Neutral Citation Number: [2020] EWHC 1833 (Ch)

Case No: CR-2018-008931

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

The Rolls Building
Fetter Lane
London EC4A 1NL

Date: 09/07/2020

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

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Between:

SIMON STARLING	**Petitioner**
- and -	
(1) THE CLIMBING GYM LIMITED	**Respondents**
(2) PAUL EDWARD BARDEN	
(3) SUSAN KAY BARDEN	
(4) VERNON MANLEY BROWN MOFFET	

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QUENTIN TANNOCK (instructed by **THRINGS LLP**) for the **Petitioner**
CHARLES NEWINGTON-BRIDGES (instructed by **KITSONS LLP**) for the **Second to Fourth Respondents**

Hearing dates: 3-12 June 2020

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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.

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 3.30 p.m. on 9 July 2020

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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

Chief ICC Judge Briggs:

Introduction

1. This is a shareholder dispute. Mr Starling seeks relief under the Companies Act 2006 (the "Act") following dismissal from his role as operations director in the Climbing Gym Limited (the "Company"). Mr Starling is one of four shareholders in the Company with a 32% holding. Together, Mr and Mrs Barden hold 52%. Mr Barden and Mrs Barden have offered to acquire Mr Starling's shares, but the offer has been rejected. The value put on Mr Starling's shares is discounted to take account of "Bad Leaver" provisions contained in a shareholder agreement. All parties accept the agreement regulates the shareholder relationship. Mr Starling argues that he was wrongfully dismissed and excluded from the management. If he was wrongfully dismissed the "Bad Leaver" provisions will not apply. He seeks reinstatement as an employee of the Company.

Issues

2. The parties have helpfully provided a list of issues for the Court to decide. They are mostly fact based. I have refined them, in keeping with the closing submissions, as follows: (i) whether Mr Starling can claim that the Company as constituted operated as a quasi-partnership, so that equitable consideration apply; (ii) whether Mr Starling signed a directors' service agreement and is bound by the agreement; (iii) in the event that equitable considerations apply, because of the existence of a quasi-partnership, do the events I shall describe below justify his exclusion from the management of the Company (iv) if there is no quasi-partnership can the directors remove Mr Starling as director and (v) what affect if any do various other matters raised have on the petition for unfair prejudice. These include a failure to pay Mr Starling a dividend payment during the period of exclusion and the wrongful use of corporate funds paid as legal costs in these proceedings. There were several other matters in dispute during the trial which I shall cover in the course of this judgment.

Factual background

3. Mr Starling holds a building surveying degree but has a passion for climbing. A finely worked business plan created prior to the incorporation of the Company explains "Simon Starling will be the general manager and is the founder of The Climbing Gym. Mr

Starling has a degree in Building Surveying and has worked in a family business prior to changing direction and working in the climbing industry. He has extensive experience in all areas of climbing wall management as well as being an accomplished climber and qualified instructor. He currently manages a climbing wall in Bristol and has specialist knowledge of revenue and costs of indoor climbing walls. His main role will be as the operations manager dealing with the daily running of the business." Mrs Barden said in evidence that she and her husband were looking for a business opportunity. She accepted that the idea of a climbing wall came from Mr Starling. Mr Barden said in evidence that Mr Starling had written his own biography. He was not concerned about titles at the time, as it was inconsequential. Mr and Mrs Barden do not disagree that Mr Starling was a founder of the business but add that as a matter of fact, they and Ms Rebecca Hughes were also founders. Mr Starling was a director until 2018 and remains a member.

4. Mr Barden is an ex Royal Marine and is described in the business plan in the following way: "Paul Barden has been employed in the Royal Marines for 23 years and is currently the rank of Major specialising in logistics, finance and HR. He has civil accreditation as a Strategic and Administrative Manager, holds a Professional Certificate in Accounting and was qualified as a mechanical and production engineer through an apprenticeship with a limited company prior to joining the Armed Forces. His main role will be in the logistical support of the Company, managing the Health and Safety criteria, Human Resources and Finance.".

5. Mrs Barden is said to have: "initially trained and qualified in secretarial and business gaining employment within the private banking sector for 10 years managing and coordinating the Head of Department business schedule, presentations and profile. She then trained and qualified as a chiropodist and complimentary therapist and went on to run a very successful private business for 5 years. An effective communicator with good organisational and research skills she also holds an intrinsic talent for design. Her main role will be jointly managing the sales and café along with retail procurement and promotions."

6. Rebecca Hughes was keen to run her own business. She was a friend to and of Mr and Mrs Starling. She was also romantically linked to Mr Starling. She introduced Mr Starling to Mr and Mrs Barden. She explained in her evidence: "I was the conduit if you like -

between Simon's idea to start a climbing wall and the knowledge that Paul and Sue and I were keen on having our own business, so I introduced Simon to Paul and Sue". Ms Hughes was heavily involved at the early stages of the business. The minutes in 2011 and 2012 demonstrate her engagement, conceptual thinking and 'feet on the ground' work looking for a suitable property to build a climbing wall and run the business. She was to give up her employment to work for the Company once it was trading and was for a time a director and member. Her relationship with Mr Starling broke down soon after her birthday in 2013. As a consequence, she resigned as a director and transferred her 10 shares equally to Mr and Mrs Barden, having previously transferred 11 of her shares to Mr Starling in early 2012. Her departure from the Company was finalised in August 2013.

7. Mr Moffet is the father of Mrs Barden and an investor in the business. He was a member and played no active role in the management of the Company. He was invited to act as chairman of an appeal against Mr Starling's dismissal in 2018.

8. The early months of 2011 were busy planning, raising finance, developing ideas about the scale and build of the wall, finding a suitable building and marketing. The Company was incorporated in the Spring of 2011, after the business plan had been produced. The business plan was sent to HSBC from whom £130,000 funding was sought. The solicitors, Pardoes, saw the business plan and were instructed by Mr Barden to produce a shareholder agreement, a directors' service agreement and give advice. A minute of a meeting dated 13 February 2011 records "when the need arises for Simon to resign from his current job to concentrate on the Climbing Gym he will need to draw a salary." The minute reflected the agreed position that Mr Starling would be a full-time employee of the Company. Given the engagement of Pardoes I infer that it was intended that employment for any of the founders would be regulated by a service agreement between them and the Company. Mr Starling set up an e-mail account for the purpose of negotiations with suppliers and obtaining quotes.

9. It is probable that the drafting of the shareholder and directors' service agreement began in August 2011. Among the documents provided to the court is a service agreement dated 20 September 2011 (the "DSA"). It describes Mr Starling as the operations director where the working hours were expressed to be "such hours as are necessary for the

proper performance of the executive's duties." Time was taken up during cross-examination of Mr Starling in dealing with whether the DSA was signed by him. He did accept that he was bound by it regardless of whether he signed it. His signature was important to a power of attorney provision contained in the DSA. The power of attorney permitted the other directors to sign a resignation form on his behalf for the purpose of Companies House.

10. The framework of this aspect of the dispute is as follows. Mr Barden says he can recall taking three copies of the DSA to Pardoes solicitors in Taunton on his way to work. One of those copies was signed by Mr Starling. The evidence of Mr Barden is supported to varying degrees by Mrs Barden and Rebecca Hughes. Memories were understandably vague given the distance in time between the event and the hearing of the dispute

11. Mr Starling's written evidence is that he did not sign the DSA. He says that he purposely did not sign because some issues remained outstanding and a further meeting was required to deal them. He relies on an e-mail sent to Mr and Mrs Barden dated 19 February 2012 that refers to a conversation he had with the solicitor drafting the DSA which he relayed to the Company. In that e-mail he explained that "whilst we should sign [the DSA], there is no requirement to send a copy to Pardoes/Charles Cook." He says this supports his view that Mr Barden never took the DSAs to Pardoes. The e-mail contains an aspiration: "In the coming week it would be nice if we could get the shareholder agreement all signed of (sic) and arrange a meeting so that we can discuss properties and a plan of action." In cross-examination he said that he wanted a solicitor to explain the terms to him. Later in cross-examination Mr Newington-Bridges asked: "if you were content with that agreement, it is likely you would have signed it." Mr Starling responded "Yes, but at that point there were still some questions outstanding and I was working for another business at the time, as was Paul and as was Rebecca."

12. I shall find that Mr Starling did sign the DSA. I shall deal with the issue in more detail below, but for now, there is no doubt that the DSA was signed Mr and Mrs Barden and Ms Hughes.

13. It is not in contention that Mr Starling, Mr Barden, Mrs Barden, Rebecca Hughes and Mr Moffett entered into a shareholder agreement dated 16 March 2012 (the "SA"). The

business plan expressed an intention to start trading within 4 months of acquiring a lease. The four-month period was calculated as the time it would take to build the climbing wall and fit out a premises with a cafe. The start-up costs were estimated to be nearly £300,000. Bank borrowing would be secured against the home of Mr and Mrs Barden. The initial aim was to achieve a net profit within two years and repay the loans. The plan provided for a future expectation: "The Company, restricted to the one climbing wall, will have a maximum expected turnover that it is unlikely to exceed £450,000 and it would only be through the investment of another wall in a different location that further expansion would occur… We would take advantage of a strong investment opportunity relating to the climbing industry whether it be with another climbing wall or training facility if the opportunity and / or the time was right." There are various iterations of the business plan as it changed, taking account of financial updates and other events. It was submitted by Mr Newington-Bridges in closing that growth remained part of the plan and there is no evidence to suppose that submission was incorrect as a matter of fact.

14. The search for a suitable property was wide. A strategy was formed so that Mr Starling and Ms Hughes would look in one area while Mr and Mrs Barden would search another. Between them they considered Bristol, Taunton, Bath, Exeter and Weymouth. It was not until the summer of 2013 that they found the right unit located in Easton, Bristol. A lease was negotiated, and planning consent obtained. Mr Starling resigned from his full-time job in July 2013 (there is a non-critical dispute about whether he was dismissed from a rival climbing centre or whether he resigned due to a pending dismissal proceeding). The Company opened its doors in February 2014. By this time Mr Starling had a new partner. In his witness statement he introduces Helen Middleditch who he says was "involved in the business from early 2013" and "regularly help[ed] during the build and launch, in the office and behind the counter and would occasionally be part of discussions as to day to day management issues with Sue and Paul Barden. Helen was effectively an unpaid employee of the business and did much to help us onsite. Helen was at the time my partner and is now my wife."

15. In his witness evidence Mr Starling says that at "no point have we discussed further expansion of the Company (beyond into Unit 3 next door in 2015) or investment elsewhere. Until early 2016 the Company was insolvent and therefore not in a position to invest". He explains that he received many approaches "regarding new climbing walls

…for many years, even before my involvement in the Company, because of my expertise and long history in the industry which is a unique combination; often I have mentioned them across the desk to Sue in the office". In his view:

> "[a] genuine opportunity only exists if it is investible, meaning certain items are in place. These include, but are not limited to, a suitable building in a viable city, competent and knowledgeable people to invest in with and funding available or securable. Most enquiries come from climbers with no real knowledge of the industry, suggesting locations based on where they live rather than cities that are viable and Paul and Sue would be able to recognise this. These were not opportunities in the sense that they were not viable and, had they come up for discussion, I would have voted against investment."

16. The Company was and remains profitable. The accounts show that its turnover grew from £633,281 in year 2016, to £1,228,162 in 2019. The profit margin also increased in the same period from £116,960 to £368,477. Some of the loan capital used to fund the set-up and expansion of the Company was repaid early.

17. According to Mr Barden he was approached while at the climbing wall in Easton by Ruth Warren. He puts the timing of the approach towards the very end of 2015. His evidence is that Ms Warren informed him that her friend, Lindsey Barker, had climbed with her at the Gym and was interested in "discussing some sort of joint venture or supporting venture with us." Mr Barden says that he gave Ms Warren his business cards to pass on to Ms Barker and "told her that Susan and Simon were the best people to contact in the first instance for further discussions about a business opportunity…" Mr Barden believed that Ms Barker contacted Mr Starling in January 2016.

18. In fact Mr Barden was a month or so out. Ms Barker's e-mail is dated 3 February 2016 and was sent to a Company e-mail address:

> "I hope you don't mind me contacting you. My friend Ruth Warren has passed on your contact details – I think she spoke to you before Christmas about whether you would be happy to share some of

> your knowledge and advice with me. I came down to Bloc recently with Ruth [Warren]….we were blown away by your set up.
> I would be interested in exploring whether I could set up a similar centre to yours in East Anglia……I am not sure of your plans for your business in the future, but this would be a one-off centre rather than anything more…..I absolutely appreciate that any more than initial sharing of experiences would mean a different proposition for you and if I did feel I could take it forward then I would be interested in you providing paid for consultation and mentoring for me so I can learn from your considerable experience."

19. Mr Starling's evidence is that he knew Ms Warren from climbing and had helped her son. She had his contact details from earlier in 2015. In any event he accepts that he did not share Ms Barker's e-mail with the other directors. Instead, without informing the Company he arranged to meet Ms Barker at a café in Spitalfields, London on 26 February 2016.

20. Ms Barker states in her written evidence (which she confirmed during cross-examination) that Mr Starling made an offer to invest in her climbing wall business ("Avid") at their first meeting. In cross examination she accepted that Mr Starling did "not say the company, the Climbing Gym, would be interested" in investing. Her unchallenged evidence is "I was really keen to have Simon and his industry experience on board with me...". Her evidence also states that she wanted to "sit down with Simon and make sure that if Simon wanted to invest then … Simon had a real commitment to the business". I infer that she was satisfied that he has such a commitment.

21. Mr Starling did not disclose to the Company that he had made a personal offer in February 2016 to invest in another climbing wall. He does not say in his evidence that he had offered to invest in the enterprise contemplated by Ms Barker. His evidence is that he raised the issue of his desire to invest in an outside business in August 2016 at the Annual General Meeting. If he did raise the issue in August 2016 it is not recorded in the minutes of the meeting. Mr Starling states that he raised the issue again at the 2017 AGM. The minutes do not record his desire to make investments outside of the Company

but the minutes of the 2017 AGM do record that Mr Starling voiced his view that the biggest threat to the Company "would be a new centre". In my judgment it is more likely than not that Mr Starling's uncorroborated memory is mistaken. He did not raise the issue at these meetings.

22. A few days after the London meeting Mr Barden wrote to Mrs Barden and Mr Starling by e-mail:

> "Given our growth and popularity there has been a notable increase in external interest in our brand and business. In line with our shareholders and directors of interest (sic) we must be alert to conflict of interest as it can creep up on us. I am hoping you are both in agreement but we should now look to log our activities with external organisation (sic), suppliers and other persons with interest…I would like to propose two entry spreadsheets…by doing so we can remain transparent and eliminate suspicions and also hold any had behaviours accountable…"

23. Mr Starling responded on 1 March:

> "We need to collectively agree what we consider to be a conflict of interest and what constitutes a meeting. Its my understanding that we should be concerned about conflicts of interest where they have the potential to be detrimental to the business. Agreed we should be declaring conflicting proprieties and detailing gifts/discounts but the standard approach would be for each individual to do this, not to log every meeting and have each and every one reviewed for a potential conflict…it would be impractical to inform you of every conversation I have, made more difficult should I become privy to sensitive or confidential information…"

24. Later in the month of March 2016 Mr Barden discovered that there had been contact between Mr Starling and Ms Barker. He contacted Ruth Warren by email on 17 March

2016 to discover what was discussed. He sent an e-mail on the same day to Mr Starling "can you please log your meeting in London that occurred on the 26th February detailing any gifting or further engagement. Thanks." It is reasonable to conclude that this instruction should be treated as an instruction from the board. Mr Starling responded to the e-mail within minutes as if it were such an instruction: "I do not consider it necessary to detail a confidential conversation I had whilst on a days (sic) annual leave. You have my assurance that no conflict of interest has or will occur." Mr Starling did then enter the meeting in the conflict of interest log stating as "an informal chat" relating to a "climbing wall operation" and that he was "not willing to release" any contact details. I find as a matter of fact that these entries were disingenuous. Ms Warren's response to Mr Barden's query was to inform him that she did not want to pass on Ms Barker's details because "I've caused enough trouble already and I really don't want to stir things up anymore."

25. On 25 April 2017 Mr Starling received an approach from an architect acting for a charity operating in a town near Bristol known as Chippenham. The e-mail began: I am hoping you can forward this to the owner…". The charity wished to set up a sports facility including an internal climbing wall. The question posed in the e-mail was "Do you think this is something of interest to [the Company]?" Mr Starling responded: "this is certainly something we would be interested in exploring." He wrote again in August 2017 "I am certainly still keen to investigate the opportunity…". At some point Mr Starling visited the site but little further is known. An e-mail in November from the Architect reveals that Mr Starling had said that he would put together a form of a financial feasibility study: "Any progress on numbers? Do you think your other directors are interested? The charity have received a proposal from the other interested group who would like to run the climbing centre so it would be great to have your figures to see how you sit!" No figures were given and after a chasing e-mail at the end of November 2017 the Chippenham opportunity was awarded to the other interested group. Mr and Mrs Barden say they knew nothing about this opportunity. I accept their evidence. At the same time, it is apparent that Mr Starling was pursuing an opportunity with Ms Barker.

26. In the meantime, Mr Starling had received an e-mail from Hyeri Heath who self-styled herself as "an enthusiastic climber". The e-mail explained that there was "a fantastic business opportunity to build a new branch in Lincoln to fulfil high demand". Hyeri was

not seeking to enter a joint venture but "would be more than happy to help with this potential project if needed." Mr Starling forwarded the e-mail to Mr Barden. There was no enthusiasm to take Hyeri's suggestion further.

27. Mr Starling wrote to the Company by e-mail dated 2 December 2017 explaining that he intended to invest in another company. The business Mr Starling was intending to invest in was Avid:

> "I write to inform you that I am likely to be investing in a climbing wall business shortly. I would like to offer reassurance that this will not affect my role at the Climbing Gym and that my commitment to the business is absolute. I do not wish to be in breach of the Shareholders' Agreement and Directors Service Agreement and therefore have sought appropriate advice from Alex Pyatt at Thrings LLP.
> I would like to assure you that I will continue to.
> - use my reasonable endeavours to promote the success of the company for the benefit of the shareholders and;
> - continue to devote my full skill, time and attention as required to the performance of my duties and;
> - protect the companies' confidential information in accordance with our data protection policy.
>
> I will however receive reports, give guidance and have meetings from time to time and this will be undertaken in my own time. I would also like to highlight that this opportunity is not portable and therefore has not been taken away from the company, and that it is in no way in competition with it as it's over 100 miles away."

28. Mr Starling's financial investment into Avid was £100,000. He was allotted 49 of 100 issued shares in the company.

29. Mr Barden sought legal advice from Mogers Drewett solicitors in January 2018. By an e-mail dated 19 January 2018 the solicitors first summarised the discussion that had taken place and then provided advice:

> "we have discussed the evolving needs of the Climbing Gym Limited and also the changes that have occurred to the stakeholder interests (Simon's external investments). Broadly, the way things are currently structured, in terms of employment contracts and roles, no longer suits the needs of the business and the Company would like to make some changes. Simon is currently employed as Operations Director to work 45 hours per week. He would like to explore a number of outside interests as an investor and also on a consultancy basis. The Company is concerned that he will not be able to fulfil his full time commitment to the Climbing Gym whilst exploring those outside interests…The Company has recently recruited an operations manager to absorb some of Simon's operational duties. This has raised a question around whether the business needs a full-time operations director and whether that role might become part-time on a basis equal to the other part time directors… The circumstances do present themselves as being a perfect opportunity for the current directors to meet to discuss and recalibrate expectations around their individual contribution to the business and to make amendments to employment documentation to reflect the reorganised senior management team… If the proposal is for Simon to reduce his hours for the reasons set out in this note and he refuses, the Company would be able to follow a process which would ultimately result in his employment being terminated for what is called "some other substantial reason". That process would involve him being consulted with about the changes, having his employment terminated in the event the change and immediate re-employment being offered on the new terms and conditions… If the restructure can be agreed, the Company would like to put new service agreements in place and

> which include clearer provisions regarding conflicts of interest and confidentiality." (sic)

30. The advice received by Mogers Drewett informed the Company as to the next steps it would take. The first was to ask Mogers Drewett to draft revised DSAs for the directors. The revision included a clause that placed a blanket ban on outside business activities except for investments unless those activities had been approved by the board. To obtain approval, the board was to receive information regarding the commitment and all outside interests were to be recorded in a board minute.

31. Permitted investments included private and public companies where up to 3% of the issued share capital could be obtained but no investment would be permitted in companies that competed with the Company. Further the employee was to agree to disclose any interests held by any family members that might prejudice the employee's obligations to the Company under the terms of the employment contract. The revised DSA was sent to Mr Starling with comments from Mr Barden by e-mail dated 25 January 2018.

32. On 30 January 2018 Mr Barden sent the revised DSA with track changes and comments. He offered to discuss the track changes and "I notice you are now away Thu and Fri (I guess holiday). Any points you want bringing up at the management meeting? The next day Mr Starling responded that he was going to Munich to "better understand new ways in which we can improve our business". The trip to Munich was "not endorsed by the business as previously discussed…it is inappropriate to link the visit with our business and we are keen you acknowledge this fact." The directors met in early April 2018 which resulted in an e-mail sent by Mr Barden to Moger Drewett: "Simon has agreed to consider a new contract…[to] amend the terms of any confidentiality or conflict of interest in the current agreement to ensure the Company is protected." In an e-mail dated 8 May 2018 Moger Drewett record that Mr Starling had met with the solicitors that day and took the view that: "the Company is adequately protected by the existing documentation and does not want to enter into the proposed DSA as it contains an overly restrictive "Outside Interests" clause. [Mr Starling] is proceeding with his investment into what he perceives to be a non-competitive business but will not work in that business and will continue with

his full-time commitment to the Climbing Gym". Following Mr Starling's visit to the solicitors, Moger Drewett sent a further draft of the revised DSA by e-mail:

> "The attached incorporates comments on the last draft and I have made some changes following my meeting with Simon last week and subsequent conversations…The issues of confidentiality and outside interests are not currently dealt with in your existing employment contracts and are clearly now important to the parties in light of recent developments. The amendments I have made to those clauses are designed to enable Simon the freedom he seeks in relation to his other interest whilst also protecting the legitimate business interests of the company."

33. The update revision contained the following clause:

> "[D]uring the Appointment the Employee shall not, except as a representative of the Company or with the prior written approval of the Board, whether paid or unpaid, be directly or indirectly engaged, concerned or have any financial interest in any Capacity in any other business, trade, profession or occupation (or the setting up of any business, trade, profession or occupation)."

34. The exception to that clause was that an employee would be entitled to hold an investment so long it was not more than 10% of the total issued share capital of any company where such company does not carry on a business which is within a certain radius and does not interfere with or conflict with the proper performance of the employee's duties. The solicitor recommended that the investment be no greater than 20-25%. If the investment is in a company that does not fall into the competitive category a limit of 3% of the total issued share capital would be permitted. The appropriate radius suggested by Mr Barden was 100 miles.

35. In his witness statement Mr Starling says that Avid is not a competitor of the Company; it is 200 miles from Bristol. In any event after several other communications between the solicitors and the directors of the Company Mr Starling wrote by e-mail on 26 June 2018

that the revised DSA was not acceptable to him and that "there is no reason not to continue from here as we have been to date". The directors had endeavoured to provide what they considered to be an acceptable way forward and viewed Mr Starling's uncooperative behaviour as a purposeful frustration of purpose.

36. Mr Starling did not view the change to the DSA in the same way but did not articulate his objection with any precision. It is more likely than not that he had committed to Avid, viewed the investment as a valuable opportunity for himself and did not want to relinquish it by agreeing to a revised DSA. In his view: "Avid Climbing was not an opportunity open to the Company as evidenced by letters from the directors Kevin Ward and Lindsay Barker. Early communications from Lindsay Barker made it clear that this was not a portable opportunity and that she was looking for advice". Ms Barker uses similar language in her written evidence:

> "The opportunity to invest in Avid was not portable to BLOC. My aim always was that I wanted to run my own climbing wall. There are plenty of climbing walls that I could have collaborated with if I wanted to have an established brand at my wall."

37. In cross-examination Ms Barker agreed that if the Company had made an offer to invest in Avid and at the same time made it clear it was not seeking to steel a march on her opportunity, she would have listened. She also explained that Mr Starling had made clear that his offer of investment was personal.

38. By a letter dated 16 July 2018 Mr Starling was suspended from work at the Company. The reason given was: "On or around 13 December 2017, the Company became aware that you were intending to invest in and work for a same sector business. You have repeatedly refused to disclose details of that investment…You chose not to disclose the detail of that venture to the company or to your fellow directors when challenged in or around the 17 March 2016 and thereafter". Mr Starling had not updated or revised the conflict log since March 2016.

39. An investigation took place following Mr Starling's suspension. A document was produced setting out the parameters of the investigation which went further than his intended investment in Avid although some matters were related:

> "In order to protect itself the Company decided to introduce updated Service Agreements for each of the Directors. These agreements included amongst other things, amplified confidentiality provisions. However, Simon did not sign the Service Agreement and no further progress was made in agreeing the Agreement. More recently it was discovered that Simon had chosen to pursue the opportunity for his own interests and that was the venture he was proposing to invest in. There was also concern that Simon had entered into a variety of non-disclosure agreements with parties who were assisting with that venture, with one such party being supplier of this business. These concerns have compounded by previous concerns about Simon's work, priorities and ability to act in the best interests of the Company. Simon was suspended from duties with effect from 13 July whilst this investigation was carried out".

40. The document referred to the employee's handbook, data protection policy, the SA and DSA. One issue that arose was the passing of "confidential" information to Helen Middleditch in 2015, who was then working at Lloyds Bank. The issue was historic by 2018 and in my judgment had been concluded long before the investigation. It was unnecessary to deal with it again. In respect of investment in Avid the document commented: "It appears that Simon entered dialogue with Lyndsay [Barker] during work time, using his work email and met infrequently…Simon supplied two suppliers of the company to build the wall and implemented a NDA to prevent the company knowing." A related issue concerned other opportunities received by Mr Starling but not disclosed to the Company's board.

41. Mr Starling was supplied with questions ahead of the investigation interview which took place on 24 July 2018. The number of questions totalled 76. In the course of cross-

examination Mr Starling accepted that he had misled with his answers on several occasions. As an example, in response to a question asking if he had discussed the Avid opportunity with any member of staff he responded in the negative. He accepted that he had lied but that he had not lied "throughout" the process.

42. A "follow up" meeting was convened on 2 August 2018. By a letter dated 17 August 2018 the Company wrote to Mr Starling informing him of a disciplinary hearing to be held on 20 September 2018. The purpose of the hearing was to consider: (i) allegations of serious misconduct; (ii) whether the Company suffered a loss of trust and confidence in Mr Starling; and (iii) whether the relationships between the owner/managers of the business had broken down. The serious misconduct was said to deal with first, a failure to act in good faith or in the best interest of the company, secondly failing to promote the success of the business, and thirdly, acting in conflict of interest.

43. In dealing with the Avid investment at the hearing, Mr Barden is recorded as saying:

> "So information deemed as been confidential has been shared with third parties, for example start up plans and building plans. Simon has not disclosed until asked his current and future involvement in other business opportunities i.e. mainly Suffolk. Simon appears business opportunities away from the company to himself. A significant amount of data was deleted from Simon's laptop, the day before the suspension meeting. Priory discussions were held between Simon and other third parties regarding consultancy and investment without disclosing to the company. There is a significant time lapse between these discussions taking place and Simon disclosing to the company, circa two years. No other contact made with third parties has been entered into the conflict of interest log therefore not been disclosed to the company…" (sic)

44. Mr Starling's response was as follows:

> "Okay. So going back to the company set up early on and my desire to invest, my email obviously or as was included in my personal statement, all shareholders have known of my plan to invest elsewhere two years… and no point have I been informed that I can't go ahead with an external investment. Obviously indirectly this has been tried to be made forbidden by the attempted introduction of the new director's service agreement in January 2018, which would make my plan external investments. That directors service agreement that they tried to introduce was unfairly prejudicial to me… During a short chat with Lindsey in February 2016, I shared my thoughts on starting up a climbing wall in Ipswich. I was later approached with an enquiry as to whether I would be in a position to invest capital into a proposed new business…" (sic)

45. Mr Starling was either mistaken about the chronology or had forgotten that he had offered to be a financial partner to Ms Barker at their first meeting. In respect of the DSA Mr Starling explained that it "was deleted from the company Dropbox folder and I obviously therefore can't be confident that the paper copy of DSA has been removed or destroyed." Mr Barden wanted some qualification to this statement: "The one you signed?" Mr Starling responded "yes". He then added that he didn't know as "I haven't seen it".

46. Soon after the disciplinary hearing Mr Hughes (a self-employed climbing-wall builder and no relative of Rebecca Hughes) e-mailed Mr Barden:

> "Following the completion of the wall built at Avid Climbing I mentioned to you that during the last week of the build I saw Simon Starling on site at Avid Climbing in Ipswich. Sat 1st September – Simon came over to talk with me saying hello and discussing his current predicament. He then said "goes without saying that you haven't seen me here". Sun 2nd September-Simon was in the unit with guests. Tue 4th September-during the day Simon was ISO container office working, then outside using his

> phone. He also had a number of parcels delivered to Avid Climbing on site… I am writing this email as evidence to support the fact Simon Starling was working at Avid Climbing."

47. A termination letter was sent to Mr Starling on 28 September 2018 on behalf of the Company. I shall say more about the letter later but for the sake of the narrative it stated, in short, that Mr Starling had acted in breach of duty to the Company by "failing to act in good faith or in the best interests of the company; failing to promote the success of the company and acting in a way which has created a conflict of interest between you and the company." The failure to disclose the Avid opportunity and to invest in it without consent of the board of directors was cited as the main ground for dismissal.

48. Using the Company's internal procedure Mr Starling appealed the decision to dismiss him in early October 2018. Mr Moffet acted as chairman on the appeal. In the meantime, Mr Starling engaged Thrings LLP to obtain a mandatory injunction to reinstate him as employee and director, and a prohibitory injunction preventing the Company from using provisions in the SA to transfer his shares in the Company: paragraph 8 of the SA is a deeming provision so that upon a shareholder ceasing to be an employee that employee is deemed to have given notice to transfer his shares. A menu of options is provided by the SA permitting the Company's board to select the transferee.

49. On 25 October 2018 Kitsons LLP acting for the directors, Mr and Mrs Barden, agreed to provide an undertaking not to use the SA provisions to force a transfer of shares held by Mr Starling but refused to agree to reinstate Mr Starling. The following day Thrings LLP wrote:

> "We have already advised you that our client's Application Notice has been withdrawn. Our client does however intend to proceed with an application, on an urgent basis, on Notice. It is of real concern to our client that he has been removed as a Director of the Company in circumstances that we say are invalid. Your clients have failed to follow the Companies Act procedure, nor Articles of Association and the Service Agreement upon which we assume that your clients sought

> to rely as a tool for resigning our client as a Director, was not executed such that it is not a valid Power of Attorney."

50. On 23 October 2018 Mr Starling was sent a letter headed "Appeal Outcome" under cover of an e-mail. Mr Moffet dismissed Mr Starling's appeal:

> "I have reviewed the paperwork from the disciplinary process and have considered and investigated your grounds of appeal and am satisfied that the decision of the original meeting is correct. I am satisfied that you have acted in breach of fiduciary and statutory director's duties and have breached your employment contract as set out in the dismissal letter dated 28 September 2018".

51. The appeal is not the focus of attention at this trial (rightly so). On 6 November 2018 Stuart Isaacs QC sitting as a Deputy High Court Judge in the Chancery Division restrained the Respondents from implementing the provisions of clause 8 of the SA, diluting Mr Starling's shareholding without consent, implementing the provisions of clause 4 of the SA (concerning share transfer) or publicising Mr Starling's dismissal. Although expressed in prohibitory language the Respondents were enjoined to "comply with their obligations" under the Company's Articles and SA. Notably an undertaking had already been offered in respect of the share transfer issue, and Mr Starling was not reinstated to the Company.

The Legal framework

52. There is little or no dispute about the relevant legal framework. I set it out in brief below the directors' duties by reference to the Act and refer to the statutory provisions contained in Part 30 of the Act. Lastly, I shall refer to some relevant authorities arising from the statutory provisions.

53. A director is obliged to:

(i) act within his powers and to exercise those powers for a proper purpose pursuant to section 171 of the Act;

(ii) promote the success of the company for the benefit of its members as a whole pursuant to section 172 of the Act; and

(iii) (iii) exercise reasonable care, skill and diligence, pursuant to section 174 of the Act.

54. Section 175 of the Act codifies the no conflict rule. This section provides (where relevant):

> "(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.
> (2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity)
> …
> (4) This duty is not infringed—
>
> (a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or
> (b) if the matter has been authorised by the directors."
> (My emphasis)

55. The authors of *Minority Shareholders, Law, Practice and Procedure* (6th edition) explain the conflict rule by reference to a judgment of Deane J quoted with approval by Morritt LJ in the Court of Appeal in *Don King Productions Inc v Warren* [2000] Ch 291:

> "The variations between more precise formulations of the principle governing the liability to account are largely the result of the fact that what is conveniently regarded as the one 'fundamental rule' embodies

> two themes. The first is that which appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest. The second is that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it: the objective is to preclude the fiduciary from actually misusing his position for his personal advantage. Notwithstanding authoritative statements to the effect that the 'use of fiduciary position' doctrine is but an illustration or part of a wider 'conflict of interest and duty' doctrine (see e.g., Phipps v. Boardman [1967] 2 A.C. 46, 123; N.Z. Netherlands Society 'Oranje' Inc. v. Kuys [1973] 1 W.L.R. 1126, 1129), the two themes, while overlapping, are distinct. Neither theme fully comprehends the other and a formulation of the principle by reference to one only of them will be incomplete. Stated comprehensively in terms of the liability to account, the principle of equity is that a person who is under a fiduciary obligation must account to the person to whom the obligation is owed for any benefit or gain (i) which has been obtained or received in circumstances where a conflict or significant possibility of conflict existed between his fiduciary duty and his personal interest in the pursuit or possible receipt of such a benefit or gain or (ii) which was obtained or received by use or by reason of his fiduciary position or of opportunity or knowledge resulting from it. Any such benefit or gain is held by the fiduciary as constructive trustee."

56. At paragraph 1.59 of *Minority Shareholders* the authors state: "If the existence of an opportunity is information which it is relevant for the company to know, it follows that a director will be under a duty to communicate it to the company".

57. This is consistent with *Bhullar v Bhullar* [2003] EWCA Civ 424 where Jonathan Parker LJ found [41] that:

> "the opportunity to acquire the Property would have been commercially attractive to the Company, given its proximity to Springbank Works. Whether the Company could or would have taken that opportunity, had it been made aware of it, is not to the point: the existence of the opportunity was information which it was relevant for the Company to know, and it follows that the appellants were under a duty to communicate it to the Company".

58. He reached this conclusion having first found that "reasonable men looking at the facts would think there was a real sensible possibility of conflict". Once it was found that there was a real sensible possibility of a conflict the no conflict rule applied giving a remedy to the claimant.

59. That was the situation prior to the introduction to the Act which codified the no conflict rule.

60. In terms of the application for unfair prejudice, Section 994(1) of the Act provides:

> "A member of a company may apply to the court by petition for an order under this Part on the ground—
> 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
> 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."

61. The requirements of section 994 of the Act are relatively clear. The law was not debated before me. As far as relief is concerned Section 996 of the Act provides:

> "(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…..
>
> "(d) 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."

62. In *Re Unisoft Group Ltd (No. 3)* [1994] BCLC 609 at 611, Harman J. explained that the words "act" and "omission":

> "…..are wide and anything that the company does or fails to do can be relied upon. But wide as the category of acts may be it is necessary that the act or omission is done or left undone by the company itself or on its behalf. Thus, voting at a general meeting, whether annual or extraordinary, may result in a resolution being passed or defeated. The resolution is, obviously, an act of the company notwithstanding that the votes which pass or defeat it are the votes of members which are their private rights which…can be exercised as they choose. The acts of the members themselves are not acts of the company and cannot found a petition under [section 994]."

63. To satisfy the test of unfair prejudice the acts or omissions need to be unfair and prejudicial. In *Grace v. Biagioli* [2006] 2 BCLC 70 at [61], the Court of Appeal highlighted the following principles from the speech of Lord Hoffmann in *O'Neill v. Phillips* [1999] 2 BCC 1:

> "(1) The concept of unfairness, although objective in its focus, is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. This will usually take the form of the articles of association and any collateral agreements between shareholders which

> identify their rights and obligations as members of the company. Both are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable.
>
> (2) It follows that it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use Lord Hoffmann's words, "consist in a breach of the rules or in using rules in a manner which equity would regard as contrary to good faith"…; the conduct need not therefore be unlawful, but it must be inequitable."

64. Prejudice maybe an economic or non-economic act or omission. In *Southern Counties Fresh Foods Ltd* [2008] EWHC 2810 (Ch) the Court applied *Saul D Harrison & Son plc* [1995] 1 BCLC 14 and *O'Neill v Phillips* reiterating that a

> "shareholder generally needs to establish a breach of the terms on which he agreed that the affairs of the company should be conducted or that equitable considerations (those referred to by Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at 379) arising at the time of the commencement of the relationship or subsequently, make it unfair for those conducting the affairs of the company to rely on their strict legal rights. Alternatively unfair prejudice may be made out if the board of directors has exceeded the powers vested in them or have exercised their powers for an illegitimate or ulterior purpose; or there is some event putting an end to the basis on which the parties have entered into association with each other, making it unfair that one shareholder should insist on the continuance of the association."

65. Equitable considerations may be important to an outcome of a case. As stated in *Minority Shareholders, Law, Practice and Procedure* [6.88] it is not in doubt that the general rule is that the relationship between shareholders is governed by a shareholder agreement

where one exists or the company's constitution. Where such an agreement exists the focus is on a breach of the that agreement or the company's constitution. It is not unfair to act in accordance with the rules agreed by the parties. The general rule is supplemented by a concept that unfairness or injustice may arise by applying the strict rules of the constitution or shareholder agreement: equitable considerations apply if there is a quasi-partnership. As explained by Hoffmann LJ in *Re Saul D Harrison & Sons Plc*, the leading case is *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360. Lord Wilberforce said:

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

66. In the context of this case, exclusion from the management of a company is legitimate through the exercise of powers contained in the company's constitution. In the absence of an agreement or understanding, usually found at the time the company was formed (when the parties "entered into an association") or sometimes at a later stage, equitable considerations will not apply.

67. A forensic examination is required to determine whether there was a quasi-partnership. Lord Hoffmann said in *O'Neill v Phillips* [1999] 1 WLR 1092, 1101:

> "I think one useful cross-check in a case like this is to ask whether the exercise of the power in question would be contrary to what the parties, by words or conduct, have actually agreed. Would it conflict with the promises which they appear to have exchanged?"

68. Where there are competing arguments about such an understanding the court may pay attention to the characteristics of the parties, and any documentation produced to govern their relationship. In *Re Coroin Limited (No. 2)* [2013] 2 BCLC 583 David Richards J (as he was) held that there was no room for equitable considerations on the facts of that case as (i) the investors were sophisticated and experienced business people; (ii) "there was little prior relationship between many of the investors…"; and (iii) "more importantly, articles of association and a shareholders' agreement were negotiated and drafted, containing lengthy and complex provisions governing their relations with each other and with the company". He observed "… I find it hard to imagine a case where it would be more inappropriate to overlay on those arrangements equitable considerations…"

69. *Third v North East Ice & Cold Storage Co Ltd* [1998] B.C.C. 242 provides a good example of a failure to make out a quasi-partnership. The petitioners had been directors of a company which had been founded and run by members of their family and another family (who were the majority shareholders). The minority shareholders averred that the company had been run as a quasi-partnership. The petitioners complained that the affairs had been conducted for the advantage of the majority shareholder, and to the disadvantage of the minority. Lord Coulsfield (sitting in the Court of Session (Inner House)) said:

> "For the purposes of the present case, what is important, in my opinion, is the stress laid by Lord Wilberforce upon the existence of some form of personal relationship of a kind which can be seen to give rise to a right in all shareholders, or at least in the petitioners' shareholders, to participate in the conduct of the business. In my view, in the circumstances of this case, the respondents' argument that the acceptance of new service contracts, which conferred on the majority shareholders a power to exclude the first and second petitioners from involvement in the management of the company by dismissing them, is wholly inconsistent with the continuance of any such personal relationship".

70. Finally, some of the events under consideration at trial took place many years ago. It is not surprising that the evidence given was not always clear or appeared contradictory

when compared with contemporaneous documents. Such indicators are not always indicative of a lying witness. I am reminded of the judgment given by Mr Justice Leggett (as he then was) in *Gestmin SGPS S.A. v Credit Suisse (UK) Limited, Credit Suisse Securities (Europe) Limited* [2013] EWHC 3560 (Comm) where he explained that the litigation process itself may lead to a witness's memory of events being based on documents and later interpretation rather than the original experience; all remembering of distant events involves reconstructive processes and [22]:

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

71. The oral testimony in this case did serve a useful purpose as the witnesses were tested on assertions made and not all assertions were substantiated. I shall have this helpful guidance in mind when assessing the witnesses.

Witness of fact

72. Ten witnesses were called in respect of the events I have outlined above. On behalf of the petitioner Mr Starling was the first to give evidence. He had produced four witness statements in all. The first concerned his application for the injunction and ran to 118 paragraphs. The second also concerned the application but was a response to evidence

provided by Mr Barden dated 2 November 2018. The third witness statement was made in support of this shareholder dispute and contains 192 paragraphs. The fourth statement is short and represents a response to the witness statements served by the Respondents. He was asked questions about the SA, his role in the Company, his investment in the Avid, opportunities that the Company should have be informed about and the disciplinary proceedings. Mr Starling accepted in cross-examination that he had not been entirely truthful when giving evidence during the disciplinary proceedings. He accepted that he had misled on at least 4 occasions. Although he was honest about his deceit, he did not volunteer his deceit. At times his evidence was inconsistent with his own written evidence and his written evidence was inconsistent with his recorded evidence given in the disciplinary proceedings and evidence before the court. An example of this concerned the DSA. In his first witness statement he emphatically stated [52] "I have not signed this Agreement". A similar statement is provided in his second witness statement [137, 146, 152]. In his fourth witness statement he says that he never met Angela Clarke who, according to Ms Hughes, witnesses his signature to the DSA at the same time as she signed her DSA. Angela Clarke was Ms Hughes next door neighbour. Mr Starling often stayed with Ms Hughes and used her address as his own for the purpose of some Company records. He was asked if he had signed the DSA at the disciplinary hearing. He said that he "was not a hundred percent certain one way or the other". The contemporaneous documents include an e-mail he sent to the solicitors Pardoes where he writes "I am not completely confident that a copy was signed but it would be useful." At one point Mr Starling said that he had signed the DSA but then changed his answer to "Well I don't know. I haven't seen it…"

73. This was fertile ground for cross-examination by Mr Newington-Bridges:

> "I suggest to you that 'all content' means that you agreed the directors' service agreements.
>
> A. Yes, but there were still some questions to be asked before a final signature was applied to them.
>
> Q. I am going to suggest to you that if you were content with that agreement, it is likely you would have signed it. Do you accept that?

A. Yes"

74. When this evidence is contrasted with his witness statements, the contemporaneous documents and answers provided in the disciplinary hearing the admission came as some surprise. I wanted to ensure I had heard his evidence correctly:

> "Judge Briggs: You said "yes, it is likely that you would have signed it". Can you just clarify your evidence for me on that, please?
>
> A. Is this on page 389, please?
>
> Judge Briggs: I have got a record that you were examined at page 388 and you were asked specifically about Directors Agreement, you were asked whether all the content was agreed, and you said it was agreed but subject to some other questions, but it is likely that you had signed the agreement?
>
> A. My apologies, I do not recall saying that it was likely that I signed the agreement."

75. Mr Starling is clearly an intelligent man who can be sure of his own view. His evidence demonstrates that he can be slow or even reluctant to accept a different position once his view has been formed. I find that he genuinely tried to assist the court with his recollection, gave honest evidence, but I treat his steadfast positions with some caution. This is partly because his apparent sureness tended to be flexible when tested and partly because of evidence he gave on the second day of cross-examination when he was asked why he was giving incorrect answers at the disciplinary hearing. He responded that "I will be completely frank, I could not remember at the time and I would rather have said yes I did than no I did not, but I was very unsure at that point in time." This is an example of Mr Starling knowing that he did not know an answer to a question, choosing not to say that he did not know and preferring to give an answer that suited him. His evidence was in part unreliable.

76. The next witness was Mrs Starling. She provided a single witness statement in the petition. She said that she became "physically" involved in the business when it first opened, working behind the reception, and helping on the tills. She was working for

Lloyds Bank when she took Mr Starling as her romantic partner. Her role at Lloyds Bank required familiarity with information technology. She recalls offering to help the Company with excel spreadsheet production if the occasion arose and that the offer was made in the presence of Mrs Barden. Her evidence concerned assisting with producing a formula in a spreadsheet, where information about the Company and its customers were sent to her Lloyds e-mail address. She says she was able to assist without looking at the data. As the trial progressed it became clear that the spreadsheet issue was historic and not of relevance as I have indicated.

77. In my view Mrs Starling took her role in the proceedings seriously and made an earnest witness. She was not undermined in cross-examination. Insofar as her evidence clashed with that of Mr and/or Mrs Barden, I prefer the evidence of Mrs Starling.

78. Mr Owen James is an associate solicitor at Berry Smith in Cardiff. He worked at Pardoes and was involved in the drafting of the DSA. He could not recall the events. Mr Whitehouse is an associate auditor with EY UK LLP. From July 2011 to December 2018 he had been employed by (and became Managing Director of) Beta Climbing Designs Ltd. That company was a specialist import and export wholesaler of climbing and running equipment. His evidence was that he discussed the possibility of a new climbing gym in London as a potential joint venture with the Company "Simon indicated a willingness and desire to expand and we felt he could help deliver a successful climbing wall. In the end it came to nothing". His evidence when tested contained no calories: it was of no value. He could not recall the events with any clarity, did not know of the Company operations and was not able to say whether Mr Starling has shared the London climbing gym opportunity with the other directors of the Company.

79. The final witness for the petitioner was Ms Barker. She had been a strategic director and then deputy chief executive officer of two local authorities in Suffolk. One of her hobbies was climbing. In 2016 she began to think of leaving the public sector and starting a business. She asked for some assistance from a friend, Kevin Ward. Kevin had experience in starting up business and in finance. Kevin became a joint director for a short while and resigned from his post by agreement. Her evidence concerned Mr Starling's investment, her motivation for starting Avid and Mr Starling's role in the business. Ms Barker's

evidence was driven by her emotions. She explained that she was single mother, she wanted to provide for herself and her child, she was uncertain about her future in the local authority, and how she wanted to do something for herself and fulfil her "dream" of bringing a project to fruition by herself. These emotions told not only of her motive to start Avid but her independent nature. The last of these was important to her denial that she would have entertained an investment by the Company even if the Company had made a high value investment seeking a low level of equity in return. She was keen to highlight her majority holding in Avid. She holds just 1% more of issued shares than Mr Starling. Her evidence, I assess was honest and overall accurate save that I treat her evidence she gave about the possibility of the Company's investment where the Company would require less equity than that provided to Mr Starling, with some caution. I do not doubt she wanted to be in control of the project but I find it unlikely that she would have rejected out of hand a chance to explore a venture with the Company when she was keen and did explore a venture with one of the Company's directors.

80. Mr Barden produced two witness statements and an affidavit in respect of the injunction proceeding. Mr Barden could be described as a man who is fond of procedures and process. An alternative is to describe him as a meticulous person who focusses on detail. It was Mr Barden who instructed solicitors to draft the SA and DSA. He is the Company's data protection manager, initiated the Company's privacy policy, ensured it had a health and safety manual, disciplinary procedures, and risk assessment forms. He has energy, enthusiasm, and confidence. It is perhaps his energy and enthusiasm that got the better of him and led him to widen the disciplinary investigation and hearing beyond what was necessary. For example, he included such matters as the excel spreadsheet issue. I find that his evidence was honest but not always reliable. As an example, he accepted honestly that he had got the dates wrong for purportedly delivering signed DSA to Pardoes. On the other hand, he was not willing to concede that he did not deliver signed copies of the DSA to the solicitors. He would not countenance the idea that he may have delivered something else (a signed customer care letter for instance). He stuck to his view despite accepting that "it was a long time ago". There is no evidence to support his memory, but a contemporaneous e-mail explains that the signed DSA did not need to be returned to the solicitors, and the solicitors did not hold them on file or have a

record of receipt. I shall find that Mr Barden's memory was not accurate in a number of ways.

81. Mrs Barden provided two witness statements. The first was made in opposition to the injunction application. Her evidence included the formation of the Company, the relationships between the directors and the disciplinary hearing. She was not shy in offering her opinion of Mr Starling's character and expressed some uncompromising views such as "it became evident that he was adept in the art of manipulating people to his advantage", she thought he had fabricated evidence and "behaved in an underhand way". It became apparent in cross-examination that her feelings were strongly held but generally unsupported by objective evidence. Her live evidence was not always convincing, but she tended to concede matters when confronted. Perhaps the reason for her underwhelming live evidence was that she had formed a view that Mr Starling had wronged her and the Company. She allowed her strong feelings to distract her from a forming a balanced view of events. As an example, Mrs Barden cited a text conversation Mr Starling had with a 15-year-old customer of the gym, who he taught. There was nothing in the text conversation that was inappropriate, but she held the view that texting the customer was wrong due to her age, indicative of misconduct and worthy of comment in these proceedings. The matter was historic. It had not relevant purpose other than prejudice. Another example concerned the biography contained in the business plan in which Mr Starling is described as the founder of the business. Mrs Barden accepted that the other directors read the biography written by Mr Starling and did not disapprove of it at the time. Mrs Barden was asked in cross-examination if she agreed that as the description was used in the business plan it was reasonable for Mr Starling to use it elsewhere. Her response was "I feel he used it to discriminate against his fellow directors and co-founders". There was no evidence of discrimination. She was asked in cross-examination if she had seen Mr Starling sign the DSA. She responded that she believed she had but on further testing of her evidence she was forced to concede she had not: "I-I-I think that's not quite right. I didn't see him actually sign the director service agreement…" I find her answer was generally given honestly but she either did not take sufficient care when submitting the defence to the petition or deliberately misled at times. I cannot discount that her apparent antagonism toward Mr Starling as told in her witness statements, may have distorted her memory by reason of what Dr Elizabeth Loftus, the

celebrated American cognitive psychologist, described as misinformation effect paradigm, where the memory becomes less accurate because of post-event information: the paradigm having been recognised in *Gestmin SGPS S.A.* I shall treat her evidence with caution but that does not mean that the totality of her evidence should be discounted.

82. In closing submissions counsel agreed that the remaining witnesses were of peripheral assistance, save for Ms Rebecca Hughes. She provided a witness statement dealing with the setting up of the business, the SA and DSA, and her departure from the Company. She was an impressive witness. She did not hesitate to say if she could not remember. Her lack of recall is highly likely to reflect (i) the distance in time of the events and (ii) the distancing of her life from Mr Starling and the Climbing Gym. One refrain she had when not being sure of her memory was "I do not remember I think is the best answer." Although she could not recall all the events when she did remember her recall was clear. She had a clear memory of meetings at Mr and Mrs Barden's house to discuss their respective roles and would often qualify her answers to ensure they were accurately given. Her evidence was mostly supported by the contemporaneous documents. She has no connection with the Company and no interest in the outcome of these proceedings. Where there is conflict in the evidence, I shall prefer that given by Ms Hughes.

83. Martin Hughes provided a short witness statement. He had been involved in building the climbing wall for the Company and Avid. He gave evidence about seeing Mr Starling at the Avid site during construction. He gave his evidence in a straight-forward manner and was not undermined in cross-examination. Mr Barford is the operations manager for the Company. He gave evidence about his role at the Climbing Gym. Mr Emerson is a director of a competitor company known as the Climbing Academy. His evidence was that Mr Starling was suspended because of a conflict arose after became involved in setting up the Company which would have been a competitor. His written evidence is "because he had not told us the truth about the depths of his involvement in the Climbing Gym, we made a decision to dismiss him." In cross-examination Mr Emerson accepted that Mr Starling may have resigned before the disciplinary hearing but "He was made aware that a disciplinary hearing would happen, and he chose not to attend." In my judgment his evidence was given honestly and in a straight-forward manner. I accept Mr Emerson's account.

Equitable considerations, the SA and DSA

84. I accept Ms Hughes evidence that she introduced Mr Starling to her friends Mr and Mrs Barden. I accept her description as the truth: "I was the conduit if you like - between Simon's idea to start a climbing wall and the knowledge that Paul and Sue and I were keen on having our own business, so I introduced Simon to Paul and Sue". The foundation of the relationship was enterprise. There was no pre-existing relationship. Ms Hughes evidence is corroborated by Mrs Barden. I accept Mrs Barden's evidence on this issue. She was asked directly about the first time she had met Mr Starling. She said in cross-examination that on that occasion "we were sharing ideas and having a chat about potential of working together".

85. In my judgment the authorities are clear in that Mr Starling has to demonstrate that some special circumstances are present or were present which create a legitimate expectation that the board would not exercise the strict rights and obligations contained in the articles of association or other documentation designed to govern the shareholders' relationship.

86. Mr Starling's evidence is that special circumstances exist. He argues that the idea for the climbing wall pre-existed the Company. He was hoping to go into business with an entrepreneur who had opened a climbing wall in London. When that did not come to fruition, he wished to pursue the idea elsewhere. He spent time and energy looking for suitable premises and meeting planners. His evidence was not undermined on his vision or on the work that he had undertaken prior to meeting Mr and Mrs Barden. He gained first-hand experience of a climbing gym by working at the Climbing Academy in Bristol. He explains that he was highly qualified to start the business as:

> "I have 20 years of climbing experience, indoors and outside, both competitive and recreational. I could see that the climbing market was growing in the early to mid-2000s and wishing to get a piece of the action designed, manufactured, and sold wooden climbing holds to private individuals and climbing walls. I was Captain of the climbing club at the University of the West of England (UWE) and took a key role on the

> committee and arranging for members to take part in national and regional competitions."

87. Mr Starling claims that the climbing wall was his idea, the name for the Company was the name he thought of and the location was the location he chose after research. I accept this evidence in most part. It is corroborated by Ms Hughes version of events. Mr Starling had long held the idea of a climbing wall. Mr Starling's written evidence is that:

> "The Company was incorporated in March 2011 and up to that point I had worked with the Respondents effectively in partnership, to further the venture. We incorporated the Company in order to formalise our working partnership."

88. The use of the word "partnership" was not intended to mean a partnership as recognised by the Partnership Act 1890. The case was not put that way. It is more likely than not that it was intended to convey a sense of unity and purpose between Mr Starling, Ms Hughes and Mr and Mrs Barden.

89. Mr Starling asserts that the relationship was one of "mutual trust and confidence and an understanding that all of us, with the exception of Vernon (who was a sleeping partner), would participate in the conduct of the Company." The understanding is not supported by evidence. Mr Starling does not state how or why there was such an understanding. I accept the evidence of Ms Hughes that her introduction brought together a person who held the idea of a climbing wall and others who had the ability to bring a project to fruition. I accept Mrs Barden's evidence that she and her husband had accumulated funds and gained experience in business through property development. Mr Starling had not at that stage run his own business or started a business. The concept of the climbing wall belonged to Mr Starling, but the business acumen and drive of Mr and Mrs Barden was required to bring it alive commercially. I accept Ms Hughes' evidence that there was no one founder of the Company. I accept Mr Barden's evidence that "None of us were the primary founder, we were all co-founders." He explained in cross-examination that the inclusion in the business plan that Mr Starling was the "founder" was "our fault. We let that be put in. that is an error." He explained "he cannot be the founder because he did not

create the business himself." In my judgment the following response to a series of questions about the issue represents, on the balance of probabilities, the events: "I did not really give it any consideration to be honest. Simon was keen to be called the founder, we were "yeah fine". It did not really mean anything to us." The response of Mr Barden had the ring of truth. In any event viewed objectively the title fails to accurately describes Mr Starling's position.

90. There are contra indicators which in my view tip the balance away from finding that the Company was formed or existed on the basis of personal relationships. First the Company was not born of a pre-existing trading partnership. I have explained how Mr Starling was introduced to Mr and Mrs Barden through Ms Hughes. They were in effect two couples who were looking for a business opportunity, perhaps for different reasons, and determined to work together and (i) produce a thorough business plan for the short and medium term; (ii) invest personal funds (iii) seek an outside investor (who would not be a director of the Company) (iv) seek bank funding and (v) obtain a commercial lease to operate the business of a climbing wall.

91. Secondly, the incorporation of the Company brought with it new rights and obligations that are primarily set out in the Articles of Association. The Articles are in standard form. Article 18 provides for termination of a director's appointment by reason of legal restriction and other grounds that include resignation. The Articles were not amended to include a provision that permitted a shareholder or founding member of the Company to remain director unless he or she resigned or was disqualified by law from holding the office.

92. Thirdly the initial distribution of shares was reasonably equal with each of the four directors holding 21% and Mr Moffet as an investor taking 16%. I accept Ms Hughes' evidence that:

> "Simon made a small financial contribution towards the business. However, I was not able to make a financial contribution. Paul and Sue invested the greater share of equity in the business, and took the full financial risk of the business, placing a bank loan against their home. I

> have no recollection of Simon taking any financial risk. A joint decision was made due to my lack of financial contribution, that my share of equity would be reduced and that my remaining shares of 11% were given to Simon".

93. The insistence that shareholders should have a financial stake in the Company is a strong indicator that the Company was a commercial enterprise rather than one built on personal relationship.

94. Fourthly, the early planning, agendas, detailed business plan, progress reports, minutes of internal and external meetings, register of applications, allotments ledger and share certificates are indicative. The focus on company law compliance is evident and points to an intention to operate the Company based on commercial considerations rather than personal relationships.

95. Fifthly, the Company instructed solicitors to draft a shareholder agreement. As originally drafted all shareholders were to be employees of the Company. Mr Starling e-mailed the solicitors on 25 September 2011 seeking clarification:

> "Please clarify why a shareholder has to be an employee (article 8) our private investor will be a shareholder but not an employee."

96. The final version of the SA excluded Mr Moffet from clause 8. It contains a provision that "if any shareholder other than shareholder E ceases for any reason to be an employee of the Company the relevant employee shall be deemed to have given a Transfer Notice in respect of all his shares on the Effective Termination Date." Shareholder E is Mr Moffet. By clause 10 of the SA where a shareholder holds less than 10% in nominal value of the issued ordinary share capital and is an employee "he shall immediately resign any office and employment with the Company." clause 13 provides that the shareholders are "not in partnership with each other, nor are they agents of each other." Clause 20 is an entire agreement clause so that the SA "constitutes the whole agreement between the parties and supersedes any previous agreement, understanding or agreement between them relating to the subject matter they cover."

97. As the SA expressly excluded any understanding or agreement prior to 16 March 2012 Mr Starling would have to demonstrate that special circumstances existed so that a quasi-partnership came into effect after that date. He provides no evidence that this was the case. As regards any restriction regarding the disposition of shares, it is true that a pre-emption clause creates is a restriction of sorts. Arguably it is not the type of restriction envisaged by Lord Wilberforce in *Ebrahimi*. In any event the professional drawn SA, freely agreed to and signed, where all relevant parties were able to comment and seek amendment represents strong evidence that the Company was not operated on the basis of personal relationships.

98. Lastly the DSA governed the relationship between the Company and the directors. On Mr Starling's evidence he was keen throughout the process to ensure that he understood the detail of the DSA. On his evidence he was not prepared to sign the DSA until he had a meeting with solicitors. This evidence is indicative of a commercial relationship where the parties understood that they were reducing their rights and obligations to writing. If Mr Starling is right in his assertion that equitable considerations should apply, one might anticipate that the DSA would expressly state that the directors would all participate and always participate in the Company's corporate governance if that was intended. It does quite the opposite. It makes provision for termination of a director's office. Clause 2 provides that Mr Starling "will have no right to hold office as s director…and shall resign immediately from any such office without claim for compensation upon the request of the Board." Provision is also made the Board to sign on his behalf "any resignation" upon the commencement of "Garden Leave" or "Termination".

99. In my judgment Mr Starling has failed to demonstrate special circumstances of the type and nature required for a quasi-partnership. The history of the relationships, the incorporation of the Company and the documents governing the relationships I have mentioned, ease out any room for the imposition of equitable considerations: the documents I have mentioned are inconsistent with a personal relationship of a kind required.

100. As in *Re Coroin Limited (No 2)* I find it hard to imagine how it would be appropriate to overlay the SA and DSA any equitable considerations to give rise to a right in all shareholders, or at least in the petitioner shareholder, to participate in the conduct of the business.

The DSA

101. It is convenient to deal with whether Mr Starling signed the DSA here as it is mentioned in the context of the argument concerning quasi-partnership. Mr Starling's assertion that he did not sign the DSA is inconsistent with not knowing whether he did or did not sign it. Mr Barden's evidence that he recalls taking signed copies to the solicitors on the way to work in Taunton is unsupported and contradicted by an e-mail from the solicitors in May 2013, close to the event: "We do not hold any signed service agreements." Mrs Barden's evidence that she was present when Mr Starling signed was undermined in cross-examination.

102. It is known that the DSA was sent to all directors. It is accepted by the three main actors that they considered the agreement binding. It is known by reason of an e-mail dated 12 February 2012 that the solicitors had informed Mr Starling and by extension, Mr and Mrs Barden, that they did not require a signed copy of the DSA. It is accepted by Mr Barden that he deleted an unsigned copy of the DSA that was to be signed by Mr Starling. Much was made of this event. I find that the evidence of the destruction or deletion from the server immaterial. The act of deletion was not nefarious. I accept Mr Barden's evidence that it did not matter because he held another copy of the unsigned DSA. It was not suggested that he deleted the signed copy. There would be every reason to preserve a signed copy. There is no evidence to contradict the assertion that Mr Starling deleted a considerable amount of material from his laptop prior to the disciplinary proceeding (something I shall return to). His explanation for deleting the material is that it was normal practice. There is no evidence that deleting approximately 600 documents shortly before an important meeting is normal practice. I cannot discount the possibility that a copy of Mr Starling's signed DSA was one of the deleted documents, having been scanned onto the system or otherwise uploaded.

103. In her written evidence Ms Hughes recalls that her neighbour witnessed Mr Starling's signature on the DSA. She was tested on her evidence. She accepted that she did "not remember physically the act of signing" the SA but her evidence in respect of the SA was striking for its clarity and description. I set it out at length due to its importance to my finding:

> Q. Now, let us just return to Angela Clarke. Was anyone with you when Angela Clarke witnessed the directors' agreement you are talking about in your paragraph 12?
>
> A. No. It was in Angela's kitchen, she's my next door neighbour. Simon, myself and Angela were present
>
> Q. So just to confirm, no one else was with you. It was just the three of you.
>
> A. Yes.
>
> Q. When you say she was your next door neighbour, was she also Simon's next door neighbour because I think you had the same address at that time?
>
> A. He used my address. We did not live together at that point. We never lived together.
>
> Q. So, she was my next door neighbour, not Simon's. I see. And so it was in the kitchen, you say?
>
> A. Yes, I - I recall walking into Angela's house, Simon behind me, straight through the hallway, small hallway, into the kitchen of the house, table is on
>
> eating in front of Simon and I.
>
> Judge Briggs: Yes. Can you continue?
>
> A. And I remember signing the document. I remember the document being part of The Climbing Gym and I remember Angela witnessing the document and I remember Simon signing a document as well.
>
> Judge Briggs: When you say 'a document', do you remember if it was this document, the director's agreement? Could it be a different document?

A. I would say my understanding is that it was the director's agreement. Do I remember clearly seeing the director's agreement on that piece of paper? No, I don't, don't. But --- as I am recalling events I recall that as signing a document which I believed to be the director's agreement for The Climbing Gym…

Q. Mr Tannock: My Lord, thank you. Now, Ms Hughes, I am sorry to be so pedantic, but this is a somewhat important issue for us and if I could ask you just to look at paragraph 12 and your last sentence there.

A. Yes.

Q. The last portion of the last sentence, you say: "Accountant witnessing both mine and Simon's signature on our director's agreement". And several times in the description you have just given you have mentioned 'the document' and 'a agreement'. So, are you meaning here that Angela Clarke signed your director's agreement - witnessed your director's agreement?

A. Yes, I believe she did.

…

Q. Ms Hughes, what is it about that day, that occasion, because you must have been into Angela's kitchen a few times, but what was it do you think that sticks out in your memory about it? Why is it that it sticks out in your memory?

A. Excitement.

Judge Briggs: Excitement?

A. Excitement in that witnessing an agreement, it was my first business at the time, it was a business with the person that I was in a relationship with, it was exciting and I have asked myself why I remember so many of those details as well and I believe it was because for me, having that document witnessed, was like the confirmation of something that was quite important to me at the time. I'm not saying it's important to me now, but, at the time, in the context of the excitement of having a business, the excitement of having a business with the person that I was in a relationship with, that was something that I found quite exciting and I think that is why I remember clearly being in that kitchen

> Judge Briggs: Yes. Do you remember the day of the week?
>
> A. No.
>
> Judge Briggs: Do you remember whether it was a cold day, or a warm day?
>
> A. Not clearly.
>
> Judge Briggs: Can you remember whether it was raining?
>
> A. I wasn't wearing a coat. I can't remember what I was wearing, but I know I wasn't wearing a coat. And I would say a fair day, but I'm-I'm-I'll be honest, I'm pulling on memory here that I haven't had to recall for-since
>
> Judge Briggs: What did you do after those documents were signed?
>
> A. I don't clearly remember what I did afterwards, or what we did afterwards. I simply remember I have a snapshot of that.
>
> Judge Briggs: That is very helpful, thank you very much."

104. In my judgment the fact that she could not recall the act of signing has a ring of truth and is unsurprising when set in the context of the emotions she described experiencing at the time. Mr Newington-Bridges described her evidence as powerful. I agree and find that on the balance of probabilities the DSA was signed by Mr Starling as described by Ms Hughes. She had a clear recall of the event, supported by a compelling reason for its sharp quality.

The dismissal investigation and hearing-discussion

105. In his witness statement in support of the injunction Mr Starling explained:

> "I have genuine concerns that my dismissal was wrongful and that the disciplinary process, commenced in the Company's name, was unfair and biased. The investigation report, the investigation itself and in the Company's name, was unfair and biased. The investigation report, the investigation itself and the disciplinary meeting together with the outcome letter were undertaken by Paul Barden. There is a clear potential for a conflict of interest to arise as Paul, and the remaining shareholders, would have a financial benefit (at least in the short term)

> from having me removed, in light of the share transfer provisions contained in the Shareholder Agreement."

106. The link to dismissal from the Company and the share transfer is a matter that Mr Starling is entitled to be concerned about. This is especially so since Mr Barden wrote to Mr Starling the day after he was sent a letter informing him that his appeal against dismissal had been rejected. Mr Starling suspects an immoral motive but does not claim bad faith. If dismissed, Mr Starling would be forced to sell his shareholding in the Company as a "Bad Lever". I remind myself that this court is not seized of the employment tribunal proceedings, but the court may consider whether the dismissal proceedings were conducted in good faith.

107. The investigation into Mr Starling's conduct resulted in both an interview and an investigation report produced by Mr Barden. Insofar as I need, I make the following findings of fact. First, that the disciplinary investigation and hearing was conducted in an open manner. Secondly, it is possible to criticise the disciplinary proceeding for (among other things): (i) not employing an unconnected third party (possibly a lawyer); (ii) Mrs Barden acting in the role of note-taker; (iii) Mrs Barden stepping outside of her designated role to be involved in the evidence; (iv) the questioning of Mr Starling at times losing focus; and (v) a failure to follow through on some questions. Thirdly, there is no reason to find it was conducted in bad faith. The issue was put squarely to Mr Barden in cross-examination:

> "Q. Now, Mr Barden, I asked you what the aim of the investigatory process was and I am suggesting that the aim of the process of your investigation of all of the various things you looked at was to find any means to justify Mr Starling's termination.
>
> A. That is not correct.
>
> Q. Rather than investigating genuine gross misconduct.

> A. That is not correct. If, at the end of the discipline hearing I had found him – I do not know what the correct word is – not guilty, or not charged, then there would have been a number of options. He could have received a verbal warning, a written warning, or he could have just returned back to work, or, if he was found guilty, he would have been dismissed. So, it was absolutely fair."

108. I find the evidence of Mr Barden given above honest and straight forward, and the documentation supports the finding. Mr Barden obtained legal advice about the procedure prior to commencing the proceedings, and Mr Starling was: (i) given advance notice of the investigation; (ii) given an opportunity to call witnesses at the hearing; (iii) provided with a chance to put forward evidence in support of his case; (iv) provided with a reasonable period of time prior to the hearing (1 month); (v) given a list of questions in advance of the second interview; and (vi) invited to bring a third party to the hearing such as a colleague or union representative. Mr Starling was accompanied by Neil Carter. Against this is the letter of 24 October 2018 notifying Mr Starling of the deemed share transfer provisions in the SA. The letter alone is insufficient to upset the findings I have made and infer bad faith.

The disciplinary investigation and hearing issues

109. A report produced by Mr Barden following the investigation includes many allegations against Mr Starling. As the main issue before the court concerned Avid and Mr Starling's failure to disclose the opportunity to the Company, many of the misconduct matters were not before the court for determination. I mention them for the sake of completeness and because they are likely to play a role in relation to the exclusion from management determination: (i) deleting e-mails from his account; (ii) using a second computer with a software licence without informing the management; (iii) setting up a domain name with "super priority"; (iv) discussing the investment in Avid with an employee; (v) intention to be a director of and receive a salary from a third party; (vi) informed the directors that he had an option to set routes for a third party; (vii) strained relationships with some suppliers when the Company was building the climbing wall; (viii) not working normal working hours; (ix) during the build of the Company's climbing wall Mr Starling in his

capacity as project manager made some errors and; (x) "Simon's performance … is sporadic and when compared to his activities outside the company mirrors his attendance at work and output i.e. when he is conducting personal opportunities, external meetings and taking third party calls when at work his output and performance significantly drops". Some or all these matters may amount to legitimate grounds of complaint. I do not need to decide their severity. It is sufficient for present purposes that the matters investigated and dealt with at the disciplinary hearing may, with some legitimacy, have given rise in the board's loss of confidence in Mr Starling.

110. It is convenient to deal with the data protection issue (which I have already described as historic) here. That is, the sending of data to Mrs Starling at Lloyds Bank for the purpose of assisting with the production of a spread sheet. Mr Starling states that he did not breach confidentiality or data protection by sending data to his wife at Lloyds Bank. I find the following evidence of Mrs Starling was not compromised in cross-examination and represents the truth:

> "I recall that when I first met Paul and Sue I told them that I could help if they ever had any excel spreadsheet needs. Of course as part of my job I am very experienced with formulas and data analysis and felt that that was something I could offer to the three of them. I vividly remember having a conversation of this nature when we had gone out for a celebratory dinner after we had secured the terms for the premises and the respondents were more than happy for me to help."

111. Mr Barden accepted that any technical breach had no serious consequences. On the basis that there was a technical breach of data protection, Mrs Starling's evidence and Mr Starling's evidence on the issue [para 129-130 of his third witness statement] lead me to conclude that the Company's governance approved in advance assistance from Helen Starling and it would be expected that data would be sent to her and for her to keep that data confidential: *EIC Services Limited v Stephen Phipps & ors* [2003] EWHC 1507 [para 13]. I find that she did keep the data confidential and conclude that this historic matter should have had no role to play in the dismissal.

112. I add that one of the mysteries of the case is why Mr Barden decided to raise it at all during the disciplinary hearing as the matter had been settled. If that were not enough an allegation was then made that Mrs Starling had been investigated for gross misconduct at Lloyds for assisting with the spreadsheet. This was resoundingly denied by her line manager. The line manager stated in an e-mail that she "is a trusted and valued colleague" and spoke of her expertise.

Conflict of interest

113. In his written argument Mr Tannock set out how Mr Starling's view of the conflict of issue:

> " 6.3.2. Simplistically, Mr Starling was dismissed for being involved in a supposedly competing business ('Avid') and the court will need to decide if Avid was a competitor. Mr Starling says that Avid, whilst also a climbing centre, was obviously non-competitive with the Company principally because the two business are local in nature and Avid's premises in Suffolk is some 200 miles away from the Company's premises in Bath.
>
> 6.3.3. The court will, also, need to decide whether Mr Starling's investment and/or involvement in Avid would give rise to a conflict of interest on his part. Mr Starling says that, from the objective standpoint of a reasonable person, investment and involvement in Avid would not "reasonably be regarded as likely to give rise to a conflict of interest" per s.175(4) of the Companies Act 2006."

114. The disciplinary investigation report contained an introduction which sets the scene:

> "It came to the Company's attention on the 2 December 2017 that Simon was intending to invest in and work for a competing business. Simon repeatedly refused to disclose details of that investment since this time. In order to protect itself the Company decided to introduce updated Service Agreements for each of the Directors. These agreements included amongst other things, amplified confidentiality

> provisions. However, Simon did not sign the Service Agreement and no further progress was made in agreeing the Agreement. More recently it was discovered that Simon had chosen to pursue the opportunity for his own interests and that was the venture he was proposing to invest in. There was also concern that Simon had entered into a variety of non-disclosure agreements with parties who were assisting with that venture, with one such party being supplier of this business."

115. In a section titled "Facts established" the report stated:

> "Early in the Company set up, the directors met, and it was agreed that any director would be allowed to invest externally provided the investment did not impact adversely on the business and that the director did not use lessons learned from the Climbing Gym or any confidential information for personal gain and that existing directors and shareholders were briefed and informed. This was acknowledged by an email from Simon on the 2 Dec 2017 following a Directors meeting."

116. Other "established" facts included the following:

> a. "Simon had not disclosed until asked, his current and future involvement in other business opportunities in Lincoln.
> b. Simon appears to have diverted business opportunities away from the Company to himself.
> c. No other contact made with third parties has been entered onto the Conflict of Interest log, therefore not disclosed to the Company.

117. Mr Starling emphatically denies that he used suppliers to the Company to assist in creating the Avid climbing centre; did not share planning data; did not fail to meet the requirement to attend the Company's climbing wall in Bristol when required and "I have not followed up any communication that would have been an opportunity for the company, nor denied the other shareholders of doing so. Many climbers contact me with

suggested venues and occasionally I have a brief chat or informal emails with them, but these are not viable opportunities as stated above and go no further".

118. In his closing Mr Tannock confined the gross misconduct and dismissal issue to the Avid investment and other potential opportunities. That was partly due to the evidence that unfolded during the trial. In cross-examination Mr Barden made his position clear "The gross misconduct, as we've said already, is conflict of interest, taking business opportunities and behaving in a way that is not trustworthy of a director..." Mr Tannock referred to the Company's employee handbook which contains a definition of gross misconduct, submitting that if there was a conflict of interest it was not serious, as defined by the handbook. If the conflict was not serious Mr Starling should not have been dismissed and by extension excluded from participating in the management of the Company. He rightly accepted the opposite conclusion would follow if there is a finding that Mr Starling was guilty of gross misconduct.

119. I find that Mr Barden was mistaken about how the opportunity to invest in Avid came to the attention of Mr Starling. In my judgment his evidence was not convincing on the issue. The opportunity is more likely than not, to have gone direct to Mr Starling due to Ms Barker's friendship with Ruth Warren. I find that Ruth Warren had spoken to Mr Starling. It was Mr Starling who gave her his business card. Ms Barker's evidence that: "It was in or around January or February 2016 that I spoke to Simon on the telephone after Ruth had spoken to Simon asking if he would be prepared to speak to me about my idea" was not undermined and is likely to represent the truth.

120. A necessary first step when considering the no conflict rule in this context, is to determine whether the conflict was real. Mr Tannock's formulation of the question is to ask if Avid was a competitor. If the court were to use his formulation, then a clear-cut case where no conflict will be found may be where an investment had been made by one of the directors in an IT start-up company based in London. The IT company would not compete for business with a climbing wall centre in Bristol. At the other end of the scale a conflict would arise if a director had become a shareholder and director of a climbing wall company within Bristol.

121. The business of the Company is fixed in location to the premises in Bristol. The Company does not participate in nationwide or worldwide sales of a product that would have to compete with Avid. The distance between the Company operation in Bristol and Avid in Ipswich is therefore relevant and indicates that that there is either no conflict or that the duty cannot reasonably be regarded to have been infringed. Ms Barker thought it possible that a climber using Avid in Ipswich moving to Bristol for work or university would benefit the Company. Avid, in this scenario, would act as type of nursery. A climber would not travel 200 miles to Ipswich to climb in circumstances where a larger more expansive climbing wall is in the city of the climber's work or study. Ms Barker also gave evidence that the climbing fraternity is cooperative and not overly competitive. If the question of a conflict is constrained to an analysis competition, it cannot reasonably be regarded as likely to give rise to a conflict of interest.

122. Mr Barden did not accept that Mr Starling's time and attention to the Company would remain unchanged if he had taken a serious stake in another company. He was asked in cross-examination in what way did Mr Starling act in breach of duty and conflict of interest. Mr Barden responded:

> "So he - he - he did it over - so November 2017, he told us he was going to invest in the - the company. He didn't tell us for approximately 18 months when we found out that it was Avid and he didn't tell us because he knew Avid had approached Bloc, and so it's an opportunity that should have been looked at by Bloc Climbing. So, because of the nature of the way he operated, and he was doing less and less time at work."

123. On the last issue he raised about time at work, Mr Barden was talking about work for the Company. The evidential burden rested with the directors to prove the assertion. The nearest the evidence gets to that point, is that Mr Starling was seen by Mr Hughes at the Avid site during the working week by Mr Hughes. In his third witness statement Mr Starling says:

> "I did not work at Avid Climbing. I am an investor. I played no part and still do not, in the running of Avid Climbing's business…I attended

> Avid Climbing's site maybe 5 times in 2018 prior to my suspension in July 2018, always in my own time. I never attended site when I should have been working. It has been claimed in Sue's WS that I was there on Monday 3 September 2018 but I actually had a meeting with my solicitor in Bath that day. I was there at the weekend before that for Lindsay Barker's 50th birthday celebration with Helen and my daughter. I returned on Tuesday 4 September 2018 (late afternoon) for a meal out. These three occasions were nearly two months after my suspension in July 2018."

124. Much of Mr Starling's evidence set out above has the ring of truth, but it is not complete. He is an investor and may not play a part in the day to day running of Avid. Ms Barker's evidence that Avid was to be her project was strong. He is likely to have been present on the birthday occasion he mentions and may have visited Avid in his free time. Does this exclude the possibility of Mr Starling working at Avid at all or at a time when he could have devoted his time to the Company? This question may be answered by understanding whether his role was purely as an investor as claimed. Ms Barker's evidence of her association with Mr Starling sheds some light. She accepted in cross-examination that she had very limited knowledge of climbing. Mr Starling has great experience of climbing. Her evidence that she had "never been an operational person" is pertinent. Mr Starling was the Company's operations director. She conceded that she wanted to know about finances for a climbing centre: Mr Starling had been involved in the same business.

125. I prefer the evidence of Mr Hughes over that of Mr Starling. He did work at the Avid site during the working week and at times when he could have been working for the Company. Mr Hughes had no interest in making-up the events he said he witnessed. He reported seeing Mr Starling soon after the event. He candidly accepted in cross-examination that he had seen Mr Starling with his daughter which is suggestive of a social occasion. In my judgment a social occasion and work occasion are not necessarily exclusive. On the balance of probabilities it is unlikely that Mr Starling, with experience of constructing a climbing wall gained from the Company, his business experienced gained from being a director of the Company and his knowledge as a surveyor, would

have travelled to Ipswich, seen the climbing wall under construction, agreed to be a substantial investor, having a substantial interest in the success of Avid and not concerned himself at all in its progress. The directors of the Company were right to be concerned about Mr Starling's work patten.

126. Returning to Mr Barden's evidence as set out in paragraph 121 above, he thought a conflict of interest arose between Mr Starling's own interests and that of the Company because Avid provided an opportunity. That Avid presented an opportunity cannot be denied. Mr Starling is heavily invested in Avid. Mr Starling argues it was not an opportunity lost to the Company. The negative argument is not easy to prove.

127. Ms Barker first denied that she would be interested in working with the Company. The only use the Company would have been to Avid was as an outsider investor: injecting capital in return for shares. Her evidence was not entirely consistent. In cross-examination she said that Avid presented no opportunity to another company and that she had made that clear to Mr Starling:

> "So, you know, I would have been very, very clear in those early conversations with Simon that it was not an opportunity for another company, this was about me building my company. And indeed, you know, I did not expect him to say he wanted to invest, I was looking for some advice and guidance at that point so it was great when he said actually you know, I would be interested, it is very early days, but you know, if you want to stay in touch that would be good."

128. Her evidence did not match her actions. She did not start Avid without assistance from others. She was working full-time when she first saw the Climbing Gym in Bristol. It was her experience of the Company that gave her the idea to start a similar (albeit suited to the locality and her personal aspirations) company in Ipswich. To achieve her goal, she relied on Kevin Ward who was an ex banker and able to assist with the financial planning. She was impressed with the Company and what it had achieved in Bristol. She wanted contact with Mr Starling (due to her relationship with Ruth Warren) to help with understanding the business and, according to her oral evidence, to help her get Avid up and running.

129. In my judgment she found Mr Starling's input valuable if not very valuable. She described his experience as "considerable" and contrasted her own in the sector as "very limited". Although she said that her friend Kevin would help with the finances (she did not need Mr Barden to assist) she did consult Mr Starling about the feasibility of Avid and the business plan: "we certainly would have shared the business plan and the financial assumptions with Simon"; "we definitely consulted Simon on the business assumptions". She agreed Mr Starling had direct contact and discussions with Kevin (in her absence). She thought that Mr Starling would have "interrogated" the financial planning. Mr Newington-Bridges put a hypothetical position to her, suggesting that she would have been interested if the Company had offered to invest a large sum of money in return for a low percentage of the shares in Avid. She first thought that such a proposition would have been unacceptable. The reason she gave was that she was concerned about losing control of Avid. Revealingly she later gave the following evidence:

> Q. Yes. If a company like The Climbing Gym came to you and said "we would like to invest £200,000 in your business for a 10 percent stake", you would have kept control, would you not?
> A. I assume so, I do not know, that did not happen, so I do not know.

130. This evidence suggests that the door was not entirely shut. I infer that it was not shut and Ms Barker would have been prepared to discuss terms with the Company, especially as the Company included a director who she prized for experience and knowledge. Avid and the Company were prevented from discussing any opportunity because of the choices made by Mr Starling. I infer he thought the opportunity good and wanted it for himself. In my judgment the circumstances gave rise to information which was relevant for the Company to know and an opportunity that could have been explored by the Company. It is not relevant whether or not the Company or Avid would have agreed to advance their mutual interests but I observe that the Company was interested in growth and Avid did settle for a large investment for all but half of the company's shareholding.

131. I conclude Mr Starling as a director of the Company failed to avoid a situation in which he took a direct or indirect interest that conflicted, or possibly may have conflicted

with the interests of the Company. The interest he took in Avid can reasonably be regarded as giving rise to a conflict of interest. He failed to seek authorisation and the circumstances I have described can reasonably be regarded as likely to have given rise to a conflict of interest.

Exclusion - discussion

132. Having found that the investment by Mr Starling in Avid can reasonably be regarded as giving rise to a conflict of interest, that the disciplinary proceedings were carried out in good faith, I find that the management were not wrong to oust Mr Starling as a director. I would regard a breach of the no conflict rule as a fundamental breach of duty to the Company, and a breach of the DSA. I do not make a finding about gross misconduct. The issue is before the employment tribunal.

133. I have found that there is no quasi-partnership. The consequence of that finding is that there are no overlying equitable considerations. In any event although pleaded that there was an understanding that members of the Company would participate in the conduct of its business and Mr Starling states the same in his written evidence he also accepts that he is bound by the DSA which obligated him to work for the Company for "such hours as are necessary for the proper performance of the executive duties." The obligation was expanded upon by clause 3.1.2:

> "devote his full time, attention and skill to the performance of his duties during such hours as may be necessary for the proper performance of his duties or as the Board may reasonably require from time to time"

134. The board were rightly, in my judgment, concerned to understand how his commitment to Avid would affect his promise to devote his full time and attention during such hours as may be necessary to the performance of his duties to the Company. The concern of the board is borne out by the evidence of Ms Barker who wanted to ensure that "Simon had a real commitment to the [Avid] business".

135. The DSA obliged him to promptly comply with all reasonable instructions from the board and provide "promptly and fully" information about the conduct of the business. It includes an obligation to keep information concerning the Company confidential, by disclosing it to no person (unless authorised) and it expressly provides for termination of office. The grounds for termination include: (a) a failure to comply with a direction from the board; (b) persistent breaches of obligation to the company "whether under this agreement or otherwise" and (c) in the case of gross misconduct. The letter of termination refers to breaches of clauses 3.1.1, 3.1.2, 3.1.3 and 5.1 of the DSA (in summary, failure to carry out his duties and promote and maintain the interests of the Company; devote full time and attention and skill to the performance of his duties; comply with reasonable instructions from the board and not to disclose confidential information).

136. Mr Starling's known involvement with Avid and suspected engagement in its business led the disciplinary tribunal to find that it was "not satisfied" that he was fulfilling his duties to the Company in accordance with the provisions of the DSA, and that he had failed to disclose his outside interest to the Company after being asked. The continued failure to disclose his involvement or provide information that would have been relevant to the Company, I view as a persistent breach of obligation. His refusal to disclose when asked constituted a failure to comply with a direction from the board. Furthermore, it was legitimate for the board to conclude that Mr Starling had provided an insufficient explanation as to why so many e-mails had been deleted at a sensitive time. Mr Starling's evidence in respect of opportunities other than Avid was unsatisfactory. At its highest his evidence is that he mentioned a few opportunities that came to his attention in a casual manner to Mrs Barden. He said that most were worthless. This attitude betrays his failure to understand that it was for the Company's decision-making organ to make that decision, not him personally. On his own evidence he made an unauthorised unilateral decision. Mrs Barden's evidence on this issue I accept. Casual disclosure of some matters was insufficient for the purpose of making a serious business decision.

137. The dismissal letter cites four opportunities that were not disclosed to the board. Having in mind the various incarnations of the business plan, and the evidence of Mr Barden in respect of wanting to explore the Chippenham opportunity, I find that outside opportunities were of interest to the Company. I agree with Mr Newington-Bridges that

information that came to Mr Starling in relation to the opportunities, including Chippenham, were relevant for the Company to know and in accordance with the direction of the board, should have been disclosed. I am mindful of Mr Barden's evidence about Chippenham:

> "[the] opportunity is so good, we probably would have snapped Elkins' hands off to do that one. There was no investment of funds. They were going to build it and they wanted a company to come in and run it and then take 10 per cent margin. It was a great opportunity."

138. These failures of obligation coupled with the matters set out in paragraph 108 above, and the acceptance that Mr Starling deliberately misled the Company's internal disciplinary hearing rightly led to his exclusion from management.

139. He could have been removed as a director by ordinary resolution in accordance with the Company's Articles (section 168 of the Act). Alternatively, the Company could have given notice under clause 2.3 of the DSA and through the mechanism of clause 2.6 placed Mr Starling on "Garden Leave". There was no automatic right for Mr Starling to remain in office. The exclusion was not improper. The exercise of the power to remove Mr Starling was not contrary to what the parties, by the SA and DSA, had agreed.

Other matters

140. A few other matters of unfairness and prejudice are pleaded in the petition although they were not pursued at trial. First that Mr Starling was excluded prior to July 2018, secondly that access to the Company's bank account was suspended thirdly that he was shut out from an annual general meeting, fourthly that the Company paid the legal fees for the defence to the petition, fifthly he had received no dividends since exclusion. In cross-examination Mr Starling accepted that he was not excluded prior to July 2018. There was nothing prejudicial to Mr Starling's interests as a member by not having access to the Company's bank account while suspended. There was no AGM. Further investigation may have to be made in respect of the legal costs, but I am satisfied that if legal costs were incurred for an improper purpose, a remedy may be fashioned through

the share valuation process. As wrongful expenditure on legal costs was not pleaded and the Respondents were taken by surprise at the claim, I make no findings of fact in respect of it. There was no application to amend the petition. I will expect an explanation at the next hearing. Lastly, I am satisfied with the explanation provided by Mr Barden during cross-examination in respect of the failure to pay a dividend during Mr Starling's exclusion. It would have been otherwise if other shareholders had received a dividend and not Mr Starling. The reason for a lack of dividend payments is not because of a policy to exclude Mr Starling from such payments but because of a series of capital and operational costs incurred.

Conclusion

141. I shall dismiss the petition. Mr Starling as member was not unfairly prejudiced by reason of the matters pleaded. On the main issue I find that he failed to avoid a situation in which he has a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the Company. The conflict applied to information and an opportunity. It is immaterial whether the Company could have taken advantage of the Avid information or opportunity. The relationship between the Company and Mr Starling was governed by the DSA that he signed. The relationship between the shareholders was governed by the SA. There was no quasi-partnership. The Company was entitled to terminate his contract of employment.