Neutral Citation Number: [2021] EWHC 2661 (Ch)

Case No: CR-2020-MAN-000015

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

In the Matter of Electrical Control Installations Limited (Company no. 33723191)
And in the Matter of the Companies Act 2006

Date: 5 October 2021

Before :

His Honour Judge Halliwell (sitting as a Judge of the High Court)

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Between :

PAUL EVANS

Petitioner

- and -

(1) STEPHEN JAMES REID
(2) JAMIE SCOTT GRANT
(3) PAUL NICHOLSON
(4) ECI CUMBRIA LIMITED
(5) ELECTRICAL CONTROL INSTALLATIONS LIMITED

Respondents

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Mr Mark Harper QC (instructed by **Baines Wilson LLP**) for the **Petitioner**
Mr Matthew Collings QC and **Mr Gareth Darbyshire** (instructed by **Kennedys Law LLP**) for the **First, Second, Third and Fourth Respondents**

Hearing dates: 12th, 13th, 14th, 15th, 16th and 20th July 2021

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APPROVED JUDGMENT

This Judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on Bailii. The deemed time and date for hand-down is 10 am on 5 October 2021.

His Honour Judge Halliwell:

(1) Introduction

1. This is my judgment on the preliminary issue of whether the affairs of Electrical Control Installations Limited ("**the Company**") have been conducted in a manner unfairly prejudicial to the members. This issue arises on a petition ("**the Petition**") presented by a minority shareholder, Mr Paul Evans ("**Mr Evans**"). Mirroring *Section 994* of the *Companies Act 2006,* Mr Evans's case is that the relevant conduct was unfairly prejudicial to the members' interests including, at least, his own interests, as a member.

2. There are five respondents to the Petition, including the Company itself. The other respondents are ECI Cumbria Limited ("**ECI Cumbria**") and three individuals, Messrs Stephen Reid ("**Mr Reid**"), Jamie Grant ("**Mr Grant**") and Paul Nicholson ("**Mr Nicholson**"), each of whom have at least historically held office as directors and been recorded as shareholders of both companies.

3. The Petition is founded on allegations that Messrs Reid, Grant and Nicholson formed ECI Cumbria to commence business in competition with the Company as a vehicle for the diversion of its business. It is alleged they did so pursuant to an unlawful means conspiracy and, pursuant to another such conspiracy, they then caused ECI Cumbria to enter into competition with the Company so as to cause unfair prejudice to the interests, at least, of Mr Evans as a minority shareholder. However, the factual basis of the claim is challenged. It is not disputed Messrs Reid, Grant and Nicholson formed ECI Cumbria nor that it entered into competition with the Company. However, it is contended ECI Cumbria only commenced business with Mr Reid as sole director once he had resigned as a director of the Company. On this basis, it is contended Mr Reid did not act unlawfully nor, indeed, did anyone else and there is no room for an unlawful means conspiracy. Unfair prejudice is in issue and it is alleged Mr Evans's right to bring a claim has been compromised.

4. At the hearing before me, Mr Mark Harper QC appeared on behalf of Mr Evans and Messrs Matthew Collings QC and Gareth Darbyshire appeared on behalf of the first four respondents ("**the Represented Respondents**"). Whilst formally joined as a respondent, the Company did not advance a case and was not represented.

(2) Background

5. The Company was formed on 1st March 1999 with an issued share capital of £2. Two ordinary shares of £1 each were issued and transferred to Messrs Reid and Grant and, at the

outset, they were appointed the Company's only directors. Both were experienced electrical engineers and they were well acquainted with one another having worked as sub-contractors and employees in the same businesses. They envisaged the Company would provide specialist engineering services and sub-contract their own specialist services in connection with the installation of conveying systems for beverage cans. Shortly afterwards, the Company commenced business on this basis and continued to do so for several years. During this period, Mr Nicholson joined the Company to set up its mechanical arm. In 2010 or thereabouts, he commenced work as a sub-contractor and was appointed a director on 8th June 2012.

6. Mr Reid had the technical skills required for the manufacture of conveying systems and can making machinery and, between 12th August 2002 and 2nd May 2008, he thus acted as operations director for another company, Electro-Mechanical Engineering Services Limited, manufacturing and installing such systems. He did so in addition to his work for the Company.

7. Mr Evans is himself an engineer. Between January 2007 and June 2012, he was employed as technical director of a company based in Dubai known as NDH Group LLC ("**NDH**"). Before ceasing in the employment of NDH, he arranged for the incorporation of an engineering company called Evans Canlines Limited ("**Evans Canlines**"). Evans Canlines was incorporated on 11th April 2012 with a share capital of £100 made up of 100 ordinary £1 shares, each of which was issued to Mr Evans himself. Mr Evans was also appointed sole director. It was formed with the object of providing engineering services utilising Mr Evans's knowledge and experience at NDH, again in connection with the installation of conveying systems. It commenced business shortly afterwards.

8. Mr Evans first became professionally acquainted with Messrs Reid and Grant in 1998 or thereabouts when he engaged them as sub-contractors installing conveying equipment. At that time, Mr Evans was working for CCH Engineering Limited. In 2008, Mr Evans engaged Mr Reid to provide services for NDH as electrical supervisor on the Crown Packaging Project in Seville, Spain.

9. Later in 2008, Messrs Evans and Reid entered into discussions with another of Mr Evans's business associates, Mr Mick Flannery, in connection with a project for NDH in Baghdad, Iraq. The project involved the construction of a factory and the installation of two high speed beverage can production lines. At Mr Evans's suggestion, they formed a separate

company, ECI Conveying Limited ("**ECI Conveying**") to tender for a substantial sub-contract manufacturing and supplying conveying equipment for the project.

10. ECI Conveying was formed on 3rd October 2008. At an early stage, Messrs Reid and Grant were appointed directors. On incorporation, Mr Reid subscribed for 40 ordinary A shares of £1, Mr Evans 30 ordinary B shares of £1 and Mr Flannery 30 ordinary C shares of £1. Mr Reid subsequently transferred his 40 ordinary A shares to the Company. It also appears from entries at Companies House that ECI Conveying subsequently purchased its own shares from Mr Flannery.

11. ECI Conveying was successful in tendering for the Iraq project. According to Mr Evans, the project was completed in or around March 2011 but with some £150,000 outstanding to ECI Conveying in respect of the amounts NDH had originally contracted to pay.

12. Although ECI Conveying was formed as a vehicle for implementation of the NDH sub-contract in Iraq, it was contemplated that it would ultimately be contracted to manufacture and supply conveying equipment elsewhere. However, as the Iraq project neared completion, ECI Conveying was starved of working capital and it became clear it had no real prospect of securing other manufacturing projects. In its unaudited accounts for the period ending on 30th April 2011, it was shown to have made an operating loss of £4,717 on a turnover of £1,500,225. In these accounts, there were no entries on its balance sheet otherwise than for capital and reserves but on its balance sheet for the previous period ending on 31st October 2009, there were net current liabilities of £73,265. It is obvious that, without the introduction of additional working capital, ECI Conveying was not well placed to enter into new commitments.

13. To determine what should be done, Mr Evans entered into discussions with Messrs Reid and Grant. In practice, however, Mr Grant left most of the discussions to the others in view of the time he was required to spend working abroad. Together, they decided to "close" ECI Conveying and transfer its assets to the Company. They apparently envisaged the Company would also assume responsibility for ECI Conveying's debts. It was at least implicit in their discussions that the Company would extend the range of its operations utilising ECI's plant and equipment. It was also agreed that Mr Evans would be issued with shares in the Company on the understanding that, as a resident of Dubai, he would be able to introduce work from the Far and Middle East.

14. The Company's issued share capital was increased from £2 to £102, at least partly to accommodate new shareholders. In the Company's Annual Return on 1st March 2011, Messrs Reid, Grant and Evans were each shown to hold 30 shares and Mr Nicholson 10 shares with one share allotted to Ms Anne Reid and one share to Ms Anna Grant. The Company's abbreviated accounts for the year ending on 29th February 2012 were approved by the Board on 11th June 2012. They show that, "on 30th April 2011, the trade assets of ECI Conveying were transferred to the Company". It can be seen from the Company's abbreviated accounts for the years ending on 28th February 2011 and 29th February 2012, that this was reflected in an increase in the tangible fixed assets recorded on its balance sheet from £2,693 to £94,154. This would have included machinery and equipment for use in the manufacturing process and presented the Company with new manufacturing opportunities. Having acquired ECI Conveying's trade assets on 30th April 2011, the Company took over its residual business – such as it was - utilising its machinery and equipment.

15. There is no specific provision in the accounts of either company quantifying the debt for which the Company assumed responsibility from ECI Conveying. In ECI Conveying's unaudited accounts for the period ending on 30 April 2011, no assets or liabilities were recorded on its balance sheet. No doubt, this was because they had been transferred to the Company or treated as such. However, in its accounts for the previous accounting period ending on 31 October 2009, ECI Conveying had net current liabilities of £73,265. A positive balance on total assets less liabilities was only achieved by valuing fixed assets – property improvements, plant and machinery, motor vehicles and equipment - at £150,823. If ECI Conveying sustained an operating loss of £4,717 in the extended period to 30 April 2011, it can be inferred, from the companies' accounts and the limited information otherwise available, that the Company eventually assumed responsibility for ECI Conveying's current liabilities in the region of £80,000. Although ECI Conveying's fixed assets had been valued at £150,823 on 31 October 2009 and these were apparently transferred to the Company, the Company was shown to have fixed assets of no more than £94,154 on its balance sheet for the year ending on 28 February 2012, up from £2,763 for the year ending on 28 February 2011. There is no reason to believe that the Company disposed of any fixed assets between 30 April 2011 and 28 February 2012. Nevertheless, whatever the realisable value of ECI's plant and machinery, the Company thereby assumed a manufacturing function but, in doing so, incurred significant liabilities. For the sake of

completeness, ECI Conveying's unaudited accounts for the period ending on 30 April 2011 were not filed at Companies House and, on 7th August 2012, it was voluntarily struck off.

16. In April 2012, Mr Evans returned to the UK from Dubai and formed Evans Canlines. Shortly afterwards, Evans Canlines commenced business at his direction, installing and commissioning conveying machines and equipment for the metal food and beverage packaging industry.

17. Mr Evans was never formally appointed a director or employee of the Company nor, indeed, did he ever contract to provide services for it. In their statements of case, the Represented Respondents assert and Mr Evans admits that he "was a de facto director". I shall thus assume this to be the case although, on the evidence adduced before me, the basis for doing so is obscure.

18. Following Mr Evans's return to the UK, there was increasingly a perception among the directors that he was devoting all his time to Evans Canlines or other business interests. He was considered to be doing little, if anything, for the Company. However, he declined to concede his right to the payment of dividends from the Company's available profits and refused to sell his shares at a price based on the valuation of the Company's accountants, David Allen. Mr Evans's own valuation of the shares in November 2014 of £118,800 to £140,400 contrasted with David Allen's valuation, in January 2015, of £10,560.

19. Mr Evans was himself aware that Messrs Reid, Grant and Nicholson were each in receipt of dividends from the Company. Mr Evans was not in receipt of dividends himself. By letter dated 12th April 2016 addressed, in general terms, to "the Directors" of the Company, Baines Wilson LLP ("**Baines Wilson**") made a series of requisitions on behalf of Mr Evans in order to "calculate the amount due to [him] for unpaid dividends (together with appropriate interest)". They also alleged that there were anomalies in relation to the Company's accounts for which they invited clarification and they reserved the right to bring claims in respect of unpaid dividends and unfair prejudice.

20. By this stage, Messrs Reid, Grant and Nicholson had formed ECI Cumbria. It was incorporated with an issued share capital of £120 divided into 120 ordinary £1 shares credited as having been fully paid up. Messrs Reid, Grant and Nicholson each subscribed for 40 ordinary shares. However, on 6th April 2016, Messrs Grant and Nicolson had transferred their shares to Mr Reid and resigned as directors.

21. Mr Evans contends that ECI Cumbria was formed with the intention that it would compete with the Company for its business or, at least, that it could be utilised for that purpose. Although ECI Cumbria had been formed as early as 9th June 2014, it did not commence in business until upwards of two years later. It thus filed dormant accounts for the years ending on 30th June 2015 and 30th June 2016.

22. On 2nd July 2016, Mr Reid resigned as a director of the Company. At about this time, he commenced work at his home address using ECI Cumbria as his vehicle for doing so. There is an issue to which I shall turn later as to when he commenced work. However, he could not initially have maintained a manufacturing operation from his house since he did not have access to the Company's plant and equipment. However, he supplied labour, supervised projects, carried out works of consultation and assisted in connection with manufacturing works that had been contracted out. In October 2016, he started to rent some workshop space on behalf of ECI Cumbria in a building managed by Stolle Europe Limited ("**Stolle**") at Kingstown in Carlisle. ECI Cumbria subsequently entered into an underlease of business premises from Stolle in May 2017.

23. Although ECI Cumbria's business activities were initially narrower and on a more modest scale than the Company's, there was plainly a substantial overlap and, in that sense, the companies were in competition from the point at which ECI Cumbria commenced in business. However, the Represented Respondents maintain this was new business under new contractual commitments after Mr Reid's resignation. On their case, the Company continued with its existing business and ECI Cumbria did not take over or otherwise interfere with the Company's contractual rights and commitments. Consistently with this, in the year ending on 28th February 2017, the Company recorded a sharply increased turnover of £4,544,749, up from £3,091,239 in the year ending on 29th February 2016.

24. Nevertheless, a significant number of customers and sub-contractors ultimately followed Mr Reid to ECI Cumbria. On 10th February 2017, Mr Grant resigned as a director of the Company and, on 30th June 2017, he was appointed a director of ECI Cumbria and allotted 120 B shares in the Company. On 26th July 2017, Ms Nicole Parker was also appointed a director of ECI Cumbria and allotted 1140 C shares. According to Mr Reid, Ms Parker took over the administration of ECI Cumbria at a time he had been diagnosed with bowel cancer and commenced intensive medical treatment with several major operations.

25. In the year ending on 30th June 2017, ECI Cumbria's turnover was £1,204,819 and, according to its annual accounts approved by the board on 29th January 2018, it made a profit before tax of £217,191. Fixed assets of £15,570 were recorded on its balance sheet made up of office equipment, motor vehicles and office equipment only. After accounting for current assets and creditors, its net current assets amounted to £100,011.

26. On 23rd October 2017, Mr Evans and the Company compromised the dispute which had been foreshadowed by Baines Wilson's letter dated 12th April 2016. The compromise was embodied in a written agreement, denoted Settlement Agreement and Release ("**the Settlement Agreement**"). By the Settlement Agreement, the Company agreed to pay Mr Evans £196,000 plus £7,000 in respect of his costs in full and final settlement of their dispute in relation to his unpaid dividends and all other claims relating to his shareholding known to him or which reasonably ought to have been known to him at that time.

27. The Company continued in business and there is no evidence existing transactions were diverted to ECI Cumbria. However, the Company's business was founded, to a large extent, on the technical knowledge and experience of Messrs Reid and Grant together with the attendant confidence in them of its customers. It is thus not surprising that a substantial number of the Company's customers followed them to ECI Cumbria. Having elected to extend its next accounting period to 31st August 2018, the Company did not file accounts for the year ending on 28th February 2018. However, David Allen produced draft accounts for the year ending on 28th February 2018, based on the Company's accounting records, recording a reduction in the annual turnover of the Company from £4,544,749 to £2,452,274.

28. By letter dated 6th April 2018 to the Company's shareholders, Mr Nicholson advised them that, following the differences between them and mindful of the resignation of directors, the loss of employees and the reduction in turnover, he wished to resign. He thus asked one or more of them to take on the role of director. None of them evinced a willingness to do so and Mr Nicholson remains in office.

29. Stolle was one of the customers who followed Mr Reid from the Company to ECI Cumbria. During 2018, there were negotiations between ECI Cumbria and Stolle for the sale and purchase of ECI Cumbria's assets. These evolved into a transaction for the sale and purchase of its entire issued share capital. By letter dated 15th February 2015, Stolle set out the main terms and conditions on which it was willing to purchase the share capital.

Unfortunately, much of the letter was admitted before me in redacted form. This includes the provisions governing the price payable for the shares. However, the parties are in agreement that the minimum consideration was £1.35m. Pursuant to the transaction, on 5th April 2019, the shares were transferred, in their entirety, to Stolle.

30. By letter dated 18th December 2018 addressed to "the Directors/Shareholders" of ECI Cumbria, Baines Wilson alleged that business and opportunities had been diverted to it from the Company and the Company had been deliberately run down. They requested disclosure of ECI Cumbria's documents. Kennedys Law LLP ("**Kennedys**") were ultimately instructed to act on behalf of ECI Cumbria and Messrs Reid, Grant and Nicholson. Ultimately, by letter dated 5th June 2019, Baines Wilson contended that business opportunities had been diverted from the Company, Mr Evans had been excluded from the management of the Company and he was thus entitled to petition the court for unfair prejudice under Section 994 of the Companies Act 2006. They also sought to rely on the Company's non-payment of dividends. However, they indicated Mr Evans would be satisfied with a resolution that his shares be purchased at their fair value without discount.

31. In response, Kennedys disputed each of the substantive allegations in Baines Wilson's Letter of Claim. They denied that Mr Evans had been excluded from the management of the Company. They denied that he had a case based on unfair prejudice and, on the hypothesis that Mr Evans might have had such a claim, they contended that it would be an abuse of process for him to advance it following the Settlement Agreement.

32. Mr Evans's *Section 994* Petition was presented to the Court on 8th January 2020.

(3) Witnesses

33. Six witnesses were called to give oral evidence. Apart from Mr Evans himself, each witness gave evidence orally on behalf of the Represented Respondents. They included Messrs Reid, Grant and Nicholson personally together, Mr Stephen Higginson and Mr Johann Samuels. In addition, the Represented Respondents relied on an unchallenged witness statement from Mr Michael Belcher.

34. A substantial amount of documentary evidence was also admitted. This included extensive documentation from the Company's accounting records and written communications, particularly written communications between Mr Reid and the Company's accountants, David Allen, through their partner, Ms Alison Welton. Some of the Company's accounting records, for example invoices, were heavily redacted before admission in court. However,

they at least provide a record of the chronological sequence of transactions. Some of the internal written communications provide a useful insight into Mr Reid's early concerns about the stance taken by Mr Evans and the options available with a view to extricating him from the Represented Parties. I have borne in mind the observations of Males LJ in *Simetra Global Assets Ltd v Ikon Finance Ltd [2019] 4 WLR 112* at [*48*] about the importance of the contemporaneous documentation "as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned". These apply with particular force in the present case since I have reluctantly been driven to the conclusion that, before me, much of the oral evidence was unreliable. However, the documents – particularly the written communications – must be construed in their proper context with an understanding, at times, of the nuances of the words used.

35. Mr Evans gave evidence about the formation of ECI Conveying and the circumstances in which, in his words, ECI Conveying was "amalgamated" in the Company. He also gave evidence about the following sequence of events, including his claim to the payment of dividends and the Settlement Agreement. He admits that he acted as a *de facto* director of the Company. Whilst the evidential basis for this is obscure and was not fully explored in cross examination, it can be surmised he held himself out as a director to the Company's customers or potential customers. However, this could only have been on an occasional basis. There is no evidence he performed a significant role in the management of the Company's affairs or dealt with matters that would ordinarily be referred to the directors.

36. In cross examination, Mr Evans was a defensive witness who was astute to make points in support of his case and unwilling to make concessions unless driven to do so. Contrary to the impression he sought to create in his witness statement and his oral evidence, it emerged in cross examination that his contribution to the Company was limited to identifying and introducing the Company to some potential work. From these introductions, he was only able to identify one transaction – a transaction in Greece – which came to fruition. Until June 2012, Mr Evans was employed as technical manager of NDH in Dubai. Upon his return, he was the sole director of Evans Canlines. At all material times, his priority was to establish Evans Canlines as a successful company.

37. Mr Reid gave evidence about the formation, in succession, of the Company and ECI Conveying, his evolving relationship with Mr Evans and his decision to resign as a director of the Company and establish ECI Cumbria in business.

38. Mr Reid is clearly an accomplished engineer, well respected by customers and sub-contractors notwithstanding Mr Evans's reluctance to concede as much in cross examination. However, it was apparent from Mr Reid's own answers to questions in cross examination that he had not done anything to re-familiarise himself with the contemporaneous documentation prior to the trial. Indeed, in re-examination, he confirmed this was so. His answers to questions were often made without proper consideration or reflection and, at times, he appeared to make a guess or jump to a conclusion without qualifying his answer or confirming the limitations on his knowledge or recollection. This is exemplified in the following exchange between himself and counsel on the second day of the hearing.

> Q…When do you recall that you told Stolle that you were leaving or had left?
> A. I wouldn't know the exact date of when I told them.
> Q. You resigned on -- at the beginning of July. Was it before you resigned or after you'd resigned?
> A. I'm not really sure.
> Q. It's quite critical.
> A. Okay. After I resigned.
> Q. Don't just jump to it.
> A. I'm not really sure.

39. At times such as this, Mr Reid's evidence was sometimes internally inconsistent. At one point in his testimony, he stated without qualification that, when resigning as a director, he had simply told Messrs Grant and Nicholson that he was doing so and was fed up. Later, when put to him he was suggesting they did not have any idea what his plan was for ECI Cumbria until "a few weeks afterwards", he agreed. However, when reminded they had transferred their shares to him in April 2016, Mr Reid confirmed that Messrs Grant and Nicholson were already aware of his intention to trade through ECI Cumbria at that stage, almost three months prior to his resignation. Any suggestion Mr Reid did not advise Messrs Grant and Nicholson of this prior to his resignation was implausible in the overall context of the case.

40. I have not discounted Mr Reid's evidence in its entirety. He was able to give helpful evidence about the general background and confidently answer questions on some specific issues where he had a distinct recollection, such as the identity of the first customer invoiced by ECI Cumbria. However, I have generally exercised caution when considering his evidence and looked for corroborative evidence on the more contentious aspects of the case.

41. Mr Grant was able to give evidence about the initial formation of the Company, his introduction to Mr Evans, the limitations on Mr Evans's involvement in the Company's

affairs and the circumstances in which Mr Reid left the Company and commenced work for ECI Cumbria. For each company, he was engaged to carry out work as a sub-contractor. Much of the time he was pre-occupied working on contracts abroad and he maintained, in evidence, that he thus had only limited knowledge of the management of their affairs. I accept that Mr Grant spent significant periods of time abroad and did not involve himself in the management of the affairs of each company or, indeed, more general issues of strategy and direction. There appear to have been few, if any, formal board meetings and Mr Grant was content to leave matters of administration to others.

42. Mr Grant was a defensive and laconic witness who sought to suggest he had only limited discussions with Mr Reid, prior to Mr Reid's resignation about Mr Reid's plans to set up ECI Cumbria in competition with the Company. Mr Grant also suggested that he wasn't aware he was going to join ECI Cumbria when he resigned from the Company in February 2017. In my judgment, these aspects of his evidence are implausible. With good reason, Mr Grant shared Mr Reid's frustration about Mr Evans's stance on his shareholding – as indeed did Mr Nicholson – and they plainly perceived it to be in their common interest to disentangle themselves from Mr Evans. As business partners or associates, Mr Grant and Mr Reid had known each other for many years and there is no suggestion they were ever on anything other than good terms. In these circumstances, there could have been no obvious reason for Mr Reid to withhold his plans from Mr Grant. Viewed from that perspective, the obvious reason for Mr Grant to resign as a director on 6th April 2016 was to avoid exposing himself to a conflict between his interests and duties to each company once ECI Cumbria commenced business in competition with the Company. It is also unrealistic to suggest that Mr Grant did not make arrangements to join ECI Cumbria before resigning from the Company as a director on 10th February 2017 notwithstanding that he was not appointed as such or allotted shares in ECI Cumbria until some four months later, on 30th June 2017. I have again exercised significant caution in considering and evaluating Mr Grant's evidence.

43. Mr Nicholson gave evidence pertaining to the dividend dispute, Mr Reid's resignation and the conduct of the Company's affairs since Mr Reid's resignation from his perspective as the Company's sole director since Mr Grant's resignation on 10th February 2017. In cross examination, he accepted he was made aware of Mr Reid's intention to resign in advance. When asked how long before, he said months before and pressed to be more precise, he said a "couple of months". When asked whether he had thought Mr Reid was entitled to

set up business in competition, his reply was "yes" on the basis it was open to Mr Reid, as a director, to "leave a company and start afresh". Although at times slow to make concessions, in my judgment Mr Nicholson did his best to address the questions put to him and answer them truthfully.

44. Mr Higginson is a director of Stolle which ultimately acquired the shares in ECI Cumbria. Indeed, he has been a director of the company since 2004. He was thus able to give evidence about the basis on which Stolle did business prior to the acquisition when it was a substantial customer of the Company and then ECI Cumbria. He gave evidence that he engaged the Company and subsequently ECI Cumbria on projects in view of his working relationship with Mr Reid and his perceptions about Mr Reid's understanding of the business and industry, and, more generally his reputation. He said that Mr Reid personally "gave us the best product and service" and, for this reason, followed him from the Company to ECI Cumbria. When asked in cross examination, whether he knew why the transaction with Stolle for the purchase of ECI Cumbria's assets had been transmuted from an asset sale to a share purchase, he stated that "…in the acquisitions that I've been involved with Toyo Siekhan and Stolle Machinery, they've never really purchased assets because the assets are quite useless if they don't have the people with them to operate or run the business. And quite often it's a condition of any purchase that we ask the principals of the business to remain with it". Mr Higginson was an impressive and reliable witness.

45. Mr Samuels is a mechanical engineer with specialist experience in beverage can making and can twists. He has historically worked as a sub-contractor for NDH, ECI Conveying, ECI and ECI Cumbria. In more recent years, he has effectively followed Mr Reid and carried out work when Mr Reid engaged him to do so. He came across as an honest and straightforward witness but his oral evidence was at times vague, confused and inconsistent with parts of his witness statement. For example, he was not able to confirm – in cross examination - that he had contacted Mr Reid "towards the end of 2016" following rumours that Mr Reid was "now running ECI Cumbria". The gist of his oral evidence was that the identity of the company didn't matter to him. He was engaged to do specific jobs by Mr Reid and worked on his instructions.

46. The Represented Respondents also rely on the unchallenged witness statement dated 17th December 2020 of Mr Michael Belcher. Mr Belcher is the owner and managing director of a conveying manufacturing installation company based in Thailand, Xetera (Thailand) Co Ltd. He confirmed that, in 2017, he sub-contracted some work to ECI Cumbria in

respect of a project for Kaveh Aluminium Can Company in Iran on the basis that he trusted Mr Reid to do the work based on his skill and expertise. This was apparently admitted to meet the suggestion, in Mr Evans's contention that the job should have been carried out by the Company on the basis that Mr Evans had introduced Mr Reid to Kevah in respect of another project in 2007. In my judgment, this contention was misconceived at the outset but, if there was ever room for doubt, it is eliminated by Mr Belcher's explanatory evidence.

47. The Represented Respondents did not call Ms Nicole Parker as a witness. Ms Parker is the daughter of one of Mr Reid's friends and, as long ago as 2013, she worked in the office with Emma, the office administrator albeit in conjunction with her studies at university. However when, in 2016, Mr Reid decided to commence business for ECI Cumbria, he approached Ms Parker to attend to matters of administration such as banking, correspondence and customer enquiries. Once he was made subject to intensive treatment for bowel cancer in 2017, he gave her more responsibility for the management of ECI Cumbria's affairs and, on 26th July 2017, she was appointed director and allotted a controlling shareholding.

48. Relying upon *Wisnieski v Central Manchester Health Authority [1998] PIQR 324* and the judgment of Cockerill J in *Magdeev v Tsvetkov [2020] EWHC 887*, Mr Harper submitted I should draw an adverse inference from the Represented Respondents' omission to call Ms Parker in relation to the transfer of business, if any, between the Company and ECI Cumbria, particularly in the period between April 2016 and Mr Reid's resignation on 2nd July 2016. In my judgment, it would be inappropriate for me to do so for the following reasons.

49. Firstly, the *Wisnieski* principle is founded on the omission of a litigant to call a witness or witnesses to address evidence adduced by another party to the litigation. It is not a device to fill gaps in the evidence. In the present case it is clear that, following his resignation, a significant number of the Company's customers followed Mr Reid to ECI Cumbria. However, Mr Evans has not adduced evidence that subsisting contracts or business opportunities were diverted from the Company to ECI Cumbria nor, indeed, that ECI Cumbria otherwise appropriated the Company's assets. There is an allegation that, on a visit to ECI's workshop in 2019, Mr Evans viewed some equipment that had originally been purchased by ECI Conveying. However, there is no suggestion Mr Reid somehow misappropriated such equipment when he commenced business for ECI Cumbria; indeed, it is inherently unlikely he could or would have done so given that he started the new

business from his home address without taking on a manufacturing function. In any event, it is difficult to see how Ms Parker could have assisted on issues such as this.

50. Secondly, until July 2017, when she was appointed as a director, Ms Parker's role was essentially in connection with matters of office administration. No doubt, she could have been cross examined on ECI Conveying's accounting records. In their form admitted before me, these were heavily redacted. However, there is no reason to believe Ms Parker would have had a specific insight into the accounting records which required clarification. More generally, although Ms Parker would have provided ECI Cumbria's customers with quotations and dealt with their enquiries once ECI Cumbria commenced in business, it is not suggested that Ms Parker by then had the technical skills to quote for work independently of Mr Reid nor, indeed, that she had independently established a significant relationship with the Company's customers personally. In reality, Mr Reid was much better placed than Ms Parker to deal with Mr Evans's case on the transfer of business. When preparing their case, it would by no means have been obvious to the Represented Respondents that there were issues in the litigation on which Ms Parker should be called to give separate evidence. As it happens, I have serious doubts about the quality of Mr Reid's testimony in court on some of the issues. However, it would be fanciful to suggest the Represented Defendants ought somehow to have anticipated this and called Ms Parker to supplement his evidence.

(4) The Facts

51. There are some significant issues of fact.

52. Firstly, there is an issue whether the shareholders ever entered into an agreement or understanding about the basis on which they were entitled to dividends. The Represented Respondents maintain there was an agreement or understanding that the shareholders would only be entitled to dividends if they undertook work for the Company or introduced business. Mr Evans disagrees. There is also an issue as to whether the parties reached an agreement or understanding that they would be free to pursue business interests elsewhere regardless of whether they were in competition with the Company.

53. These issues were raised, at the outset, in the Respondents' Points of Defence in which it was alleged that they were entitled to "a legitimate expectation that the shareholders and directors would introduce work to, and undertake work, for the Company, so as to make

their joint venture worthwhile and justify their shareholdings in it". Again, this is denied by Mr Evans.

54. In my judgment, whilst the factual context is nuanced, it is not possible to identify an agreement or common understanding that is binding upon Mr Evans as the Represented Parties suggest.

55. I shall turn first to the payment of dividends. On 24th September 2010, the Company's share capital was raised to £102, Mr Evans was allotted 30 ordinary shares (in addition to the shares allotted to Mr Reid, Mr Grant and Mr Nicholson) and, on 30th April 2011, the assets of ECI Conveying were transferred to the Company.

56. No doubt, part of the parties' intention was to tidy up the affairs of ECI Conveying. However, I am satisfied that they entered into these arrangements in the expectation that each of the main shareholders – Messrs Evans, Reid, Grant and Nicholson – would make a substantial contribution to the Company. This would include them undertaking work. No doubt, in broad terms, the allotted shareholdings were also intended to reflect this expectation and it was anticipated that they would be entitled to draw dividends and monies on account of such dividends to supplement their bare contractual remuneration. Prior to these arrangements, Mr Reid and Mr Grant, as the Company's only shareholders, had drawn dividends in amounts similar to one another on the basis their overall contributions were commensurate. I am satisfied Mr Evans was aware that this was the case and, mindful that he was not undertaking substantial work for the Company, he didn't initially claim a dividend.

57. However, on these matters, there was never anything more than a loose understanding or expectation between the parties with which Mr Evans did not initially take issue. They did not enter into a formal shareholders' agreement nor, indeed, did they enter into contractual commitments about the payment of dividends and it was not suggested that Mr Evans made any assurances so as to cause the other shareholders to act to their detriment. In my judgment, Mr Evans did not release or do anything to waive or qualify his right to a dividend before entering into the Settlement Agreement.

58. I have reached a similar conclusion in relation to the issue of whether the parties reached an agreement or understanding that they would be free to pursue competing business interests.

59. Although the business activities of the Company and Evans Canlines were not the same, there was a significant overlap. At all material times, the Company's business activities encompassed the design, manufacture, installation and commissioning of conveying systems for canning. Evans Canlines also offered services in connection with the design, installation and commissioning of such systems but did not itself manufacture equipment or machinery. It was always open to Evans Canlines to provide services for clients which could have been provided by the Company – as indeed it did - sub-contracting such work to third parties, including the Company itself, as appropriate. To that extent, the companies were in competition. Mr Evans did not conceal this from the other directors and shareholders of the Company and they did not take any action to prevent him working for a competing business notwithstanding the suggestion he was a *de facto* director of the Company. Their grievance was more that Mr Evans was not "pulling his weight" than that he was actively engaging in competition. In any event, they did not take pre-emptive action and, in that sense, they showed Mr Evans a measure of indulgence. There was no general agreement or understanding that the parties would be free to pursue business interests in competition with the Company.

60. There is a factual issue about the extent of Mr Evans's contribution to the Company during the period between September 2010 or thereabouts, when he was allotted shares, and April 2016 when he asserted his claim to the payment of a dividend. In his witness statement, Mr Evans stated that, in his discussions with Mr Reid before he returned to the UK, he had been asked whether he would work for the Company but responded by advising him that it would be better for him to set up his own company. This was on the basis his own company would be a customer, generating work for the Company itself. Later in his witness statement, he confirmed that he subsequently arranged for the Company to quote for some work; on one occasion he put forward the Company's name for the supply of some conveying equipment in Dubai and, on another, he recommended the Company for equipment in relation to a project for Crown Braunstone. However, he was only able to identify a single occasion on which he had successfully introduced the Company to a transaction which came to fruition, namely in relation to conveying for a new can line in Korinthos, Greece. There is no evidence that Mr Evans or his company, Evans Canlines, successfully introduced or generated any other work or transactions for the Company.

61. Prior to his return to the UK, Mr Evans worked for NDH. He then worked for Evans Canlines. At no stage did he contract to provide services for the Company. Whilst he

accepts that he was a *de facto* director of the Company, he did not state that he had attended meetings with the other directors in relation to the Company's affairs – whether formal board meetings, if any, or otherwise - nor did he clarify what he might have done in his capacity as a director. In my judgment, Mr Evans's contribution to the Company was insubstantial. Historically, he had made some loans to ECI Conveying - subsequently repaid - but there is nothing to suggest he made a significant financial contribution to the Company itself. Whilst he occasionally sought to introduce work to the Company and draw its attention to potential transactions, this was only on a sporadic basis and, as I have mentioned, successfully led to only one transaction.

62. The next significant question is as to when ECI Cumbria first started to trade. Given the nature of the business, this involves asking when it started quoting for work, entering into transactions and performing services for customers. Approached in this way, I have reached the conclusion that ECI Cumbria started to trade shortly after the resignation of Mr Reid on 2nd July 2016. This is for the following reasons.

63. Firstly, ECI Cumbria filed dormant accounts for the years ending on 30th June 2015 and 2016. Its accounting records have been disclosed and they were admitted in evidence. Its first invoice is dated 10th July 2016. Unfortunately, the relevant invoice details were redacted in the document admitted before me. There is no quotation or other contemporaneous documentary evidence about this transaction nor, indeed, is there contemporaneous documentary evidence in relation to any other transaction with ECI Cumbria's customers prior to this date. It follows there is no documentation showing when ECI Cumbria was engaged to do the works invoiced on 10th July 2016 nor, indeed, is there a document to show when the works were carried out and the extent of the works. However, in cross examination, Mr Reid stated that the invoice was for work to which he attended personally for a friend and confirmed, in cross examination, that he would have advised the customer that, by then, he had resigned as a director of the Company. Mr Reid's evidence is to be treated with caution. It is noteworthy that the relevant invoice was delivered little more than a week after ECI Cumbria commenced business allowing little, if any time, for Mr Reid to have quoted and contracted to do the work. It cannot be demonstrated, from the contemporaneous documentation, that ECI Cumbria commenced the work before Mr Reid's resignation. On the balance of probability, it was commenced afterwards. It is more than conceivable that Mr Reid quoted for the work prior to his resignation. If so, this would

be capable of amounting to a breach of Mr Reid's fiduciary duties as a director but, in my judgment, it would be *de minimis* in the context of the present dispute.

64. Secondly, Mr Reid had good reason to await his resignation before commencing business for ECI Cumbria since the Company's accountant, Ms Alison Welton, had already advised him that he could not lawfully engage in trade for a rival business whilst a director of the Company. He also had reason to believe that Mr Evans would be astute to protect his rights as a shareholder, reinforced by Baines Wilson's letter dated 12th April 2016 and Mr Evans's own account of a dispute in which he had engaged with NDH. By April 2016, if not before, he had decided to resign as a director and commence business through ECI Cumbria. By 2nd July 2016, he had thus attended to formalities in preparation for the commencement of the business, such as obtaining registration for VAT and setting up a bank account, but was careful to avoid transacting business with customers until after his resignation.

65. Thirdly, although Mr Reid's testimony must be treated with caution, there is nothing in the evidence of the other witnesses or in the contemporaneous documentation, to contradict his testimony on this aspect of the case. I am disinclined to discount Mr Reid's testimony in its entirety and, on this aspect, it is not inherently implausible. Since, at this stage, he was ECI Cumbria's sole director and its services were initially provided through him, he was and is plainly better placed to give evidence pertaining to the date on which ECI Cumbria commenced in business than anyone else.

66. Although ECI Cumbria only commenced business after Mr Reid's resignation, there is a residual question as to whether he diverted to ECI Cumbria subsisting transactions with the Company or maturing business opportunities. The short answer to this question is that there is no immediate contemporary documentary evidence (whether in the companies' accounting records or otherwise) that Mr Reid or, indeed, anyone else did so. There is no evidence that the Company's customers withdrew from transactions nor, indeed, is there evidence that they withdrew from negotiations with the Company for business commenced prior to Mr Reid's resignation. It is clear that many of the Company's customers and contractors held Mr Reid in high regard and ultimately followed him from the Company to ECI Cumbria. However, there is no evidence that they sought to abandon or discontinue their existing projects or negotiations with the Company. Consistently with this, it can be seen from the Company's annual accounts that its turnover increased sharply in the year ending on 28th February 2017 from £3,091,239 to £4,544,739.

67. In his subsequent entries on a questionnaire dated 26th September 2017 about ECI and ECI Cumbria – the OKL Questionnaire – Mr Reid stated *inter alia* that "the *trade/business* of [the Company] has been *migrated* over the last year or so to ECI Cumbria Limited with the eventual closing of [the Company envisaged] in the near future" (My italics). Construed in context, this should be taken to mean that customers who had previously placed their trade or business with the Company were now placing their trade or business with ECI Cumbria as part of a process starting approximately a year before. In the absence of evidence to the contrary, it should not be taken to mean that the directors had diverted existing contracts or maturing business opportunities to ECI Cumbria.

68. When ECI Cumbria commenced business, it operated on a much smaller scale than the Company and was at first incapable of performing the Company's manufacturing function from Mr Reid's home address without the necessary plant and equipment. However, by that stage, it was plainly in competition with the Company. The next questions that arise are as to when Messrs Reid, Grant and Nicholson first conceived ECI Cumbria would trade in competition with the Company and the extent to which they co-operated with one another in setting it up for this purpose prior to Mr Reid's resignation on 2nd July 2016.

69. In answer to these questions, there can be little room for doubt that, when they formed ECI Cumbria in June 2014, Messrs Reid, Grant and Nicholson viewed it as a potential vehicle for a business in competition with the Company. This is consistent with Mr Reid's testimony in cross examination. Messrs Grant and Nicholson were more reluctant to accept this was the case. However, no other explanation has been provided for the incorporation of the company. By then, Mr Evans had returned to the UK and he was fully occupied establishing Evans Canline. They hoped he might be persuaded to sell his shares but, in the event this did not prove possible, they believed it would be open to them to set up a new corporate vehicle. This is reflected in Ms Welton's file note dated 18th December 2013 of a meeting with Mr Reid in which it was recorded that, whilst Mr Reid was in discussions with Mr Evans with a view to the purchase of his shares, Mr Evans did "not seem too keen…at the moment". It was recorded that Mr Reid "may look to set up a new company and transfer the trade to it. Would be called ECI-Company. Paul N 30, Jamie 35%, Steve 35%. Steve will let us know if we need to do this".

70. On incorporation, Messrs Evans, Grant and Nicholson were issued with 40 shares each. They were also appointed directors. The new company didn't initially commence in

business. However, they obviously considered this would remain open to them if Mr Evans could not be persuaded to sell his shares.

71. The parties entered into discussions with a view to the sale of Mr Evans's shares. However, having obtained discordant professional share valuations, their discussions broke down.

72. During April 2016 at the latest, Mr Reid decided that he would resign as a director of the Company and set up business on behalf of ECI Cumbria. However, he envisaged it would first be necessary to attend to formalities, such as VAT registration, and he may then have decided to wait a few days until the expiry of ECI Cumbria's accounting year, 30th June 2016, unless this is simply a coincidence of timing.

73. Although Mr Reid's testimony evolved in cross examination, he eventually accepted that Messrs Grant and Nicholson were aware of his plans by 6th April 2016 when they disposed of their shares. Without being precise as to a time, Mr Nicholson also accepted he was aware of Mr Reid's plans a "couple of months" before his resignation. Mr Grant implausibly suggested that he spoke very little about it prior to Mr Reid's resignation and referred to a single telephone conversation shortly before the date of the resignation itself. No doubt Mr Grant was working abroad during this period; he was taciturn when giving his evidence in court and it is more than conceivable he does not favour lengthy discussions. However, ECI Cumbria was plainly formed as a potential vehicle for Messrs Reid, Grant and Nicholson to sever business from Mr Evans and, by the time they disposed of their shares, it is overwhelmingly likely they were aware Mr Reid intended to resign from the Company and commence a rival business utilising ECI Cumbria as his corporate vehicle.

74. It is self-evident that Messrs Grant and Nicholson co-operated with Mr Reid in connection with the formation of ECI Cumbria in June 2014 and, on 6th April 2016, transferring their shares to Mr Reid and resigning as directors. They can be taken to have resigned as directors of ECI Cumbria in anticipation that Mr Reid intended to resign as a director of the Company and commence a rival business using ECI Cumbria as his corporate vehicle. At this stage, it is also likely they envisaged there was every chance that they would ultimately be given the opportunity to participate in ECI Cumbria as shareholders and directors.

75. Finally, there is a factual question as to the extent of Mr Evans's knowledge of the claims that might have been open to him in respect of his shareholding when, on 23rd October 2017, he entered into the Settlement Agreement.

76. It can be seen from the correspondence between his solicitors, Baines Wilson, and the Company during the period 12 April 2016 – 26 January 2017 that, prior to Mr Reid's resignation, Mr Evans was already alert to potential claims for unpaid dividends, "anomalies" in relation to the Company's accounts and expenses and a potential claim for unfair prejudice. In cross examination, Mr Evans confirmed that, on 2nd July 2016, Mr Reid advised him of his resignation as a director of the Company. Mr Evans thus surmised that he had done so in order to set up his own company, ECI Cumbria, which would come out of dormancy. He also surmised that ECI Cumbria would be in the business of "making conveying and competing with [the Company]". In cross examination, Mr Evans appeared reluctant to confirm the full extent of his knowledge by the time he entered into the Settlement Agreement. However, I am satisfied he was by then fully aware that Mr Reid had resigned from the Company and set up a competing business. As Mr Higginson put it, when confirming he was aware, at an early stage, of rumours about Mr Reid's plans: "it's a very incestuous business and there's not a lot goes on out in the field of can making that people don't know about, particularly with small firms…" Mr Evans was in the same industry, and he had assiduously sought to reserve his right to bring a claim based on unfair prejudice. He was astute to protect his rights as a shareholder and, if, as he maintains, he was acting as a *de facto* director, he could have been expected to keep an eye on the Company's affairs. Of course, if ECI Cumbria did not commence business prior to Mr Reid's resignation or divert transactions and maturing business opportunities to it, Mr Evans obviously cannot have had knowledge to the contrary.

(5) The Statutory Remedy

77. *Section 994(1)* of the *Companies Act 2006* provides for a member of a company to petition the Court for statutory relief on the ground:

> "(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of the members generally or of some part of its members (including at least himself), or
>
> (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial".

78. As a registered shareholder, there is no dispute about Mr Evans's status as a member. However, to succeed in his petition, his complaint must relate to the *conduct of the company's affairs* or an *act or omission* of the *company*. He must also show this is *unfairly*

prejudicial to the interests, as a shareholder, of the members generally or some part of the members including himself.

79. Action taken by directors in the exercise of their powers as director or, indeed, an omission to exercise such powers is capable of qualifying as the conduct of the company's affairs or an act or omission of the company itself. However, "the conduct must be both prejudicial (in the sense of causing prejudice or harm to the relevant interest) and also unfairly so: conduct may be unfair without being prejudicial or prejudicial without being unfair, and it is not sufficient if the conduct satisfies only one of these tests…", *Re Saul D Harrison & Sons [1995] 1 BCLC 14, 31c (Neill LJ).* Moreover, unfairness is to be assessed with reference to the directors' powers and duties, the rights of the members and any equitable considerations arising from the reasonable expectations of members. In *O'Neill v Phillips [1999] 1 WLR 1092*, Lord Hoffmann thus observed, as follows, at *1098H-1099B*:

> "…a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But…there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist of a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith".

(6) The Claim

80. Mr Evans contends that the Represented Respondents entered into unlawful means conspiracies and Messrs Reid, Grant and Nicholson committed breaches of their statutory duties, as directors, under *Section 172* and *175* of the *Companies Act 2006.* He also contends that they pursued an unlawful dividend policy.

81. The unlawful means conspiracies are summarised in Paragraph 18 of Mr Evans's Skeleton Argument. Paragraph 18 is as follows.

> "18. ..
>
> a. On a date/date(s) unknown to the P but prior to the incorporation of ECI Cumbria and at a time when they were each directors of the Company; the Rs agreed that they would (to the exclusion of the Company and the P) incorporate ECI Cumbria with a view to using the same as a medium through which to compete with the Company and/or conduct the business of the Company for the benefit of themselves and ECI Cumbria and/or to the exclusion of the Company and the Petitioner ("**Conspiracy 1**");
>
> b. On a date/date(s) unknown to the P but between the date when ECI Cumbria was incorporated and 2 July 2016 (being the date when Mr. Reid resigned as a director and left the employment of the Company to commence working for ECI Cumbria) and at a time when they were each directors of the Company, the Rs agreed that ECI Cumbria would commence trading in competition with the Company and/or conducting the business of the Company and that this would be (as originally intended – see (a) above)

for the benefit of themselves and ECI Cumbria and/or to the exclusion of the Company and the P ("**Conspiracy 2**");

c. On a date/date(s) unknown to the P but between the date when ECI Cumbria was incorporated and 2 July 2016 (being the date when Mr. Reid resigned as a director and left the employment of the Company to commence working for ECI Cumbria) and at a time when they were each directors of the Company, there were discussions, negotiations and agreement(s) between the Rs (and each of them) and representatives of Stolle, the gist of which was (inter alia) to inform Stolle of the plan(s) referred to in (b) above in order to secure their agreement to moving their custom from the Company to ECI Cumbria ("**Conspiracy 3**"); …

d. …

e. ECI Cumbria was a party to Conspiracies 2 – [3] and is affixed with the knowledge that each of the Rs had.

f. Each of Conspiracies 1 – [3] ("the Conspiracies") was a conspiracy to injure the Company and/or the P by unlawful means, namely the consequential breaches by the Rs of the statutory duties that they owed to the Company under the [Companies Act 2006].

82. Conspiracy 1 thus amounts to an agreement to incorporate ECI Cumbria with a view to using it as a device to compete with the Company or conduct its business. Conspiracy 2 is an agreement to commence trade in competition with the Company and conduct its business and Conspiracy 3 is an agreement to inform Stolle of the same. Since they each involve a breach of the statutory duties of Messrs Reid, Grant and Nicholson to the Company, it is alleged that the Represented Respondents thereby entered into a conspiracy to injure the Company by unlawful means.

83. It is alleged that the Represented Respondents failed to inform the Company of the three conspiracies and committed breaches of duty under *Section 172, 174* and *175* of the *Companies Act 2006.* However, these allegations are not free standing allegations. They are incidental to the unlawful means conspiracy.

84. Mr Evans's case is also based on the following propositions, summarised in Paragraph 21 and 24 of his Skeleton Argument.

21. Further or alternatively:

a.

(i) By incorporating ECI Cumbria and/or being directors of and shareholders in the same at a time when they were directors of the Company, irrespective of whether or not Conspiracy 1 existed or not, the Rs and each of them were in breach of s175 of the Act because such interests could or possibly may conflict with their duties as directors to the Company;
(ii) The conflict was and is obvious and is illustrated by (d) below.

b. In the circumstances pleaded in (a) above and the fact that the Rs (and each of them) did not inform the Company of the same, the Rs (and each of them) acted in breach of s172 of the Act as they could not and did not believe, in good faith, that the Company being deprived of this information would promote the success of the Company;

c….

d. Each of the Rs knew that (i) they were each a director of and shareholder in ECI Cumbria, (ii) ECI Cumbria provided each of them with a medium through which to compete with the Company and (iii) their employment contracts with the Company did not include post-termination restrictive covenants;

i. Despite this knowledge they did not take any steps to protect the Company. In particular; they did not identify and inform the Company of the need for each of them to have an enforceable employment contract that included enforceable post-termination restrictive covenants. Further, they did not take any steps to have such employment contracts drawn up and executed.

ii Each of the Rs is therefore in breach of section 174 of the Act. A director acting with reasonable care, skill and diligence would have identified and informed the Company of the need for such contracts and would have taken steps to have such contracts drawn up and executed.Reliance is placed on the line of authorities and principles referred to in *G Attwood Holdings Ltd & another v Woodward & others [2009] EWHC 1083 (Ch)* at *[22] – [26]*. By being a party to each of the Conspiracies and/or not informing the Company of the same and/or the fact that the Company would be facing competition from ECI Cumbria, each of the Rs was in breach of the statutory duties that they owed to the Company.

24. The P is entitled to…and does also rely upon the dividend policy that was operated by the Company during the period from 24 September 2010 until financial year ending 28 February 2015 pursuant to which the Company unlawfully paid dividends to only the director shareholders and therefore not to the P. Whilst giving the P a cause of action to recover his share of the dividends, this also amounted to unfairly prejudicial conduct of the affairs of the Company. Whilst the claims were compromised by the Settlement Agreement and Release dated 23 October 2017…the P, the Rs having committed the acts of unfair prejudice referred to above, can also rely upon the unlawful dividend policy as unfair prejudice on this petition."

(7) The Settlement Agreement

85. The Settlement Agreement contained a series of recitals, definitions and operative terms. Under the heading "Background", Mr Evans's allegation that "he was entitled to payment of unpaid dividends as a debt from [the Company]" was specifically recorded. The allegation was itself denoted as "the Dispute" and defined so as to relate to "dividends declared by [the Company] prior to 28th February 2017".

86. "Related Parties" was defined so as to mean "a party's parent, subsidiaries, assigns, transferees, representatives, principals, agents, officers, shareholders, current or former directors".

87. Having provided for the Company to pay Mr Evans the sum of £196,000 in two instalments of £98,000, it was provided *inter alia* as follows:

> "4.1 This Agreement is in full and final settlement of, and each Party hereby releases and forever discharges, all and/or any actions, claims, rights, demands and set offs, whether in this jurisdiction or any other and whether in law or equity, that it, its Related Parties or any of them ever had or may have against the other Party or any of its Related Parties arising out of or connected with:
>
> (a) the Dispute; and

(b) any and all other claims relating to [Mr Evans's] shareholding in [the Company], which are known or reasonably ought to be known to [Mr Evans] as of the date of this Agreement ("the Released Claims")

4.2 [Mr Evans] agrees not to make any demands or commence or prosecute any proceedings (whether commenced by way of claim form, petition or otherwise) against [the Company] or its Related Parties concerning the Released Claims.

4.3 Clauses 4.1 and 4.2 shall not apply to and the Released Claims shall not include:

(a) Any claims in respect of breach of this Agreement; or

(b) Any dividends declared by [the Company] and not paid to [the Company] after 28 February 2017.

7. This Agreement is entered into in connection with the compromise of disputed matters and in the light of other considerations. It is not, and shall not be represented or construed by the parties as an admission of liability or wrongdoing on the part of either party to this Agreement or any other person or entity.

9.1 This agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.

9.2 Each party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this Agreement. Each party agrees that is shall have no claim for innocent or negligent misrepresentation (or negligent mis-statement) based on any statement in this Agreement."

88. There is an issue between the parties as to whether the definition of "Released Claims" in Clause 4.1 of the Settlement Agreement is sufficiently wide to encompass a Petition for relief under *Section 994* of the *2006 Act.*

89. In support of his contention that it does not do so, Mr Harper submits that a petition is not an action, claim, right, demand or set off within the meaning of Clause 4.1.

90. I take a different view.

91. The Settlement Agreement is to be construed in one unitary exercise, *Rainy Sky v Kookmin Bank [2011] 1 WLR 2900* at [21] (Lord Clarke) by ascertaining the meaning it would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time

of the contract", *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896* at *912* (Lord Hoffmann). If susceptible of more than one interpretation, the court may prefer the construction which is consistent with business common sense, *Rainy Sky v Kookmin Bank [2011] 1 WLR 2900*, Lord Clarke at [21]. However, the clearer the natural meaning, the more difficult it is to justify departing from it and "a court should be very slow to reject the natural meaning of a provision…simply because it appears to be a very imprudent term for one of the parties to have agreed", *Arnold v Britton* [2015] AC 1628*,[17]-[20].*

92. The obvious purpose of the Settlement Agreement was to conclusively compromise the dispute foreshadowed in Baines Wilson's letter dated 12 April 2016 and pursued in their letters to the Company dated 4 July 2016 and 26 January 2017. In this correspondence, Baines Wilson contended that the Company had unlawfully withheld dividends from Mr Evans. It also contended there were unexplained anomalies in the Company's accounting records. Requisitions were made in respect of some company expenses and issue was taken with the way in which the Company had contracted on some projects. In their letter dated 26 January 2017, Baines Wilson demanded the sum of £137,988.60 plus interest in respect of unpaid dividends and confirmed that Mr Evans had grounds to substantiate a claim for unfair prejudice against his co-shareholders.

93. The Settlement Agreement was expressed to be in full and final settlement of the Released Claims, as defined and Mr Evans covenanted to release the Company and not to commence any proceedings in respect of such claims. Viewed objectively as a whole, the Settlement Agreement was intended to definitively compromise the parties' rights and liabilities in *substance* and it is to be construed as such. The reference in Clause 4.1 to "actions, claims, rights, demands and set offs" was intended to comprehend the *substance* of the parties' claims and rights against one another; it is not limited to the *form* in which they are pursued or presented. When Clause 4.1 is construed together with Clause 4.2, this can be seen from the passage in parenthesis in which it is provided that it matters not whether "any proceedings" are "commenced by way of claim form, petition or otherwise". Moreover, as Mr Collings observed, in his closing submissions, the reference, in parenthesis in Clause 4.2, to proceedings "commenced by…. *petition*" (my italics) is otiose if "Released Claims", as defined, does not comprehend such proceedings.

94. Relying on *Re Bankside Hotels Limited [2018] EWHC 1035 (Ch*) in which Sir Nicholas Warren stated, at *[150],* that a petition under *Section 994* is not founded on a "cause of

action…or entitlement to relief", Mr Harper submitted that a petition is not a claim. However, in my judgment, this is a *non-sequitur*. Sir Nicholas Warren himself characterised a *Section 994* petition as a *claim* earlier in the same paragraph. To make a claim, it is not essential for the claimant to be entitled to a cause of action or an immediate right to relief in the narrow sense envisaged by the Judge himself. In the *Bankside Hotels* case, the petitioners could not show they were entitled to relief so as to furnish themselves with a right to obtain a judgment to which *CPR 3.5(5)* would apply. This was because relief was at the court's discretion. However, this does not, in any meaningful sense, deprive a petitioner of the status of a claimant and provides no assistance on the interpretation of the Settlement Agreement.

95. In my judgment, the Settlement Agreement was intended to compromise a right or claim that Mr Evans was entitled to advance against the Company when made, including a claim based on an unfair prejudice petition.

96. "Released Claims" was defined (see above) so as to include the dispute in relation to the payment of dividends paid prior to 28 February 2017 and "any or all other claims relating to [Mr Evans's] shareholding in the [Company] which are known or reasonably ought to be known to [Mr Evans] as of the date of [the] Agreement". No doubt, the purpose of the secondary clause was to ensure that, whilst the general scheme was for the Company to be released from any claim or right to which Mr Evans might then be entitled, he would remain at liberty to advance claims based on facts of which he was unaware and had no reason to know of. In my judgment, "the Released Claims" can thus be taken to comprehend claims relating to his shareholding of which he was aware when he entered into the Settlement Agreement and claims based on facts fully known to him. It would also have included claims of which Mr Evans would have been aware had he not wilfully turned a blind eye or failed to make proper inquiry after being alerted to matters indicative of a potential claim.

97. For the sake of completeness, I was not referred to specific authority for assistance on the interpretation of this part of the Settlement Agreement and it would be dangerous to draw assistance, by analogy, from the authorities on *Section 14A* of the *Limitation Act 1980* in which there is a specific statutory scheme on the time limit for negligence actions where facts relevant to the cause of action are not known at date of accrual.

(8) Analysis

98. In order to engage the statutory jurisdiction in *Section 994*, it is first necessary to ask whether Mr Evans's complaints pertain to the conduct of the Company's affairs or an act or omission of the Company itself. This involves analysing whether the complaints relate to the exercise of powers or an omission to exercise powers conferred on one or more of Messrs Reid, Grant and Nicholson under the Company's constitution or otherwise in their capacity as directors of the Company.

99. Having identified the complaints, if any, which pertain or are capable of pertaining to the conduct of the Company's affairs, I must then consider the extent to which the essential factual elements of Mr Evans's complaints have been substantiated.

100. I shall then determine whether, subject to the Settlement Agreement, they involve unfair prejudice or are causative of unfair prejudice to Mr Evans as a shareholder.

101. Finally, I shall determine whether Mr Evans is precluded from advancing his claim by the Settlement Agreement or, more generally, whether it undermines his case based on unfair prejudice or his rights to statutory relief.

102. Conspiracy 1 is narrowly based on an allegation that Messrs Reid, Grant and Nicholson agreed to incorporate ECI Cumbria and did so with the intention that it would compete with the Company "or conduct its business…" at some point in the future. Since ECI Cumbria was incorporated on 9th June 2014, the putative agreement was entered into upwards of two years before it commenced in business. Conspiracy 2 is based on an allegation that Messrs Reid, Grant and Nicholson agreed that ECI Cumbria would trade in competition with the Company "or conduct its business…" The agreement was allegedly made some time later, between 9th June 2014 and 2nd July 2016, the date of Mr Reid's resignation. Conspiracy 3 is for Stolle to be advised of Conspiracy 2 and thus cannot exist independently from Conspiracy 2.

103. In my judgment, the alleged conspiracies only pertain to the conduct of the Company's affairs to the extent it is implicit the conspirators agreed that, as a director or employee of the Company, one or more of them would cause or allow ECI Cumbria to compete with the Company, solicit its business or, as Mr Evans puts his case, conduct the Company's business and advise Stolle of their plan to do so.

104. On this basis, the alleged agreement, in Conspiracy 1, to incorporate ECI Cumbria would not, in itself, qualify nor would it suffice for Messrs Reid, Grant and Nicholson to have entered into the agreement in contemplation that at some indeterminate date in the future,

ECI Cumbria would carry on business in competition with the Company. Similarly, the agreement, in Conspiracy 2, that ECI Cumbria would trade in competition with the Company would not, in itself, suffice unless it was agreed that at least one of the conspirators would exercise his powers in respect of the Company to cause or allow ECI Cumbria to do so. Again Conspiracy 3 could only pertain to the conduct of the Company's affairs if the information was to be provided, through one or other conspirator, when in office as a director or in the employment of the Company.

105. If Mr Evans must show that the conspiracies pertain to the conduct of the Company's affairs on this basis, the essential factual elements of his case can only be established to a limited extent.

106. Turning to Conspiracy 1, I am satisfied that, at the outset, Messrs Reid, Grant and Nicholson agreed to incorporate ECI Cumbria and contemplated that the new company might ultimately carry on business of the same or a similar nature to the Company and, if by then, the Company remained in business, there was every chance that it would carry on business in competition with the Company. They also contemplated that, if this were to happen, they would each be given the opportunity to participate as shareholders and directors. However, this was at an early stage before they could have known the outcome of negotiations with Mr Evans for the disposal of his shares. I am not satisfied there is evidence on which I can reasonably conclude they formed the intention that ECI Cumbria would itself "conduct the business of the Company for the benefit of themselves and ECI Cumbria and/or the exclusion of the Company and [Mr Evans]". Nor am I satisfied that there was any agreement that one or other of the conspirators would cause or allow ECI Cumbria to compete with or solicit the Company's business and do so whilst in office as a director or employee of the Company. In view of the fact that the putative agreement was made prior to 9th June 2014 when ECI Cumbria was formed, it is unlikely the issue of whether one or other of the conspirators would vacate office before causing ECI Cumbria to compete with the Company formed any part of their agreement or collective understanding.

107. Conspiracy 2 incorporates an allegation that, prior to Mr Reid's resignation on 2nd July 2016, the Represented Respondents agreed that ECI Cumbria would commence trade "in competition with the Company and/or [conduct] the business of the Company and this would be…for the benefit of themselves and ECI Cumbria and/or to the exclusion of the Company and [Mr Evans]". I am satisfied that, by 6th April 2016 if not before, the

Represented Respondents were each aware that Mr Reid intended to commence in business using ECI Cumbria as his vehicle and, once it did so, ECI Cumbria would be in competition with the Company. However, I am not satisfied that they agreed that ECI Cumbria would commence in competition prior to Mr Reid's resignation as a director of the Company. Again, I am not satisfied that they reached an understanding that ECI Cumbria would somehow conduct the business of the Company and do so for the benefit of themselves and ECI Cumbria and/or to the exclusion of the Company and Mr Evans.

108. Conspiracy 3 involves an allegation that, prior to 2 July 2016, "there were discussions, negotiations and agreement(s) between the Rs (and each of them) and representatives of Stolle, the gist of which was (inter alia) to inform Stolle of the plan [in Conspiracy 2] in order to secure their agreement to moving their custom from the Company to ECI Cumbria". I am not satisfied that there is evidence to substantiate this allegation, whether documentary or otherwise. In my judgment, it is also inherently unlikely to be correct. Stolle was certainly a valued customer of the Company. However, Mr Higginson was first appointed as a director of Stolle on 15th January 2004 and he has remained in office since that time. Had the Represented Respondents been minded, prior to 2 July 2016, to inform Stolle of their plan, it is likely they would have approached him. There is no evidence they took any steps to do so. Mr Higginson himself confirmed, in cross examination, that he heard rumours Mr Reid intended to leave the Company shortly before his resignation but Mr Reid did not advise him of his resignation until after he had left. Following Mr Reid's departure, Stolle did indeed follow him to ECI Cumbria. However, there is no evidence that any existing business or maturing opportunities were diverted to ECI Cumbria and had the plan been to contact Stolle prior to Mr Reid's resignation, it was not implemented.

109. For the avoidance of doubt, I am not satisfied that the putative conspirators ever agreed or understood that one or other of them would cause ECI Cumbria to carry on business in competition with the Company at a time that he remained in the Company's employment or in office as a director. However, prior to Mr Reid's resignation on 2nd July 2016, they were well aware that he intended to leave the Company and set up ECI Cumbria in business in competition with it. It was also at least implicit that they all believed and understood that none of them would take action, on behalf of the Company, to prevent ECI Cumbria carrying on business lawfully in competition with the Company itself. More specifically, in all likelihood, Messrs Grant and Nicholson indicated to Mr Reid or at least knowingly allowed him to form the impression that, whilst in office as directors of the Company, they

would not do anything to prevent Mr Reid from carrying on such a business following his resignation. In these limited respects, Messrs Reid, Grant and Nicholson reached an agreement or understanding which pertained to the conduct of the Company's affairs. However, it can be seen, from the outset, that Mr Evans's case based on conspiracy hangs by a thread.

110. Mr Evans does not contend that the putative breaches of *Section 172, 174* and *175* of the *Companies Act* and the alleged failure to advise the Company of the conspiracies furnish him with statutory grounds for relief independently from the conspiracies.

111. Conversely, Mr Evans's complaints in relation to the non-payment of dividends plainly relate to the conduct of the Company's affairs. However, this gives rise to different issues with which I shall deal with later.

112. The next issue is whether Mr Evans can show that, by reason of the matters of which he complains, he sustained unfair prejudice.

113. For this purpose, the Represented Respondents do not deny that, as a member of the Company, Mr Evans has been prejudiced. However, in order to engage the statutory jurisdiction in *Section 994*, the prejudice must itself be a function of a grievance about the conduct of the Company's affairs. No doubt, in this respect, Mr Evans is entitled to rely on the Represented Respondents' understanding or agreement that no one would take action, on behalf of the Company, to prevent ECI Cumbria carrying on business in competition. However, so long as it was understood ECI Cumbria would do so lawfully and the Company would thus be in no position to challenge it, it is by no means clear that this understanding could be causative of any *material* prejudice to Mr Evans.

114. In any event, the Represented Respondents maintain that the prejudice of which Mr Evans complains is not *unfair* and it is on this aspect that their case is focussed. Consistently with Lord Hoffmann's observations in *O'Neill v Phillips (supra)*, Mr Collings submits, on their behalf, that to succeed in establishing unfairness, it must be shown the Represented Respondents have acted unlawfully in some way or inconsistently with their legal duties and the rights of Mr Evans himself or the Company. For this purpose, Mr Collings submits that it does not suffice for Mr Evans to show that the Represented Respondents formed an understanding or intention ECI Cumbria would compete with the Company or, indeed, that Mr Reid caused it to compete with the Company after he had ceased as a director. He must go further and show they agreed to appropriate or divert the

Company's business or assets. In the absence of any evidence of an agreement on the part of the Represented Respondents to appropriate or divert the Company's business or assets and, indeed, any action to do so, Mr Collings submits that there has been no unlawful means conspiracy; the Represented Respondents have not acted unlawfully. He thus submits that any prejudice that might have been occasioned to Mr Evans is not unfair.

115. Mr Collings's submissions on this aspect of the case were based on the judgments of the Court of Appeal in *Foster Bryant Surveying Ltd v Bryant [2007] 2 BCLC 239* in which a company director was adjudged, at first instance, not to have committed breaches of his fiduciary duties to the company by incorporating a new company to provide services in competition following his resignation from office. In dismissing the company's appeal, Rix LJ (with whom Moses and Buxton LLJ agreed) implicitly endorsed, at *[8]*, the following principles from the judgment of Mr Livesey QC, sitting as a deputy judge of the High Court in *Hunter Kane Ltd v Watkins [2002] EWHC 186*:

> "1. A director, while acting as such, has a fiduciary relationship with his company. That is, he has an obligation to deal towards it with loyalty, good faith and avoidance of the conflict of duty and self-interest.
> 2. A requirement to avoid a conflict of duty and self-interest means that a director is precluded from obtaining for himself, either secretly or without the informed approval of the company, any property or business advantage either belonging to the company or for which it has been negotiating, especially where the director or officer is a participant in the negotiations.
> 3. A director's power to resign from office is not a fiduciary power. He is entitled to resign even if his resignation might have a disastrous effect on the business or reputation of the company.
> 4. A fiduciary relationship does not continue after the determination of the relationship which gives rise to it. After the relationship is determined the director is in general not under the continuing obligations which are a feature of the fiduciary relationship.
> 5. Acts done by the directors while the contract of employment subsists but which are preparatory to competition after it terminates are *not necessarily* in themselves a breach of the implied term as to loyalty and fidelity.
> 6. Directors, no less than employees, acquire a general fund of skill, knowledge and expertise in the course of their work, which [it] is plainly in the public interest that they should be free to exploit … in a new position. After ceasing the relationship by resignation or otherwise a director is in general (and subject of course to any terms of the contract of employment) not prohibited from using his general fund of skill and knowledge, the 'stock in trade' of the knowledge he has acquired while a director, even including things such as business contacts and personal connections made as a result of his directorship.
> 7. A director is however precluded from acting in breach of the requirement at 2 above, even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself any maturing business opportunities sought by the company and where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.
> 8. In considering whether an act of a director breaches the preceding principle the factors to take into account will include the factor of position or office held, the nature of the

> corporate opportunity, its ripeness, its specificness and the director's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or indeed even private, the factor of time in the continuation of the fiduciary duty where the alleged breach occurs after termination of the relationship with the company and the circumstances under which the breach was terminated, that is whether by retirement or resignation or discharge.
> 9. The underlying basis of the liability of a director who exploits after his resignation a maturing business opportunity of the company is that the opportunity is to be treated as if it were the property of the company in relation to which the director had fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating for himself that property. He is just as accountable as a trustee who retires without properly accounting for trust property.
> 10. It follows that a director will not be in breach of the principle set out at point 7 above where either the company's hope of obtaining the contract was not a 'maturing business opportunity' and it was not pursuing further orders or where the director's resignation was not prompted or influenced by a wish to acquire the business for himself."

116. Since these principles have implicitly been endorsed by the Court of Appeal – indeed, at *[76],* Rix LJ described them as "perceptive and useful' - they can be treated as an accurate statement of the law.

117. Elsewhere in his judgment, at [*74*] and [75], Rix LJ referred to the judgment of Etherton J in *Shepherds Investments Ltd v Walters [2007] 2 BCLC 202*, in which directors were adjudged to have committed breaches of their fiduciary duties by reason of what they did whilst directors in anticipation of the competition they planned after their resignations. At [74], Rix LJ referred to a passage from Etherton J's judgment in the following terms.

> "It is obvious…that merely making a decision to set up a competing business at some point in the future and discussing such an idea with friends and family would not of themselves be in conflict with the best interests of the company and the employer. The consulting of lawyers and other professionals may, depending on all the circumstances, equally be consistent with a director's fiduciary duties and the employee's obligation of loyalty. At the other end of the spectrum, it is plain that soliciting customers of the company and the employer or the actual carrying on of trade by a competing business would be in breach of the duties of the director and the obligations of the employee."

118. On this aspect, Mr Evans's case was ultimately focussed on the period leading up to Mr Reid's resignation on 2nd July 2016. Relying on the principles endorsed by the Court of Appeal in *Foster Bryant Surveying Ltd v Bryant (supra)* and observations elsewhere from Rix LJ's judgment on the outcome of other cases, Mr Collings submitted that Mr Reid was entitled to resign on 2nd July 2016 (Principle (3), *245d-e*) in order to compete with the Company (*265a*) and that, upon resignation, his fiduciary duties to the Company were brought to an end (Principle (4), *245d-e*). In the absence of contractual provision to the contrary, such as a restrictive covenant, Mr Reid was then entitled to exploit his "general fund of skill, knowledge and expertise in the course of [his] work" (Principle (6), *245f-g*), other than trade secrets or other confidential information, on behalf of a rival business.

119. Mr Collings accepted that a director is not entitled to divert from the company assets such as business and maturing business opportunities. For the purpose of assessing what constitutes a maturing business opportunity, Mr Collings referred me to *Recovery Partners GP Ltd v Rukhadze [2018] EWHC 2918* in which Cockerill J observed, at [60], that "…a business opportunity may be regarded as 'maturing' so long as there is contact between the principal and a third party with regard to future business and that contact has progressed to the stage where some outlines of future contractual obligations are in play. There need not be a draft contract or any imminence of agreement". However, in the present case, Mr Collings submitted there is no evidence any transactions or maturing business opportunities were diverted from the Company to ECI Cumbria prior to or, indeed, after Mr Reid's resignation.

120. In my judgment, Mr Collings's submissions on this issue are essentially correct. There is no documentary evidence any such transactions or business opportunities were ever diverted from the Company to ECI Cumbria, whether in their accounting records or otherwise, and Mr Reid's oral evidence was to the contrary. In the absence of such evidence, I am not satisfied that the Represented Respondents ever entered into an agreement to divert business in this way nor, indeed, am I satisfied that this ever happened. For reasons to which I have already referred, in Paras 62-65 above, I am also satisfied that ECI Cumbria did not start to trade until after Mr Reid's resignation. It is true that, following his resignation, an increasing number of customers followed Mr Reid from the Company to ECI Cumbria. This included Stolle. However, they did so based on his personal reputation and there is no evidence to suggest they did so prior to his resignation. Following his resignation, Mr Reid was entitled to trade in competition with the Company using ECI Cumbria as his corporate vehicle consistently with the principles identified by the Court of Appeal in *Foster Bryant Surveying Ltd v Bryant (supra).*

121. Moreover, there is no substantial evidence that Mr Reid or, indeed, Messrs Grant or Nicholson, solicited the Company's customers, on behalf of ECI Cumbria, or, indeed, caused ECI Cumbria to carry on business in competition with the Company at a time they were directors or employees of the Company. It is conceivable that, in advance of his resignation, Mr Reid was in communication with ECI Cumbria's first invoiced customer about the relevant work and, if so, it is also conceivable that he was in communication with other potential customers at the time. However, there is no documentary evidence to suggest that this was the case and, if so, it is unclear when or with whom it might have

taken place and whether it might have amounted to solicitation. In any event, if such communication took place and it did amount to solicitation, in my judgment it can only have been *de minimis* in the context of the overall dispute. If there was such communication, there is also no evidence that it was the subject of discussion between the Represented Respondents at the time or, indeed, that it might somehow have formed part of one or more of the alleged conspiracies.

122. If the Represented Respondents did not act or agree to act unlawfully and are not to be treated as such, there cannot have been an unlawful means conspiracy. An unlawful means conspiracy is a "conspiracy to do by unlawful means an act which may be lawful in itself, albeit that injury to the claimant is not the predominant purpose", *JSC BTA Bank v Ablyazov (No 14) [2020] AC 727* at [8]. In the present case, however, shorn of any intention to divert, appropriate, dispose of or solicit the Company's assets or business or compete with it whilst in office, the residual factual elements in Conspiracies 1, 2 and 3 are not unlawful.

123. Following my conclusions on the alleged conspiracies, none of the matters identified, as breaches of statutory duty, in Para 21 of Mr Evans's Skeleton Argument, give rise to grounds of unfairness. Contrary to Para 21(a), I am not satisfied that, by incorporating a company, issuing shares and appointing themselves directors, Messrs Reid, Grant and Nicholson committed a breach of their duty, under *Section 175* of the *2006 Act*, to avoid conflicts of interest. It is obviously open to directors to hold office and shares in multiple companies. In reliance upon Rix LJ's observations in *Foster Bryant (supra)* at *[70]*, Mr Collings submitted that a director can compete with a company in the absence of contractual provision to the contrary. I am not persuaded this is correct as a blanket proposition. However, for a director to do so would not *necessarily* amount to a breach of the statutory duty in *Section 175* and, in a case such as the present, where it was not initially envisaged the company would immediately commence in business, it is difficult to see why the mere act of incorporating a company together with the attendant formalities should itself amount to a breach of the statutory duty in *Section 175.*

124. The allegation in Para 21(b) is that the Respondents – defined so as to include the Company itself – acted in breach of their duty in *Section 172*, to promote the success of the Company by forming ECI Cumbria and failing to inform it of the same. In my judgment, there is nothing in this allegation. Messrs Reid, Grant and Nicholson were themselves the only *de jure* directors of the Company at the time. The allegation may thus amount to a suggestion they should have advised Mr Evans himself of the formation of the Company

on the basis that Mr Evans was holding himself out as a *de facto* director. If so, there is an element of unreality about this part of Mr Evans's case. The allegation in Paragraph 21(b) is in relation to the incorporation of a company which was dormant for the next two years. During this period, Mr Evans was himself in competition with the Company through the vehicle of Evans Canline. In these circumstances, Messrs Reid, Grant and Nicholson were entitled to exercise significant caution before making disclosures to Mr Evans.

125. The allegation in Para 21(d) is that the Represented Respondents did not take adequate steps to protect the Company by identifying the need for an enforceable contract with post-termination restrictive covenants and they are thus in breach of their statutory duty of care in *Section 175* of the *2006 Act*. It is implicit that this breach was committed at the time ECI Cumbria was incorporated or in the period immediately following. This issue was not fully explored in evidence or in the parties' closing submissions. However, throughout this period, it is inherently unlikely that any Respondent had any realistic prospect of persuading the others to enter into such covenants under the shadow of the dispute with Mr Evans.

126. I shall now turn to the Settlement Agreement. In my judgment, the Settlement Agreement precludes Mr Evans from petitioning the Court under *Section 994* in respect of each of his complaints, including his complaints in relation to the non-payment of dividend. It is sufficiently wide to compromise his right to petition the Court under *Section 994* (see (7) above) and each complaint falls within the scope of "the Released Claims" as defined in Clause 4.1.

127. The claim in relation to unpaid dividends arises from or is connected with "the Dispute" defined under the heading "Background". It relates to dividends declared by the Company prior to 28 February 2017. The Company has expressly entered into the Settlement Agreement in full and final settlement of this claim.

128. Once shorn of the allegations in Paragraph 18(a) of Mr Harper's Skeleton Argument that the Represented Respondents agreed to "conduct the business of the Company for the benefit of themselves and ECI Cumbria to the exclusion of the Company and [Mr Evans]" and any suggestion in Paragraph 18(b) that they agreed ECI Cumbria would commence in competition prior to Mr Reid's resignation as a director or that they reached an understanding ECI Cumbria would somehow conduct the business of the Company for the benefit of themselves and ECI Cumbria and/or to the exclusion of the Company and Mr

Evans, I am satisfied that Mr Evans had knowledge or can be deemed to have had knowledge of each of the residual matters in those paragraphs when he entered into the Settlement Agreement. In cross examination, Mr Evans accepted that he was by then aware ECI Cumbria had been incorporated and that, whilst dormant, it had been a potential rival to the Company. He also confirmed that he then became aware that Mr Reid had subsequently left the Company to set up ECI Cumbria and ECI Cumbria had come out of dormancy and commenced in competition with the Company. If there was any ambiguity in his answers as to when he first became aware of these facts, in my judgment it is to be resolved in favour of the Represented Respondents. It is inherently unlikely that, as late as 23 October 2017, Mr Evans was unaware Mr Reid was carrying on business for ECI Cumbria in competition with the Company given that this was common knowledge in the local community specialising in this type of business. Mr Evans was himself part of that community. He was based locally in Wigton and, through Evans Canlines, he had a particular interest in the installation of conveying equipment. He also had a keen interest in the affairs of the Company, demonstrated by the requisitions made on his behalf in the correspondence with the Company prior to the Settlement Agreement itself.

129. Since Mr Evans entered into the Settlement Agreement in the knowledge that Messrs Reid, Grant and Nicholson had formed ECI Cumbria as a potential rival and Mr Reid had subsequently carried on business for ECI Cumbria in competition with the Company, I am also satisfied that Mr Evans had, by then, the factual knowledge required to bring his claims based on the putative breaches of *Section 172*, *174* and *175* of the *2006 Act*. If it is part of his case that Messrs Reid, Grant and Nicholson did not notify him of these matters at the time, he had the factual knowledge to advance such a case and can thus be deemed to have had sufficient knowledge of the claim itself given that he was aware of the underlying facts.

130. There remains an issue as to whether Mr Evans is precluded, by his own conduct, from bringing a claim based on unfairness. Relying on the observations of Nourse J in *Re RA Noble & Sons (Clothing) Limited [1983] BCLC 273* and *Re London School of Electronics Ltd [1986] Ch 211 at 222A-C,* Mr Collings submitted that, in a suitable case, the petitioner's own conduct might preclude a finding of unfairness or, in Nourse J's own words "render the conduct of the other side, even if it is prejudicial, not unfair". In the present case, Mr Collings submitted that I should not make a finding of unfairness for the following reasons.

131. Firstly, Mr Evans himself accepted, in evidence, that there was a loose understanding that the members would not receive a reward from the Company unless they made a

contribution to the Company's business. Mr Evans makes the present claim notwithstanding his failure to make any substantial contribution to the Company's business. He has already received the sum of £196,000 plus costs under the Settlement Agreement.

132. Secondly, Mr Collings submits that it was and is hypocritical for Mr Evans to advance the present claim, based on an agreement to establish a competing business at a time when he was conducting a competing business himself, through the vehicle, of Evans Canlines since 2012, whilst a *de facto* director of the Company.

133. In assessing whether the petitioner has established unfairness, it is certainly relevant to consider the conduct of the petitioner himself. Consistently with Nourse J's observations in *Re RA Noble & Sons (Clothing) Limited* and *Re London School of Electronics Ltd (supra)*, it may be adjudged a petitioner bears ultimate responsibility for the matters of which he complains. In the present case, Mr Evans's overall contribution to the Company was relatively insubstantial and he allowed the others to form a perception he was in for a free ride. When he sought to make financial demands of the Company, this exacerbated their sense of distrust and accelerated the breakdown of the parties' relationship. However, criticisms of this kind are not uncommon on the hearing of a *Section 994* petition. In the present case, Mr Collings's specific criticisms of Mr Evans are not without foundation but, in my judgment, they would not have precluded a finding of unfitness had Mr Evans been able to establish the essential factual requirements of his case. Whilst there may have been a loose understanding between the parties about their rewards from the business, it was never elevated into contractual commitments and Mr Evans did not do enough to waive his right to a dividend. No doubt, Mr Evans's stance on the competing businesses of Evans Canlines and ECI Cumbria was and is inconsistent. It is also true that Mr Evans maintains he was a *de facto* director of the Company and, as a director, he would have owed the Company a duty to avoid conflicts of interest. To the extent there was an overlap between the business activities of the Company and Evans Canlines, they were in competition and it is more than conceivable Mr Evans thus committed breaches of his duties to the Company. However, the factual basis for this was not fully explored in evidence and it does not form part of their case that Mr Evans specifically set out to conceal anything from Messrs Reid, Grant and Nicholson about Evans Canlines' business activities. The latter were more concerned about Mr Evans' perceived failure to "pull his weight" than his involvement in a competing company. Coupled with Mr Evans's financial demands, it was primarily for this reason, not Mr Evans's involvement in Evans Canlines, that Mr Reid left

the Company and set up ECI Cumbria in competition. As has been demonstrated, it was of course open to him to do so lawfully without committing breaches of duty to the Company.

134. Nevertheless, Mr Evans has failed to substantiate the essential factual requirements of his case or demonstrate that the Company's affairs have been conducted in a manner unfairly prejudicial to Mr Evans himself as a member or, indeed, the members more generally.

(9) Disposal

135. By her directions dated 8th June 2020, District Judge Obodai provided that there was to be a trial of the preliminary issue of whether unfair prejudice has been established. Having now tried the preliminary issue, I am satisfied unfair prejudice has not been established. I shall hear further from counsel in relation to all consequential issues and costs.