Neutral Citation Number: [2020] EWHC 2392 (Ch)

Case No: HC-2017-002353

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

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

Date: 15/9/2020

Before:

MASTER CLARK

- -

Between:

HABIBUR RAHMAN	**Claimant**
- and -	
(1) AZIZUR RAHMAN **(2) ICON COLLEGE OF TECHNOLOGY AND MANAGEMENT LTD** **(3) ICON TECHNOLOGY (UK) LTD**	**Defendants**

- -
- -

Andrew Clutterbuck QC and **Changez Khan** (instructed by **Laderman & Co**) for the **Claimant**
Neil Hext QC (instructed by **Smithfield Partners Limited**) for the **First Defendant**

Hearing dates: 20 & 21 August 2020

- -

Approved Judgment

This approved judgment, sent to the parties by email on 15 September 2020, is deemed to be handed down on that date and is to be treated as authentic.

.....

Master Clark:

Application

1. This is my judgment on the application dated 28 July 2020 of the claimant ("C") to strike out certain passages in the Counterschedule dated 31 July 2020 of the first defendant ("D1") and in the witness statements served by him in the assessment of damages in this claim. [References to "C" and "D1" are also to be read, according to the context, as references to their counsel.]

Parties, the background and the proceedings

2. C's claim against D1 is for breach of an oral contract made in July 2003 ("the Agreement") to allot to him 1/3 of the shares in the second defendant ("the Company"), and the third defendant ("D3") (which has never traded). The Company runs a training college called Icon College ("the College"). C and D1 were its three founders, together with a Dr Nurun Nabi.

3. Following a period of difficulty and tension between the parties from about 2006 onwards, there was a breakdown in relations in 2010, which culminated in D1, on 22 July 2010, dismissing C, and excluding him from the Company.

4. C's response was to bring proceedings on 20 October 2010 in the Employment Tribunal ("the ET proceedings"), in which he was successful in showing that he was unfairly dismissed. His claim for wrongful dismissal was initially rejected, but, on a reconsideration hearing, he succeeded in revoking that decision. The first instance hearing of the ET proceedings took 11 days of Tribunal time; the reconsideration hearing another 2 days. The ET proceedings were finally resolved by settlement on 5 May 2014.

5. This claim was commenced on 27 May 2015 in the County Court at Central London.

6. The (amended) particulars of claim asserted the Agreement, that C had been at all material times and was, ready, willing, and able to accept an allotment of shares in both companies. The relief sought was specific performance, alternatively equitable damages in addition to or in lieu of specific performance, or damages for breach of contract at common law, and C's rateable share of any dividends declared by the companies since April 2003.

7. The (amended) defence denied that there was ever any agreement that C, D1 and Dr Nabi would be equal shareholders, and asserted that the agreement alleged by C was insufficiently certain to be legally enforceable. It also raised defences of laches and limitation.

8. The 5 day trial of liability took place in February 2017 before Recorder McAllister. There was little relevant documentary evidence, and no written records of the discussions between C, D1, and Dr Nabi. There was therefore extensive oral evidence from the parties, Dr Nabi, Shakhawat Khandaker (a friend of the parties), Ashraf Mahmud (Head of Student Services at the College from 2004 to 2014) and Raphael Matthews (who had worked part-time at the College).

9. The evidence before the judge included 5 transcripts of conversations in 2009 between C, D1 and Mr Mahmud, as to which she said:

> "Although some time was spent at trial considering the transcripts, in the end I found them of little real use. [C] accepts that he recorded two conversations; there is an issue as to the provenance of the other three. The conversations are in Bengali, and there was a further issue as to the accuracy of the translations. The conversations revolve around salaries, the amount of investments and loan repayments, and are not always easy to follow. The question of shares is raised, but never resolved." [21]

10. C succeeded on liability. The judge gave two judgments.

11. In her first judgment, on 27 March 2017, the judge reviewed and made findings in respect of the entire history of the relationship of C, D1 and Dr Nabi, both before and (to some extent after) the incorporation of the two companies, and the setting up and running of the College.

12. Her key finding was that the three founding members of the College agreed at the outset that they were equal shareholders, and would each be directors; that it was a joint venture from the outset [59].

13. She also made findings that:
    (1) D1 and Dr Nabi's attempts to describe C as much less qualified, less educated and with very limited relevant experience were "not borne out by the totality of the evidence" [9];
    (2) C and D1 "considered themselves and acted as equals" [10];
    (3) a wide range of tasks were carried out by C in dealing with students and all aspects of the administration of the College [33];
    (4) C was treated by D1 and Dr Nabi (and by the staff) as a director from March 2006 onwards [34];
    (5) C held himself out as a director to the outside world [35];
    (6) the discussions, some time after the Agreement was made, about the respective contributions of the three founding members related to the question of how much each should and did take by way of salary and loan repayment, and not to their share entitlement [59];
    (7) there were tension, disagreement, and difficulties in the parties' relationship from about 2006 to July 2010 (when the letter was written dismissing C) [38] - [43].

14. A key element in the judge's conclusion was D1's oral evidence, which differed materially from his witness statement, and which she recorded as follows:

> "In essence, [D1] accepted that all three were co-founders and business partners, all three were to be appointed directors; all were to be registered as shareholders at some point when the issue of [C]'s credit rating and other issues had been resolved, and all three would invest their own money." [27]

> "In terms he stated that assertions such as 'it was never agreed by him that he would allocate shares to [C]' and '[C] had no entitlement to shares or a directorship of the company' misrepresented the position." [30]

15. Dr Nabi's oral evidence also differed materially from his witness statement. He agreed that "the three were business partners and co-founders and would all be directors at some point." [31]

16. As to laches, the judge set out the test at [61]:

> "Laches is established when two conditions are fulfilled. There must first be an unreasonable delay in the commencement or prosecution of proceedings for specific performance, and, secondly, in all the circumstances the consequences of delay must render the grant of relief unjust. Aldous LJ in the Court of Appeal in *Frawley v Neil* [2000] C.P. 20 stated: '*The more modern approach should not require an inquiry as to whether the circumstances can be fitted within the confines of a preconceived formula derived from earlier cases. The inquiry should require a broad approach, directed to ascertaining whether it would in all the circumstances be unconscionable for a party to be permitted to assert his beneficial right.*' … This investigation is necessarily fact specific."

17. The judge then recorded D1's submissions that C had delayed unreasonably in not making his claim, and that, in any event, the prejudice to D1 was manifest [62]. This included taking on a personal debt, and his own (and Dr Nabi's) hard work in creating an entirely new busines model.

18. However, the judge accepted C's submissions that:
    (1) D1 did not come to the court with "clean hands", having wrongfully dismissed C on the basis of fabricated allegations [63];
    (2) C had made it clear to D1 before the ET proceedings were brought by him on 20 October 2010 that he intended to pursue his claim in relation to the shares [63];
    (3) the growth of the College had been very much to D1's advantage [64];
    (4) the essential model of the College remained the same: the trading name, reputation and good will were all the same, and in each case built on the hard work of all three co-founders [64];
    (5) C had not stood back to see "which way the wind blew" [65].

19. She concluded therefore that C was entitled to call for an allotment of a one third shareholding in the two companies.

20. Following the circulation of the draft of the first judgment, the defendants raised two further issues, and a further hearing took place. Those two issues were:

    (1) whether an order for specific performance should be granted, or whether there should be an order for damages in lieu;
    (2) the limitation period in relation to C's contractual claim to damages.

21. The judge delivered her second supplemental judgment on 11 July 2017. As to the first issue, she concluded that, given the nature of the relationship between the parties and, as she feared, the risk of further litigation if C were to be given a share, damages in lieu was the appropriate remedy.

22. As to limitation, the judge held that the breach of D1's initial promise to allot a share to C occurred within a reasonably short time after an important meeting in June 2009, and that since the claim was issued within 6 years of that June meeting, it was not barred by limitation.

23. In the alternative, the judge held that there was an ongoing obligation to allot a share to C, and that D1 was in continuing breach of that obligation. She held that the ET proceedings were the time when "[C] elected to treat the continued non-performance as repudiation of the contract. The relevant date, on this analysis, is 19 December 2010". (This date should be 19 November 2010 (as is apparent from the judge's order), being the date of the College's defence in the ET proceedings, which disputed C's entitlement to any share ownership in the College.)

24. The judge's order dated 3 August 2017 provided:

> "5. There shall be an assessment of the damages suffered by the Claimant in respect of the First Defendant's breach of contract, as follows:
> 5.1 damages in lieu of specific performance of the contract referred to in paragraph 5.2 below; and
> 5.2 damages in respect of missed or unpaid distributions (namely distributions made to or for the benefit of others by the Second Defendant but not made to the Claimant), on the following footing:
> 5.2.1 the Claimant and the First Defendant entered a contract in September 2003 under which they agreed that the Claimant would eventually be granted a one third shareholding in the Second Defendant and Third Defendant;
> 5.2.2 the First Defendant was in continuing breach of his obligation to allot shareholding from approximately June 2009 onwards and he ultimately repudiated the contract on 19th November 2010 upon service of his "ET3" Response Form in proceedings in the Employment Tribunal (case number 3203565/2010); and …."

I refer to the head of damages under para 5.1 as "the first head" and under para 5.2 as "the second head".

25. On 9 August 2017, the judge transferred the claim to the Business and Property Courts.

26. There was then a procedural hiatus, during which D1 unsuccessfully appealed against the judge's order, including on the ground that she was wrong to conclude that the claim was not barred by laches. As to this, Paul Walker J held:

> "the judge was fully entitled to find that the particular circumstances of the present case did not involve unreasonable delay on the part of [C]." [115]

27. On 14 November 2019 at the first CMC in the assessment of damages, I gave directions for the trial of the assessment. This is listed for 5 days commencing on 19 October 2020. I ordered the parties to seek to agree a list of issues in the assessment, setting out their respective positions on each issue. This was filed on 21 January 2020. The parties' positions as to damages in lieu are set in summary under issue 1:

	ISSUE	**Claimant's Position**	**1st Defendant's Position**
1.	What damages should C be awarded in lieu of specific performance of D1's obligation to transfer or procure the allotment to him of 1/3 of the share capital of each of D2 and D3?	C should be awarded under this head a figure equal to 1/3 of the fair value of the share capital of D2 and D3: (i) valued as at the date of valuation, (ii) not discounted to reflect a minority shareholding and (iii) adjusted upwards to reflect marriage value (see Issue 1.4). The fair value of the share capital of D2 and D3 will be a matter for expert evidence in due course. On the exchange of such evidence further issues may be identified, in particular whether adjustments stand to be made to D2 and D3's financial statements.	The fair value of a notional shareholding equating to one-third of the share capital of D2 and D3 should be assessed as at 19 November 2010, alternatively 14 July 2016, alternatively 14 July 2017. It is denied (a) that it is appropriate to ignore the discount that would be applicable to a minority shareholding, and (b) that C is entitled to any adjustment upwards to reflect marriage value. Further or alternatively, D1 is entitled to adjust the valuation downwards to take account of the windfall that C would otherwise receive reflecting the significant investments, both financial and in kind, that D1 has made in the company since C's departure. D1 will respond to any adjustments to financial statements that are alleged to be appropriate when those adjustments are proposed. Any such adjustments should be set out in C's Schedule of Loss.

28. As to the parties' positions on distributions,

2.	What damages should C be awarded to reflect missed or unpaid distributions (the term "distribution" being defined as at para 5.2.3 of the Order of Recorder McAllister dated 3 August 2017)?	C should be awarded under this head a figure (i) equal to the distributions made by D2 and D3 to or for the benefit of D1 or to other parties on the account of D1; alternatively (ii) equal to 1/3 of the distributions that have been made by D2 and D3 to parties other than C.	Damages for allegedly unpaid distributions cannot be awarded in respect of periods prior to June 2009, or after the date the court adopts for the valuation of D2 and D3. The basis for calculation of damages asserted is denied. Save as aforesaid, no admissions are made as to the alleged or any entitlement.

29. As to interest, D1's position, so far as relevant to this application was that "any interest should be reduced in any event to reflect C's delay in bringing these proceedings". No period of delay is specified.

30. On 14 November 2019, I also ordered that C should serve a Schedule of loss setting out the amount he is claiming, and that D1 should serve a Counterschedule, setting out which amounts are agreed or disputed, and why.

31. C's initial Schedule of loss was dated 27 March 2020. Witness statements were due to be exchanged after service of the Counterschedule, but for reasons which it is not necessary to go into, C was directed to file and serve an amended Schedule.

32. This meant that the parties exchanged witness statements in mid July 2020, before C's amended Schedule was served on 22 July 2020. D1's Counterschedule was filed and served on 31 July 2020.

33. The application originally sought only to strike out, pursuant to CPR 32.1:
    (1) D1's 10th witness statement dated 13 July 2020: paragraphs 4 to 110, 132 to 135, and 161;
    (2) the statement of Dr Nabi dated 10 July 2020;
    (3) the statement of Mithra Dulloo dated 12 July 2020;
    (4) the statement of Sue Hindley dated 13 July 2020.
    I refer to this as "the disputed evidence".

34. However, following service of the Counterschedule, the application as amended (without objection by D1) also seeks to strike out, pursuant to CPR 3.4(2)(a) and (b), paragraphs 6(d) and 20(c) of the Counterschedule. C's skeleton argument added (again, without objection) paragraphs 139 and 140 of D1's 10th witness statement as passages sought to be struck out.

35. D1 sought to criticise C for the timing of his application. He submitted that C had known about D1's case both on date of valuation and on delay since January and treated that as part of the agreed issues. I do not accept the validity of that criticism or that there has been a "dramatic change" in C's position. The list of issues sets out D1's contention for a valuation date of November 2010 without any articulation of its basis. That only became apparent on the exchange of evidence in mid-July 2020, and C's application was issued within a reasonable time of that.

36. Although D1 now seeks to rely on C's role in the College and his conduct in relation to whether his shares should be valued with a minority discount, the list of issues gave no forewarning of this. As to delay, the only reference to this in the list of issues is in relation to interest – again, there is no articulation of D1's case that the 14 July 2016 valuation date will be based on delay. In response to an inquiry by C's counsel, D1's counsel did indicate on 23 January 2020 that the July 2016 date was to take account of delay in bringing the claim, but not that D1 would be alleging (as he does in his evidence) a deliberate strategic decision to delay bringing the claim.

The disputed evidence

37. I turn to consider the nature and purpose of the disputed evidence. This is set out in paras 4 to 9 of D1's 10th witness statement dated 13 July 2020:

> "4. I understand that a general rule for assessment of damages is to place the Claimant in the same position as if the contract had been performed.
>
> 5. Recorder McAllister has ruled that I was in breach of a contract entered into in 2003 (to allot a one-third share to the Claimant) from approximately June 2009 to 19 November 2010 (when she says he accepted the repudiation). For the purposes of this statement I will refer to this as period as the '**Breach Period**'.
>
> 6. I will therefore set out what I consider the position *would* have been had the Claimant been allotted a one-third share in the Second Defendant at the commencement of the Breach Period.
>
> 7 The only 2 possible scenarios that *could* have occurred had the Claimant been granted a share at the commencement of the Breach Period are as follows:
>
> a) There would have been a termination of the relationship between the Claimant and myself and Dr Nabi at some point between June 2003 (*sic*) and now;
> b) We would have continued working together.
>
> 8. I set out below the reasons that I believe that option (a) would have been inevitable, the timeframe for when I believe this would have happened and why I think it is inconceivable that option (b) could have taken place.
>
> 9. In order to understand why it would be inconceivable for us to have continued working together, it will assist the Court for me to refer to the events that led to the breakdown in our relationships and the mindset of each of the parties at the time."

Transcripts

38. D1 exhibits to his statement a number of transcripts. These are all undated. The first two appear to be translations from Bengali. The translator is not identified. It is unclear whether the third, fourth and fifth transcriptions are of conversations in English, or in Bengali which has been translated. Their provenance is unidentified.

As matters stand, they are not admissible, since there is no evidence as to who made the recordings, or the transcriptions, or as to the apparent translations.

Paragraphs 6(d) and 20(c) of the Counterschedule

39. Paragraph 6(c) and (d) of the Counterschedule are as follows:

> "6. As to paragraph 5 of the Schedule of Loss:
>
> c. The value of the said notional shareholding should be assessed as at 19 November 2010 at the latest (date of breach), alternatively 14 July 2016 (reflecting C's delay in bringing these proceedings), alternatively 14 July 2017 (the date of Recorder McAllister's order giving judgment), alternatively the date of valuation, alternatively trial.
>
> d. In support of the above breach-date assessment, but without prejudice to the generality of the submissions that will be made, D1 will say that:
>
> i. C would never have received the benefit of the increase in the value of the company that has actually occurred since November 2010 had the contract to grant a one third shareholding been performed. As set out in more detail at paragraph 20(c) below, but for the breach, D1 would have offered and C would have accepted a cash settlement to exit the business based on market value as at November 2010 (at the latest), or D1 would have procured the purchase of C's shares, at market value, by D2 or D1 would have procured the sale of the business, at market value, to another company controlled by him, and/or D2 would have been put into liquidation (whether before or after sale of the business) to permit all parties to withdraw their fair share of its value as it was at that time.
>
> ii. Alternatively, D1 would not have been prepared to put the investment of time and/or cost to grow the business in the manner in which it has in fact grown.
>
> iii. Assessment of the value of the shareholding at a date later than November 2010 would provide C with a windfall reflecting the significant investment, both financial and in kind, that D1 has made in the company since that time. Such a valuation would produce an award of damages that significantly exceeded C's loss."

40. Paragraph 20(c) is as follows:

> "20. As to paragraph 15 of the Schedule of Loss:
> …
> c. It is denied that C is entitled to damages in respect of any distributions made after at the latest 19 November 2010. By that stage, relations

between C and D1 had broken down. Had C insisted on the issue of shares to him, D1 would not have been obliged, nor would he have been prepared, to continue to support and expand D2's business at his own expense but for the substantial benefit of C, nor would he have been prepared to procure the declaration of dividends to benefit C. At that stage, D1 would have offered and C would have accepted a cash settlement based on market value at the time to exit the business, or D1 would have procured the purchase of C's shares, at market value, by D2, or D1 would have procured the sale of the business, at market value, to another company controlled by him, and/or D2 would have been put into liquidation (whether before or after sale of the business) to permit all parties to withdraw their fair share of its value as it was at that time."

Issues in the application

41. As they developed in the hearing, the issues in the application can be summarised as follows:
    (1) whether the valuation date of 19 November 2010 ("the November date") is unarguable as a matter of law;
    (2) whether D1 is entitled to rely on the November date as the date from which C should be treated as no longer entitled to distributions and dividends;
    (3) if the November date is unarguable, whether the evidence is relevant to other issues in the assessment, in particular, to the issue of whether C's share should be valued with a discount as a minority shareholding;
    (4) if the November date is an arguable date, whether the disputed evidence is relevant to that issue;
    (5) whether the disputed evidence is inadmissible as being a collateral attack on the findings of fact made by the judge:
        (i) in respect of the facts relied upon in relation to the November date argument;
        (ii) in respect of D1's allegation of delay by C;
    (6) if the evidence is in principle admissible, whether it should nonetheless be excluded for case management reasons.

Striking out statements of case – the legal principles

42. CPR 3.4(2) provides, so far as relevant:

> "The court may strike out a statement of case if it appears to the court –
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings;"

43. As to striking out for no reasonable grounds, as noted in the White Book (para 3.4.7), there is a considerable overlap between the court's powers under CPR Part 24 and r.3.4; and the court has a discretion to treat an application made under CPR 3.4 (2)(a) as if it were an application under Part 24. In this case, there is no practical distinction in the test to be applied.

44. The principles applicable to summary judgment are well established. They were summarised by Lewison J, as he then was, in *Easyair Ltd v Opal Telecom Limited* [2009] EWHC 339 (Ch), in a formulation approved in a number of subsequent cases at appellate level, including *AC Ward & Sons v Catlin (Five) Limited* [2009] EWCA Civ 1098 and *Mellor v Partridge* [2013] EWCA Civ 477. The burden of proof is on the claimant.

45. Of particular relevance to this claim is the principle derived from *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725, namely, if the application gives rise to a short point of law and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it.

46. This is confirmed by CPR PD3A, which provides:

> "1.6 A defence may fall within rule 3.4(2)(a) where:
> …
> (2) the facts it sets out, while coherent, would not even if true amount in law to a defence to the claim.
>
> 1.7 A party may believe that he can show without a trial that an opponent's case has no real prospect of success on the facts, or that the case is bound to succeed or fail, as the case may be, because of a point of law (including the construction of a document). In such a case the party concerned may make an application under rule 3.4 or Part 24 (or both) as he thinks appropriate.

47. On the other hand, the court should not strike out a statement of case in an area of developing jurisprudence: see the cases referred to at para 3.4.2. of the 2020 White Book.

Striking out witness statements – the legal principles

48. Two principles are in play here.

49. The first principle is that if and to the extent that a statement of case is struck out, then the evidence relevant to the struck out allegations will no longer be admissible, and (unless otherwise relevant to remaining parts of the statement of case) must be struck out. This is uncontroversial.

50. The second principle concerns the interplay of admissibility and case management. The court's power to control evidence is contained in CPR 32.1:

> "(1) The court may control the evidence by giving directions as to –
>
> (a) the issues on which it requires evidence;
> (b) the nature of the evidence which it requires to decide those issues; and
> (c) the way in which the evidence is to be placed before the court.

(2) The court may use its power under this rule to exclude evidence that would otherwise be admissible."

51. The jurisdiction to exclude evidence must be exercised in accordance with the overriding objective of dealing with cases justly: see *O'Brien v. Chief Constable of South Wales Police* [2005] 2 AC 534 at [54].

52. More detailed guidance as to the way in which the court should exercise its discretion is found in *BGC Brokers v Tradition UK* [2019] EWHC 3588 (QB) at paras 49-51:

> "49. Where an issue arises as to the admissibility of particular evidence, a two-stage test is to be applied. First, is the evidence potentially probative of one or more issues in the litigation? If so, it is legally admissible, but the court will then go on to consider, secondly, whether there are good grounds for why it should decline to admit that evidence in the exercise of its case management powers; see *JP Morgan Chase Bank & Others v Springwell Navigation Corporation* [2005] EWCA Civ 1602 at paragraph 67, applying the principles laid down by Lord Bingham in *O'Brien v Chief Constable of South Wales Police [2005] 2 AC 254* , HL.
>
> 50. At the second stage, Lord Bingham suggested that three matters might affect the way in which a judge should exercise their discretion in this regard; see as summarised by the Court of Appeal in *JP Morgan v Springwell*:
>
> > "(i) That the new evidence will distort the trial and distract the attention of the decision-maker by focusing attention on issues that are collateral to the issues to be decided.
> >
> > (ii) That it will be necessary to weigh the potential probative value of the evidence against its potential for causing unfair prejudice.
> >
> > (iii) That consideration must be given to the burden which its admission would lay on the resisting party."
>
> 51. In relation to the third of these considerations, Lord Bingham specifically identified:
>
> > 'The burden in time, cost and personnel resources …of giving disclosure, the lengthening of the trial, with the increased cost and stress inevitably involved, the potential prejudice to witnesses called upon to recall matters long closed or thought to be closed, the loss of documentation, the fading of recollections …In deciding whether evidence in a given case should be admitted, the judge's overriding purpose will be to promote the ends of justice, but the judge must also bear in mind that justice requires not only

that the right answer be given but also that it be achieved by a trial process that is fair to all parties.'"

Whether the November 2010 valuation date is unarguable as a matter of law

53. I note that the financial consequences of this point are very significant. If the judge had ordered specific performance on 3 August 2017, C would have received a share worth at least £1.2 million. If the valuation date is November 2010, this would result in a reduction in C's recovery by nearly 90%, to £143,255.

54. The Court's jurisdiction to order damages in lieu of specific performance goes back to Lord Cairns' Act of 1858, and is now found in s.50 of the Senior Courts Act 1981:

> "Where the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance."

C's submissions

55. C made the following submissions. He relied upon the phrase "in substitution for" in s.50, which he submitted was key. By choosing to order damages rather than specific performance (or an injunction), the Court is deciding, he said, to satisfy the claimant's rights by providing a remedy for a wrong in one way rather than in another. The foundation for a Court's decision to do so can only be its determination that although both remedies remedy the wrong – and are to that extent of equivalent value to the claimant - an award of damages is for some reason preferable (here that reason was to prevent future litigation).

56. He relied upon Lord Reed SJC in *One Step (Support) Ltd v Morris-Garner* [2019] AC 649 (substituting, where necessary, "specific performance" for "injunction"):

> "44. Damages awarded in substitution for an injunction are, as one might expect, a monetary substitute for an injunction. As Viscount Finlay stated in *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, 859, "the power to give damages in lieu of an injunction must in all reason import the power to give **an equivalent for what is lost by the refusal of the injunction**. …"

and

> "95 (3) Damages can be awarded under Lord Cairns's Act in substitution for specific performance or an injunction, where the court had jurisdiction to entertain an application for such relief at the time when the proceedings were commenced. **Such damages are a monetary substitute for what is lost by the withholding of such relief**.
>
> (4) One possible method of quantifying damages under this head is on the basis of the economic value of the right which the court has declined to enforce, and which it has consequently rendered worthless
>
> …

(5) That is not, however, the only approach to assessing damages under Lord Cairns's Act. **It is for the court to judge what method of quantification, in the circumstances of the case before it, will give a fair equivalent for what is lost by the refusal of the injunction**."

(emphasis added)

57. He submitted that the Court's task at the trial of the damages assessment under the first head will therefore be to assess what damages will compensate C for the judge's refusal of specific performance. That refusal took place in 2017. If C had been awarded specific performance in 2017, C would have had a 1/3 interest in the Company as from that date. The Court's task under the first head is therefore to assess the value of that interest as at, at the earliest, that 2017 date.

58. On this basis, he submitted, that as a matter of law, on the basis pleaded by D1, the November date was unarguable as the appropriate valuation date.

D1's submissions

59. D1 made the following submissions:

(1) An assessment of damages in lieu of specific performance in a case like the present takes place on the same basis as an assessment of damages at common law for the breach: see *Johnson v. Agnew* [1980] AC 367 at 400 *per* Lord Wilberforce; see also *Chitty on Contracts*, 33rd ed. (2018) at para 27-097. The starting point of C's argument is therefore incorrect.

(2) Lord Wilberforce's dictum was qualified in respect of damages for future wrongs in *One Step (Support) Ltd v. Morris-Garner* [2019] AC 649 at [47]; see also *Jaggard v. Sawyer* [1995] 1 WLR 269 at 290-291. This case is not within that category. [I note that no reference is made to *One Step* in para 27-097 of *Chitty*, suggesting it has been overlooked by the editors.]

(3) The general principle is that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed: *Johnson*, *ibid*.

(4) The normal measure of damages is the market price of the shares at the contractual time for delivery: *McGregor on Damages*, 20th ed. (2017), para 29-003; see also *Plumbly v. Beatthatquote.com Ltd* [2009] EWHC 321.

(5) Sometimes the court will depart from this rule, as it did in *Johnson* itself. But that will always involve asking the fundamental question, what has the claimant lost, and applying other contractual doctrines such as causation, remoteness, and mitigation.

60. He submitted that, in the present case, D1 will say that the right approach to assessment of damages is to adopt the *prima facie* breach date rule. D1 does not yet know, he said, what reasons C will give for displacing that rule. But D1's approach is, he said, rooted in the question what has C lost. He will say, in particular, that:

(1) C would never have been in a position in which he would have held shares at the increased value that they achieved in later years because he would have

sold them to D1 or D2: see Counterschedule at para 6(d)(i)

(2) Alternatively, if C had refused to sell the shares, D1 would not have used the Company as the vehicle for the growth in the business that has occurred between 2010 and today: Counterschedule, paras 6(d)(i) and (ii)

(3) Assessment of damages at any of the later dates represent an unwarranted windfall to C providing him with unearned profit derived from the significant investment, both financial and in kind, that D1 has made in D2 since 2010: Counterschedule, para 6(d)(iii).

Discussion and conclusion

61. The starting point is the nature of a claim for specific performance. A pre-requisite of the claim is a valid and binding contract: see Snell's Equity (34th edn) at para 17-006. Concomitantly, after specific performance has been decreed, the contract continues to exist and is not merged in the order; though the working out of the order (and hence the contract) is subject to the discretion and control of the court: Snell at para 17-024.

62. The judge held that there was a valid and binding agreement, and that C was entitled in principle to an order for specific performance. She found that D1 was in repudiatory breach of that Agreement on 19 November 2010. Contrary to what is stated in D1's witness statement (at [5], [108] and [109]), and was submitted by his counsel, she did not find that C had at any point accepted D1's repudiation. Such a finding was not open to her on the statements of case, and would have been inconsistent with her finding that C was entitled to call for an allotment of the shares.

63. It would also have been inconsistent with the judge's finding, in the alternative, that D1 was in continuing breach of his ongoing obligation to allot a share to C. Her reference to the ET proceedings is to a step taken by D1, and must, in my judgment be read, as the point when C decided to treat D1 as being in breach of the Agreement.

64. I turn now to *Johnson v Agnew*.

65. At 400C-D, Lord Wilberforce says

> "there is sound authority for the proposition that [Lord Carins' Act] does not provide for the assessment of damages on any new basis."

66. He goes on (at 400E) to discuss *Wroth v Tyler* [1974] Ch 30, in which

> "Megarry J., relying on the words "in lieu of specific performance" reached the view that damages under the Act should be assessed as on the date when specific performance could have been ordered, in that case as at the date of the judgment of the court. ... If this establishes a different basis from that applicable at common law, I could not agree with it, but in *Horsler v. Zorro* [1975] Ch. 302, 316 Megarry J. went so far as to indicate his view that there is no inflexible rule that common law damages must be assessed as at the date

of the breach. Furthermore, in *Malhotra v. Choudhury* [1980] Ch. 52 the Court of Appeal expressly decided that, in a case where damages are given in substitution for an order for specific performance, both equity and the common law would award damages on the same basis - in that case as on the date of judgment. On the balance of these authorities and also on principle, I find in the Act no warrant for the court awarding damages differently from common law damages, but the question is left open on what date such damages, however awarded, ought to be assessed."

67. At 400H-401E:

> "(2) The general principle for the assessment of damages is compensatory, i.e., that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach - a principle recognised and embodied in section 51 of the Sale of Goods Act 1893. But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.
>
> In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost. Support for this approach is to be found in the cases. In *Ogle v. Earl Vane* (1867) L.R. 2 Q.B. 275; L.R. 3 Q.B. 272 the date was fixed by reference to the time when the innocent party, acting reasonably, went into the market; in *Hickman v. Haynes* (1875) L.R. 10 C.P. 598 at a reasonable time after the last request of the defendants (buyers) to withhold delivery. In *Radford v. De Froberville* [1977] 1 W.L.R. 1262 , where the defendant had covenanted to build a wall, damages were held measurable as at the date of the hearing rather than at the date of the defendant's breach, unless the plaintiff ought reasonably to have mitigated the breach at an earlier date.
>
> In the present case if it is accepted, as I would accept, that the vendors acted reasonably in pursuing the remedy of specific performance, the date on which that remedy became aborted (not by the vendors' fault) should logically be fixed as the date on which damages should be assessed. Choice of this date would be in accordance both with common law principle, as indicated in the authorities I have mentioned, and with the wording of the Act "in substitution for... specific performance."

68. D1 submitted that no principle was to be drawn from *Johnson v Agnew*, and that it was decided on its own facts. I reject that submission. In my judgment, *Johnson v Agnew* is authority for the proposition that the default position is that damages under s.50 SCA 1981 are to be assessed at the date of the hearing, rather than the date of breach. This may be displaced if the claimant has acted unreasonably in pursuing the remedy of specific performance, the burden of proof being on the defendant. However, in this case, D1 has never pleaded or alleged that C acted unreasonably in pursuing specific performance.

69. In addition, as noted, Lord Wilberforce's remarks were qualified in *One Step (Support) Ltd v Morris-Garner* [2019] AC 649 at [47]:

> "it is necessary to treat with care Lord Wilberforce's remark in *Johnson v Agnew* [1980] AC 367, 400 that he found in Lord Cairns's Act "no warrant for the court awarding damages differently from common law damages". As Millett LJ explained in *Jaggard v Sawyer* at pp 290–291, all that *Johnson v Agnew* decided was that damages, whether at common law or under the Act, are not invariably to be measured by reference to "the value of the land ascertained at the date of the breach of contract". Lord Wilberforce's words should not be read out of context and taken to imply that damages awarded in substitution for an injunction must necessarily be measured in the same way as damages recoverable at common law. That is hardly to be expected, given that the damages are available on a different basis, in different circumstances, and in respect of different types of wrong (past, on the one hand, and future or continuing, on the other)."

70. A key element of D1's argument was that this is not a case in which C is being compensated for future wrongs. This depended on his submission that the Agreement came to an end in November 2010. I have rejected that submission.

71. In my judgment, *One-Step* clearly supports the conclusion that the measure of damages in lieu is what C has lost by not being awarded the shares themselves in 2017 i.e. the value of the shares as at that date, or possibly some later date. This is not a matter of developing jurisprudence. D1's arguments as to what he would have done had C had the shares in 2010, are therefore irrelevant.

72. In any event, the argument that valuation at a later date confers a windfall on C is not in my judgment open to D1. The judge held that C made it clear before and during the ET proceedings that he intended to pursue his claim in relation to the shareholding issue. At all material times, therefore, D1 and Dr Nabi acted with full knowledge both of the Agreement (which the judge held they had entered into) and (as the judge held) C's intention to enforce it. The increase in value attributable to the shares during that period cannot arguably be regarded as a windfall.

November date as date when C's entitlement to dividends would have ceased

73. D1's case as to this mirrors his case as to the appropriate valuation date: C would not have received distributions after at the latest the November date because the relationship between C and D1 had by that stage broken down. D1 would therefore have purchased, or procured the purchase, from C of his shares. Alternatively, D1 would have procured the sale of the business by the company, which would have been put into liquidation.

74. As to this, C submitted as follows.

    (a) As at the date of judgment C was entitled to performance of the Agreement, subject to the Court's discretion to order damages in substitution. Accordingly, the first step is to compensate C for the loss of that right. That is the first head of damages – the value of the lost right to performance, to be calculated by reference to the value of a 1/3 interest in the Company.

(b) That however will not on its own fully compensate C. During the period in which C has been kept out of his shares, D1 has been drawing profits out of the Company by way of distributions, and has been keeping 100% of those distributions. The second head of the damages recognises that C, had he had his rights when he should have had them, would too have been entitled to a share of those distributions. He has lost that share.

(c) If damages under the first head are based on the value of the shares at the date specific performance was refused i.e. the date of judgment or a later date, then causation arguments based on an assumption which is inconsistent with that factual basis are impermissible.

75. I accept this argument. The valuation date for the shares reflects the date on which C's entitlement to the shares is treated as coming to an end and being replaced by financial compensation. The entitlement to the shares carries with it an entitlement to distributions, and an argument that C would not have been entitled to the distributions is inconsistent with the finding that C has remained entitled to the shares up to the date of judgment.

Relevance of the evidence to issue of whether C's share should be valued without a discount to reflect his minority shareholding

76. D1 submitted that substantial parts of the disputed evidence go to the question of whether C would have been entitled to an order under section 994 of the Companies Act 2006 that D1 buy the shareholding at an undiscounted valuation.

77. This ground of relevance is not relied upon in D1's witness statement. It was first raised in the witness statement dated 14 August 2020 of his solicitor, Anand Pattani, but only in respect of the witness statement of Sue Hindley, who is described as "a key figure in the establishment of the College", and whose statement spans the period 2003 to 2005 i.e. before the breakdown in relations between the parties.

78. I also note that in the List of Issues, D1 again does not articulate any factual basis for alleging the applicability of the minority discount; and at issue 1.3 states that "The appropriate discount will be a matter of expert evidence." His pleaded case in the Counterschedule similarly does not articulate any factual basis in support of a minority shareholding discount; and simply alleges that the appropriate discount is 35% as set out in the report of D1's expert (which was not in evidence before me).

79. C's position in his skeleton argument was that he was content to rely upon the judge's findings as to conduct in relation to this issue. In his skeleton argument D1's counsel expanded D1's reliance on substantial parts of the evidence of all 4 witnesses. He did not refer me to any authorities as to the principles applicable to share valuation in s.994 claims.

80. For present purposes, it is sufficient to refer to *Hollington on Shareholders' Rights* (9th edn):

> "8-52
> …
> It has been suggested that a discount may be applied if the petitioner's conduct has contributed to the actions on the part of the majority of which

complaint is made. Yet such a doctrine of contributory responsibility has not found favour with the courts, no doubt because it would run counter to the desirability of predictability in this field and of the avoidance of petitions descending into a form of old-style divorce litigation. Yet there is no reason in principle why a court should not apply a discount in such circumstances if the justice of the case exceptionally so required. *In Re Bird Precision Bellows* [1986] Ch. 658 at 671–672, Oliver LJ held that the court was obliged in the exercise of its wide discretion to take the conduct of the parties into account.
Quasi-partnership
8-53
In the case of quasi-partnerships where the minority has been unfairly excluded from management, there is a strong presumption that no such discount should be applied."

81. In relation to valuation, therefore, the following issues arise:
    (a) whether the Company was a quasi-partnership – in my judgment, this issue has plainly been determined by the judge and evidence to the contrary is inadmissible;
    (b) whether C's conduct contributed to his exclusion from the Company – I accept that this is not an issue which the judge was required to address, and that it is arguable that evidence as to D1's conduct is admissible; however, the burden of proof would be upon D1 to show such conduct.

82. C's response to D1's submissions, was that his primary objective was to maintain the trial date, and that if doing so required him not to proceed on the basis that in a s.994 claim his shares would be bought at an undiscounted valuation, then he was willing to make that concession. I return to this at the end of this judgment.

Admissibility of the disputed evidence if the November date is arguable

83. In case I am wrong in concluding that D1 is not entitled to allege a valuation date of November 2010 on the counterfactual basis put forward by him, I now consider whether the disputed evidence would be admissible if the November date is arguable. To do so it is necessary to consider it in more detail.

D1's witness statement

84. D1's statement gives a very detailed account of the genesis of the College and its business, and of the role of C and other members of staff (including D1 and Dr Nabi) in its functioning, and seeks to minimize C's role by reference to his "capabilities and commitment" [37], and lack of "loyalty, reliability and hard work" [38].

85. The statement then sets out D1's version of a number of incidents involving C's conduct in the business, concluding that "Dr Nabi and I felt we were fully justified in suspending (and subsequently dismissing) [C] in 2010". [70]

86. D1's evidence is that by 2010 there had been a "complete breakdown" in his relationship with C ([72]), such that had C been a shareholder, D1 would have offered to buy his share, and had the funds to do so.

87. As to whether C would have accepted the offer, he states that he does not believe that C ever thought his entitlement was going to be for one third [80].

88. D1 also refers to a meeting in 2006, and states that Dr Nabi proposed at this meeting that each of the parties be distributed shares in accordance with percentages reflecting their financial contributions to the Company.[82]

89. There is extensive reference to transcripts as demonstrating C's willingness to negotiate. D1 states his belief that C was fully aware that his contribution to building the goodwill of the College was significantly less than his and Dr Nabi's. [95]

90. D1 then considers what would have occurred if C had not accepted an offer for his shares. He concludes that he and Dr Nabi would have sold the business ([103]-[104]), or wound it up on the just and equitable ground in s.122(1)(g) of the Insolvency Act 1986 [106].

91. Paras 108-110 are headed "Delay in bringing the proceedings", and assert again that C accepted D1's repudiation of the Agreement on 19 November 2010. His evidence is that he would not have worked as hard as he did in the business had he considered that C was entitled to a one third share [110].

92. Paras 132 to 135 deal with a crisis in February 2010 (the suspension and then revocation of the College's Tier 4 licence by the UK Border Agency), and alleges that C played no part in resolving the crisis. This is said to be further evidence of the complete breakdown of the relationship.

93. Para 139 states that D1 has been informed by Mr Dulloo that C specifically delayed issuing his claim (on the advice of Shakhawat Khandaker) in order to benefit from the College's improving financial position after the difficulties it faced in 2011/12. This is simply reciting Mr Dulloo's evidence.

94. Para 140 states that C could have issued his claim at the same time as bringing the ET proceedings. As a bare statement of fact, this unobjectionable. To the extent it suggests that C unreasonably delayed it is discussed below.

95. Para 161 states that it would be manifestly unfair to award C damages beyond "the Breach Period". This is mere argument, not evidence.

Dr Nabi's statement

96. Dr Nabi's statement deals with facts going back to 1999, when he first met C. He covers the following topics:
    (1) his, D1's and C's respective roles and relative importance in the establishment and functioning of the College;
    (2) the breakdown in his and D1's relationship with C;
    (3) various alleged incidents showing misconduct by C;
    (4) C's suspension and dismissal;
    (5) whether the College had sufficient funds to buy C out in September 2010;
    (6) the work carried out by him in building up the business, and that he would not have carried out this work had C continued to be a partner in it.

Mr Dulloo's statement

97. Mr Dulloo's statement deals with events from 2001 onwards. He covers the following topics:
    (1) the establishing of the College
    (2) his employment by the College from 2005 to June 2010 and his role in it;
    (3) an alleged agreement with C that he would receive £10,000 for helping C in the ET proceedings, and C's failure to pay that sum;
    (4) recordings made by C of conversations relating to the College, and the circumstances in which he obtained 12 of those recordings;
    (5) allegations that C copied D1 and D2's documents;
    (6) allegations that C and Shakhawat Khandaker had a close business relationship;
    (7) an allegation that, in his presence, C and Mr Khandaker made a "strategic decision" to delay the proceedings in respect of his share entitlement until 2015 in order that they could fully maximise the level of damages that would be awarded to C.

Sue Hindley's statement

98. Ms Hindley was Director of Marketing and Administration at the College from 2003 to 2005. She gives evidence as to her role at the College, which she summarises as "de-facto deputy principal across all activities outside of teaching and assessment".

99. She also gives evidence as to the roles of D1, Dr Nabi and C, and is critical of C's conduct during her time there. She expresses the view that the success of the College was attributable to D1 and Dr Nabi; and that C's contribution to the essential work that was required to establish it (and the goodwill in the business) was negligible.

100. She describes a "clear gulf" between C on the one hand and D1 and Dr Nabi on the other in their respective capabilities and contributions to the business of the College.

Is the evidence necessary – does it relate to an issue in the claim?

101. The key fact underlying D1's case for the November date as the date of valuation is that, one way or the other, C would not have retained his shares or had any further involvement in the business of the College. Underlying this counterfactual argument is his evidence that by the November date, his and Dr Nabi's relationship with C had broken down such that it was inconceivable that they would continue working together.

102. That is no longer an issue in this claim. C accepts that there was a falling out in 2009/10. At the hearing before me, C's position was that the relationship could only have been resumed on terms that he was allowed back into the Company's business. D1's evidence is clear that he and Dr Nabi would not have countenanced this.

103. In my judgment, the reasons why the relationship broke down and the extent to which the breakdown was attributable to C's conduct are entirely irrelevant to D1's

counterfactual argument. Even if they are marginally relevant, their admission is wholly outweighed by the case management considerations considered below.

104. As to whether C would have cashed out his one third share, evidence as to his conduct in the Company is not in my judgment of assistance in deciding that question, in circumstances where it is common ground that the parties' relationship had broken down.

Whether the disputed evidence is a collateral attack on findings of fact by the judge

105. Much of the material in the disputed evidence was extensively ventilated in the ET proceedings, and the liability stage of this claim.

106. C submitted and D1 (rightly) did not contest that factual issues decided by the judge could not be challenged in the assessment stage of the claim.

107. As to the findings of fact in the ET proceedings, C did not contend that they gave rise to an actual estoppel, relying rather on the case management considerations discussed below. As D1 submitted, it is clear that no estoppel arises out of the first instance judgment in the ET proceedings. In paras 69 and 70 of the reconsideration judgment dated 22 November 2013, Employment Judge Pritchard said:

> "69. the review judgment has been a <u>negative</u> judgment, revoking certain findings and decisions. … There therefore has been no resolution of the following issues, which may all arise:
>
> Contributory conduct
> *Polkey*
> *Devis v Atkins*
> Mitigation
> Wrongful dismissal
>
> 70. The tribunal will have to hear evidence and contentions on these at a remedy hearing. There are no limits on the scope of either party's case. There is no question of estoppel. The parties may change their stance and their factual evidence form that previously given."

108. This is reflected in the ET judge's order which provides that:

> "2. The Judgment that the claimant contributed to his dismissal is revoked.
> 3. The Judgment that the claimant was not wrongfully dismissed is revoked.
> 4. The unfair dismissal finding stands. It was never the subject of a reconsideration application."

109. Since the ET judgment was revoked in respect of the issues identified by the ET judge, no estoppel arises in respect of those issues, which include the conduct of the parties.

Evidence sought to be adduced in support of the November date argument

110. I confine my conclusions to the principal topics in respect of which evidence is advanced:

(1) C's skills and experience
The judge rejected D1's and Dr Nabi's characterisation of C as less qualified, less educated and with very limited relevant experience.[9].

(2) C's role in the College
The judge made findings about the three partner's roles at [32]: "Each of the founding members had a slightly different role. [C] concentrated on general administration and marketing. [D1] was effectively the managing director. Dr Nabi concentrated on the academic side."
The downplaying of C's role in the College is contrary to the judge's finding that "Although each had a different role, the plan was to pool their respective strengths. This was a partnership of equals. I accept [C's] evidence on this point" [58]

(3) Incidents of misconduct by C
The judge was not directly concerned with alleged incidents of misconduct by C. However, she held that the real gravamen of the complaint about the interview given by C to MTV (made at a time when relations between the three were strained) was that it was given without D1 or Dr Nabi's consent.[35]

(4) Parties' discussions as to shareholdings and directorships
At [36] to [41] the judge addresses the documentary evidence (meeting notes, etc) from 2006 to 2009 as to what was said about shareholdings and directorships.
D1's evidence at [81] that at a meeting in 2006 Dr Nabi proposed shareholdings proportionate to financial contributions is directly contrary to the judge's finding at [59] that these discussions were concerned with how much each should and did take by way of salary and loan repayment, and not with their share entitlement.

(5) C did not believe that he was entitled to a one third share
D1's evidence that C did not believe he was entitled to a one third share is contrary to the judge's finding that there was an express agreement that C was entitled to one third (at [59] of the judgement). D1's counsel conceded at the hearing that D1 will not assert that C did not believe he had an entitlement to a 1/3 share. He sought to reframe the evidence as being that C was uncertain as to whether he would recover 1/3, and would therefore have accepted an offer at full value. This is not, however, the evidence that is given.

(6) C's willingness to negotiate
D1's evidence that C was fully aware that his contribution to building the goodwill of the College was significantly less than his and Dr Nabi's is again directly contrary to the judge's finding at [64] that the College's reputation and goodwill were built on the hard work of all three co-founders.

111. Insofar as the evidence served by D1 seeks to depart from the judge's findings as set out above, it is, in my judgment, inadmissible.

Evidence that C unreasonably delayed in bringing his claim

112. D1's case as to delay is as follows:

(1) As a fallback position to his November date submission, D1 says that the appropriate date of valuation should be 14 July 2016 to take into account C's delay in bringing this claim: see Counterschedule para 6(c).

(2) The logic to this is said to be that there was a hiatus of 1 year between the settlement of the employment proceedings and the commencement of the claim for the shares. Had C issued proceedings a year earlier, the judgment date would have been in July 2016, rather than 2017.
(3) D1 also relies upon delay in the context of the calculation of interest: see Counterschedule, paras 9 and 24.

113. The judge's findings as to laches are set out above. She identified unreasonable delay as one of the two conditions which must be fulfilled for laches to be established, and adopted the broad approach in *Frawley v Neil* in deciding whether the consequences of that delay rendered the grant of relief unjust. This approach was approved on appeal.

114. I therefore reject D1's argument that the judge made no express finding that there had been no unreasonable delay. This is sufficient in my judgment to exclude Mr Dulloo's evidence on this issue on the grounds of issue estoppel.

115. D1 also argued that the judge's findings did not in any event preclude him from arguing that for the purposes of the calculation of interest that C's delay was unreasonable. I do not find it necessary to decide whether this is correct. Even if it is, it does not enable Mr Dulloo's evidence on this issue to be admitted. The judge found that C did not hold back from issuing proceedings. Mr Dulloo's evidence that C made a deliberate decision not to bring proceedings i.e. to hold back from issuing them is contrary to the judge's express finding and D1 is issue estopped from asserting this.

Case management considerations

116. I have concluded that:
(1) D1's case as to the November date for valuation of the shares and as the date when C's entitlement to distributions should be treated as ending is unsustainable as a matter of law;
(2) Accordingly, paras 6(d) and 20(c) are to be struck out as having no reasonable prospect of success;
(3) Insofar as the disputed evidence is sought to be adduced to support that case, it is inadmissible;
(4) In any event, evidence as to C's role in the business of the College, and C's alleged responsibility for the breakdown in the parties' relationship are irrelevant to that case;
(5) That evidence is arguably relevant to the issue as to whether C's share should be valued with a minority discount; but the factual matters relied upon by D1 have never been articulated in the List of Issues or in the Counterschedule;
(6) As set out above, substantial parts of the evidence are inadmissible as being collateral challenges to the judge's findings of fact, as to which D1 is issue estopped; they are therefore to be struck out as an abuse of process.

117. The majority of the disputed evidence is as to C's role in in the business of the College, and C's alleged responsibility for the breakdown in the parties' relationship. Even if I am wrong as to its admissibility as a matter of law, and its relevance, and whether D1 is issue estopped from adducing it, it is at best marginally relevant to the November date issue.

118. Although the disputed evidence is capable of being relevant to the minority discount issue, D1's intention to rely on C's conduct has been raised at the latest possible stage, namely in counsel's skeleton argument. No particulars of the conduct relied upon have ever been pleaded. The consequence is that C has had no notice of the factual matters relied upon; and could not reasonably have been expected to adduce evidence as to these in the witness statements which have been served by him.

119. On this basis, I would exercise my discretion to exclude the disputed evidence on the following grounds:

120. The disputed evidence is lengthy and contentious. It has already been the subject of the lengthy ET proceedings and, in part, the liability trial. Some of it is entirely irrelevant on any basis e.g. Mr Dulloo's evidence that C reneged on an agreement to pay him £10,000, as to C's business relationship with Mr Khandaker, and that C copied D1 and D2's documents. D1 submitted that the fact that the evidence is lengthy and contentious is not sufficient to justify striking it out. I agree, but these factors are capable of affecting the trial estimate (and in this case, the trial date).

121. For the reasons set out above, in my judgment, the disputed evidence would distort the trial and distract the attention of the court, by focussing on issues which are essentially collateral to the issues to be decided.

122. At best, the potential probative value of the evidence is marginal to the November date issues. There is no need for evidence that the parties' relationship broke down. There is no need for evidence that C was willing to consider negotiating with D1 to resolve the dispute. The allegations of misconduct against C are capable of being unfairly prejudicial.

123. Although the evidence as to C's conduct is capable of being relevant to the minority discount issue, C has not had proper notice of it, and it would be unfair to permit D1 to rely upon it, given the consequences below of permitting that reliance. It is not therefore necessary to consider whether to accept the concession offered by C, set out at para 82 above.

124. The consequences of allowing the evidence to remain in would be that C would have to adduce further statements addressing the matters raised. Disclosure would need to be revisited. These burdens fall squarely within the passage from *JP Morgan v Springwell* cited in *BGC Brokers* (see para 52 above):
    (a) C would face a substantially increased burden in time, costs, and his own resources;
    (b) the trial would be doubled from 5 days to 10 days (about the same length as the ET proceedings), with the associated increased costs and stress;
    (c) the matters with which the evidence deals occurred between 17 and 6 years ago (and in the case of the allegations as to C's role and conduct, between 17 and 10 years ago), so that there is high risk of faded recollections.

125. In addition, with the trial due to commence on 19 October, there is a real risk that the additional steps required as a result of its admission could not be achieved in the remaining available time before trial.

126. As to the increase in trial length, as at today's date, the court could not accommodate the longer trial, so the trial would either go part heard (inherently undesirable) or need to be vacated and relisted. In this long-running and highly acrimonious dispute, I consider it to be of paramount importance to maintain the trial date, and resolve the remaining issues between the parties.

Conclusions

127. For the reasons set out above therefore, I accede to C's application and will hear counsel as to the form of the order.