Neutral Citation Number: [2021] EWHC 960 (Ch)

Case No: HC-2017-001837

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (CHANCERY DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 April 2021

Before:

RICHARD SPEARMAN Q.C.
(sitting as a Deputy Judge of the Chancery Division)

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Between:

SPRINT ELECTRIC LIMITED
Claimant

- and –

(1) BUYER'S DREAM LIMITED
(2) ARISTIDES GEORGE POTAMIANOS
Defendants

Claim No: CR-2017-006788

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMPANIES COURT (CHANCERY DIVISION)

IN THE MATTER OF SPRINTROOM LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

Between:

ARISTIDES GEORGE POTAMIANOS
Petitioner

- and –

(1) EDWIN JOHN PRESCOTT
(2) SPRINTROOM LIMITED
Respondents

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Michael Hicks (instructed by Moore Barlow LLP) for the Claimant
Rebecca Page (instructed by Moore Barlow LLP) for the First Respondent
Anthony Pavlovich (instructed by Blake Morgan LLP) for the Defendants and the Petitioner

Hearing date: 30 March 2021

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Richard Spearman Q.C.:

Introduction and nature of the hearing

1. This is a hearing to determine significant issues relating to costs in these two sets of proceedings. The background to the disputes is set out in detail in my judgment on liability: see *Sprint Electric Ltd v Buyer's Dream Ltd & Anor* [2018] EWHC 1924 (Ch), [2018] WLR(D) 585 ("the Liability Judgment").

2. Following the Liability Judgment, the claim concerning source code and other materials used by Sprint Electric Limited ("SEL") which had been brought by SEL against (a) a former director of SEL and the author of the source code ("Dr Potamianos") and (b) Dr Potamianos' service company, Buyer's Dream Limited ("BDL") ("the Source Code Claim") proceeded to a trial on quantum ("the Source Code Quantum Trial"). This resulted in a judgment of His Honour Judge Hacon: see *Sprint Electric Ltd v Buyer's Dream Ltd & Anor* [2020] EWHC 2004 (Ch). On 12 November 2020, HHJ Hacon assessed SEL's damages in the sum of £23,730 (plus interest of £2,578.44) and fixed the sum payable by SEL to BDL and Dr Potamianos at £18,000 (plus interest of £1,898.70), stayed the payment of the balance pending final determination of the Unfair Prejudice Claim (see further below), and ordered SEL to pay the costs of BDL and Dr Potamianos assessed in the sum of £241,129. SEL obtained permission to appeal that costs decision of HHJ Hacon to the Court of Appeal from Newey LJ on 22 February 2021, and the appeal is presently listed to be heard on 14 or 15 July 2021. The essential issue raised by the appeal is whether HHJ Hacon should have deferred the decision on those costs pending determination of quantum in the Unfair Prejudice Claim, so as to enable the value of any "global" offers of settlement covering both that Claim and the Source Code Claim to be taken into account before a final determination is made as to where those costs should fall.

3. In the meantime, the outcome of the petition presented by Dr Potamianos against (a) Sprintroom Limited, the company of which SEL is a wholly owned subsidiary, ("SRL") and (b) the holder of the remaining 60% of the shares in SRL ("Mr Prescott") under sections 994-996 of the Companies Act 2006 ("the Unfair Prejudice Claim") was appealed by both Mr Prescott and Dr Potamianos. The Court of Appeal (McCombe, Leggatt and Rose LJJ) allowed Dr Potamianos' appeal in one respect, relating to the requirement to assess various offers made by Mr Prescott, but otherwise dismissed both appeals: see *Prescott v Potamianos & Anor* [2019] EWCA Civ 932, [2019] 2 BCLC 617) ("the Appeal Judgment"). In a passage explaining the reason why Dr Potamianos' appeal was allowed in part, which is also relevant to the issues concerning costs which I now have to decide, the Court of Appeal said at [144]-[145]:

> "An evaluation of all the circumstances surrounding the offers shows that none of them rendered Dr Potamianos' exclusion from the Company fair. They could not be relied on to defeat Dr Potamianos' petition and it would make no difference to that conclusion that an expert might now value the shares as at the time the offers were made at less than the £1.34 million or £1 million offered …We do not think that the expert evidence of valuation, whatever its result, will be capable of producing a result that would deny Dr Potamianos any relief upon his petition. That is not to say that the offers made may not have some bearing upon costs questions, depending upon the outcome."

4. In due course, the issues of quantum arising from the Unfair Prejudice Claim which had not been agreed were the subject of a further judgment from me: see *Potamianos v Prescott & Anor* [2020] EWHC 3465 (Ch) ("the Unfair Prejudice Quantum Judgment"). In brief, those issues were resolved by me as follows:

(1) With regard to the Balancing Payment (see the Liability Judgment at [398], and the Appeal Judgment at [105]), at the beginning of the hearing Dr Potamianos was contending for a Balancing Payment of £406,370.67, and Mr Prescott for one of £372,981.13. As the hearing progressed, Dr Potamianos sought a Balancing Payment of £361,810.67. Mr Prescott contended that an invoice for £3,744 should be taken into account for the purposes of the relevant calculation. I accepted that contention, and ordered a Balancing Payment of £361,810.67 – (4/6 x £3,744) = £359,314.67. Accordingly, Mr Prescott substantively succeeded on the issues which were contested.

(2) With regard to quasi-interest on the Balancing Payment, Dr Potamianos sought 3%, alternatively 2%, above base rate. Mr Prescott contended that it would be unfair for the Balancing Payment to be augmented by an award

equivalent to interest. In the alternative, he contended for a rate of no more than 1% above base rate. I ruled substantively in favour of Dr Potamianos, and awarded him interest at 3% and from 28 September 2018 (i.e. the Valuation Date in accordance with the Liability Judgment) *simpliciter*.

(3) With regard to the value of Dr Potamianos' shares in SRL, there was no issue between the parties as to the valuation of one of SRL's principal assets, namely the equity in Peregrine House. However, there were a number of issues concerning the appropriate basis upon which the valuation of SRL's other principal asset, namely the shares in SEL, ought properly to be made.

(4) First, there was an issue as to whether the correct figure for the cost of employing a CEO was, as Dr Potamianos contended, £100,000 for each of the years 2016, 2017 and 2018, or was instead, as Mr Prescott contended, £101,417 for 2016, £103,547 for 2017, and £99,068 for 2018. I decided that issue in favour of Dr Potamianos and observed (at [74]): "It is unfortunate that Mr Prescott considered it worthwhile to take time over this issue".

(5) Second, there was an issue as to whether the cost of staff to replace Mr Prescott and Dr Potamianos which should be inserted into the calculation was (a) £37,000 for each of the years 2016, 2017 and 2018, as Dr Potamianos contended, or (b) £120,000 for 2016, increased to £122,520 for 2017 and further to £126,564 for 2018, as Mr Prescott contended. I decided that the correct figure was £37,000 plus £45,000 for each of those three years. This constituted, arithmetically at least, a determination which was approximately half way between the rival contentions of the parties.

(6) Third, there was an issue as to whether the saving of the cost of a salesman at £50,000 per annum should be added back for the years 2017 and 2018, as contended by Dr Potamianos. I decided that issue in favour of Mr Prescott.

(7) Fourth, there was an issue as to whether the correct value of SEL's surplus cash was £450,000, as agreed by the experts for both parties, or £755,000 as contended by Dr Potamianos. This was a major item of dispute, as any difference fed directly into the calculation of the total value of SEL. I decided that issue in favour of Mr Prescott. With regard to the arguments advanced by Mr Pavlovich on behalf of Dr Potamianos, I observed (at [110]): "Although these points were attractively put, I am not persuaded that they provide any proper basis upon which to reject the clear, cogent and considered views of not only Mr Prescott's expert but also Dr Potamianos' expert". Mr Pavlovich relied on this observation in the course of his submissions on costs as demonstrating an acceptance that this

attempt to controvert the evidence of the experts was reasonable. As to that, I would not go so far as to say that it was unreasonable, but I do not consider that it was ever promising, and the point of greatest significance is that it failed.

(8) Fifth, there was an issue as to whether the experts' agreed approach towards marketing costs was correct. This was another instance in which Dr Potamianos contended that both experts were wrong. I rejected that contention. In addition, I observed (at [120]) that if Dr Potamianos' invitation for me to revisit the experts' approach to the underlying facts were to be accepted, the consequences for the valuation of Dr Potamianos' 40% shareholding in SRL would be relatively small and that "Even if, contrary to all the foregoing, [Dr Potamianos'] points under this head were right, I question whether they justified the costs of arguing them. This is an instance where Ms Page's criticisms of [Dr Potamianos'] approach seem justified."

(9) Sixth and seventh, there were issues as to whether and to what extent the value of SEL should be adjusted to take account of (a) the cost of remedial work to the Source Code and (b) the further "significant issues" raised by Mr Prescott and listed at paragraphs 16(i)-16(xvi) of his 5th witness statement dated 21 April 2020. As to (a), this was a major issue, because the case which Dr Potamianos had to face was that this work would cost "in the region of £468,000". As to (b), no figure was placed on these matters, whether separately or cumulatively, on behalf of Mr Prescott but, on the face of it, they potentially would have had a marked effect on that value. It was therefore, also, a major issue. I decided both of these issues in favour of Dr Potamianos, saying at [137] for the reasons which I went on to explain: "I have not found it entirely easy to decide what would be fair, just and equitable with regard to these issues, which were very fully argued by both sides. At the end of the day, however, I am not persuaded that they require any adjustment to the value of the shares in SRL as at the Valuation Date".

(10) Eighth, there was an issue as to whether and to what extent quasi-interest should be payable on the share price. I deferred determination of that issue until such time as it became possible to ascertain the final outcome of (a) the findings made in the Unfair Prejudice Quantum Judgment and (b) the consequential orders made following the Source Code Quantum Trial.

5. At a further hearing on 9 March 2021, I determined a number of consequential issues in relation to the Source Code Claim as follows:

(1) I ordered that BDL and Dr Potamianos should pay 90% of SEL's costs of the trial of liability of the claim and counterclaim up to and including 31 May 2018, including any costs reserved for the CMC and PTR.

(2) I summarily assessed that payment on the standard basis in the sum of £198,000.

(3) I ordered (by consent) that BDL and Dr Potamianos should pay SEL interest on that amount of costs at 2% above base rate from the date SEL paid those costs to the payment date that would be fixed by the Court.

(4) I ordered that all outstanding matters, including the costs of the hearing on 28 September 2018 and of that hearing on 9 March 2021, as well as the date(s) for the payments ordered by me on 9 March 2021, by paragraph 7 of the order of HHJ Hacon dated 12 November 2020, and in an order dated 28 January 2021, were adjourned to be heard on 30 March 2021. (With regard to the hearing on 28 September 2018, I determined that if SEL was entitled to its costs of that hearing they should be assessed in the sum of £10,000, but the question of whether SEL was entitled to those costs was left over).

6. At the same hearing on 9 March 2021, I made the following orders (among others) consequential upon the Unfair Prejudice Quantum Judgment:

(1) The purchase price for Dr Potamianos' shares in SRL was fixed at £1,135,884.38, which:

(a) represented the value of those shares in the sum of £1,056,684.38 which was produced by the rulings that I had made in the Unfair Prejudice Quantum Judgment but which excluded the value of the Source Code Claim and quasi-interest; and

(b) included 40% of the payment in respect of the costs in the sum of £198,000 recoverable by SEL under the order of 9 March 2021 in the Source Code Claim, being £79,200 (subject to any adjustment to reflect the costs of the hearing on 28 September 2018, consideration of which was adjourned by paragraph 3 of that order).

(2) I ordered that Mr Prescott and SRL should pay quasi-interest on the sum of £1,135,884.38 at 1.5% per annum from 28 September 2018 to 18 December 2020 (the date of the Unfair Prejudice Quantum Judgment) and thereafter at the rate of 3% per annum until the date payment is made pursuant to sub-paragraph (3) below and continuing thereafter to the date

of payment, subject to adjustment to reflect any adjustment under sub-paragraph 1(1)(b) above.

(3) I ordered that SRL should pay the purchase price by 4pm on 9 September 2021, with liberty to all parties to apply in that regard.

(4) I ordered that Mr Prescott and SRL should procure that, by 4pm on 23 March 2021, SEL would pay to BDL the sum of £359,314.67 representing the Balancing Payment, plus quasi-interest on that sum at the rate of 3% per annum from 28 September 2018 to the date of payment (being total quasi-interest of £26,372.71 to 9 March 2021 and continuing thereafter to the date of payment at a daily rate of £29.53).

7. Dr Potamianos contended that, in addition to sum of £79,200 referred to above, the value of his shares should be increased by a sum representing 40% of the interest which was recoverable by SEL on the costs of the Source Code Claim up to 28 September 2018. Mr Prescott contended the contrary. This was the subject of a separate ruling that I made at the hearing on 30 March 2021.

8. SEL on the one hand and Dr Potamianos and BDL on the other hand were also at loggerheads concerning who should pay the costs of the hearing on 28 September 2018. This issue has yet to be determined (see para 5(4) above).

9. The main issue which fell for determination on 30 March 2021 concerned the costs of the Unfair Prejudice Claim. It was originally envisaged that issue this would be decided on 9 March 2021. However, as the entirety of that day was taken up with parties' submissions and my rulings on other issues, it was listed to be heard (together, as it transpired, with the two shorter issues identified above) with a time estimate of half a day on 30 March 2021. In fact, the parties' submissions on that occasion took up the entire day until about 5pm. In the result, there was no time for me to give an oral ruling on that issue on that day, and I decided to provide my ruling in writing. This is that ruling.

10. Before turning to that issue, it is relevant to note the overall costs figures for these two sets of proceedings.

11. In the Source Code Claim, SEL's proposed budget for its liability trial costs was £222,709 shortly before the PTR (SEL's costs budget was never approved because Barling J dispensed with costs budgets at the PTR), and SEL's incurred costs were about £237,306. As set out above, I determined that BDL and Dr Potamianos should pay 90% of SEL's costs of the trial of liability of the claim and counterclaim up to and including 31 May 2018 (including any costs reserved from the CMC and PTR), and I summarily assessed that payment on the standard basis in the sum of £198,000. At the same time, the costs of Dr Potamianos and BDL of the Source Code Claim are probably of a

similar order. So far as concerns the Source Code Quantum Trial, the upshot, as set out above, is that (subject to SEL's outstanding appeal to the Court of Appeal) SEL has been ordered to pay the costs of BDL and Dr Potamianos assessed in the sum of £241,129. At the same time, SEL's own costs of the Source Code Quantum Trial amount to £312,560.

12. In the Unfair Prejudice Claim, the costs of Dr Potamianos are as follows: (1) for the liability phase, £298,557.12 (including VAT) all of which is unbudgeted; (2) for the quantum phase, £245,438.87 (including VAT), of which £208,853.98 is budgeted and £36,584.89 is unbudgeted; (3) these costs exclude the costs since the Unfair Prejudice Quantum Judgment. The costs of Mr Prescott and SRL are no doubt of a similar order.

13. These sums do not include the costs of the appeal to the Court of Appeal which resulted in the Appeal Judgment and the costs of SEL's ongoing appeal to the Court of Appeal against the costs order made by HHJ Hacon.

14. Overall, therefore, the parties have expended well in excess of £2m on legal costs, fighting over claims which, in total, are worth less than £1.5m, and which have not been decided all one way (i.e. £1,056,684.38 in relation to Dr Potamianos' shares, plus £359,314.67 in respect of the Balancing Payment, plus the sums of £23,730 and £18,000 ordered by HHJ Hacon – I leave out of account for this purpose any sums ordered in respect of costs). While the final resting place of these costs burdens has yet to be resolved, it is plain that the parties' assets overall have been greatly depleted as a result of their regrettable inability to resolve their differences without extensive, bitter and protracted litigation.

Parties' submissions

15. On behalf of Dr Potamianos, Mr Pavlovich submitted: (1) the general rule is that costs follow the event; (2) Dr Potamianos was the effective winner, securing substantial payments for his shares and by way of the Balancing Payment, in order to redress the unfair prejudice which was proved; (3) there is no reason to depart from the general rule merely because Dr Potamianos did not succeed on every issue (and, in particular, Mr Pavlovich placed reliance on *Pigot v Environment Agency* [2020] EHHC 1444 (Ch) at [6] and *Sharp v Blank* [2020] EWHC 1870 (Ch), [2020] Costs LR 835 at [7]); (4) if, contrary to the foregoing, Dr Potamianos' losses on various issues should be taken into account, that should be done by way of a percentage reduction rather than by a detailed issue-based costs approach or by way of costs orders in both directions; (5) the settlement offers made by each side reinforce the conclusion that costs should follow the event; (6) in so far as the costs of specific hearings have not already been dealt with by previous orders, those costs (comprising (a) the costs of the joint CMC and PTR in the liability phase and (b) the costs

of the hearings on 9 March 2021 and 30 March 2021) should be ordered to be paid to Dr Potamianos; (7) the Court should order a payment to Dr Potamianos on account of his costs of at least £400,000, representing 90% of his budgeted costs plus 60% of his unbudgeted costs; and (8) the Court should order interest on those costs at the rate of 3%, consistently with the order for interest on costs that was made in the Source Code Claim, in which regard Dr Potamianos would not resist the like order in favour of Mr Prescott if he were to obtain costs orders in his favour.

16. On behalf of Mr Prescott, Ms Page submitted that Dr Potamianos should be ordered to pay Mr Prescott's costs. In her written submissions, Ms Page argued that this is a case in which the Court should not order that the unsuccessful party should pay the costs of the successful party but should instead make a different order. That approach assumed that Mr Prescott was the unsuccessful party. In her oral submissions, Ms Page put the matter differently, and argued that Mr Prescott was, in truth, the successful party. Ms Page said that it is over simplistic to ask who has to write out the cheque at the end of the proceedings, and, in truth, such success as Dr Potamianos may have had was highly qualified, and the costs order should reflect that. In support of both ways of putting the case, Ms Page relied on the same essential contentions, namely, in summary: (1) Mr Prescott made offers which Dr Potamianos failed to beat, such that the costs of the proceedings or parts of them were unnecessary and have been wasted; (2) Dr Potamianos lost on the majority of issues in relation to both (a) liability and (b) quantum (in which regard, Ms Page placed reliance, in particular, on *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507, and on the notes in the White Book, volume 1, at 44.2.10, culminating in the statement "Put shortly and colloquially, the policy objective is to discourage by costs risks a "kitchen sink" approach to litigation"); and (3) Dr Potamianos' conduct was found wanting and ought to be taken into account against him.

17. In the latter regard, Ms Page placed reliance on: (i) CPR 44.2(5)(a) and Dr Potamianos' conduct before the proceedings, principally on the basis of the findings in the Liability Judgment at [261], [262(7)], [262(10)], [310], [392], but also in relation to Mr Prescott's attempts to obtain a joint valuation of the shares in SRL; (ii) CPR 44.2(5)(b) and (c) and the reasonableness of the issues which were raised and subsequently pursued by Dr Potamianos, and of the manner in which that was done, including and in particular serious allegations of breach of fiduciary duty which were made against Mr Prescott, and rejected in their entirety (see Liability Judgment, [390]), and, in the quantum trial, a number of arguments which were misconceived, took up disproportionate time, and in some instances contradicted Dr Potamianos' own expert; and (iii) CPR 44.2.5(d), Ms Page's contention being that exaggeration was

demonstrated by the rejection of "the majority" of Dr Potamianos' arguments at both trials.

18. The following are among the passages in the Liability Judgment which are relevant to Ms Page's submissions in this regard:

> "261. When it became apparent that SEL on the one hand and BDL and Dr Potamianos on the other had a difference of understanding as to the rights to the Source Code, and when SEL asked where it was and how SEL could access it, I consider that Dr Potamianos was not entitled to act in a manner that was detrimental to SEL by being evasive or misleading, including by dissembling as to those matters. SEL was entitled to be provided with a candid statement of his position, so that it had an opportunity to decide how to respond to it, for example by working round his denial of rights and access.
>
> 262. Regrettably, Dr Potamianos saw things differently, and did not comply with this duty. A single illustration suffices:
>
> …
>
> (7) This reflects, and I so find, that right up to August 2016, while Mr Prescott was being open and clear about SEL's position both as to ownership of the Source Code and as to the right to access it, Dr Potamianos was not being direct, frank or remotely helpful about those matters. On the contrary, Dr Potamianos was professing a standpoint which contradicts the stance that he has adopted in these proceedings, and was then avoiding answering a direct and simple question by professing a lack of understanding of what was being asked of him that I am certain he did not have, and by asking questions which he knew to be irrelevant.
>
> (8) There was nothing unclear about Mr Prescott's email dated 25 August 2016, but even if there had been, any lack of clarity was resolved by his email dated 26 August 2016. However, Dr Potamianos did not reply to that second email.
>
> (9) Moreover, his suggestion that software issues had not been discussed at the meeting was disingenuous, especially as he suggested (at a time when he did not know the meeting had been taped) that he could back this is up with "full notes". Any such notes would either have shown that the claim that software issues had not been discussed was untrue, or would themselves have been inaccurate.
>
> (10) In my opinion, Dr Potamianos is unable to justify acting in this way by relying either on the terms of the Contracts or on any genuine disagreement that he may have had with SEL's stance as to ownership of, and rights of access, to the Source Code. He was in a position to behave as he did because he

alone knew what Source Code had been created and where it was stored, and he alone had that knowledge because of the trust that had been placed in him by SEL with regard to those matters. He was using that knowledge, obtained by him in that way, for his own ends, seeking to gain an advantage for himself in his wrangling with Mr Prescott and other SEL personnel. All this was contrary to the duties that he owed to SEL, and was detrimental to SEL for the reasons that I have identified above."

19. When assessing these submissions of Ms Page, it is also relevant, in my view, to have in mind the following further passages in the Liability Judgment:

> "380. In the present case, the allegations of unfair prejudice are based on alleged failure to consult/exclusion from management of Dr Potamianos and alleged resultant mismanagement of SEL and SRL in relation to (1) the first decision to terminate Mrs Macdonald's contract (2) the second decision to terminate Mrs Macdonald's contract (3) the engagement of Mr Pearson (4) the Business Plan (5) the engagement of Mr Levine/his company to review the Business Plan (6) the engagement of Mr Levine as SEL's business development and marketing manager (7) the engagement of Mr Levine's company to perform marketing and similar functions for SEL (8) the retention of Dr Fells (9) the termination of the Bardac project (10) ceasing to pay BDL's invoices after 15 July 2016 (11) the establishment of the Sub-Committee and (12) the continued employment of Mr Van Der Wee (the costs of which Mr Prescott promised to pay personally on 16 and 17 March 2015, and which he has not in fact paid, but in respect of which he said "I am quite happy for it to be considered [on] quantum eventually.").
>
> 381. A further allegation, that excess sums were spent on renovation of Peregrine House, was pursued by Dr Potamianos until the close of evidence, but was then abandoned.
>
> 382. In addition to the above, there is the fundamental complaint that Dr Potamianos has been removed as a director of SEL. Indeed, that was one of the two central planks that were identified at the outset of Dr Potamianos' opening submissions. The other plank, which I have rejected, related to the Source Code claim, which was said to be invented. The opening paragraph of Dr Potamianos' written submissions before me allege:
>
> > "This trial concerns a boardroom coup perpetrated by Mr Prescott …against his fellow director and shareholder, Dr Potamianos. The result is that [Mr Prescott] has unfairly and unlawfully deprived [Dr Potamianos] of his right to participate in management. Furthermore, [Mr Prescott] and SEL seek retrospectively to invent a right to obtain the source code of certain computer "firmware" developed by Dr Potamianos'

> service company, BDL. They thereby seek to obviate the need to retain BDL's services and to exclude [Dr Potamianos] from the business more generally."

383. While Dr Potamianos submits that the Court "only needs to accept the most severe kind of prejudicial conduct in order to establish unfair prejudice", he also argues that "the earlier conduct is still relevant because it affects the extent of the prejudice and the relief to which [he] should be entitled". As it is common ground that, if Dr Potamianos is entitled to relief, it would be appropriate to make a buy-out order, I take this to refer to another aspect of his case. This is that the valuation should be based on a date before the dispute began, with its consequent effects on the business of SEL and SRL. He suggests that date should be 31 October 2014, which is the end of SEL's financial year.

384. Dr Potamianos further contends that some of Mr Prescott's conduct was not simply unfairly prejudicial in itself, but was made more unfairly prejudicial because it gave rise to breaches of Mr Prescott's directors' duties under sections 171, 172, 175 and/or 177 of the CA 2006. In broad terms, Dr Potamianos says that Mr Prescott acted for ulterior motives in excluding him from management.

Mr Prescott's position

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

386. Mr Prescott contends that Dr Potamianos' conduct should be taken into account, either to deny him any relief, or alternatively when deciding what remedy is appropriate. As, in the event that there is any entitlement to relief, the principle of a buy-out is accepted, the latter point has two aspects. First, that there should be no adjustment to the buy-out price to take account of any unfairly prejudicial events that occurred before the valuation date. Second, that the buy-out price should be discounted to reflect Dr Potamianos' contributory fault, perhaps even to the extent that he should be treated as having made a constructive election to depart from SRL so that it would be fair for him to be bought out on the basis that he freely decided to sell his shares (i.e. at a minority discount). Among other things, Mr Prescott relied on *Hollington* at [7-114] and [8-152]:

> "There will, however, be cases where the excluded minority has brought his exclusion upon himself by his own wrongful or unconscionable conduct. The courts then have to wrestle with the individual facts of particular cases to determine whether the majority were justified in excluding the minority …"
>
> "… In the case of quasi-partnerships where the minority has been unfairly excluded from management, there is a strong presumption that no discount should be applied … It has been suggested obiter, however, that a discount may be applied if the petitioner's conduct has contributed to the actions on the part of the majority of which complaint is made, but this seems anomalous, although there is no reason in principle why a court should not apply a discount in such circumstances if the justice of the case exceptionally so required …"

387. These arguments have to be viewed in the context that the court is not in a position to second-guess or interfere with matters of commercial and managerial judgment, and that what needs to be shown is mismanagement which is sufficiently serious to justify the intervention of the court (see, for example, *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354, Arden J at 404i-405a).

388. As to the allegations of breaches of directors' duties, Mr Prescott denies that there were any breaches. If, contrary to his primary case, he is found to have acted in breach of duty, he contends that he is entitled to relief under section 1157 of the CA because he acted honestly and reasonably and having regard to all the circumstances of the case.

Discussion and conclusion

389. In the present case, I have given careful consideration to all the allegations upon which the petition is based, much of the history of which is apparent from the documents that I have summarised above. I think that there is force in the submission that in many instances Dr Potamianos was consulted, or at least apprised of what was happening. However, even if it were to be assumed in respect of each matter complained of that he was entitled to be consulted and that he was not consulted, I am not persuaded that any of the matters alleged amounted to mismanagement, let alone serious mismanagement. Nor am I persuaded, to the extent that Dr Potamianos was not consulted, that it would have made any or any material difference in any instance if he had been consulted.

390. I am also entirely unpersuaded that in any of the instances complained of Mr Prescott was not acting *bona fide* and in what he perceived to be the best interests of SEL (and SRL) but was instead acting for ulterior motives such as to fortify his position *vis-à-vis* Dr Potamianos. On the contrary, having heard and seen Mr Prescott

> give evidence, I have no doubt that he acted in what he believed to be the best interests of SEL (and SRL) throughout, and that he went to great lengths to try and maintain a working relationship with Dr Potamianos and to keep him on board, even though the two men had very different personalities and even though they had difficulty working together. In my judgment, these findings are also supported by the documents considered above."

20. Ms Page argued that Dr Potamianos' pursuit and abandonment of one issue (relating to the cost of renovations to Peregrine House) was such that Mr Prescott was entitled to an order for indemnity costs in respect of that issue.

21. Finally, Ms Page submitted that Mr Prescott should be awarded interest on any costs that were ordered in his favour, in accordance with CPR 44.2(8).

22. Mr Pavlovich disputed all of those points in reply, and submitted in particular that: (1) proper analysis of the offers made showed that Dr Potamianos had not failed to beat any material offer, and, conversely, that Mr Prescott would have been better off accepting at least one of the offers made by Dr Potamianos; (2) Ms Page's analysis of wins and losses on issues was incorrect, and in any case most of the issues would have arisen in any event and Dr Potamianos had not acted unreasonably in raising or pursuing them; (3) the allegations concerning director's duties had not resulted in any additional costs; and (4) the claim for indemnity costs in relation to the renovations issue was unfounded, because it was reasonable to pursue that matter until cross-examination, at which time Dr Potamianos sensibly gave it up in response to an indication from the Court, and, in any event, it would be wrong to make an issue-based order in relation to this claim, and it should be dealt with, if it arises, by applying a percentage approach.

Applicable principles

23. In addition to the material provisions of the CPR, which there is no need to rehearse further than as set out above and by Warren J in the extract below, both sides made reference to the judgment of Warren J in *Re Southern Counties Fresh Foods Ltd* [2011] EWHC 1370 (Ch), [2011] 3 Costs LO 343, [2011] EWHC 1370 (Ch):

> "3. A preliminary point to make is that there are no special principles applicable to unfair prejudice petitions. It is, of course, the case that every case is heavily fact-dependant when it comes to deciding where costs should fall. There are, no doubt, factual features commonly present in unfair prejudice petitions which are not present in other types of litigation and those features will fall to be taken account of when applying established principles.

4. It does, however, need to be remembered that, in order to be in a position to exercise its discretion concerning the appropriate remedy if unfair prejudice is established, the Court needs to have a full understanding of the background to and the context of the dispute giving rise to allegations of unfair prejudice. Accordingly, a petitioner or a respondent may adduce evidence of facts which are relevant for the Court to know. A petitioner may rely on those facts as amounting to an example of unfair prejudice. The petitioner may establish those facts but fail to demonstrate that they amount to unfair prejudice. It does not follow that, because the petitioner has failed to demonstrate unfair prejudice by reference to those facts, that the incidence of costs is to be decided as if the petitioner had lost the issue to which those facts were relevant. The facts in this type of case would be relevant to the petition as a whole. Of course, the Court must take into account, as one factor in determining what costs order to make, the fact that the petitioner has failed to make out the case of unfair prejudice based on those facts and also the extent to which those facts were in reality only relevant to that claim.

5. The starting point is section 51 Senior Courts Act 1981 which provides that costs are in the discretion of the court subject to rules of court. This is a wide, although not unlimited, jurisdiction: see *Aiden Shipping Ltd v Interbulk Ltd* [1986] AC 965. The relevant rules for present purposes are found in CPR 44.3. CPR 44.3(1) affirms the discretion of the court about who is to pay, the amount of the payment and time of payment. If the court decides to make an order for payment – it may decide to make no order at all – the general rule under CPR 44.3(2)(a) is that the unsuccessful party will be ordered to pay the costs of the successful party, but under CPR 44.3(2)(b) the court may make a different order. CPR 44.3 does not lay down, nor does any other rule lay down, how it is to be decided, in cases where it is not obvious, who has been successful or unsuccessful.

6. CPR 44.3(4) provides that when deciding what (if any) order to make the court must have regard to "all the circumstances" which include

   a. the conduct of all parties;

   b. whether a party has succeeded on part of his case even if he has not been wholly successful and;

   c. any payment into court or admissible offer to settle and which is not a Part 36 Offer.

7. For this purpose, conduct includes conduct before as well as during the proceedings, whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue, the manner in

which a party has pursued or defended his case or a particular allegation or issue and whether a claimant who has succeeded in his claim in whole or in part exaggerated his claim.

8. The court has a range of orders which it can make which include those set out in CPR 44.3(6). One of those (see paragraph (f)) is an order relating only to a distinct part of the proceedings (otherwise known as an issue based order). Thus, where a successful claimant wins his case overall but loses on a distinct part of his case, the court can preclude recovery by him of his costs referable to that claim and can even order that he pays the costs of the other party referable to that claim. Issue based orders are discouraged. Thus CPR 44.3(7) directs that where the court would otherwise make an issue based order it must instead, if practicable, make an order under CPR 44.3(6)(a) or (c) (that is to say an order for payment of a proportion of another party's costs or an order for payment of costs from or until a certain date only). The policy is to prevent orders being made which will of themselves produce more cost and added difficulty for costs judges who will often need to apportion costs between one issue and another."

11. At [11], Warren J summarised the general rules relating to the costs of unfair prejudice petitions under the Rules of the Supreme Court to be derived from *Re Elgindata Ltd (No. 2)* [1993] BCLC 119 (Nourse LJ at 124i-125c) as follows: (1) as is generally the case, costs are in the discretion of the court; (2) costs should generally follow the event, except where it appears to the court in all the circumstances that some other order ought to be made; (3) the general rule does not cease to apply simply because the successful party has raised some issues or made allegations which have failed; (4) but where the raising of such allegations has caused a significant increase in the length or cost of the proceedings the petitioner may be deprived of the whole or a proportion of those costs; and (5) where a successful petitioner has raised issues or made allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a proportion of the unsuccessful respondent's costs.

24. At [12]-[13], Warren J considered the extent to which those principles remained applicable in accordance with the CPR, and said at [13]-[14]: (1) "the principles set out in *Elgindata* remained a good working guide, but should not be applied mechanistically"; (2) "the starting point [is] still that the loser should pay"; and (3) "but it does not follow that a departure from that starting point can only be made if remaining at the starting point would be unjust" (citing Lord Woolf's observation in *Phonographic Performance Ltd v AEI Redifusion Music Ltd* that "it is no longer necessary for a party to have

acted unreasonably or improperly to be deprived of his costs of a particular issue on which he has failed").

25. At [15]-[17], Warren J referred to another authority which was relied upon by Ms Page before me, in the following terms:

> "15. Thus, in *Summit Property v Pitmans* [2001] EWCA Civ 2020, the claimant succeeded on liability but failed in the action on a point of law. Longmore LJ (with whom Tuckey LJ agreed) said that it was no longer necessary for a party to have acted unreasonably or improperly before he can be required to pay the costs of the other party of a particular issue on which he (the first party) has failed. In support of that, he referred to *Johnsey Estates (1990) Limited v Secretary of State for the Environment* [2001] EWCA CIV 6535. In that case Chadwick LJ, giving the judgment of the court set out the principles, in a passage cited by Longmore LJ, as follows:
>
> > "The principles applicable in the present case may, I think, be summarised as follows: (i) costs cannot be recovered except under an order of the court; (ii) the question whether to make any order as to costs -- and, if so, what order -- is a matter entrusted to the discretion of the trial judge; (iii) the starting point for the exercise of discretion is that costs should follow the event; nevertheless, (iv) the judge may make different orders for costs in relation to discrete issues -- and, in particular, should consider doing so where a party has been successful on one issue but unsuccessful on another issue and, in that event, may make an order for costs against the party who has been generally successful in the litigation; and (v) the judge may deprive a party of costs on an issue on which he has been successful if satisfied that the party has acted unreasonably in relation to that issue; (vi) an appellate court should not interfere with the judge's exercise of discretion merely because it takes the view that it would have exercised that discretion differently…"
>
> 16. Longmore LJ went on to say this
>
> > "17. It is thus a matter of ordinary common sense that if it is appropriate to consider costs on an issue basis at all, it may be appropriate, in a suitably exceptional case, to make an order which not only deprives a successful party of his costs of a particular issue but also an order which requires him to pay the otherwise unsuccessful party's costs of that issue, without it being necessary for the court to decide that allegations have been made improperly or unreasonably."
>
> 17. Chadwick LJ was also one of the judges in *Summit Property*. He said this at paragraph 27 of his judgment:

> " … An issue based approach requires a judge to consider, issue by issue in relation to those issues to which that approach is to be applied, where the costs on each distinct or discrete issue should fall. If, in relation to any issue in the case before it the court considers that it should adopt an issue based approach to costs, the court must ask itself which party has been successful on that issue. Then, if the costs are to follow the event on that issue, the party who has been unsuccessful on that issue must expect to pay the costs of that issue to the party who has succeeded on that issue. That is the effect of applying the general principle on an issue by issue based approach to costs. Further, there will be cases (of which this is not one) where, on an issue by issue approach, a party who has been successful on an issue may still be denied his costs of that issue because, in the view of the court, he has pursued it unreasonably. The question, therefore, can be re-stated: was the judge entitled to approach the costs in this case on an issue by issue basis? In my view, for the reasons set out by the judge and by Longmore LJ, I am not persuaded that the judge can be criticised for adopting that approach in what he described as an unusual case, having circumstances which were special and particularly strong …"

26. At [21], Warren J turned to consider offers to settle and negotiations, saying that "Offers to settle are of great practical important in unfair prejudice petitions".

27. Warren J then cited the following passage from the speech of Lord Hoffmann in *O'Neill v Phillips* [1999] 1 WLR 1092 at 1107:

> "But the unfairness does not lie in the exclusion alone but in exclusion without a reasonable offer. If the respondent to a petition has plainly made a reasonable offer, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out. It is therefore very important that participants in such companies should be able to know what counts as a reasonable offer.
>
> In the first place, the offer must be to purchase the shares at a fair value. This will ordinarily be a value representing an equivalent proportion of the total issued share capital, that is, without a discount for its being a minority holding. …….
>
> Secondly, the value, if not agreed, should be determined by a competent expert. The offer in this case to appoint an accountant agreed by the parties or in default nominated by the President of the Institute of Chartered Accountants satisfied this requirement. One would ordinarily expect the costs of the expert to be shared but he should have the power to decide that they should be borne in some different way.
>
> Thirdly, the offer should be to have the value determined by the expert as an expert. I do not think that the offer should provide for the full machinery of arbitration or the half-way house of an expert who gives

reasons. The objective should be economy and expedition, even if this carries the possibility of a rough edge for one side or the other (and both parties in this respect take the same risk) compared with a more elaborate procedure….

Fourthly, the offer should, as in this case, provide for equality of arms between the parties. Both should have the same right of access to information about the company which bears upon the value of the shares and both should have the right to make submissions to the expert, though the form (written or oral) which these submissions may take should be left to the discretion of the expert himself.

Fifthly, there is the question of costs. In the present case, when the offer was made after nearly three years of litigation, it could not serve as an independent ground for dismissing the petition, on the assumption that it was otherwise well founded, without an offer of costs. But this does not mean that payment of costs need always be offered. If there is a breakdown in relations between the parties, the majority shareholder should be given a reasonable opportunity to make an offer (which may include time to explore the question of how to raise finance) before he becomes obliged to pay costs. As I have said, the unfairness does not usually consist merely in the fact of the breakdown but in failure to make a suitable offer. And the majority shareholder should have a reasonable time to make the offer before his conduct is treated as unfair. The mere fact that the petitioner has presented his petition before the offer does not mean that the respondent must offer to pay the costs if he was not given a reasonable time."

28. Warren J continued as follows:

"22. Quite apart from the special circumstances of an unfair prejudice petition, the court should, in assessing the conduct of the parties with regard to costs, take account of the absence of any intention to settle the matter. In *Painting v Oxford* [2005] EWCA Civ 161, Maurice Kay LJ said this:

> "22…at no stage did Mrs Painting manifest any willingness to negotiate or to put forward a counter-proposal to the Part 36 payment. No one can compel a claimant to take such steps. However to contest and lose an issue of exaggeration without having made ever a counter-proposal is a matter of some significance in this kind of litigation. It must not be assumed that beating a Part 36 payment is conclusive. It is a factor and will often be conclusive, but one has to have regard to all the circumstances of the case…"

23. Longmore LJ agreed:

> "27… that it is relevant that Mrs Painting herself made no attempt to negotiate, made no offer of her own and made no response to the offers of the University. That would not have mattered in pre-CPR days but, to my mind, that now matters very much. Negotiation is supposed to be a two-way street, and a claimant who makes no attempt to negotiate can expect, and should expect, the courts to take that into account when making the appropriate order as to costs…"”

29. One of the submissions made by Mr Pavlovich is that Mr Prescott could have protected himself from adverse costs consequences by making an offer which accorded with Lord Hoffmann's speech in *O'Neill v Phillips*.

30. In *Re Southern Counties Fresh Foods Ltd* itself, the petitioner sought the whole of the costs of the litigation, including indemnity costs in relation to certain aspects, together with interest, whereas the respondent contended that it should recover 32% of its costs up until the date of the handing-down of Warren J's main judgment in November 2008 and all of its costs after that date. After a detailed consideration of a host of factors, Warren J held (at [114]) that the respondent should pay the petitioner (i) 50% of its costs for one period ("Period 1") and (ii) 100% of its costs for two other periods ("Periods 2 and 3"); that the reserved costs of one of the petitioner's applications should be dealt with in the same way as the costs for Period 1; and that the respondent should pay simple interest from a particular date on one half of the total amount of costs actually paid by the petitioner before that date at the rate of 1% over the prevailing Bank of England base rate. Naturally, each case is different on its facts, but, among other things, Warren J made some observations at [49]-[50] which, in my judgment, have some relevance to the present proceedings:

> "Who was the successful party?
>
> 49. Clearly CIL is the successful party in the sense that it has obtained the relief which it sought in the amended Petition and has obtained more for its shares in SCFF than was ever on offer from RWM. But equally clearly it has been less than wholly successful in that it failed to establish many of its allegations of unfair prejudice although, in some instances, the facts established had financial implications for valuation or compensation. It is a somewhat arid question whether CIL qualifies as the "successful party" for the purposes of CPR 44.3(2). Even if it is, the success is clearly qualified and my costs order must reflect that fact. It does not make any difference to the end result whether my starting point is that CIL should have its costs and then go on to consider how its lack of success on some issues is to be reflected in my costs order, or whether I simply make a judgment about where costs should fall taking into account as one factor that CIL has achieved what it set

out to achieve, namely an order that RWM purchase its shares in CIL at a proper value.

Conduct of the litigation

50. This was hard-fought litigation with hardly a stone left unturned. Apart from suggestions from each side that the other was unwilling to negotiate in a sensible way (or at all), I have to say that, from time to time, both sides took positions which were not entirely reasonable and conducted the litigation in a way which might be perceived as oppressive. On CIL's sides I have in mind particularly the way in which the initial valuation evidence was produced on instructions from Matthew which CIL was not able to establish. Further, one of the main complaints concerning the cow trade continued to be pushed when, realistically, CIL should not have continued with it. It was a claim which rested in hope and speculation. On the other side, CIL had to face an application for summary judgment or alternatively to strike out parts of the Petition which was withdrawn. It can now be seen to have been without merit, but even as the evidence stood at the time, it is surprising to me that it was made. However, RWM was faced with a mass of allegations and complaints and it was entitled to meet them. It cannot be criticised for the fact that this resulted in lengthy pleadings and a vast amount of evidence."

The offers to settle

31. Mr Pavlovich appended a table to his Skeleton Argument which detailed two offers by Mr Prescott and/or SEL and three offers by Dr Potamianos and/or BDL to settle the Source Code Claim; six offers by Mr Prescott and four offers by Dr Potamianos to settle the Unfair Prejudice Claim; and four offers by Mr Prescott and five offers by Dr Potamianos which were global and related to both sets of proceedings. I propose to address only those offers which I regard as having the greatest significance for the purposes of the arguments presently before me.

32. I summarised the early offers to settle the Unfair Prejudice Claim in the Liability Judgment as follows:

"62. Throughout the Spring and Summer of 2015, Mr Prescott and Dr Potamianos made efforts to explore a sale to a third party. An email from Dr Potamianos to Mr Prescott dated 23 September 2015 records that Dr Potamianos had told an adviser at Baker Tilly that "our business is being affected by 10 to 15% down (being conservative)" and that the adviser had immediately replied that this would affect the selling price. Mr Prescott's evidence is that in a telephone call that they had with Baker Tilly not long after this, Baker Tilly advised that they would struggle to sell the business at all, and

that if they did manage to do so, it would be for no more than £2.5m.

63. On 30 September 2015 Mr Prescott and Dr Potamianos had a meeting at which they agreed they "would explore three possible changes to group structure a) EP purchase AP shares in SR b) EP purchase SE off SR c) EP purchase SE off SR and AP purchase EP share in Peregrine House". They also agreed to:

"do their best to agree a fair value for whatever solution is deemed appropriate. In general for SE this means considering:

a) An element of multiplier on profit (AP suggested 4, EP thought this seemed right)

b) Spare cash to be a separate element

c) Excess stock to be considered

d) Taking account of previous higher performing years to provide a fair value not only based on the current low year."

64. On 16 October 2015, Mr Prescott offered to purchase Dr Potamianos' shares by way of share buyback for £1.34m using a methodology "guided by our previous discussions". On 19 October 2015, Dr Potamianos replied "I would like to inform you that your offer has not been successful". Later that day, Dr Potamianos rejected the suggestion that it was now his turn to come up with a value acceptable to Mr Prescott, and stated that it was up to Mr Prescott to make his best offer and then in response he would "tell you if it is acceptable".

65. In November 2015, Mr Prescott produced a memorandum on "Problems that need a solution", which he sent to Mr Macdonald as an attachment to an email dated 13 November 2015. In that email Mr Prescott sought Mr Macdonald's help and advice, in essence as to how he could buy out Dr Potamianos and end "the management paralysis we have at the moment".

66. …

67. By email to Mr Prescott dated 24 November 2015, Mr Macdonald gave his reasons for thinking that Mr Prescott's offer was "a Wee bit too low".

68. Mr Prescott made an improved offer to include a post-sale 4 year contract for BDL at £60,000 pa on top of his initial offer. This was rejected by Dr Potamianos."

33. These and other offers were considered in the Appeal Judgment, in the context of allowing the one ground upon which the appeal of Dr Potamianos succeeded, not only in the passages already cited above but also at [139]-[143]:

> "139. When considering the proper case management of a petition, the court should also take into account that the effect of a reasonable offer is not binary in the sense that either it leads to the petition being dismissed or it is to be disregarded altogether. Once the court has considered the reasonableness of an offer, it may take one of four courses. If the offer made was entirely reasonable and the petitioner acted unreasonably in rejecting it, it is open to the court to conclude that the unfair prejudice petition fails. The court should bear in mind the potentially draconian effect of that conclusion if the petitioner is then forced indefinitely to remain a minority shareholder in a business in the management of which he is no longer involved. Secondly, it is open to a court to conclude that the unfair prejudice petition succeeds but that the appropriate remedy is an order directing the buy out of the shares at the price that was offered, perhaps subject to adjustments to take account of the passage of time and changes in the market or to redress the impact of the unfairly prejudicial conduct on the value of the company. This course would have the advantage of avoiding the delay and expense of a subsequent hearing and the instruction of experts to value the shares. Thirdly a court may conclude that the fair response is to treat the offer as a factor relevant to the award of costs following the conclusion of the proceedings. It may be appropriate in some cases to modify an order that costs follow the event so as to recognise the making and rejection of the offer. This is an approach recognised by Lord Hoffmann in *O'Neill v Phillips*: see p. 1106E - H. Fourthly, of course, the court could conclude that the making of the offer has no effect on the success of the petition, the appropriate method for valuing the shares for the buy out order or the petitioner's entitlement to his costs of the proceedings.
>
> 140. Applying those principles to the present case, we have concluded that the judge erred in deciding at paragraph 376 that he could not assess the reasonableness of the offers and of Dr Potamianos's response to them without expert valuation evidence and hence that the issue had to be postponed to the second hearing in accordance with the order of Snowden J. In our judgment there was sufficient material to establish that the making and rejection of the offers were not factors that defeated Dr Potamianos's petition by making his exclusion from the Company fair.
>
> 141. The October 2015 Offer and the Increased Offer were made at a time when it was not apparent that the quasi-partnership had irretrievably broken down. Mr Prescott was still offering to negotiate a new shareholder agreement with Dr Potamianos in

January 2016: see the email quoted at paragraph 69 of the judgment, and he was urging Dr Potamianos to cooperate with the development of the software. Dr Potamianos was fully engaged in discussions about the validity of the contentious business plan and in trying to redirect the business of the Company for several months after those offers were made and rejected. It was also not clear whether the ultimate outcome might be that Dr Potamianos would buy out Mr Prescott rather than the other way around. The ability of Mr Prescott to obtain funding for the offer of £1.34 million was in doubt and there was a possibility of offering the business to a third party buyer.

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

143. The price of £1 million offered in February 2017 was put forward without any explanation as to why it was substantially less than the Increased Offer. If the reduction was intended to reflect the possibility of a minority discount being applied at the end of the legal proceedings, then we have held that such a deduction would have been inappropriate. The Source Code Claim was still hotly disputed between the parties. The offer of £1 million was a "take it or leave it" one, open for 21 days only. Six days later (23 February 2017) notice was given of the meetings of the Boards on 7 March 2017 to consider the possible removal of Dr Potamianos as a director of SEL in the light of "concerns" relating to him which were not particularised until 23 March. We have related above the outcome of those meetings and the subsequent events. The offer expired only 2 days after the 7 March meetings. Given what had passed, we do not consider that Dr Potamianos's failure to accept this final offer can be judged with hindsight to have been so unreasonable to result in denial to him of any relief upon his petition to which he might otherwise be entitled."

34. Ms Page submitted that Mr Prescott's offer of £1.34m for Dr Potamianos' shares was greater than the value of £1,056,684.38 which was produced by the rulings that I had made in the Unfair Prejudice Quantum Judgment; and that it was greater, also, than the value of £1,135,884.38 which was produced by

adding to that sum 40% of the payment in respect of the costs recoverable by SEL under paragraph 1 of the order of 9 March 2021 in the Source Code Claim. Those points applied *a fortiori* to Mr Prescott's improved offer of £1.58m.

35. Mr Pavlovich disputed that approach on a number of grounds. First, Mr Pavlovich submitted that Dr Potamianos had recovered more by rejecting those offers and by retaining his shares. In this regard, there should be added to the sum of £1,135,884.38 not only the Balancing Payment of £359,314.67 but also various payments that Dr Potamianos/BDL received for providing services to SEL after the date of those offers, which had the effect of increasing the total sum received by Dr Potamianos for retaining his shares to about £1.625m. Second, Mr Pavlovich submitted that it could not be said that £1.34m was a fair price for Dr Potamianos' shares in 2015 (and that £1.58m was not the appropriate sum to take into account in this context, because that improved offer was not made for the shares alone but instead involved requiring Dr Potamianos to provide services for 4 years at what was, for him, a low rate of £60,000 pa). In support of that submission, Mr Pavlovich produced a table which was designed to show that Dr Potamianos' shares were worth approximately £1.48m in 2015, using the same approach as was used to produce the value of £1,056,684.38 as at the Valuation Date. Third, Mr Pavlovich submitted that these offers were of little, if any, relevance for present purposes because they pre-dated the events upon which the finding of unfair prejudice was based.

36. In my judgment, the appropriate comparator with the offer of £1.34m is £1,135,884.38. If the Balancing Payment and other remuneration that was paid to Dr Potamianos/BDL is to be taken into account as part of the calculation of what Dr Potamianos has gained by rejecting Mr Prescott's offers, then I consider that the appropriate offer for purposes of that comparison is £1.52m (i.e. £1.34m plus three of the proposed £60,000 pa consultancy payments, for the years between the date of the offer and the Valuation Date). I am doubtful about the validity of the latter comparison, however, because it has the effect that the longer the delay in reaching the Valuation Date the greater the extent of the Balancing Payment to which Dr Potamianos is entitled, and therefore the greater the amount of that Dr Potamianos has "recovered by retaining his shares", and (a) there was no suggestion before me that Mr Prescott is responsible for all of that delay and (b) the Balancing Payment was "rough justice" in any event.

37. As to whether £1.34m was a fair price, Mr Pavlovich's table included a figure of £800,000 for surplus cash, based on a cash balance of £1,070,443. That figure contradicts the agreement of the experts which is recorded in the Unfair Quantum Judgment that SEL required cash of around £500,000. If the surplus

cash figure in Mr Pavlovich's table is adjusted in line with the agreed approach of the experts, the total value of SEL is reduced by £230,000, and the value of Dr Potamianos' shares in SEL is reduced by 40% of that sum, that is to say from £1.48m to £1.388m. That is still greater than £1.34m, but by quite a slender margin. Moreover, that figure takes no account of other reservations which Ms Page expressed about that table; and in any event it pales into insignificance if it is approached on the basis of asking whether all the subsequent trouble and expense for the parties was justified because Dr Potamianos was offered £48,000 less than the true value of his shares (if that is indeed what happened).

38. Mr Pavlovich suggested that Dr Potamianos was reasonable in rejecting Mr Prescott's offers of £1.34m and £1.58m, and in not putting forward any response of his own which I regard as constructive, because he was hoping for an offer from a strategic buyer which might yield greater returns for him (and Mr Prescott). Consistent with the approach contained in the Appeal Judgment, I do not feel able to say that it was unreasonable for Dr Potamianos to take this prospect into account. The like considerations apply to the submission that these offers were made at a stage which was too early to be afforded much weight in the context of the Unfair Prejudice Claim which subsequently transpired: here, again, I consider that the Appeal Judgment lends some support to that argument. In my judgment, however, it is nevertheless right to point out, and permissible to take into account, that, in the result: no third party buyer emerged; the relationship between the parties deteriorated; the events which prompted the Unfair Prejudice Claim transpired; and even on the basis of the most favourable arithmetic put forward on his behalf, Dr Potamianos is hardly any better off than if he had accepted the offers, to say nothing of negotiating in response to them in the spirit of the discussions which had taken place on 30 September 2015. Accordingly, the consequence of adopting that approach was, in the end, dire.

39. Pulling all these factors together, I do not consider that either of these offers lands a knock-out blow for the purposes of the present arguments about costs. That is not to say, of course, that they should be disregarded in that context.

40. The next offer to which Mr Pavlovich attached significance is an offer made Without Prejudice Save as to Costs by Dr Potamianos on 26 January 2017 to buy Mr Prescott's shares in SRL for £2.4m. That offer accordingly valued Dr Potamianos' shares (without a minority shareholder discount) at £1.6m, which is more than Dr Potamianos was offered in 2015, and more than Dr Potamianos recovered as a result of the present proceedings, on all save the most optimistic calculation of his recovery, which includes payments attributable to services either provided or offered to be provided by Dr Potamianos/BDL to SEL. As matters have transpired, it was on the face of it a

generous offer to Mr Prescott. Mr Pavlovich submitted that the offer was made at the pre-action stage, and that it accorded with some of the discussions which the parties had held in the past, as recorded in the Liability Judgment at [59]: "At a meeting on 28 January 2015 (the minutes of which were later recorded as agreed on 3 February 2015) Mr Prescott and Dr Potamianos discussed their options. Option 1 was "Ed buys out Aris' share in the whole business, or Aris buys out Ed's share in the whole business". Option 2 was "Ownership change of SE". This had a number of permutations, including "Ed buys SE, or Aris buys SE" …". I accept that, if Mr Prescott had accepted this offer, he would have been significantly better off in financial terms than he is as a result of the present proceedings, even without taking into account the privations on resources wrought by costs. However, the relevant letter (from Dr Potamianos' solicitors) states: "The offer is made subject to contract and is subject to our client being able to raise adequate finance, which he would seek upon confirmation that the offer is acceptable in principle". There was no evidence before me as to Dr Potamianos' prospects of raising the necessary funds, and if his attempts to do so depended upon borrowing against the potential or security of this investment, I consider that they would have been uncertain. This weakens the significance of this offer.

41. The next offers in time were relied upon by Ms Page and comprised (i) an open offer and (ii) an offer made Without Prejudice Save as to Costs and Subject to Contract by Mr Prescott, both on 17 February 2017, to buy Dr Potamianos' shares for the sums of £1m and £1.1m respectively. I consider the latter is the more relevant, as it is for a higher sum: in particular, it exceeds the value of £1,056,684.38 which was produced by the rulings that I had made in the Unfair Prejudice Quantum Judgment. The offer was conditional upon SEL receiving the source code and associated materials and "being satisfied (acting reasonably) with the quality thereof". It was also conditional on "the usual warranties and indemnities". In my judgment, these conditions greatly reduce the reliance which Mr Prescott can place upon that offer in the present context, in light of (a) the numerous complaints which Mr Prescott subsequently made about the quality of the source code and the standard of Dr Potamianos' work on it, and (b) the propensity to disagree about matters which both men have displayed before and during the progress of these proceedings. In addition, the offer was open for acceptance, subject to contract, for 21 days, and it is right to note that the view taken in the Appeal Judgment was that this factor was relevant to the reasonableness of a refusal of acceptance, having regard to "what had passed" at and after the time when this offer was made. For these reasons, I do not consider that these offers greatly assist Mr Prescott's arguments on costs.

42. The next offers to which I propose to refer are offers made Without Prejudice Save as to Costs by Dr Potamianos and Mr Prescott on 13 May 2018. These

offers represented the culmination of correspondence which began on 11 May 2018, which took place during the course of the trial of the Source Code Claim and the Unfair Prejudice Claim, and in which various proposals and counter-proposals were made concerning settlement of both claims, common elements of which included (i) that the source code and "deliverables" would be provided to SEL, (ii) that all the parties would bear their own costs, and (iii) that the parties' disputes would otherwise be settled (for example, without payment of damages to SEL in respect of the Source Code Claim). Mr Prescott's final offer was to buy Dr Potamianos' shares for £1m, and Dr Potamianos' final offer was to sell his shares for £1.65m. In the events which happened, on the one hand Dr Potamianos recovered more than this figure of £1m (bearing in mind that it included compensation in respect of what became the Balancing Payment); but, on the other hand, Dr Potamianos recovered less than £1.65m from Mr Prescott, even according to the method of calculation which is most favourable to Dr Potamianos. I therefore consider that these events are neutral for purposes of the present arguments concerning costs, although I also consider that it is to the credit of all parties (and their lawyers) that serious efforts were made to settle their differences before costs escalated further, as they subsequently did.

43. The next offer to which I propose to refer is an offer made Without Prejudice Save as to Costs and Subject to Contract by Dr Potamianos on 27 June 2018, to sell his shares and "the source code deliverables" (as described in the earlier correspondence in May 2018) for £1.2m in full and final settlement of all the parties' claims against one another, including costs. This offer was made following the trial of the Source Code Claim and the Unfair Prejudice Claim and before the hand down of the Liability Judgment, and expired on 29 June 2018 (only two days later). Although that gave only a short time for acceptance, the significance of that element of the offer has to be considered in the context that (a) it was made against the background of the offers and counter-offers which had been made in May 2018, and, as I see it, by way of a final attempt by Dr Potamianos to bring matters to a conclusion at that time, and (b) there was no suggestion, either at the time or in the course of argument before me, that it would have made any difference if a longer time had been given for the offer to be considered. For these reasons, when evaluating the significance of this offer in the context of the present arguments about costs, I attach less weight to the duration for which the offer was open for acceptance than to its financial terms.

44. At this stage, SEL had incurred the costs of the Source Code Claim of about £237,306 (£222,709 of which was subject to a proposed budget), and Dr Potamianos had incurred the costs of the liability phase of the Unfair Prejudice Claim of £298,557.12 (including VAT) (all of which was unbudgeted). Dr Potamianos was therefore willing to accept £1.2m and to forgo an entitlement

to costs (on a detailed assessment) of, as it seems to me, what is likely to be a sum in excess of £200,000, which had the effect of reducing the value of that offer to him to around £1m, in exchange for (i) giving up a claim to be paid the value of his shares, which transpired to be worth £1,056,684.38, (ii) giving up a claim for the Balancing Payment, which transpired to be worth £359,314.67, and (iii) avoiding a net liability to pay 60% of the costs recoverable by SEL in respect of the Source Code Claim, which transpired to be £198,000 (the other 40% of those costs being recoverable by Dr Potamianos through being added back to the value of SEL). Accordingly, it seems to me that this offer was plainly more advantageous to Mr Prescott, and less advantageous to Dr Potamianos, than the eventual outcome of these proceedings in respect of the matters which were in play at the time when the offer was made. Put another way, in order to recover the value of his shares, the Balancing Payment, and his costs of the Unfair Prejudice Claim for which he was then willing to accept (a) £1.2m plus (b) a release for 60% of SEL's recoverable costs of the Source Code Claim, Dr Potamianos was compelled to go on with the proceedings, as a result of which he incurred the costs of the quantum phase of the Unfair Prejudice Claim and, in the event, recovered significantly more than he offered to accept in June 2018.

45. The position is even clearer if the costs of the Source Code Quantum Trial are taken into account, because the net damages recovered by SEL at the end of the day pale into insignificance in comparison to the costs, which, in the round, and subject always to SEL being successful in its proposed appeal of HHJ Hacon's order, have been borne by SEL - reflecting SEL's failure in the Source Code Quantum Trial to recover more than a tiny fraction of its claim, or to beat a Part 36 offer which had been made by Dr Potamianos in the Source Code Claim.

46. The final offers I propose to mention are the offers made Without Prejudice Save as to Costs and Subject to Contract (i) by Mr Prescott on 24 December 2019 and repeated on 17 April 2020 to buy Dr Potamianos' shares for £500,000 on the basis that Dr Potamianos and BDL should pay SEL damages of £750,000 and each side should pay its own costs, and (ii) by Dr Potamianos on 17 March 2020 to sell his shares for £1.67m. In my view, in each instance these offers were beaten by the offerees, and they therefore take matters little further.

Discussion and conclusion

47. In my judgment, it is plain that Dr Potamianos is the successful party overall at both stages of the Unfair Prejudice Claim, in that (i) at the liability stage, he succeeded in establishing that he had been unfairly prejudiced (and, on appeal, that Mr Prescott's offers were not capable of curing that unfair prejudice), and (ii) at the quantum stage, he obtained an order for a substantial recovery.

48. The most obvious answer which Mr Prescott might have to the general starting point that, in these circumstances, he should be ordered to pay Dr Potamianos' costs is that he made an admissible offer to settle which Dr Potamianos did not beat. For the reasons set out above, although the offers that he made are relevant as to the extent to which he acted reasonably, I do not consider that Mr Prescott can establish this. Indeed, in my judgment, it is Dr Potamianos rather than Mr Prescott who can make good that contention. Dr Potamianos' offer dated 26 January 2017 to buy Mr Prescott's shares in SRL for £2.4m faces the difficulty that it is uncertain whether Dr Potamianos could have raised the necessary funds. However, Dr Potamianos' offer dated 27 June 2018, to sell his shares and "the source code deliverables" for £1.2m in full and final settlement of all the parties' claims against one another, including costs, faces no such difficulties. Further, I consider that offer was plainly more advantageous to Mr Prescott than the final outcome which resulted from the Unfair Prejudice Quantum Judgment. Accordingly, that offer reinforces rather than undermines the general starting point. It is also of relevance when considering the conduct of the parties.

49. Turning from the topic of admissible offers to the topic of the conduct of the parties, it seems to me that both sides are open to criticism. That accords with my finding in the Liability Judgment at [393] ("I do not consider that the fault in this case lies by any means all on one side") which was echoed and endorsed by the Court of Appeal in the Appeal Judgment at [67] ("We would add that in each party's skeleton argument for this appeal he 'puts his best foot forward' in identifying the features of the case upon which he relies to put the other in the worst possible light … In our judgment, such paragraphs only serve to support the judge's overall conclusion that fault lay on both sides"). If the starting point is that Mr Prescott is liable to pay the costs, to the extent that his conduct has caused costs to be incurred or increased that conduct already tells against him. The live issue, therefore, is whether and to what extent the conduct of Dr Potamianos ought to be taken into account to ameliorate the consequence that, if it is not taken into account, the burden of any costs that are attributable to it fall upon Mr Prescott alone. Further, in principle, if Dr Potamianos' conduct is material in this regard, it seems to me that not only should Mr Prescott not have to pay Dr Potamianos' costs attributable to that conduct, but also Dr Potamianos should have to pay Mr Prescott's costs attributable to it.

50. A further point concerns the extent to which I should exercise my discretion to take account of the fact that, while Dr Potamianos has been generally successful in the litigation, he has been unsuccessful on some issues. In this regard, it is not necessary for Dr Potamianos to have acted unreasonably or improperly to be deprived of his costs of a particular issue on which he has failed. Furthermore, in this context, also, in principle, it is permissible to order

not only that the generally successful party should be deprived of his costs of some or all of the issues on which he has been unsuccessful but also that he should pay the costs of the generally unsuccessful party on some or all of those issues. At the same time, while conceptually distinct from the question of conduct, consideration of success on particular issues is related to it in that the Court may deprive a party of costs on an issue even if he has been successful on it if the Court is satisfied that the party has acted unreasonably in relation to that issue.

51. In my judgment, the conduct of Dr Potamianos and the fact that he failed on a number of issues ought to be taken into account in this case.

52. With regard to the extent of that failure, according to two Annexes to her written submissions produced by Ms Page, in the trial on liability Mr Prescott succeeded on about 80% of the issues, and Dr Potamianos succeeded on about 17%, with the remainder being issues on which neither succeeded more than the other; and in the trial on quantum the comparable figures were about 70% and 30% in respect of the issues which have been decided (according to Ms Page's analysis, the trial on quantum involved 16 issues, of which 13 have been decided).

53. However, I do not consider that this is an appropriate analysis to carry through to the determination of costs issues, for the following principal reasons. First, the comparative importance of these issues varies widely: for example, at the liability stage, as well succeeding on the issue of unfair prejudice, Dr Potamianos also succeeded on the major contested issues of quasi-partnership and minority discount. Second, there are plainly different ways of looking at issues: for example, in relation to the trial on quantum Ms Page has described "Remedial works to Source Code" as one issue, whereas (a) there was a further dispute as to the further "significant issues" raised by Mr Prescott and listed at paragraphs 16(i)-16(xvi) of his 5th witness statement dated 21 April 2020 (which went well beyond remedial works to the source code, and so, in my judgment, should be treated as a separate issue) and (b) if each of those "significant issues" was looked at separately, Mr Prescott could be said to have failed on 16 issues. Third, as appears among other things from [385] of the Liability Judgment, it was not only Dr Potamianos who wanted many of these issues determined, and, in my view, it would be going too far to visit on Dr Potamianos without qualification the costs of issues being raised or pursued regardless of whether (a) Mr Prescott also played a part in those issues taking up the resources of the parties and of the court and (b) Dr Potamianos' loss on those issues made any difference to the overall outcome. Fourth, even where Dr Potamianos could be said to be solely responsible for raising or pursuing issues on which he failed, it does not follow that he should be deprived of his costs of those issues, let alone ordered to pay Mr Prescott's

costs of the same: on the contrary, many successful parties fail on some issues but are nevertheless awarded all of their costs.

54. With regard to the liability stage, the matters which weigh most with me are (i) the criticisms which I made of the conduct of Dr Potamianos before the proceedings began in the passages from the Liability Judgment which I have quoted above, (ii) the fact that he ran arguments concerning the source code as part of the Unfair Prejudice Claim, and that he lost on the source code issues, such that this loss has a bearing on that claim as well as on the Source Code Claim, (iii) the fact that there was a "kitchen sink" element to his claims (although I readily accept that, as is shown by other passages from the Liability Judgment which I have quoted above, Mr Prescott was also guilty of failing to exercise discrimination with regard to the ambit of his case), and (iv) his failure on the serious allegations of breach of fiduciary duty against Mr Prescott (which, contrary to the submissions of Mr Pavlovich, I consider did add to the complexity and cost of the proceedings).

55. I do not attach special significance to the claim concerning renovations to Peregrine House, and I certainly do not consider that it attracts indemnity costs.

56. With regard to the quantum stage, the matters which I consider it appropriate to take into account are (i) that Dr Potamianos failed on a number of issues and (ii) in particular, that in two instances he ran arguments which did not succeed and which were contrary to the views of the experts for both sides (which, for the avoidance of doubt, plainly added to the complexity and cost of the proceedings). As against these factors, I consider it important to bear in mind: (a) that the starting point remains, of course, that Dr Potamianos was the generally successful party, (b) that Mr Prescott could have protected himself by an admissible offer to settle which was cast in terms which Dr Potamianos did not better, and (c) with regard to the quantum stage, that by the time those costs were incurred Dr Potamianos had made his offer dated 27 June 2018 which was in eminently reasonable commercial terms – and the significance of which is not eroded by its short duration - and which Mr Prescott plainly failed to better.

57. Having regard to these considerations, I am of the opinion that the appropriate order for costs is that Dr Potamianos should have 65% of his costs of the liability stage of the Unfair Prejudice Claim and 80% of his costs of the quantum stage.

58. That has the effect, in broad terms, that Mr Prescott will bear five sixths and Dr Potamianos will bear one sixth of the overall costs of the liability stage, and that Mr Prescott will bear nine tenths and Dr Potamianos will bear one tenth of the overall costs of the quantum stage. That seems to me to be about

right, bearing in mind, in particular: (i) that where factors tell against Dr Potamianos, it is necessary to consider not only whether he should be deprived of his own costs but also whether he should pay the costs of Mr Prescott, and (ii) that there are a number of considerations which distinguish the liability phase and the quantum phase, not least that Dr Potamianos made the offer he did on 27 June 2018. If regard is had to the costs of the Source Code Claim as well, of course, the overall position is that Dr Potamianos is even more clearly the winner on costs issues.

59. I am also minded to order that Mr Prescott should make a payment on account of those costs, although lower than the "at least £400,000" sought by Mr Pavlovich on the basis that Dr Potamianos would recover all his costs. However, I have not heard argument on that point, or, I believe, some of the other matters rehearsed above, such as the applicable rate of interest on costs, and, it may be, whether different costs orders ought to apply to specific hearings. I therefore do not propose to rule on any of those matters without affording the parties the opportunity for further argument. Among other things, in light of the order that I was pressed to make affording time for payment of the purchase price of the shares, and having regard to the order that I made concerning payment of the Balancing Payment, it may be that time will be sought for payment of costs.

60. I invite the parties to reach agreement on any issues which remain outstanding. If they are unable to do so, I will deal with those issues at the hearing which has already been fixed at a time convenient for all Counsel on 30 April 2021.