actions taken by the directors are matters which arise over and over in the life of the company, not once only. The petitioners are entitled to rely on the conduct of the respondents after October 2014, even if Allan were held to have consented to or acquiesced in that before then.

157. But secondly, there are important questions as to the scope of application of the probate rule. One is whether it applies to mere failure to do anything in light of knowledge of something as it applies to positive acts of disposition. *Birdseye* (and indeed all the other cases I am aware of) are cases where the personal representative takes a positive step to dispose of an asset or to give up a right. The point was not argued before me, but there is no case of which I am aware which applies this rule to a failure to complain about someone's conduct amounting to acquiescence disentitling a person in equity to complain about a breach of duty owed or an infringement of a right.

158. However, it is not necessary to deal with that point, as in any event there is a more important aspect of the rule. This is that it only applies where the act relied on is committed *in the capacity or character of personal representative*. There are many decisions making this clear, such as *Fox v Waters* (1840) 12 Ad & El 43, *Scholey v Walton* (1844) 12 M & W 510, and *Astbury v Astbury* [1898] 2 Ch 111. Unfortunately none of these was cited to me in argument, but they are all referred to in *Williams Mortimer and Sunnucks* (to which Newey J in *Birdseye* referred). In the present case, as the petitioners pointed out in their written submissions, Allan's actions relied on by the respondents as amounting to consent to or acquiescence in the conduct otherwise unfairly prejudicial were (according to his own evidence, which I accept) the actions of Allan *as director of or beneficial shareholder in the Company*, and cannot be shown to have been his actions as personal representative of the estate of Angus. So they do not avail the respondents.

159. Alistair relies on the case of *Anonymous v Adams* (1830) 1 You 117, as explained in *Williams Mortimer and Sunnucks on Executors, Administrators and Probate*, [35-10]:

> "Notwithstanding his interest '*in auter droit*', a representative is not to be treated for all purposes as if he were subject to a 'cleavage of personality' between him in his representative capacity and him in his individual capacity, as if he were two distinct persons. Nor is his interest in the property of the deceased so different from the interest of the beneficial owner that the normal doctrines of notice will cease to apply. Thus, where A, one of the executors of B, had notice of a transaction because of his partnership with one G, it was held that he was unable to sever his character of executor of his character as partner. As a result, the executors of B where taken to have had notice of the transaction in question. They could not, therefore, claim as bone fide purchasers for value without notice and were therefore bound by it…"

160. But this decision is about the adoption of notice in the context of a purchaser of an asset taking free (or not) from a person with a prior interest. Plainly, a person who knows a thing in one capacity still has *notice* of it in another. This does not support the proposition that an executor who in another capacity (*eg* director) consents to or acquiesces in conduct also does so *as executor*. In oral closing submissions, Alistair appeared to accept that *knowledge acquired* in a different capacity affected the estate but that *an act done* in a different capacity did not bind it.

161. The third respondent similarly argues that Allan "cannot compartmentalise his knowledge into the part of his brain marked 'Company'." But if a *positive* act purporting to dispose of an estate asset is ineffective unless done in the capacity of personal representative, I see no basis for saying that a *negative* act purporting to

acquiesce in the loss of an estate right should be effective in whatever capacity it is done. So whether you regard the *knowledge* as compartmentalised or not is beside the point. The *acquiescence* must be acquiescence in the capacity of personal representative, and I am satisfied that that is not the case here.

162. There is a further point. Even if the respondents were right, and Allan had so acquiesced as executor in the acts constituting unfair prejudice before his removal that he could not sue, it would be possible for the beneficiaries (or untainted personal representatives on their behalf) to bring a derivative claim under the principles set out in *Hayim v Citibank NA* [1987] AC 730 and *Roberts v Gill* [2011] 1 AC 240. If Allan's actions were a defence to the claim, they would obviously be the product of the conflict of his duty as executor and his interest as beneficial shareholder and director. These would be special circumstances which would justify the derivative claim. But in the circumstances, I need say no more about this aspect.

163. *Acquiescence by Lucy*: The third aspect of consent and acquiescence is that of Lucy herself. She is said to have been directly aware of many of the matters that she now complains of, and yet did not complain at the time. It is therefore said that she herself has acquiesced in them, both as executrix and as beneficiary of the estate. Acquiescence is not, however, the same as mere knowledge. As a term, it has been used by lawyers to mean a number of different things.

164. Sometimes it is used to describe mere failure to speak out or complain, unaccompanied by anything else. In this sense, it is not usually legally significant. Sometimes it is used to describe delay without more. In this sense, it is generally significant only when the delay exceeds appropriate limitation periods. Thirdly, it can be used to refer to a kind of waiver or election between two inconsistent courses of action (for example, so as to waive the forfeiture of a lease whose terms have been breached). If there is such a waiver or election, the party concerned will not be able subsequently to change his or her mind and opt for the inconsistent course of action.

165. Fourthly, it may refer to words or (more likely) conduct from which it may be inferred that a person has positively assented to a particular situation. This is legally significant whenever informal consent is a relevant element. Fifthly, it can be used to refer to a failure to complain of an infringement of rights and reliance by the infringer on that failure to his or her detriment. This last case is a form of equitable estoppel, based upon a duty in equity to speak. It is exemplified by a number of cases, such as *Willmott v Barber* (1880) 15 ChD 96, *Taylors Fashions v Liverpool Victoria Friendly Society* [1982] QB 133n, *Jones v Stones* [1999] 1 WLR 1739, CA, and *Fisher v Brooker* [2009] 1 WLR 1764, HL. (In fact, none of these cases was cited to me, but they are all well known.)

166. In the present case, the first three of the senses of the word acquiescence are not relevant. The claim by the respondents here that Lucy "acquiesced" in what the respondents did is in my judgment a claim *either* that, somehow, she *actually agreed* to what was done (the fourth sense of the word), *or alternatively* that by failing to complain she has *represented her agreement* (even if she did not actually agree) to it, and the respondents have relied upon that representation to their detriment, thus making it unconscionable for her now to deny it (the fifth sense of the word).

167. In my judgment, there is no basis on the evidence for saying that Lucy by any words or conduct evinced a positive acceptance of what the respondents were doing. The best that can be said is that she knew of at least some of the things for which she now reproaches them, and yet did not issue proceedings until November 2016. So, if the defence of acquiescence is to succeed, it can only be on the basis of the fifth sense of the word, that is, a form of estoppel. I can illustrate this sense of the word by reference to two of the cases which I mentioned earlier.

168. So, in *Jones v Stones* [1999] 1 WLR 1739, the parties disputed ownership of an old stone wall that divided their properties. In 1990 the defendant placed some flower pots on the wall. In 1995 the plaintiffs sued for trespass. The defendant claimed that the wall was a party wall. At first instance, the judge found that the wall was not a party wall but was owned by the plaintiffs. However, since the plaintiffs had not complained about the pots until 1993 he held that they had acquiesced in the acts of trespass and dismissed the claim.

169. On appeal, Aldous LJ (with whom Tuckey LJ agreed) said (at 1745G – 1746 A):

> "In my judgment the judge came to the wrong conclusion. He concluded that the defence of acquiescence should succeed because of delay in complaint. That, I believe, can be seen from the passage in the judgment that I have read relating to his finding that acquiescence had been established, when compared with the passage that I have read in which he rejected the defence of acquiescence in respect of the fence. In the latter passage, to reject the defence, he relied upon Mr. Stones's assumption as to his right so that he was not encouraged by Mr. and Mrs. Jones standing by in any way, whereas he made no such finding in respect of the flower pots. In my view the correct approach was to consider whether Mr. Stones had established that he had relied on any action or inaction of Mr. and Mrs. Jones. That he had not so established upon the evidence. Further, Mr. Stones did not establish that he had suffered any detriment by being allowed to maintain the flower pots on the wall owned by Mr. and Mrs. Jones. In the circumstances none of the essential elements needed to establish a defence of acquiescence was made out. Delay was not sufficient."

170. In *Fisher v Brooker* [2009] 1 WLR 1764, in 1967 the claimant had written an eight bar introductory melody, and a variation of it, which he played as an organ solo on the recording of a song which was otherwise written by the first defendant. The copyright in the song subsequently became vested in the second defendant. In 2005 the claimant issued proceedings against both defendants seeking declarations that he was a joint author of the work and the joint owner of the musical copyright. At first instance the claimant was successful.

171. On appeal, the Court of Appeal held that the claimant had acted unconscionably and inexcusably in waiting 38 years, with knowledge and without reasonable excuse, while the defendants exploited the work, before notifying them of his claim to co-ownership of the copyright. The Court of Appeal also held that, although the defendants had not suffered any detriment from reliance on the claimants acquiescence so as to entitle them to proprietary estoppel, they were entitled to the defences of acquiescence and laches which did not require detrimental reliance. The House of Lords unanimously reversed the decision of the Court of Appeal.

172. Lord Neuberger of Abbotsbury (with whom all their Lordships agreed) said:

> 62. Thirdly, laches and estoppel are well established equitable doctrines. However, at least in a case such as this, I am not convinced that acquiescence adds anything to estoppel and laches. The classic example of proprietary estoppel, standing by whilst one's neighbour builds on one's land believing it to be his property, can be characterised as acquiescence: see per Oliver J in *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd (Note)* [1982] QB 133, 151. Similarly, laches, failing to raise or enforce an equitable right for a long period, can be characterised as acquiescence.
>
> 63 Fourthly, in so far as the respondents' argument is put on the basis of estoppel, they would have to establish that it would be in some way unconscionable for Mr Fisher now to insist on his share of the musical copyright in the work being recognised. As Robert Walker LJ said in *Gillett v Holt* [2001] Ch 210, 225D, 'the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine' of estoppel. Given that their case at each of the three stages is based on the fact that Mr Fisher did not raise his entitlement to such a share, one would expect the respondents to succeed in estoppel only if they could show that they reasonably relied on his having no such claim, that they acted on that reliance, and that it would be unfairly to their detriment if he was now permitted to raise or to enforce such a claim. As was also said in *Gillett v Holt* [2001] Ch 210, 232D, the 'overwhelming weight of authority shows that detriment is required' although the 'requirement must be approached as part of a broad inquiry' into unconscionability."

173. The first respondent says that Lucy has known of the remuneration paid to the directors since Angus was alive. Her evidence was that she did not actually remember this (but I have commented on her limited ability to remember events). However, even if it is true, mere knowledge of what was being paid to the directors during her husband's lifetime is irrelevant. She was not then a member of the Company or the beneficiary of the estate which on her husband's death became such a member. In any event, as I have already said, Angus's death changed everything. Conduct which may have been carried on before with consent of the relevant persons, and thereby not been unfairly prejudicial, is not prevented from becoming unfairly prejudicial thereafter. As to directors' remuneration thereafter, I accept that the estate cannot complain of at least the basic salary paid to directors during the period in 2007-08 when the estate itself was being paid the equivalent of Angus's salary in accordance with the 2005 management agreement.

174. I also accept that after Angus's death Lucy had solicitors from time to time acting for her (and her own brother, a solicitor, was also involved). They will have known of some at least of the negotiations of new shareholders' agreements, and of basic salaries being paid. But that does not mean that Lucy knew, much less approved of, the full remuneration (*ie* including bonuses) being paid to Alistair and Allan, especially after 2013.

175. In any event, whatever knowledge she may thereafter have had of all such new agreements, or indeed what individual directors were being paid, has to be seen in light of the fact that she expected the Company to be sold within a relatively short time, and the capital value attributable to the estate's shareholding to be distributed.

And the fact that she knew (if she did) the whole of what directors were being paid is a far cry from saying that she acquiesced in it. Until 2014 Allan was her co-executor and she trusted him to advance the interests of the estate. She was not a businesswoman and had a young family to occupy herself with. There is no evidence, and I have not been satisfied, that the respondents in any way acted upon Lucy's failure to complain to their potential detriment. In my judgment, therefore, there is no acquiescence by her in relation to remuneration after 2008.

176. In relation to dividends, I accept that, as HHJ Purle QC said in *Re Sunrise Radio Ltd* [2010] 1 BCLC 367, [142], where a director adopts or acquiesces in a policy of growth rather than dividend payment, a complaint of failure to pay dividends is unlikely to be upheld. But Lucy was not a director, and at no time did she express an opinion that a policy of growth was the better course than one of payment of dividends. Nor did the respondents in any way rely on the absence of complaint. On the contrary, they ignored her existence so far as they could and continued their own course.

177. In relation to directors' loan accounts, in circumstances where she was not a director, and was not benefiting from the advantages of an interest free long term unsecured director's loan account, she cannot be said to have consented to their existence and use by Allan and Alistair to the extent and at the levels seen after the death of Angus, merely because she did not make any complaint until these proceedings were started. In any event, there is no evidence to show that Alistair and Allan in any way relied on her silence to encourage them to use or increase their directors' loan accounts. They used them as they had always done. All in all, I reject the view that Lucy is, or the petitioners are, barred by consent or acquiescence.

Non-registration of estate shares

178. A further defence is said to arise because the estate did not register its ownership of shares in the company. As I have already said, by virtue of the Table A regulations incorporated in the articles of association, the voting share belonging to the estate could not therefore be voted. This meant that the only voting shares in the Company since the death of Angus have been those three ordinary shares registered in the names of Alistair, Allan and Anna. But it is said that all the alleged acts of conduct unfairly prejudicial to the estate were acts consented to by all the *voting* shareholders. Accordingly, the estate cannot complain of them.

179. In substance, this argument is based on the so-called *Duomatic* principle, derived from the case of *Re Duomatic Ltd* [1969] 2 Ch 365. In that case, all the voting shareholders agreed the remuneration of a director, but without the formality of a properly convened meeting. There was also a preference shareholder, holding shares which conferred no right to receive notice of or to attend and vote at a general meeting of the company. The preference shareholder did not consent. (I should say that, in the argument when we discussed this case, I had lost sight of this point.) Buckley J held (at 373C) that:

> "… where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be."

180. The principle only applies to ratify acts which are both intra vires and honest: see *Bowthorpe Holdings Ltd v Hills* [2002] EWHC 2331 (Ch), [50]. However, the facts found in the present case are against the application of this principle. So far as concerns the question of remuneration, Anna did not agree with either Alistair or Allan, with the three small exceptions I have already mentioned, when she agreed with Allan, but not Alistair. So far as concerns dividends, I have held that no decision at all was made in good faith not to pay dividends. So far as concerns the loan accounts, Anna did not approve or agree with these.

181. But even if the facts had been in the respondents' favour, conduct unfairly prejudicial to the petitioners which not only benefits the respondents but also damages the Company (as the loan accounts certainly did) cannot be made whole by an application of the *Duomatic* principle. As Megarry V-C said in *Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1 WLR 2, 16 (where the only shareholder entitled to vote at a meeting had instructed the directors to discontinue litigation brought by the company against itself),

> "No right of a shareholder to vote in his own selfish interests or to ignore the interests of the company entitle him with impunity to injure his voteless fellow shareholders by depriving the company of a cause of action and stultifying the purpose for which the company was formed."

182. I was also referred to the Companies Act 2006, section 239 (in force 1 October 2007), which relevantly provides as follows:

> "(1) This section applies to the ratification by a company of conduct by a director amounting to negligence, default, breach of duty or breach of trust in relation to the company.
>
> (2) the decision of the company to ratify such conduct must be made by resolution of the members of the company.
>
> […]
>
> (4) where the resolution is proposed at a meeting, it is passed only if the necessary majority is obtained disregarding votes in favour of the resolution by the director (if a member of the company) and any member connected with him…"

183. So the conduct of any respondent as a director amounting to negligence, default, breach of duty or breach of trust in relation to the Company cannot be ratified by the vote of that respondent or any other member connected with him. The first and second respondents are brothers, and the third respondent is their mother. Alistair and Allan are connected to Anna (and vice versa) within the meaning of section 239 (see sections 252 and 253). The conduct of the respondents in paying themselves excessive remuneration, failing to consider the payment of dividends and running loan accounts in their own favour are in the circumstances all breaches of their duty. Since they were and are the only members who can vote at a meeting of the members, it follows that no such resolution for ratification could be passed.

Exclusion of Alistair

184. Another defence is said to arise from the fact that Alistair was excluded from the business of the company between 15 July 2009 and 25 March 2011. During that period, Allan ran the Company, and was responsible for its actions. But at the same time he was an executor, and Lucy and he instructed the same solicitors. Lucy was aware of the decisions taken by Allan and Anna during this period. This is a variation of the argument already made and dealt with that Allan's being an executor somehow bars the claim. For the reasons already given, in my judgment it does not. The involvement of solicitors makes no difference. In respect of any given act they are the agent of their client. To the extent that Allan consented to or acquiesced in the conduct now complained of, or that solicitors did so on his behalf, they did so on his behalf in his capacity as director of or beneficial shareholder in the Company, and not as personal representative of Angus's estate.

Settlement agreement in 2010

185. Next there is the fact that in 2010 the Company agreed to settle the unfair dismissal proceedings brought against it by Alistair. The agreement by which the litigation was settled involved an agreement to continue paying Alistair's existing salary to him. Lucy's own brother (an employment lawyer) reviewed this settlement agreement. At best, this is an argument about knowledge of Alistair's salary being attributed to Lucy. I have already dealt with this above.

Petitioners' own conduct

186. It is also argued that the petitioners' own conduct in failing to accept or progress offers made by others to acquire shares in the Company operates as a defence to the claim. I am satisfied that there is nothing in this. The estate was a shareholder without any executive role in the Company. It was entitled to take its own course and to accept or reject offers to buy shares as it saw fit. I have seen nothing to persuade me that the estate unreasonably failed to progress any offer, or failed to negotiate in good faith. Indeed, Allan's evidence (which I accept) was to the contrary. I consider that Alistair is simply seeking to blame others for what happened. In his witness statement he sought to blame "his relatives and their advisers", and in his oral evidence he accepted that the estate was not alone in its approach to the offers. Indeed, in closing submissions he also argued that "the driving force behind the rejection of the various offers was Allan".

187. However, even if the allegation were true, it would not make the respondents' conduct not unfair. In my judgment, it would merely go to the discretion of the court in granting relief to the petitioners: *cf Interactive Technology Corporation Ltd v Ferster* [2016] EWHC 2896 (Ch), [318].

"Circumvention" of the articles

188. Finally, it is suggested that the petitioners have "circumvented" the pre-emption provisions in the articles, and that therefore they should not be entitled to relief. I reject this argument. The estate was not obliged at any time to seek to register its shareholding, and thus trigger the pre-emption provisions. The provisions of regulation 31 of the 1985 Regulations take away the voting rights of the shares until registration. They take away nothing else. In particular, the estate does not by failing

to register lose the right to complain of conduct unfairly prejudicial to its interests: *cf* s 994(2) of the 2006 Act.

Conclusion on defences

189. I conclude that none of the conduct which I have found to be unfairly prejudicial to the petitioners is defensible on grounds of consent or acquiescence. Nor is it excused by the fact that some, even the majority, may have agreed with it, nor by any of the other arguments put forward.

Remedy

190. Since I have concluded that the petitioners have established a case of conduct unfairly prejudicial to them on the part of the respondents, I must consider the remedy that should be awarded. In this respect, section 996 provides as follows:

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

Share purchase order

191. The petitioners seek an order that the respondents buy the estate's shares. This kind of order was described by Patten J, giving the judgment of the Court of Appeal in *Grace v Biagioli* [2006] 2 BCLC 70, in the following terms:

> "75. In most cases, the usual order to make will be the one requiring the Respondents to buy out the petitioning shareholder at a price to be fixed by the court. This is normally the most appropriate order to deal with intra company disputes involving small private companies. This is the relief which Mr Grace

says that the judge should have granted and which he seeks on this appeal. The reasons for making such an order are in most cases obvious. It will free the petitioner from the company and enable him to extract his share of the value of its business and assets in return for foregoing any future right to dividends. The company and its business will be preserved for the benefit of the respondent shareholders, free from his claims and the possibility of future difficulties between shareholders will be removed. In cases of serious prejudice and conflict between shareholders, it is unlikely that any regime or safeguards which the court can impose, will be as effective to preserve the peace and to safeguard the rights of the minority. Although, as Lord Hoffmann emphasised in *O'Neill v Phillips*, there is no room within this jurisdiction for the equivalent of no-fault divorce, nothing less than a clean break is likely in most cases of proven fault to satisfy the objectives of the court's power to intervene."

192. On the facts of the present case, I find it difficult to see how any other order than a share purchase order would be appropriate to remedy the unfairly prejudicial conduct that I have found. There is no evidence that the conduct has ceased or will cease in the future. The attitude of the respondents towards Lucy and Angus's estate remains entrenched. It is obvious that the estate should not be required to remain a co-adventurer with the other shareholders in the Company for a moment longer than necessary, and it is equally obvious that the same conduct makes it wrong to leave the estate to its remedy of seeking to offer its shareholding to other shareholders under the Company's constitution. That would enable the respondents to take advantage of their wrongdoing in rewarding themselves excessively and failing properly to decide whether to declare dividends.

193. In the present case, the petition complains about the respondents' conduct down to the end of 2016, and seeks an inquiry into their conduct subsequently, as this may affect the details of any remedy awarded. In particular it may affect the 'fair price' to be paid pursuant an order to buy out the petitioners' interest. In principle I agree that information about the conduct of the respondents (especially in relation to directors' remuneration and loan accounts, but also other events such as sales of any of the Company's assets or business) is necessary before a buy-out order can be implemented. The petitioners ask therefore to be allowed to seek further adjustments to the order made (including a variation of the valuation date) in the light of any information rendering this desirable. I consider that it is appropriate, and the order I will make will have to make provision for information to be provided by the respondents and any issues arising to be determined before the "fair price" can be ascertained.

Basis of share purchase: discount or not?

194. If there is therefore to be an order that the petitioners' shares be bought, there is a further question as to the basis upon which such a buyout should take place. In particular, the question arises whether the Company is to be treated as a quasi-partnership, and thus no discount allowed for the sale of what would otherwise be a minority holding, or whether, even if it is not a quasi-partnership, no discount should be allowed, or whether a minority holding discount should be applied, and if so of what size.

195. The petitioners argue for an undiscounted valuation, even if the Company should not be found to have been a quasi-partnership. They say that the court "has a very wide discretion to do what is fair and equitable in all the circumstances of the case." They refer to *Re Bird Precision Bellows Ltd* [1986] Ch 658, where Oliver LJ said (at 669D-E):

> "It seems to me that the whole framework of the section, and of such of the authorities as we have seen, which seem to me to support this, is to confer on the court a very wide discretion to do what is considered fair and equitable in all the circumstances of the case, in order to put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders of the company; and I find myself quite unable to accept that that discretion in some way stops short when it comes to the terms of the order for purchase in the manner in which the price is to be assessed."

I note that the only other member of the court, Purchas LJ, expressly agreed with this view at 678G-H.

196. This may be contrasted with what Arden LJ (with whom Mummery and Richards LJJ agreed) said in *Strahan v Wilcock* [2006] 2 BCLC 555:

> "17. The burden of the dispute between the parties on this appeal is as to the basis of valuation in the buy-out order. Shares are generally ordered to be purchased on the basis of their valuation on a non-discounted basis where the party against whom the order is made has acted in breach of the obligation of good faith applicable to the parties' relationship by analogy with partnership law, that is to say where a 'quasi-partnership' relationship has been found to exist. It is difficult to conceive of circumstances in which a non-discounted basis of valuation would be appropriate where there was unfair prejudice for the purposes of the 1985 Act but such a relationship did not exist. However, on this appeal I need not express a final view on what those circumstances might be."

197. Moreover, in *Irvine v Irvine (No 2)* [2007] 1 BCLC 445, Blackburne J said:

> "A minority shareholding, even one where the extent of the minority is as slight as in this case, is to be valued for what it is, a minority shareholding, unless there is some good reason to attribute to it a pro rata share of the overall value of the company. Short of a quasi partnership or some other exceptional circumstance, there is no reason to accord to it a quality which it lacks."

But it will be noted that, even there, the judge did not refer only to "quasi-partnership", but also to "some other exceptional circumstance".

198. The petitioners say that modern cases such as *Re Sunrise Radio Ltd* [2010] 1 BCLC 367 and *Re Blue Index Ltd* [2014] EWHC 2680 (Ch) are consistent with the approach adopted in *Re Bird Precision Bellows* rather than with the stricter approach of *Strahan v Wilcock* and *Irvine v Irvine (No 2)*. In *Re Sunrise Radio Ltd*, the petitioner had been a quasi-partner in the company at the outset, but had later ceased to be so, and was not so at the time of the conduct relied on. HHJ Purle QC held that that did not prevent the court from ordering her (minority interest) shares to be bought out at an undiscounted value. He said:

> "295. That there is no inflexible rule is amply confirmed by the decision, both at first instance and in the Court of Appeal, in *Bird Precision Bellows Ltd* [1984] 1 Ch 419 (Nourse J); [1986] Ch 658 (CA) concerning a predecessor section. That was a quasi-partnership case, but the comments at both levels were of wider import."

199. He went on to say:

> "301. Another relevant factor in any given case may be to consider whether the facts would, apart from section 994, justify a winding-up on the "just and equitable" ground, in which event each shareholder would receive a rateable proportion of the realised assets. A minority in those circumstances should not ordinarily be worse off than in a winding-up..."

And he added that:

> "302. In the winding-up context, the 'just and equitable' ground is not limited to cases of quasi-partnership..."

200. In *Re Blue Index Ltd*, the petitioner had a 3% shareholding, and the question once again was whether it should be bought out at a valuation undiscounted for its minority size. The deputy judge, Mr Robin Hollington QC, referred once again to *Re Bird Precision Bellows*, and in particular to the judgment of Oliver LJ approving passages in the judgment of Nourse J at first instance.

201. He then said this:

> "23. In my view it is reasonably clear that the distinction that Nourse J was drawing between the two categories of case for the purpose of his exposition of the underlying principle, i.e. as to whether or not a discount for a minority shareholding was applicable, was a distinction between the general case where it was unfair to treat the wronged petitioner as a willing seller and therefore for the price to be fixed on a discounted basis, and the exceptional case where it was fair to do so because (for example) he had acquired his shares at a discounted price. In other words, the emphasis in his exposition of the underlying principle lay in the unfairness in treating a successful petitioner as a willing seller. Nourse J was not drawing a distinction between a quasi-partnership and a non quasi-partnership, because it would have been easy for him to express himself to that effect and he did not. For the purposes of his exposition of the underlying principle, the quasi-partnership case was the case where typically the wronged petitioner could not be treated as a willing seller (to the contrary where he had deserved his exclusion) or as having acquired his shares at a discounted price."

202. The deputy judge went on to say:

> "26. … the whole purpose of the unfair prejudice remedy is to grant the oppressed minority a remedy which it would not otherwise have. It would substantially defeat the purpose of the new remedy if the oppressing majority were routinely rewarded by the application of a discount for a minority shareholding."

203. He then referred to the speech of Lord Hoffmann in the House of Lords (with which all their lordships agreed) in *O'Neill v Phillips* [1999] 1 WLR 1092, where he said (at 1107D-E):

> "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."

204. The deputy judge concluded:

> "29. Lord Hoffmann's remarks may have been *obiter* but they had clearly been carefully thought through and were fully reasoned. I regard them as binding on me and in any event entirely in keeping with the judgment of Oliver LJ in *Re Bird Precision Bellows* on this issue, which is also binding on me."

205. The most recent judicial pronouncement on this controversy appears to be that of Fancourt J in *Estera Trust (Jersey) Ltd v Singh* [2018] EWHC 1715 (Ch). In that case, the judge having found proved conduct unfairly prejudicial to the petitioners said:

> "641. The Petitioners argue for a pro rata, 'non-discounted' valuation on the basis that the Petitioners are involuntary sellers and that the purchasing Respondents will be obtaining the full, non-discounted value of the shares, and so otherwise benefiting hugely from their own wrongdoing. Further, they submit that HS has been a shareholder and participant in the Company from the outset, and that the shares of HS and Estera were intended to be operated as a single block of majority shareholding, held for the joint benefit of those shareholders.
>
> 642. In my judgment, those factors do not justify making an order for purchase on a pro rata basis. While such an order may be appropriate in certain circumstances when a company is not a quasi-partnership, such as the circumstances in *Re Sunrise Radio*, there is no presumption in favour of it, as there is in the case of a true quasi-partnership. The shares of HS and Estera do not have and never did have that enhanced value, as a minority shareholding, and there are no considerations binding the other shareholders that require them or any of them to treat the shares as having a pro rata value. Further, it would not be accurate, at any time after 2006, to characterise HS or Estera as unwilling sellers of their interest in the Company: I find that they were in principle willing to sell, but only at a price that JS was unwilling to pay, namely a pro rata share of the value of the Company. The purchasers would benefit from their wrongdoing if they were able to acquire the shares for their suppressed market value, having regard to the articles of association, but that does not of itself lead to the conclusion that a pro rata valuation is appropriate."

206. The judge went on to say:

"644. The Respondents' case is that the shares should be ordered to be purchased at their market value: that is, at whatever price the shares would actually command if sold as a minority shareholding in the market on the valuation date, subject to the articles of association. That, they say, is the true value of the shares, and that is all the Petitioners are entitled to.

645. In my judgment, the Respondents' argument is too simplistic and ultimately wrong, for the following reasons. First, the shares in question are not being sold on the open market, subject to the restrictions (such as they are) in the articles. They will be sold privately to JS or (at their election) to the Jasminder trusts, or to the Company, by virtue of the court order. As such, market forces will not come into play, nor will the pre-emption rights in the articles that would apply on a sale in the open market. The price for the shares should not be suppressed on that account.

646. Second, the shares are not being purchased by an unconnected investor in the market but by JS, the Jasminder trusts or the Company. The shares are very much more valuable to each of them than they are to investors in the market. A purchase by JS or the Jasminder trusts will have the effect of raising their combined shareholding above 75%. Any purchase by the Company at a price below the pro rata value of the shares will have the effect of increasing the value of the other shares in the Company, which will principally benefit JS and the Jasminder trusts. Those are considerations that do not exist on an open market sale.

647. Third, a purchase of the shares by JS or the Company at their open market value would create a very substantial windfall to JS or the existing shareholders. It would therefore have the surprising effect of enabling JS to benefit significantly in financial terms from the unfairly prejudicial conduct that has given rise to the relief against JS and the Company. That outcome cannot be just, certainly not on the facts of this case where the shares of HS and Estera will inevitably have a much higher value to JS and the Jasminder trusts than their market value."

207. As a result, the judge concluded:

"648. What I have to determine is a basis for a *fair* price for JS (or the Company) to pay HS and Estera for their shares, in circumstances where a share purchase is appropriate and necessary to relieve HS/Estera against unfair prejudicial conduct that they have suffered as shareholders. That question is not, in my judgment, a simple choice between a pro rata share of the Company's overall value and the market value of the shares. Those are, as it were, the two extremes of price that could be ordered to be paid, but between them there are various possibilities for specifying a basis of valuation that results in a fair price as between these minority shareholders and the Respondents against whom relief is granted. I do not read Arden LJ's *obiter dictum* as implying that market value is the only alternative in cases where a non-discounted valuation is inappropriate."

208. Just as Fancourt J said of the minority's shares in *Estera*, here the estate's shares are not to be sold on the open market, but to the respondents or some of them. On the evidence, I hold that the estate is not an unwilling seller. It is simply that the terms which the respondents are prepared to offer are not those which the petitioners are prepared to accept. I note also that the shares will be very much more valuable to the respondents than to any outside purchaser. Although the three respondents presently have 75% of the voting shares in the company, they are not a homogenous block.

Each of Alistair and Allan, for example, would like to acquire more shares so as to gain control of the Company over the other. Anna's share is apparently "under offer" at present. She has given notice to the Company dated 5 April 2018 of her wish to sell her share at the price of £1,214,285. It is clear from the minutes of the board meeting held on 20 April 2018 that Alistair is in favour of the sale and Allan is against it. I therefore infer that the proposed sale is one to Alistair.

209. In the present case, the petitioners' shareholding is derived from that of Angus, who together with Allan, Alistair and their father Alexander, were the original shareholders in the Company. At the outset the Company was clearly a quasi-partnership. The management agreement (and the drafts of the revised management agreement) preserved this idea by rewarding the three brothers more or less equally, even though they also recognised their inability to get on together and accepted that someone had to run the Company.

210. But the death of Angus in 2006 changed the situation. Thereafter, only Allan and Alistair were involved in active control or management, and it ceased to be a quasi-partnership between the shareholders. Yet it was expected that the Company would shortly be sold to a third party, and in that case each shareholding, including that of Angus's estate (which at two-sevenths was substantial), would have benefited to its full pro-rata value. At that stage questions of excessive remuneration and directors' loans were of little or no importance. The loan accounts were small in value and paid down or off regularly, and in 2007-08 the estate received, albeit by way of dividend, what Angus could reasonably have expected to receive as director of and shareholder in the Company.

211. But the anticipated sale of the Company never happened, partly because of the deteriorating world financial and economic situation, but also because of the internecine warfare between the surviving brothers. By the time they managed to agree, the window of opportunity had narrowed, if not closed altogether. And this is, in my judgment, the responsibility of the respondents. Despite arguments to the contrary, the estate is not in any meaningful sense responsible for the failure of efforts to sell the Company to a third party.

212. The conduct thereafter of the respondents has gone instead to enrich themselves at the expense of the Company. In economic terms, this loss falls on the shareholders, including Angus's estate, who conversely have not benefited from declarations of dividends sharing out the Company's profits. These should at the least have included the excessive part of the directors' remuneration, and the benefits which would have accrued had the directors not used the Company's cash-flow, by way of loan accounts, for their own private purposes.

213. At the same time the respondents have sought to use their dominant position in the Company, coupled with the lack of dividends, to put pressure on the estate to sell its shareholding in accordance with the Company's articles. However, the shareholding having over time become progressively less valuable, the estate has become the less willing to sell it, and has ultimately been prepared instead to resort to legal proceedings to vindicate its rights. To put it another way, the estate has – in my judgment reasonably – come to the court instead of going to the market.

214. So far as concerns the debate between the contrasting views expressed in cases like *Bird Precision Bellows* on the one hand and *Irvine v Irvine (No 2)* on the other, it is not necessary for me to express any concluded view, but it is at least clear that the weight of authority is that there is a discretion to be exercised. In all the circumstances of this case, in my judgment there are good reasons for saying that sale and purchase should be without any discount for minority. I recognise that in some cases, such as *Re McCarthy Surfacing Ltd* [2009] BCC 464, the court has been prepared to value shares on the minority valuation basis, but on the footing of adding back dividends that ought to – or at least might – have been declared.

215. In that particular case the deputy judge, Michael Furness QC, said:

> "101. It seems to me that there is force in what Mr Chivers is saying here, because a simple order for valuation on a discounted basis will result in the respondents, in a sense benefiting from the failure to consider declaring dividends. I also agree with Mr Chivers that the broad discretion which the court has over the question of remedies for unfair prejudice would extend to making an order of the sort he is asking for in an appropriate case. I am, however, conscious, that an exercise to determine the amount of dividends that the board ought to have declared if they had properly applied their minds to the question may be a difficult one. I have, however, decided that some provision should be made in the order to ensure that the petitioners are compensated for, as it were, the loss of opportunity of having dividends declared."

216. However, in the present case I consider that that is not enough. The conduct unfairly prejudicial in this case is not just a failure to consider whether to declare dividends, but also encompasses excessive directors' remuneration and extensive use of directors' loan accounts, amounting to a total exclusion of the estate (which did not have an independent director to represent it) from benefiting from its shareholding. A sale at a discounted value would present an undeserved windfall to the purchasing respondents. Now this Company, like all companies limited by shares, belonged to its shareholders. In these circumstances, I consider that nothing less than a sale and purchase of the shares at an undiscounted valuation will do justice, and amount to a "fair price".

The non-voting shares issue

217. Anna raises a point concerning the issue of the three non-voting shares to the three brothers in 2003. I have referred to this already in paragraphs [22]-[24] above. Anna says, and the point is not challenged, that this was done in error. She therefore says that the estate shareholding should be treated as one quarter, and not two sevenths, of the Company. The petitioners resist this.

218. Despite the fact that the error was discovered at least by 2006, it has never been corrected. Indeed, the decision appears to have been taken to leave matters as they were until after the sale of the Company. Nor has there ever been any claim or legal proceedings to set aside the issue on the grounds of mistake, or to rectify the register. If any such proceedings were now to be begun, there would be important issues of limitation and laches to be confronted. All the Company's decisions in the meantime have been taken or made on the basis of this shareholding structure. They cannot now be re-opened. Moreover, given that Anna has left the management of the Company to

her sons, has said that she does not wish to be a shareholder, and is apparently trying to sell her share, her complaint about the 2003 error seems to me artificial and opportunistic.

219. In my judgment, I have to decide these proceedings on the basis of the situation as it actually is. As matters stand, the estate has two sevenths of the Company. It is not appropriate to try to deal with a rescission or rectification claim of this kind as some sort of side wind to the main proceedings, in order to produce an artificial advantage for the respondents, and I decline to do so.

Apportionment of responsibility

220. The question arises as to the apportionment of responsibility amongst the respondents. In my judgment, the primary responsibility for the unfairly prejudicial conduct which I have found in this case lies squarely with Alistair and Allan. As between those two, I find that Allan was the more concerned to consider the interests of the estate, was the more concerned for the welfare of his dead brother's children, and was slightly more squeamish about the prejudicial conduct. Nevertheless, I have to record that he followed suit when he saw that his brother was not to be deterred. In terms of what they actually did, I hold that they are each as responsible as the other.

221. The position of their mother Anna is different. She left her sons to run the company and took very little part. That is why I say that the primary responsibility lies with them. But she was the holder of a voting shareholding and was also a director. Aside from taking excessive remuneration (although to a much lesser extent than her sons), she bears some responsibility for not using her shareholding and position as a director to intervene in the governance of the company and prevent, or at least ameliorate, the conduct of her sons. I accept that her age and language difficulties, as well as her love for her sons, would have made this difficult. But although that may in part explain what happened, in law it is not an excuse.

222. The reality is that if a person cannot properly perform the onerous duties of a company director, that person should not hold office. She must accept the consequences of her actions or inactions. The power of attorney that she granted on 1 April 2011 does not change matters. At best, that concerns only her share voting rights, and not the exercise of the powers attaching to her directorship.

Conclusion on remedy

223. In the circumstances that Alistair and Allan vie for control of the Company, that their mother Anna does not wish to continue to be a shareholder in the Company, and that the primary responsibility for what has happened lies with Alistair and Allan, I consider that the proper remedy to be awarded in the present case is that Alistair and Allan buy the petitioners' shares at a fair value. It would not be right, in my judgment, for the Company to be ordered to do so. There will have to be a hearing to give directions for this process and for other consequential matters to be dealt with. By agreement amongst all parties, Tuesday 5 February 2019 has been set aside for this purpose.

Envoi

224. I cannot leave this case without thanking all the legal representatives, counsel and solicitors, for their tremendous assistance before and during the trial, including all the (copious) written materials, and their remarkable forbearance afterwards, when I was indisposed. I am grateful for the sense of co-operation which pervaded the whole proceedings, and which made it so much easier to try this case. I am just sorry that it took so long for me to produce this judgment.