Neutral Citation Number: [2023] EWHC 596 (Ch)

CASE NO: CR-2022-BHM-000388

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN BIRMINGHAM

COMPANIES AND INSOLVENCY LIST (CH.D)

Trial dates: 8, 9, 14 December 2022, 15 February 2023 (directions and listing only) and 27 and 28 February 2023

Judgment handed down on 17 March 2023 at 10.00 am

IN THE MATTER OF THE WHITEHALL PARTNERSHIP LIMITED

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN

JOHN LESLIE TAYLOR

Petitioner

-and-

(1) THE WHITEHALL PARTNERSHIP LIMITED

(2) JOANNE TAYLOR

Respondents

BEFORE HIS HONOUR JUDGE MITHANI KC, SITTING AS A JUDGE OF THE HIGH COURT, at the Wolverhampton Combined Court Centre, Pipers Row, Wolverhampton, WVI 3LQ, on 17 March 2023

Mr Glenn Willetts (instructed by FBC Manby Bowdler LLP, solicitors) for the Petitioner

The Second Respondent, Ms Joanne Taylor, appeared in person.

Approved Judgment

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

....

His Honour Judge Mithani KC

(17 March 2023)

THE PETITION AND THE BACKGROUND CIRCUMSTANCES

1 This is a contributory's petition to wind up THE WHITEHALL PARTNERSHIP LIMITED which I will refer to as "the Company".

2 The petition (hereinafter referred to as "the Petition" or "the Present Petition") was presented on 10 August 2022 by John Leslie Taylor who is a 50% shareholder in the Company. I will refer to him as "the Petitioner". The respondents to the petition are the Company and the Petitioner's former wife, Joanne Taylor, who holds the other 50% of the shares in the Company. As the Company is only a notional respondent to the Petition, I will refer to Mrs Taylor as "the Respondent". I will refer to the Petitioner and the Respondent collectively as "the parties". The Petitioner and the Respondent are the only directors of the Company.

3 The Petition was presented by the Petitioner in his capacity as a contributory. The Petitioner maintains that, under s. 122(1)(g) of the Insolvency Act 1986 ("IA 1986"), it would be "just and equitable" for the Company to be wound up.

4 The grounds upon which the Petitioner seeks a winding up order are set out in the following terms in the Petition:

> "The grounds on which the winding-up order is sought are: winding-up order is made pursuant to Section 122(1)(g) of the Insolvency Act 1986 on the basis that it would be just and equitable for the Company to be wound up, in particular as: (1) There is deadlock in the conduct or the management of the Company; and (2) There has been a serious breach or breakdown in the underlying basis upon which the Company was set up."

5 Paragraph 55 of the first witness statement of the Petitioner summarises the facts and matters upon which the Petitioner relies in support of his assertion that the Company is deadlocked or that the relationship of trust and confidence between the parties has broken down irretrievably. Those facts and matters are the same or similar to the grounds relied upon by the Petitioner in support of an unfair prejudice petition that the Petitioner brought against the Respondent, under s. 994 of the Companies Act 2006, which he subsequently discontinued:

> "the … Respondent has conducted herself in a manner which has been unfairly prejudicial to my interests and has caused significant regulatory difficulties for the Company. The following facts and matters are submitted to be relevant:
>
> 55.1 The … Respondent no longer works for the Company on a full-time basis;
>
> 55.2 The … Respondent taken an appointment as a director of another company;
>
> 55.3 The … Respondent incorporated a new company as a vehicle for her own business venture;
>
> 55.4 The … Respondent has absented herself from the business of the Company since August 2019;
>
> 55.5 The … Respondent has refused to co-operate with me in dealing with the FCA;
>
> 55.6 The … Respondent issued an employment claim against the Company;
>
> 55.7 The … Respondent made a [sic] compliant to both the FCA and the Ombudsman about the Company and me personally; and
>
> 55.8 The … Respondent has refused to obtain a joint valuation of the shares in the Company."

6 The Petitioner asserts that the Company is solvent. I am not sure that it is. In any event, even if it is, it is unlikely to remain so for too long.

7 The Respondent opposes the making of the winding up order. In para. 96 of her witness statement dated 17 September 2022, she asks the court:

> "to reject the winding up of the Company in favour of the following:
>
> a. That the Petitioner be ordered to provide me access to all company records, including financial ones; and
>
> b. That we both be joint signatory on all bank accounts for all transactions; and
>
> c. That the Company be ordered to appoint an independent professional, perhaps from a firm who provides compliance services; and that the directors be ordered to agree to honour that professional's opinion as a casting vote where deadlock on the decisions of the Directors occur - subject to FCA [i.e., Financial Conduct Authority] approval of this arrangement. The firm is currently too small to carry the burden of paying a non-executive director or chair for regular enough meetings; and
>
> d. That all minutes for directors and shareholder meetings be signed by us both, or that we prepare written resolutions instead."

8 It would appear from this paragraph of her witness statement that she wishes the Company to continue trading. The Petitioner has made it clear to her, and to this court, that if the Petition is dismissed, he will resign his directorship in the Company. He is unable to countenance any situation in which he would be willing to run the Company together with the Respondent.

9 This court cannot force the Petitioner to remain a director of the Company, still less require him to run the Company jointly with the Respondent if he does not wish to do so.

10 It is clear to me, from the material I have seen, that the most appropriate way of dealing with the deadlock which has arisen between the parties would have been to place the company into administration. If the parties could not have agreed to an "out of court" appointment of an administrator, the court could have made an administration order on the application of either the Petitioner or the Respondent. If the Company were to enter into administration, the administrator would not only be able to continue the business of the Company in order to

enable the goodwill, business and other assets of the Company to be sold as a going concern[1], but would also be able to undertake the wide-scale investigation which the Respondent wishes to see happen to enquire into the conduct of the Company during the period that the Respondent says she was excluded from having any say in it.

11 As I have said, on the material before me, I can see a clear case for the Company to be placed into administration. If I had the power to, I might have made an administration order in relation to the Company on my own initiative. But I do not have that power. The order can only be made on an application of a person specified in para. 12 of Sch B1 to the IA 1986. While the Respondent might not understand the consequences of the Company being put into administration as she is not legally qualified, I find it surprising that the Petitioner, who is (and has throughout been advised by solicitors and counsel) should not have thought that this course of action was the most appropriate in the present case. That he has not applied for an administration order is, as I find, because he seeks to derive a personal benefit from the Company being wound up which would not be available to him if the Company were to be placed into administration.

12 When, on the first day of the trial, I broached the question with the parties (given that it was obvious to me that the Company was deadlocked) about whether placing the Company in members' voluntary liquidation might be better than making a winding up order in relation it (because it would avoid the significant costs associated with the compulsory winding up of the Company), Mr Willetts was quick to respond that it would be. He was less forthcoming with my suggestion that the Company be placed in administration. There has been no, or no proper, explanation given by him or the Petitioner about why this would not be a more appropriate course of action than having the Company wound up. I am clear that it has a lot to do with

[1] While a liquidator has power to carry on the business of the company, the power is extremely restricted: see ss 165-168 of, and Sch 4 to, the IA 1986. The power may only be used to carry on the business of the company so far as is necessary for its beneficial winding up. In practice, this power is seldom exercised and if it is exercised, it can only be exercised for a very short period of time.

the "exit strategy" that the Petitioner has planned for his departure from the Company if the Company is wound up by the court and – indeed – even if it is not.

13 It is appropriate for me to give a short background summary of the facts and matters which led to the presentation of the Petition.

14 The Petitioner and the Second Respondent are the only two directors of the Company. They each hold 50% of the issued share capital in the Company. There is no provision in the Company's constitution about how deadlocks between the shareholders should be resolved.

15 The Petitioner and the Respondent married in 1992. Following the irretrievable breakdown in their marriage and personal relationship, their divorce was finalised by the grant of a decree absolute on 4 February 2015.

16 I understand that there was neither any agreement nor a court order setting out how the shares held by the parties in the Company were to be dealt with following the breakdown of the marriage. I raised that point in the course of the hearing but was told that I should disregard it.

17 The Company was incorporated on 7 March 2001, having formerly traded as a partnership, with both the Petitioner and the Respondent as partners of that partnership. That business was transferred into the Company and continued by the Company. The Petitioner and the Respondent each acquired a 50% shareholding in the Company, and were both appointed as directors of the Company.

18 The Company is said to be both "balance sheet" and "cash flow", solvent, i.e., it has a surplus of assets over liabilities (including the expenses of winding up), and it can pay its debts and liabilities as and when they fall due.

19 The Respondent ceased working within the Company business in August 2019 and has not played any role in, or carried out any work for, the Company since that date.

20 The Respondent opposes the winding up of the Company on the following grounds:

(1) That the deadlock and the loss of the relationship of trust and confidence were caused entirely or mainly by the Petitioner;

(2) Whilst the Second Respondent acknowledges that the Petitioner's alleged (but disputed) misconduct could be investigated by an appointed liquidator if the Company is wound up, she would prefer the investigation to be carried out without the Company having to be wound up.

(3) That the Second Respondent considers that the winding up of the Company "would not be the best answer in all of the circumstances, and that it would be preferable for the court to instead order the appointment of an independent expert in the area of deadlock and also for the court to order that the directors have to honour that court appointed expert's opinion as a casting vote in resolving any deadlock in the decisions of the directors (subject to the Financial Conduct Authority approving of such arrangement)"; and

(4) That the Second Respondent does not consider that the winding up of the Company would be fair to her interests as a member of the Company.

21 There was some issue about whether the Petitioner was able to bring this petition in his capacity as a contributory. It is plain that he can. The Respondent no longer contends otherwise. Nor does she contend any longer that the petition should have been advertised. It plainly should not have been and was not.

THE LAW

22 The law in this case does not require any detailed exposition. What follows is simply a summary of the relevant principles which apply to this case.

23 Section 122(1)(g) of the IA 1986 simply states that a company may be wound up by the court if "the court is of the opinion that it is just and equitable that the company should be wound up."

24 The discretion of the court to make a winding up order under s. 122(1)(g) on the just and equitable ground is extremely wide (subject to the requirement that it should be exercised judicially) as is clear from s. 125(1) of the IA 1986, the relevant provisions of which state:

> "On hearing a winding-up petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make an interim order, or any other order that it thinks fit …"

25 However, the exercise of that discretion is subject to the following limitation specified in s. 125(2) of the IA 1986:

> "If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the court, if it is of opinion:
>
> (a) that the petitioners are entitled to relief either by winding up the company or by some other means, and
>
> (b) that in the absence of any other remedy it would be just and equitable that the company should be wound up,
>
> shall make a winding-up order; but this does not apply if the court is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy."

26 The leading cases that set out the principles which govern the making of a winding up order on the "just and equitable" grounds are *Re Westbourne Galleries Ltd, Ebrahimi v. Westbourne Galleries Ltd* [1973] AC 360 and *Lau v. Chu* [2020] UKPC 24, [2020] 1 W.L.R. 4656. However, a helpful summary of the principles which may be derived

from these cases, and other cases on the subject, is set out in the decision of His Honour Judge Mark Cawson KC, sitting as a Judge of the High Court, in *Duneau v. Klimt Invest SA* [2022] EWHC 596 (Ch), at [185] to [199]. The only passages of his judgment, to which I need to refer are these:

> "187. The remedy has been described as one of last resort and an exceptional remedy in the context of disputes between shareholders – see e.g., *Fulham Football Club (1987) Ltd v Richards* [2012] Ch. 333 at [54]–[56]. This is reflected in the wording of Section 125(2) of the 1986 Act, which requires the Court to decline to make a winding up order where some other remedy is available, and the petitioner is acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy. An alternative remedy might potentially be provided by pursuing a remedy under Sections 994-996 of the Companies Act 2006 ('the 2006 Act') on the grounds that the affairs of the company are being or have been conducted in a manner that is unfairly prejudicial to the petitioner in his capacity as a shareholder, or by an offer to buy the petitioner's shares.
>
> 189. Absent an alternative remedy, the question is one of considering whether it is 'just and equitable' that the company should be wound up.
>
> 190. As emphasised by Dillon J in *Re St Piran Ltd* [1981] 1 W.L.R. 1300 at 1307: 'The words "just and equitable" are wide general words to be construed generally and taken at their face value. Whether in any case a winding up order should be made would depend on a full investigation of the facts of the particular case … The concept of justice and equity is a very wide concept …'
>
> 193. In *Lau v Chu* (supra), Lady Arden JSC approved this approach, saying at [101]: 'Lord Wilberforce clearly held the phrase "just and equitable" was general and should 'not be reduced to the sum of particular instances' '(pp 374-375). He also held that the courts may have been too timorous in the past in just and equitable winding up and that it was impossible or undesirable to define the circumstances in which equitable considerations could arise (p 379).'
>
> 194. The jurisdiction is most often invoked in circumstances where the company is in substance a partnership, but it is clear that the jurisdiction is not so limited, and 'may be invoked whenever justice and equity require' – *Re Ringtower Holdings plc* (1989) 5 B.C.C. 82, at 91F, per Peter Gibson J.
>
> 197. In *Lau v Chu* (supra), Lord Briggs JSC, at [39(a)] and [43], made clear that: 'There is no rule that a just and equitable application for winding up must be justified solely by reference to the position as at the date of the filing of the application… The court has to ask itself, at the time of the hearing, whether it is just and equitable that a liquidator should be appointed… the court should consider all relevant matters as at the date of the hearing. Secondly this is entirely in accordance with the court's ordinary practice when considering whether to grant discretionary relief of an equitable nature'.
>
> 198. It is apparent from the extract from the judgment of Lord Briggs in *Lau v Chu* (supra) referred to in the last paragraph that the court is required to consider all relevant matters pertaining at the date of the hearing that might bear upon the question as to whether it is just and equitable that the company be wound up, a question that is liable to involve an element of discretion with regard to whether the relief sought ought to be granted.

199. Apart from the question of alternative remedies, those discretionary matters might potentially include considerations such as the wishes of other members of the company, the financial consequences to the company of making a winding up order, and the conduct of the petitioner."

27 I do not read the words of s. 125(2) as requiring a winding up petition on the just and equitable ground to be dismissed where some other remedy is available, and the petitioner is acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy, though in the present case, that has little significance. The literal words of s. 125(2) appear to me to suggest that a winding up order should be made ("a winding up order shall be made") where the requirements of paras. (a) and (b) of s. 125(2) are satisfied (subject to any countervailing considerations which might militate against the court taking that course of action in the exercise of its discretion) but if the court finds that the petitioner has acted unreasonably in failing to pursue an alternative remedy, it need not make the winding order, and will usually not do so. In other words, it still has a discretion to decide whether to wind up the company or to make any other order it considers just and appropriate, in accordance with the discretion given to it under s. 125(1) of the IA 1986[2], but it is unlikely to exercise that discretion in favour of making a winding up order.

28 As noted, above, the remedy of winding up is one of last resort and an exceptional remedy in the context of disputes between shareholders. As Patten LJ observed in *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA 855, at [54]-[56]:

"54 The power of the court to wind up on the just and equitable ground is also contained in section 122 of the 1986 Act but, in relation to a contributory's petition, the conditions for its exercise are very different. As a general rule, the shareholder seeking the winding up order must be able to establish that the company is solvent and that there will be a surplus remaining for distribution after the payment of the company's debts and the costs and expenses of the liquidation: see *In re Rica Gold Washing Co Ltd* (1879) 11 Ch D 36.

[2] In my judgment, these and several of the matters analysed below cannot be regarded as pre-conditions to the exercise of the discretion in one way or another. They are matters that the court must take into account in deciding how it should exercise its discretion. Some will have substantial significance; others less so. But ultimately, they go to the discretion of the court and their importance will vary depending on the circumstances of each individual case.

55 A shareholder will not therefore be permitted to petition under s.122(1)(g) for the winding up of an insolvent company and, in the case of a solvent company, the court's power will only be exercised in his favour with a view to dividing the net assets of the company where no other means can be found of resolving the dispute between shareholders in relation to their rights and interests as members. To this end, s.125(2) of the Insolvency Act 1986 provides: 'If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the court, if it is of opinion: (a) that the petitioners are entitled to relief either by winding up the company or by some other means, and (b) that in the absence of any other remedy it would be just and equitable that the company should be wound up, shall make a winding up order …' but this does not apply if the court is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy …

56. Section 994 [of the Companies Act 2006] will usually provide the source of a satisfactory alternative remedy such as a buy-out order so that winding up under s.122(1)(g) is therefore a last resort and, in my experience, an exceptional remedy to grant in the context of disputes between shareholders. This is confirmed by the terms of the current Practice Direction 49B (Order under s.127 of the Insolvency Act 1986) which draws attention to the undesirability of asking, as a matter of course, for a winding up order as an alternative to an order under s. 994."

29 But although the remedy of winding up is a remedy of last resort, it does not mean that the remedy is not available to a member if he has another remedy. As Lord Briggs JSC said in *Lau v. Chu*, at [20]:

> "It is well established that winding up is a shareholders' remedy of last resort. But this does not mean that winding up is unavailable to members if they have any other remedy. The member retains a significant element of choice in the remedy to be sought, even though the court has the last word …the court carries out a three stage analysis, asking: (a) Is the applicant entitled to some relief? (b) If so, would a winding up be just and equitable if there were no other remedy available? (c) If so, has the applicant unreasonably failed to pursue some other available remedy instead of seeking winding up?"

30 Lord Briggs went on to say, at [52], that:

> " … Bearing in mind the onus of proof, a judge may reasonably expect the respondent (especially if represented by an experienced legal team) to put forward one or more remedies which it is alleged were both available and sufficiently attractive as an alternative to make it unreasonable to continue to seek a winding up. It was not for the judge to imagine every potential alternative remedy and deal with it, in the absence of a properly formulated invitation to do so".

31 In addition, it is clear that the court will – or should – not exercise its discretion in favour of the making of a winding up order if the petitioner is responsible by his own misconduct for the deadlock or the

breakdown in the trust and confidence between the parties. As Lord Cross said in *Westbourne Galleries,* at 383—384:

> "People do not become partners unless they have confidence in one another and it is of the essence of the relationship that mutual confidence is maintained. If neither has any longer confidence in the other so that they cannot work together in the way originally contemplated then the relationship should be ended unless, indeed, the party who wishes to end it has been solely responsible for the situation which has arisen."

He then went on to say that a person wishing to seek the remedy of winding up on the "just and equitable" ground must come with "clean hands", stating, at 387FG-H.

> "… If the respondents were telling the truth — and the judge held that they were — the almost inevitable inference was that the petitioner had been stealing the company's money. A petitioner who relies on the "just and equitable" clause must come to court with clean hands, and if the breakdown in confidence between him and the other parties to the dispute appears to have been due to his misconduct he cannot insist on the company being wound up if they wish it to continue."

32 However, the remedy of winding up would be available to a petitioner if the breakdown of the relationship was, at least, partly attributable to the conduct of a respondent-member. In *Re Paramount Powders (UK) Ltd* [2019] EWCA Civ 1644, at [39]-[41], McCombe LJ (with whom Simon and David Richards LJJ agreed) observed:

> "39. It seems to me, therefore, that a petitioner may well not qualify for relief if he is 'solely responsible for the situation which has arisen' (Lord Cross [in *Westbourne*] at 383–4). If the breakdown in confidence has been due to his misconduct, he may not be able to insist on a winding up of the company (Lord Cross at 387).
>
> 40. Here, as it seems to me, the judge found that TSB was solely responsible for the situation that had arisen. The matters of which he complained were rejected and the breakdown in confidence was due to his own misconduct.
>
> 41. Having noted the passages from Lord Cross's speech (quoted above), one must be careful to avoid creating the impression that every breach of fiduciary duty by one corporator in a quasi-partnership company will automatically render his exclusion from management fair. That is not the case, as was said in this court recently in the context of an "unfair prejudice" claim in *Re Sprintroom Ltd* [2019] EWCA Civ 932; [2019] B.C.C. 1031 at [82]–[83]. However, relief (in some unfair prejudice cases) has been refused where the excluded party has been found to have been justifiably excluded: see the examples quoted at [82] of the *Sprintroom* judgment."

33 I do not read the words "solely responsible for the situation which has arisen", used by Lord Cross, as meaning that the entirety of the conduct leading to the breakdown of the relationship between the parties must have been caused by the respondent-member. I would

not consider that a petitioner who has been guilty of serious misconduct could expect to have the discretion of the court exercised in his favour if the misconduct for which the respondent is responsible is minor. Both might be said to be the cause of "the situation that has arisen" (to use Lord Cross' words) but to permit the Company to be wound up, in those circumstances, would be manifestly unjust. Nor do I consider that the court should undertake a formulaic analysis of whose conduct is more culpable by reference to a scale of misconduct. The "clean hands" principle requires the court in every case to examine the overall conduct of each party conduct and conclude whether the conduct of the petitioner can be said to be the main or sole cause of the breakdown. If it can be, then the court would be entitled to exercise the discretion against the making of a winding up order, even if there was some minor misconduct on the part of the respondent.

34 Mr Willetts relied on the decision of the Privy Council in *Vujnovich v Vujnovich* (1989) 5 BCC 740, to suggest that there had to be a causal link between the conduct complained of and the deadlock or loss of trust and confidence, so that if the conduct complained of by the respondent arose after the deadlock or the breakdown of the trust and confidence between the parties, that conduct could be disregarded. At page 744-5 in that case, Lord Oliver observed:

> " … it is, to begin with, important to bear in mind both exactly what Lord Cross said [in *Re Westbourne Galleries*] and the context in which he said it. He was considering, and suggesting a justification for, an unreported decision in which Brightman J. had declined to make a winding-up order under the just and equitable rule on a ground with which Lord *Cross* felt unable to agree. He felt, however, that the decision might have been justified on the facts on the footing that it was the petitioner's own misconduct which brought about the impasse on which the petition was based and in this connection he observed: 'A petitioner who relies on the "just and equitable" clause must come to court with clean hands, and if the breakdown in confidence between him and the other parties to the dispute appears to have been due to his misconduct he cannot insist on the company being wound up if they wish it to continue.' What Mr. Temm seeks to do is to extract from this the reference to coming to court with clean hands as if it stood alone and to suggest that, since both Henry J. and the Court of Appeal were of the view that the respondent had misconducted himself in relation to the diversion of business away from the company, that should have concluded the case against the making of a winding-up order. The same submission was made to the Court of Appeal who rightly rejected it. It is quite clear that Lord Cross was considering the position in which the petitioner's misconduct (and thus the relative uncleanliness of his hands) was causative of the breakdown in confidence on which the petition was based. On no analysis of the facts could that possibly apply here. The transaction concerned did not take place until 1986, long after all confidence between the

> parties had irretrievably gone, and it did not come to light until the trial. Whether or not the Court of Appeal was right to regard it as a consequence of the breakdown, it was clearly right in saying that it was not the cause of it and in regarding it as being no bar to a winding-up order if such an order was otherwise appropriate".

35 This passage was commented on by Rose J (as she then was) in *Harding v Edwards* [2014] EWHC 247 (Ch), at [20] and [21], but, contrary to Mr Willetts' submissions, I do not find those comments to deal specifically with the "causation" point. They do little more than make it clear that in a dispute such as the present one, it would be rare for one party to be completely blameless and for the other party to have been entirely at fault for the breakdown of the business relationship between the parties. As she rightly observed, to expect a petitioner to behave with "exemplary politeness and reasonableness throughout [would be to] set such a high standard [that] it would … ignore the very realities of human relationships which [are] regarded as the foundation of the jurisdiction".

36 It also necessary for the Petitioner to demonstrate that he will receive some tangible benefit from the making of a winding up order. This usually means that he must stand to gain some pecuniary benefit from it. Most commonly, this requirement will be satisfied where there is likely to be a distribution to the members towards their shareholding if the company is wound up, i.e., if there is a surplus of assets over the liabilities of the company (including the costs and expenses of its winding up) and, thus, a return of capital to the shareholders: see, by way of examples, *Re Rica Goldwashing Co Limited* (1879) 11 Ch D 36, at 42 to 43, per Lord Jessell MR; and *Re Chesterfield Catering Co Limited* [1977] Ch 373, especially at 379-380.

37 Finally, the court will not grant the remedy of winding up to a contributory if his motive for seeking it is to further some collateral purpose or objective, not related or connected with his shareholding: see, by way of examples, *Re Bellador Silk Ltd* [1965] 1 All ER. 667; and *Re JE Cade & Son Ltd* [1991] B.C.C. 360.

BURDEN AND STANDARD OF PROOF IN THE PETITION

38 As noted above, in *Lau v. Chu*, at [20], Lord Briggs JSC stated that in determining whether a winding up should be made on a contributory's petition based on the just and equitable ground, the court carries out a three-stage analysis, asking:

(a) Is the applicant entitled to some relief?

(b) If so, would a winding up be just and equitable if there were no other remedy available?

(c) If so, has the applicant unreasonably failed to pursue some other available remedy instead of seeking a winding up?

39 At para. [21], of his judgment, Lord Briggs, said that, as regards the burden of proving the facts and matters specified in the above stages:

> "The legal burden of proof is on the applicant at stages (a) and (b). But it shifts to the respondent at stage (c): see *Moosa v Mavjee Bhawan (Pty) Ltd* (1966) (3) SA 131, 152 and *Asia Pacific Joint Mining Pty Ltd v Allways Resources Holdings Pty Ltd* [2018] ACSR 227, paras 32 and 43."

40 In addition, as noted above, the Petitioner must also demonstrate that he will obtain a tangible benefit from the making of a winding up order. It is for him to prove that. However, where a respondent puts the motive of the petitioner in issue (as the Respondent has done in the present case), it is for him (or more correctly, her) to prove that the petition is designed to further an improper collateral purpose.

41 The authorities on what constitutes a "tangible benefit" are not straightforward. In *Re Rica Goldwashing Co Limited* (1879) 11 Ch D 36, CA, Jessell MR observed, at 43-43:

> "Now I will say a word or two on the law as regards the position of a Petitioner holding fully paid-up shares. He is not liable to contribute anything towards the assets of the company, and if he has any interest at all, it must be that after full payment of all the (debts and liabilities of the company there will remain a surplus divisible among the shareholders of sufficient value to authorize him to present a

> petition. That being his position, and the rule being that the Petitioner must succeed upon allegations which are proved, of course the Petitioner must shew the Court by sufficient allegation that he has a sufficient interest to entitle him to ask for the winding-up of the company. I say " a sufficient interest," for the mere allegation of a surplus or of a probable surplus will not be sufficient. He must shew what I may call a tangible interest. I am not going to lay down any rule as to what that must be, but if he shewed only that there was such a surplus as, on being fairly divided, irrespective of the costs of the winding-up, would give him £5,1 should say that would not be sufficient to induce the Court to interfere in his behalf."

42 In *Re Chesterfield Catering Co Limited* [1977] Ch 373, Oliver J said that tangible benefit was not simply limited to a "monetary surplus", stating, at 379-380, that:

> "I cannot think that a petition presented by a fully paid shareholder on ground (b) of section 222 could be treated as demurrable because he was unable to allege that there would be a surplus of assets. I also think, if I may say so respectfully, that the references to 'a surplus' or to 'assets for distribution amongst the shareholders' which appear in some of the cases, are to some extent an unnecessarily restrictive gloss upon what was said in *Re Rica Gold Washing Co*., 11 Ch.D. 36. What was required for a fully paid shareholder to petition was, Jessel M.R. said, at p. 43: '... a sufficient interest to entitle him to ask for the winding up of the company … He must show what I may call a tangible interest.' He then went on to stress that he was not going to lay down any rule as to what that tangible interest must be, and gave as an example of what was not a sufficient interest a negligible surplus on the distribution. I do not, however, think that it can be quite accurate to say that the tangible interest of the fully paid shareholder must necessarily and in all cases be restricted to the existence or the prospective existence of a surplus. Indeed, Jessel M.R. himself in R*e Rica Gold Washing Co*., in the opening words of the paragraph which I have read, seems to suggest that the potential liability of a shareholder can constitute an interest for this purpose. And, for instance, a fully paid shareholder who petitions to wind up a company on ground (d) of section 222 — that is to say, that the number of members has been reduced below the requisite minimum — has the strongest possible interest in seeing that the company's business is brought to an end, for otherwise he may find himself personally liable for the company's debts under section 31; and I cannot conceive, if the company were insolvent and his peril thus increased, that the court would tell him that the petition was incompetent on this ground. Furthermore, it must be recalled that the fasciculus of sections dealing with winding up applies to unlimited companies as well as to limited companies, and a shareholder, albeit his shares were fully paid in such a company, might have a very strong interest in the liquidation of the company which was totally insolvent simply from the point of view of terminating his liability as a member. However, it is I think clear that in referring to 'a sufficient interest' Jessel M.R. meant an interest by virtue of the petitioner's membership. In order to establish his locus standi to petition a fully paid shareholder must, as it seems to me, show that he will, as a member of the company, achieve some advantage, or avoid or minimise some disadvantage, which j) would accrue to him by virtue of his membership of the company. For instance, a member of a company might have a strong interest in terminating its life because he was engaged in a competing business or because he was engaged in litigation with the company, but I do not think that that was the sort of interest that Jessel M.R. had in mind."

43 The standard of proof at each of the above stages is the usual civil standard of proof – the balance of probabilities. There is no heightened standard of proof simply because the allegations which each party makes against the other are of a serious nature: see the decision of the House of Lords in *Re B* [2008] UKHL 35 and of the Supreme Court in *Re S-B* [2009] UKSC 17.

44 The overall assessment of the evidence in connection with an issue arising in a claim is within the sole province of a trial judge. However, I am mindful of the observations made by Leggatt J (though doubted in some quarters) in *Gestmin SGPS S.A. v Credit Suisse (UK) Limited and another* [2013] EWHC 3560 (Comm), that the presence of contemporaneous documents (and their contents) will be of substantial importance in that assessment.

45 However, for the reasons which are referred to below, my factual findings are not based on the niceties of where the burden of proof lies. I am clear that wherever the burden lies, the evidence supporting the findings that I have made is clear.

ISSUES

46 Based on the legal principles set out above, the court must determine the following specific issues on the Petition:

(a) Whether the Company is "deadlocked", i.e., whether there is a deadlock between the parties or whether there is no longer any trust and confidence between them.

(b) Whether there is some other remedy available to the Petitioner and, if there is, whether he is acting unreasonably in seeking to have the Company wound up rather than pursuing that other remedy.

(c) Whether the Petitioner is solely responsible for that deadlock or the loss of trust and confidence between them. Even if he is not

solely responsible for it, whether he is mainly responsible for it, even if it may also have been caused, to some minor extent, by the conduct of the Respondent.

(d) Whether the Petitioner will receive some tangible benefit from the winding up of the Company in his capacity as Petitioner, such as to make it possible for him to prosecute the petition.

(e) Whether the Petitioner seeks the winding up order for a purpose or purposes not connected with his shareholding, but for an ulterior or collateral purpose.

OVERVIEW OF THE EVIDENCE IN THE CLAIM

Introduction

47 It concerns me that what should have been a straightforward case involving whether the Company should be wound up has become so complicated. It may not have been if – as is now common practice (in the Business and Property Courts of England and Wales at least) – directions had been given when this case was being case-managed that it be tried by "pleadings", i.e., points of claim, points of defence and the like, as appears now to be characteristic for unfair prejudice petitions[3]. As the main issue – on the part of the Respondent at any rate – was that the deadlock in the Company and the loss of mutual trust and confidence in the Company was caused entirely by the Petitioner, the questioning concentrated largely on the documents

[3] As regards contributories' petitions, see r. 7.31(2) of the IR 2016. The petition has to be verified by a statement of truth (see *ibid*, r. 7.28) but this does not have to be way of a witness statement. The statement of truth may be contained in, or endorsed upon, the petition. If the petition is verified by a statement of truth in this way, the usual practice is that on the initial return date of the petition, the court will give directions relating to the substantive hearing of the petition, which will usually be that the petition should stand as the petitioner's points of claim, the respondent should serve a defence to it (points of defence), with the usual other directions (such as disclosure and exchange of witness statements) to bring it to a final hearing.

included in the bundles[4], which meant that both parties – particularly the Petitioner – had to be taken through those documents to provide an explanation about their conduct by reference to the documents[5]. In addition, several matters were raised for the first time in the course of the trial by reference to the documents contained in the bundle or the answers given to the questions raised by one or the other party. What should have been a trial of a maximum of 2 days, therefore, took almost 6 days (without judgment being given) to complete.

48 The court might have made an order for disclosure and is likely to have done so if this case had been directed to be tried by pleadings[6]. In any event, even without such an order, the disclosure given by the Petitioner to the Respondent has been woeful. The Respondent had challenged several aspects of the Petitioner's conduct, particularly in relation to the setting up by him of his new enterprises. He failed to provide any disclosure about those and many other matters, which made the evidence that he was giving very difficult to verify. It was not necessary for a formal order for disclosure to be made for this information to be given. The Petitioner should have provided the Respondent with any reasonable information concerning his new enterprises in order that the veracity of what he was saying could be tested, particularly as this had been raised as an issue by the Respondent. He failed to do so.

49 The Petitioner raised every conceivable point to support his claim that the deadlock between the parties or the loss of mutual trust and confidence had been contributed to, at least in part, by the Respondent. As noted throughout this judgment, some of these points

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[4] I should also state that the manner in which the bundles were prepared left a lot to be desired. I expect the documents to be prepared in some form of chronological order, without any duplication of documents. This has made the writing of this judgment very difficult.

[5] I refer, in this judgment, to various pages of the Bundle. There were some discrepancies between the electronic bundles and paper bundles which were lodged with the Court. The references to pages on their own or to pages "of the Bundle" are to pages of the paper bundles.

[6] Arguably, if the court had given directions for the Petition to be tried in the manner suggested above, PD 57AD governing disclosure in the Business and Property Courts would have applied and appropriate orders for disclosure could have been made.

were raised for the first time in the course of the trial. I have not considered it appropriate to decide every point which has been advanced by the Petitioner in these proceedings in order to determine the issues in the Petition. It is only necessary for me to decide whether the matters relied upon by the Petitioner are supported by the evidence which I have heard and, if they are, whether they warrant the relief sought by him against Respondent being granted: see, by way of examples, *Weymont v Place* [2015] EWCA Civ 289, [4]-[6], per Patten LJ; and *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605; [2002] 1 WLR 2409.

50 On the basis that the Respondent was in person, I considered it appropriate to undertake some of the questioning of the Petitioner myself in order to ensure that I had a complete picture of the evidence which he was giving to the court. I did so in line with CPR 3.1A, which I construe to apply not just to case-management and similar hearings but also to the case-management of the trial of a claim, and para. 65 of the Equal Treatment Bench Book (February 2021 Edition).

51 I am grateful to Mr Willetts for raising no objection to my taking this course of action. I indicated to Mr Willetts that if he thought I was asking questions above and beyond any attempt on my part to assist the Respondent, he should tell me. He did not stop me at any stage. The intervention on my part made it possible for me to obtain a much clearer basis upon which the Petitioner was seeking to advance his case before the court for a winding up order.

52 It is also appropriate to mention that the Petition or the witness statement in support should have contained all the facts and matters relied upon to support the making of a winding up order. Neither the Petition nor the witness statement of the Petitioner dated 10 August 2022 in support of the Petition does so. The witness statement contains the principal grounds upon which a winding up order is sought. Other than giving background information and referring to the deadlock between the parties, it provides almost no information about

why the Company should be wound up[7]. In the circumstances, the Respondent could – and if she was properly advised is likely to – have applied to strike out the Petition on the basis that it could not support the making of a winding up order and it is difficult to see how, on the material before the court, the Petitioner could have resisted that: see, by way of example, *Re WR Willcocks & Co* [1974] Ch. 163*.*

The Petitioner

53 I found much of the evidence of the Petitioner on the matters which were in issue between him and the Respondent difficult to accept.

54 The Petitioner gave a completely distorted picture about the Respondent's conduct both in his written and oral evidence. He sought to portray himself as the victim of the Respondent's conduct, while at the same time making scant mention of his own appalling conduct. His answers to questions were long and convoluted, often not answering the questions put to him. He sought to avoid answering questions which he found difficult to deal with and his response even to straightforward questions was to seek to blame the Respondent for their fallout, even though it is plain that the Respondent was little to blame for it. At times, I found the evidence which he gave to be simply untruthful. I will deal with examples of this below and as I analyse the various issues I need to determine.

55 I found the Petitioner's evidence on the important issue of why he thought it appropriate to unilaterally remove the Respondent as a director of the Company and to write to the Financial Conduct Authority (i.e., the FCA) to remove her SMF3 authorisation on two occasions to be vague, evasive and entirely unconvincing.

56 In the course of giving his evidence, the Petitioner appeared to suggest that he was unaware that he could not remove the Respondent as a

[7] The facts and matters set out in para. 55 of the Petitioner's witness statement are insufficient, by themselves, to understand his case. Much of what he had to say come from the response contained in his second witness statement to the matters raised by the Respondent in opposition to his first witness statement.

director of the Company or withdraw her SMF authorisation as he had done. He said that he had done so because the relationship had become so bad between them that he could not "even order a bag of coffee beans without controversy". He said that he did what he thought he had to "purely to protect the business [of the company]" and that as "[the Respondent] longer carried out work, it would be necessary to remove the control function for her for disclosure purposes".

57 There is no substance whatsoever in this. He has been a company director for many years and must have known that he could not remove another director without going through the necessary machinery under the company's constitution to do so. He was also fully aware of the practice and procedures of the FCA and well knew that he could not unilaterally withdraw a person's SMF3 authorisation. He could have sought the advice of Mr Mummery-Smith[8] or others – but did not do so. He took the view that as the Respondent was no longer employed by the Company, he could treat the Company as his own and unilaterally take these steps – and did so without notifying the Respondent. What is more, he withdrew the SMF3 authorisation of the Respondent twice, so the excuse that he gave of not knowing that he could not do this simply does not withstand proper scrutiny.

58 Of course, the Petitioner withdrew the steps which he took after the FCA wrote to him, but it shows that the Petitioner regarded the Company as belonging to him and that he could do as he pleased in running its affairs, even though the Respondent and he were equal directors and shareholders in the Company.

59 The Petitioner first sought to withdraw the Respondent SMF3 authorisation in December 2019. It is appropriate to set out what the FCA said in its letter to the Company dated 7 August 2020 in relation to his having done this:

[8] Mr Mummery-Smith's evidence was that he was not happy when he found out that the Petitioner had sought to unilaterally withdraw the directorship or the SMF3 authorisation of the Respondent and said so to the Petitioner.

> "Following an application for a Change of Legal Status from The Whitehall Partnership Limited to The Whitehall Partnership LLP the FCA responded to this with our letter of 6 February 2020. This letter advised that the Authorisations Division is minded to recommend to the relevant FCA Committee to refuse this application. FCA concerns were that It does not consider that Threshold Condition 2E, Suitability is satisfied for the following reasons –
>
> Mr Taylor failed to set out the clear legal basis upon which he, as a co-Director, was entitled to remove the other co-Director Joanne Taylor, and to record the termination of Joanne Taylor's director appointment at Companies House; No alternative legal provision has been Identified by Mr Taylor as providing him with the powers, as co-Director and a 50% shareholder, to unilaterally remove Joanne Taylor as co-Director; We did not consider that we had received a satisfactory explanation as to the legal basis for the unilateral removal of Joanne Taylor as Director; and Mr Taylor was not sufficiently open in the original application papers and subsequent correspondence with us regarding Joanne Taylor's position in the firm, and the purpose of her removal as CF1."

60 There is little mention of this in either of his witness statements. It took a lot of questions for him to finally admit that he should not have done what he did. As I have said, despite knowing that he was not able to withdraw the Respondent's SMF3 authorisation, he purported to do so again on 12 May 2021 and was required again to reinstate it on 25 February 2022 by the FCA.

61 In addition, it is interesting to note that, in providing his purported explanation to the FCA about the steps that the Petitioner took, the FCA observed that "Mr Taylor was not sufficiently open in the original application papers and subsequent correspondence with us regarding Joanne Taylor's position in the firm, and the purpose of her removal as CF1". That was largely the impression I got of his evidence on this point.

62 Likewise, his conduct in relation to the setting up of his new enterprises, Whitehall Partnership LLP and Whitehall Equity Release Ltd. He was asked several questions about these enterprises before he finally admitted that they did or intended to operate in the same or similar business as the Company. Three points are appropriate for mention in this context: first, there is very little about this in either of his witness statements, which is surprising given that the matter was raised by the Respondent in her first witness statement; second, the Petitioner relies as one of his grounds in support of the Petition (see para. 27 of his first witness statement) the fact that the Respondent

had set up a new company without his knowledge but makes no mention of his having set up businesses which undertake a similar business to the business of the Company; and third, he has provided no disclosure[9] to the Respondent about the businesses of these new enterprises and, specifically, whether any of the clients of the enterprises are or may be former clients or connections of the Company.

63 As I have said, the Petitioner was not forthcoming, on this issue, in the course of giving evidence about his new enterprises. So far as he suggests that these enterprises are not in the same business as the Company, on the evidence I have heard and seen, I reject what he has to say. His own email, in response to the Respondent's email about this, suggests that there is some substance in what the Respondent is saying. In her email to the Petitioner dated 16 August 2019, the Respondent said:

> "Now that I am fully aware of your actions, I can see that you aren't restructuring the Whitehall Partnership as you claim, but instead are taking [sic] it's clients to further your own interests. Your actions aren't separate to the buyout, you have avoided one. Knowing you intend to, and after having already applied to transfer TWP Ltd's authorisation & clients to your own company, you have continued to engage TWP Ltd in more contractual expense and purchasing - for example, signs that are clearly for the benefit of your new company - The Whitehall Partnership Ltd has no need for signs, it will not be trading shortly. Why would you do this? And why would you not respond to my requests to have the agreements terminated even though you know the company will soon have no income to pay them? Since it was you who instigated the buyout, the correct way for you to approach things would have been to obtain a valuation, offer me a decent buyout & [sic] severence package. Instead you chose another path. Enabling me to have ample freedom & resources to locate another job would have meant a speedier conclusion for you. Instead you chose another path. Before we both embark on an expensive legal path, I'm asking you one more time to reconsider your choices and do the right thing".

The Petitioner wrote to the Respondent in reply to this email on the same date, stating:

> "Thanks for your email Jo. I write to confirm that Whitehall LLP will absorb all liabilities of the Ltd company following the change in legal status with the FCA, leaving the Ltd company unencumbered from any contractual obligations I have arranged. As an alternative, I have also arranged dual authorisation via a third party as an AR if the FCA declines my application, but I assure you that either solution will leave the Ltd company free of debt and remain in-situ during our buy-

[9] So far as it is necessary to make a finding on the point, I accept the substance of the evidence of the Respondent that she has had no disclosure in relation to this matter from the Petitioner.

> out negotiations ... Our ongoing buy-out negotiations will remain entirely independent and any subsequent valuation will retain the same integrity despite the change in trading style. As stated to you in my previous email, my reasons for restructuring the business are primarily focussed on tax-efficiency, trading flexibility and providing clients with a better ongoing service, amongst other secondary issues. Let me reassure you that I still want to provide you with financial security going forward, and that I intend to meet whatever financial obligations we agree as part of a mutual buy-out settlement".

64 This suggests to me that he was less than forthcoming about his future plans and had decided on an exit strategy which meant that if he could not buy the Respondent's shareholding at a price that he wanted, he could set up the same business as the Company through his new enterprises and avoid having to pay the Respondent anything for her shares. The proposed winding up of the Company was part of that strategy.

65 The Petitioner also had a consultancy with "Responsible Equity Release" or "RER" (a trade name for Responsible Life Ltd)[10] which he claimed he entered into when the parties separated in 2014 to create what he called a "bit of space" between them following that separation – something which he also did not mention in his witness statements. Even if (as he claimed) he was not involved in any conflict by entering into this consultancy agreement, he was away from the office – on average – once a day so it is difficult to see how he can allege any lack of commitment on the part of the Respondent when he was himself not committing himself full time to the company. The Respondent alleged that the Petitioner failed to account for the consultancy fee of £20,000 he was receiving from that company, which he claimed was payable to, and for the benefit of, the Company. Whether or not the Petitioner accepts that, there is no information provided by the Petitioner about the terms of that arrangement or whether any of the payments made towards the consultancy fee were made to or for the benefit of the Company, despite this having been raised as an issue by the Respondent.

[10] The details of this consultancy are taken from para. 25 of the Respondent's first witness statement. I am unsure about the accuracy of these details as the Petitioner simply failed to respond to the allegation made by the Respondent about the consultancy.

66 I have no doubt that the Petitioner was more than just annoyed and irritated at the numerous demands which the Respondent was making for information and documentation to be supplied by him. The Petitioner might have thought those demands to be excessive. But the Respondent was entitled to seek the information she had asked for and I am satisfied that she was not doing so in order to make the Petitioner's task of running the Company difficult. It is important to observe that although the Respondent was excluded from the Company, she had an obligation, as a director of the Company, to monitor what was going on in the Company. She was, therefore, perfectly entitled to seek information to which she should have had uninhibited access in order to do so.

67 So far as the Petitioner suggests that the Respondent had unrestricted access to all the information and documentation she requested, I do not accept what he says. Nor, in that context, do I accept the evidence of Mr Mummery-Smith – who, of course, continues to be employed with and works for the Company and is likely to take up a position with the Petitioner's new enterprises. Mr Mummery-Smith's evidence was that he was not happy with the removal of the Petitioner as a director and the withdrawal of her SMF3 authorisation and said as much to the Petitioner when this was done. I appreciate that the Petitioner relies on the letter sent by Mr Mummery-Smith dated 14 November 2019 to the effect that he had been instructed to provide uninhibited access to the information relating to the Company which she wanted, but that, I find, was certainly not the position on the ground. That much is clear from the letter dated 4 October 2022 sent by the Respondent to the Petitioner in which, it is recorded that, as at 25 January 2020, she was still awaiting the restatement of her login credentials to the Company's computer network and cloud-based services, and this appears never to have been provided to her or, at any rate, there is no response to that letter from the Petitioner, the Company or Mr Mummery-Smith.

<u>Adam Mummery-Smith</u>

68 I have touched on Mr Mummery-Smith's evidence above. I do not wish to say much about it, other than the few points I mention below.

69 It is plain that Mr Mummery-Smith is torn between two individuals whom he regarded as friends and colleagues. He says so as much in his witness statement – see para. 28.

70 While the Petitioner's case in the witness statements provided in support of the Petition is that the reason for the deadlock is entirely based on the conduct of the Respondent, Mr Mummery-Smith's position is more measured. At para. 12 of his witness statement, he says that, in his view, all three of them are "at fault" for the deadlock in the Company.

71 Much of the rest of the written and oral evidence of Mr Mummery-Smith was concerned with the background relating to the fall-out between the Petitioner and the Respondent and why it has not been possible to effect an amicable parting of ways between them. There is no doubt that he lays the blame for this largely on the Respondent.

72 At para. 9 of his witness statement, he comments on how "fastidious, detail-orientated, extremely-motivated and conscientious" the Respondent is, the "kind of person able to identify every facet of a problem and work methodically to solve it". But then – at paras. 28 onwards of his witness statements – he states how her requests for information became unnecessary, repetitive and obstructive and that, rather than engendered by any genuine concern for the Company, those requests became "purely disruptive" on account of the bitterness she felt towards the Petitioner. He relies on the letter dated 14 November 2019 to which I have already referred, though was unable to provide a response to the question that the Respondent had asked the Petitioner to reinstate her login credentials on or about 25 January 2020, but that she had not received any response from him.

73 At para. 42 of his witness statement, Mr Mummery-Smith lists several other matters which he says demonstrate the Respondent's obstructive

and destructive attitude towards the Petitioner and the Company. I am unable to accept what Mr Mummery-Smith says. He was, of course, unable to comment upon the letter dated 4 October 2022 in which the Respondent had recorded that, as at 25 January 2020, she was still awaiting the restatement of her login details. Nor am I able to accept – as I state below – that the matters referred in para. 42 of his witness statement support the proposition that the Petitioner was on a course to destroy the Company and to make life as difficult as possible for the Petitioner.

The Respondent

74 If I have any criticism of the Respondent, it is that she questioned the Petitioner on every point (however small) in support of the position which she was advancing before the court. Much of the cross-examination on the first day of the trial, for example, was unnecessary, repetitive and excessive.

75 Although she appeared in person, she had a complete grasp of the documents which were included in the Bundle. The fact that she sought to question the Petitioner on every conceivable point included in the Bundles shows only too clearly how – as Mr Mummery-Smith observed in his witness statement – "fastidious, detail-orientated, extremely-motivated and conscientious" the Respondent is and how she understood – and was prepared to argue – every detail of the case against her. These observations were also echoed by Employment Judge Wilkinson at para. 22 of his written judgment in the claim which the Respondent brought against the Company in relation to the termination of her employment.

76 Had the case-management directions included the parties' respective cases being dealt with by "pleadings", I may have limited her cross-examination of the Petitioner. However, on the basis that the Petitioner (initially at least) was laying the entire blame for the deadlock on her, she was entitled to ask him questions about how what he was saying

could be consistent with several of the documents included in the Bundle, which she contended suggested otherwise, particularly as the Petitioner's witness statements failed to deal properly with a number of the allegations made by the Respondent against the Petitioner. In addition, of course, she was in person and deserved some leeway in the way in which her questioning of the Petitioner was conducted.

77 As I have indicated, I have taken the position of the Respondent in these proceedings to be that she does not agree to a winding up order being made under any circumstances, so I must either decide either that the Company should be wound up on the evidence which I have seen and heard, or that it should not. If I decide against the making of a winding up order, I must dismiss the Petition. What then happens to the Company is not for me to consider, though it is likely to be placed in an invidious position. As she is not the petitioner, her motive in wishing the Petition to be dismissed is not relevant, though I accept her evidence that she hopes to be able to run the Company without the Petitioner and will, if the Petition is dismissed, either explore the possibility of putting together a team of professionals to enable her to do so or see if she can get investors to invest in the Company. Whether or not she will be successful is another matter, though it is not an aspect of this case that I am able to take into account. In short, she is perfectly entitled to invite the court to dismiss the Petition if the case for the winding up has not been made out by the Petitioner, regardless of what happens to the Company as a result.

78 The Respondent's evidence was also fair and even-handed. She did not take any false points and was prepared to be corrected whenever that was appropriate. She did not make untruthful allegations against the Petitioner, as the Petitioner was prepared to do against her. Nor did she make allegations for which she did not have supporting information or evidence. For example, she properly indicated that she could not be sure whether any of the clients of the Company had left to join the Petitioner in his new enterprises. She "suspected" that some

may have done but she could not go beyond asserting that this was simply her suspicion.

79 I, therefore, accept the substance of her evidence.

DETERMINATION OF THE ISSUES BEFORE THE COURT

Deadlock

80 There is one requirement for the making of a winding up order about which there is, or can be, no issue between the parties: that requirement relates to whether the Company is deadlocked and whether the trust and confidence between the parties has been destroyed.

81 As at today's date, the Company is plainly deadlocked and there is no question that there is no longer any mutual trust and confidence between the parties. Although, in the course of her submissions, the Respondent sought to suggest otherwise, I believe that she was confusing the existence of the deadlock and loss of trust and confidence with who was responsible for having caused them.

82 That the Respondent accepts that she and the Petitioner are deadlocked and there is no trust and confidence between them is admitted in her witness statement: see paras. 85-90 of her first witness statement dated 17 September 2022. Whatever views the Respondent has about the future of the Company, it cannot include any expectation that the Company will be able continue in business with both the Petitioner and the Respondent being involved in its running.

Standing and compliance with technical requirements for presentation of the Petition

83 Nor can there be any issue about the Petitioner's standing to bring the petition. He plainly satisfies the requirements of s. 124(2) of the IA 1986. The Respondent conceded this.

84 The Respondent no longer contends that the Petition should have been advertised. That must be right. Unlike a petition presented by a creditor, a petition brought by a contributory does not need to be advertised unless the court directs that it should be. It will be very unusual for the court to do so and, in the present case, no such direction was given.

Reasonable alternative remedy

85 Has the Petitioner exhausted all the remedies reasonably available to him before bringing the Petition?

86 Before presenting the Petition, the Petitioner brought an unfair prejudice petition ("the Unfair Prejudice Petition") under s. 994 of the Companies Act 2006 against the Respondent seeking an order from the court that the Respondent sell her shares in the Company to the Petitioner at a price determined by the court. The Unfair Prejudice Petition was presented to the court in February 2021 and is included in the Bundle at page 60 onwards.

87 The grounds upon which the Unfair Prejudice Petition was presented are set out at pages 60-63 of the Bundle. They are broadly the same as the facts and matters, set out in the Petitioner's written evidence, upon which the Petitioner relies in seeking a winding up order against the Company on the Petition. The Unfair Prejudice Petition would have been the ideal forum in which to the test those grounds.

88 If the grounds upon which the Petitioner relied in the Unfair Prejudice Petition had been made out at the hearing of that petition, the court is almost certainly likely to have granted the Petitioner the relief sought

in that petition – i.e., that the Respondent sell her shares in the Company to the Petitioner at a price determined by it. The price would have taken into account all the matters upon which the Petitioner relied in contending that the rights and interests of the Petitioner had been unfairly prejudiced by the acts or omissions of the Respondent: see, by way of example, *Scottish Cooperative Wholesale Society v Meyer* [1959] A.C. 324 at 364, which states that, as a general rule, the court will value the shares of a respondent on the basis that the unfairly prejudicial conduct complained of had not taken place.

89 If the Petitioner had not established the grounds set out in the Unfair Prejudice Petition, the court is likely to have dismissed that petition. I do not know whether the Respondent had sought an order from the court (or intended to) that the Petitioner should sell his shares in the Company to her if the grounds set out in the petition were not established. The only documents in the Bundles are the Unfair Prejudice Petition and the order made by the District Judge Rich dated 19 November 2021. It is unlikely that she did (or intended to) and it is almost certain that the court would not have done so unless the Respondent had brought a cross-petition based on the Petitioner's unfair prejudice (in which she had claimed that relief) and the grounds of the unfair prejudice upon which she relied had been established by her.

90 If the Unfair Prejudice Petition had been progressed to, and been dismissed at, trial, it might have been possible for the Petitioner to contend that he had reasonably pursued all the remedies which were available to him, and the deadlock had still not been resolved. But instead of bringing the Unfair Prejudice Petition to a conclusion by having it heard, and inviting an order for the sale of the Respondent's shares at a price determined by the court which took full account of any "misconduct" or "prejudicial conduct" upon which he relied against the Respondent, he simply discontinued the Petition. The reason he did so is explained at para. 40 onwards of his first witness statement:

"40 The Second Respondent subsequently defended that petition on various grounds but ultimately, she did not want to sell the shares to me unless I paid her a considerable sum that did not bear relationship to any valuation of her shares in the Company.

41. Directions were subsequently issued by the court on 19 November 2021 ('the Order'). A copy of the Order is appended hereto at pages [50 to 54] of Exhibit 'JLT1'. It will be noted that the Order provided that:

41.1 disclosure was to take place by 7 February 2022.

41.2 witness statements were to be exchanged by 28 March 2022.

41.3 that the parties were to agree to the identity of a valuation expert by 14 February 2022 and instruct that expert by 11 April 2022; and

41.4 my costs budget was approved by the court at £75,155.00.

42. Due to a disagreement with my then solicitors, I retained new solicitors at the beginning of January 2022.

43. They subsequently complied with disclosure but were unable to agree the identity of an expert with the Second Respondent since she refused to accept any of the four experts put forward which forced me to make an application to the court seeking further directions and to push compliance with the remaining directions back to include witness statements. That application was issued on 7 March 2022 and was listed for hearing on 18 August 2022. A copy of the order listing the application is appended at pages [55 to 56] of Exhibit "JLT1".

44. Post the issue of the application I have been able to take stock. It became apparent that the Second Respondent has every intention of fighting me on every single point which has had the effect of increasing my costs significantly. My solicitors have advised that since their instruction at the end of January 2022 they have received approximately 40 e-mails and letters from the Second Respondent which have been required to be responded to.

45. The effect of the above is that my solicitors have advised me that the budget (which was prepared by my previous solicitors) was no longer accurate and an application was necessary to the court to seek to increase the same up to £125,000.

46. Having reflected long and hard I came to the decision that I was simply not in a position to be able to personally fund the legal costs associated with the unfair prejudice petition and the reality of the matter was that the final hearing of the same was unlikely to have been heard until early to mid-2023. Furthermore, it was distracting me from trying to run the Company and I could not risk any further action from the FCA.

47. The unfair prejudice petition to date had cost me in excess of £40,000 and I simply did not have the funds to pay up to another £85,000, as was suggested by my solicitors.

48. In view of the above, I took the very difficult decision to stop the unfair prejudice petition and filed a Notice of Discontinuance with the court on 21 June 2022 …".

91 At para. 44 onwards of his skeleton argument, Mr Willetts sets out why the Petitioner has acted reasonably in seeking to have the Company wound up:

> "The Second Respondent cannot sensibly contend that the Petitioner ought to have pursued a remedy pursuant to the unfair prejudice petition jurisdiction since when the Petitioner did issue a section 994 petition she sought to oppose it and averred that he was not entitled to any relief on his petition … Likewise, as the filed evidence shows, the Second Respondent is not prepared to sell her shares in the Company based on any independent valuation, nor is there any offer to sell shares on the table. The Second Respondent's position on offers appears to be that she wishes to purchase the Petitioner's shares in the Company from him (even though he is the only qualified financial adviser in the Company) and on terms that he agree to 'exit the industry permanently': … The Second Respondent's alternative suggestion that both the Petitioner and the Second Respondent give up their decision-making rights as directors and shareholders to a court appointed 'independent expert in the area of deadlock', is plainly not a credible argument. The court having no jurisdiction to order such an appointment on the hearing of a winding up petition (or otherwise), and there also being absolutely no evidence (nor credibly any possibility) of the Financial Conduct Authority authorising such a proposal."

92 The Petitioner complains about the Respondent's opposition to his Unfair Prejudice Petition. There is no substance in that point. The Respondent was perfectly entitled to oppose the Unfair Prejudice Petition. If she had not, the court is likely to have ordered the sale of her shares at a price which took account of the allegations which the Petitioner was making. The Respondent might have denied the allegations made against her by the Petitioner and agreed to sell her shares at a price to be determined by the court without taking into account the allegations which were made to her. Whether or not the Respondent had agreed to that, the plain fact is that she was not obliged to. She was perfectly entitled to defend the petition based on what was said in it. I find it impossible to understand how she could be said to have behaved unreasonably by defending the petition and seeking a dismissal of it. She was not obliged to bring a cross-petition or seek any relief against the Respondent. It should, in those circumstances, have been up to the Petitioner to have had the petition tried and to have sought an order from the court for the sale of her shares in accordance with the prayer for relief set out in it.

93 Nor is there any substance in the point that the Respondent was not prepared to sell her shares based on any independent valuation of them . The court had directed the instruction of a single joint expert to value the shares. If the grounds set out in the petition had been established by the Petitioner, the court would undoubtedly have ordered her shares to be sold at a price determined by it, to take into

account the value placed on them by the single joint expert. If the Respondent was being difficult – as the Petitioner contends – about cooperating with the instruction of a single joint expert, the Petitioner could have applied to the court for that expert to be nominated by the court or to give some other direction to enable it to have the material before it which would allow it to fix a price for the shares and – if the grounds in the petition could be established – to order the Respondent to sell the shares at that price. In fact, I was told by the Respondent, in closing, that the Petitioner had done that, but discontinued the Petition before the court could adjudicate upon that application. The fact of the Respondent asking for more money for the shares than they were worth is a complete irrelevance. If the Petitioner had proceeded with the petition, the value that the Respondent had placed on her shares would have been a complete non-issue. The court – not the Respondent – would have determined their value. So far as the Petitioner suggests otherwise, I reject what he says.

94 There is no merit in the Petitioner's assertion that one of the reasons for not pursuing the Unfair Prejudice Petition was the costs he had incurred and the likely costs he would incur if the petition had to be tried. First, by discontinuing the petition, the Petitioner is not just liable for his costs of the Unfair Prejudice Petition but also the Respondent's costs of that petition. In addition, it is difficult to see how his costs for pursuing the Present Petition are likely to be any less than the costs he is likely to have incurred if he had proceeded with Unfair Prejudice Petition, though both these matters are for detailed assessment. If the Unfair Prejudice Petition was going to last five days, then the trial time occupied in hearing the Present Petition has also been five days, though (I accept) it was given a two-day time estimate. However, to suggest he only became aware of his exposure to costs when his solicitors indicated to him that his costs budget might have to be increased seems to me to stretch credibility. He would have been told about the likely costs when he first instructed solicitors and would or should have been informed throughout the progress of the petition how the costs position would play out if the matter went to trial. An

important purpose of costs budgeting is to provide an indication to a party of what costs they are likely to recover if they are successful in a claim or in a defence to a claim and what costs they are likely to have to pay to the successful party if their claim or defence is unsuccessful. If the litigation had become expensive to the Petitioner, he could have acted in person, as the Respondent was doing at the time, and continues to do. If he had decided to pursue a reasonable alternative remedy by bringing the Unfair Prejudice Petition, it is difficult to see why he would not have proceeded with it to a trial. If he had been successful, he could have recovered the costs of that petition from the Respondent, including possibly seeking a charging order over her shares to enforce those costs.

95 I do not, therefore, accept his reasons for discontinuing the petition. I find this to be clear not just from what I have said about but also by his current position relating to the Company.

96 On the second day of the trial, the Petitioner made an open offer to the Respondent in court that if the Respondent agreed to the making of a winding up order in respect of the Company, he would not claim the return of any capital of the Company in respect of his shareholding and would also not seek an order for the costs of the Petition against her. By that stage, the Petitioner had already incurred substantial costs in relation to Present Petition, so agreeing to forgo the costs of it if he was successful seems to me difficult to understand. I asked him if the offer to purchase the Respondent's shares in the Company was still on the table. He told me that he was no longer prepared to buy the Respondent's shares.

97 Even at that stage, the Petitioner was not prepared to consider pursuing a reasonable alternative remedy. If he had been prepared to enter into negotiations for the purchase of the Respondent's shares, I might have been prepared to stay the petition for a short period to ascertain whether this was possible. Nor – despite asking Mr Willetts on a number of occasions – was he prepared to consider putting or assisting to put the Company into administration.

98 The Respondent believes that the Petitioner is motivated to seek a winding up order because he has already set up enterprises which trade, or will trade, doing the same business or businesses as the Company, and no longer needs to purchase the Respondent’s shares in the Company. If the Company is wound up, he will be able to walk away from the Company and possibly take several of the customers and clients of the Company to his new enterprises.

99 I am not going to speculate on why the offer to purchase the Respondent’s shares is no longer on the table, though there does appear to me to be considerable substance in what the Respondent says: if the Company is wound up, the Petitioner will simply be able to walk away from the Company, taking a significant part of the Company’s clients and customers to his new enterprise and, thereby, reduce the value of the shareholding of the parties to a negligible amount.

100 Whatever the reasons for the withdrawal of the offer, I am unable to accept that the reasons which he puts forward to the court for his abandonment of the Unfair Prejudice Petition are correct.

101 I should also add that I consider it highly unlikely, on the material that I have seen, that the Petitioner would have succeeded in the Unfair Prejudice Petition. The allegations he relied upon in that petition (which he also seeks to rely in seeking the winding of the Company) – even if they could be made out – are unlikely to have supported the making of an order for the relief sought in the petition. I cannot see how the Respondent can be criticised for pursuing complaints and claims against the Company or the Petitioner through the proper channels, even if they were found to be unmeritorious, still less that they amounted to prejudicial conduct on her part, particularly given the context in which they were made, i.e., the purported unilateral removal of her directorship and withdrawal of her SMF3 authorisation by the Petitioner. So far as the professionals instructed by the Company (such as ThreeSixty), there is no suggestion that they

thought that the conduct of the Respondent was more culpable than that of the Petitioner: see the recommendations they make in their letter dated 29 August 2018.

102 Put simply and starkly, and taken at its highest, the Petitioner's case on whether he pursued an alternative remedy is this: he started pursuing an alternative remedy by bringing the Unfair Prejudice Petition. He accepts that the court gave perfectly meaningful directions about how it might determine a fair price for the Respondent's shares if he could prove his claim. However, he decided not to proceed with the alternative remedy because things got too much for him (particularly in terms of how much it would cost him to pursue that remedy). On that basis, he claims that he cannot be said not to have pursued the alternative remedy because he did, but only stopped pursuing it because it was getting too costly for him to do so and the Respondent was seeking a price for her shares which he could not afford. He was, therefore, entitled to bring the Present Petition. How the Petitioner could conceivably be said to have pursued a reasonable alternative remedy, in these circumstances, is quite beyond my comprehension. In fact, he recognises this at para. 65 of his witness statement, in which he says:

> "I do not seek to argue that this shows that I have exhausted an alternative remedy as no final determination was made by this honourable court. However, my finances dictated that I was unable to proceed with the unfair prejudice petition and would not be in a position to issue a further one. Further, the Second Respondent would not voluntarily proceed to issue an unfair prejudice petition of her own volition meaning that I am stuck in a true deadlock".

103 But the Petitioner draws attention to the offer which he made for the purchase of the Respondent's shares before launching his Unfair Prejudice Petition which he states demonstrates that that he made a reasonable offer which the Respondent unreasonable failed to take up.

104 The relevant exchanges on the point are at pages 347 onwards of the Bundle.

105 Page 347 of the Bundle contains a letter from Bridgepoint dated 16 August 2020 which sets out their involvement in the proposed purchase by the Petitioner of the Respondent's shareholdings in the Company. This is the relevant excerpt from that letter:

> "A further meeting was held at the offices of The Whitehall Partnership Limited on the 12th July 2018. The only subject to be discussed was sale and acquisition of the shares of Joanne Taylor and again my role was as facilitator to the meeting. It was noted at this meeting that the Independent Valuation of the 50% shareholding had not been obtained or commissioned.
>
> At this meeting Mr John Taylor had produced his offer price for the shares belonging to Mrs Joanne Taylor of £200,000. This was rejected by Mrs Joanne Taylor and it was again agreed that she would obtain a 'Court approved Independent Valuation".

106 The Respondent's evidence was that this was not nearly as much as she believed her shares were worth. She was entitled to take that view.

107 Further offers for the purchase of the Respondent's shares were made, including an offer of mediation on the part of the Petitioner, and the relevant pages are included at pages 331-333 and 414 and 417 of the Bundles. The letter at pages 313-333 is a letter (described as a "letter before action") dated 15 December 2020 sent by the Petitioner's former solicitors to the Respondent. That letter states that the Petitioner would be prepared to purchase the Respondent's shares in the Company "at a valuation to be conducted by an independent accountant to be appointed (in default of agreement) by the President of the Institute of Chartered Accountants in England and Wales" on the basis that:

> "(1) That your shareholding will be valued at a fair value as between a willing buyer and a willing seller on a pro rata basis and with no discount for a minority shareholding (there being none), and on the basis that the Company is a going concern;
>
> (2) The valuer shall take account of the assets, profitability and prospects of the Company;
>
> (3) The valuation will be as of the date of this letter;
>
> (4) For the purpose of making submissions to the valuer, each party will have full access to all financial information concerning the Company;

(5) The valuer will act as expert not arbitrator, and shall not give reasons for his decision; and (6) The valuer will have power to determine who shall bear the costs of the valuation."

108 The letter also made it clear – a point upon which the Petitioner relies heavily – that if the proposals set out in it were not acceptable, the Petitioner would be prepared to consider "acceptable counter proposals", failing which he would issue his Unfair Prejudice Petition. The letter also stated that the Petitioner would be prepared to go to mediation at any appropriate stage. The offer of mediation was repeated in their subsequent letters to the Respondent, included at pages 414 and 417 of the Bundle.

109 Prior to the above exchange, the Petitioner's former solicitors had also indicated to the Respondent (see their letter dated 26 May 2020) that the Petitioner proposed that the Company pay the costs of the Respondent for any advice that she needed to take on the exchange of communication which she was having with the Petitioner relating to the proposed sale of her shares.

110 The Petitioner contends that this demonstrates three things: first, that the Petitioner did everything he could to resolve the deadlock which had arisen between the parties and that, rather than consider his proposals or come up with counter proposals for the determination of their dispute, she failed to respond substantively to his attempts to bring about a settlement of their dispute; second, referring to the *dicta* of Lord Briggs JSC in *Lau v. Chu*, that the court should not take an over-zealous approach to what remedies or options were available to, and should have been pursued by, the Petitioner. He had plainly pursued the most suitable remedy before resorting to the Unfair Prejudice Petition and, subsequently the Present Petition, and received no satisfactory response from the Respondent; and third, as the overtures he made were a genuine attempt to resolve the dispute, the court should take that into account in deciding how it should exercise its discretion.

111 I reject what he says. The offer on the table was for the Petitioner to buy the shares of the Respondent. He did not countenance the alternative possibility that the Respondent might have wished to purchase his shares and should have given her that option. Mr Willetts' first response to that point was that the Respondent had not produced any evidence to demonstrate that she was in a position to pay for the Petitioner's shares and then to say that having been invited to put forward counter proposals, the Respondent had failed to do that. I do not agree with either point. Despite the Petitioner's former solicitors' letter inviting the Respondent to put forward her counter proposals, the communication only refers to the proposed purchase by him of her shares, and this is reflected in the relief which the Petitioner sought in his Unfair Prejudice Petition. The apparent inability of the Respondent to provide evidence of her ability to purchase the shares is a complete non-point. If the Respondent was not given that option, it is difficult to see how the Petitioner can contend that even if that option had been given to her, she would not have been able to avail herself of that offer. It is, at least possible, that the Respondent would have been able to find the funds to purchase the Petitioner's shares[11].

112 So far as the reference to mediation is concerned, I am not sure that it carries any great weight in the exercise of the discretion which the court has to undertake in the present case, though it may have some relevance on the issue of costs. In any event, the Respondent did not reject the offer of mediation as is clear from her letter dated 1 September 2022. I find the suggestion that the Company should pay the costs of the Respondent to take legal advice difficult to understand given that the parties were equal shareholders and directors in the Company, but demonstrates that, even on the Petitioner's case, he

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[11] The position here is completely different from the situation which applied in *Asia Pacific Joint Mining Pty Ltd v Allways Resources Holdings Pty Ltd* [2018] QCA 48, in which the court found that it was entirely reasonable for the claimant to prefer a winding up over a share purchase order where there would be cost and delay in a valuation and no certainty that the majority shareholder would pay. In the present case, even on her means, she might have been able to find with which to Purchase the Petitioner's shares.

seemed to think that he was entitled to treat the Company as his own to the exclusion of the Respondent[12].

113 But there are three other matters which wholly undermine the Petitioner's case on this point. First, it is wrong to suggest that the Respondent failed to engage with the Petitioner in response to the proposals he was putting forward to her. The Respondent responded to the letter from the Petitioner's former solicitors by email dated 27 December 2020 (which, inexplicable was not included by the Petitioner's solicitors in the Bundle), in which she said, in terms, that she was not going to be badgered into selling her shares. Second, and more crucially, at that stage, she had been excluded from having any say in the running of the Company and had no access to the accounting records of the Company, despite having asked the Petitioner to provide her with her login credentials to access those records. In those circumstances, it is difficult to see how she could countenance the possibility of selling her shares, particularly as she was concerned that the Petitioner had "rendered her shares in the Company valueless". Third, the Respondent suggested a sale of the shares of the Company to True Potential – see para 13 of her first witness statement – to which the reply of the Petitioner (contained at para. 28 of his witness statement)[13] was:

> "Despite the fact I have no plans to retire, the Second Respondent has proposed selling the Company to True Potential. However, the 'restricted' retail packaged products offered by True Potential are incompatible with bespoke 'whole of market' solutions required by the Company's clients. The Second Respondent refers to the value of client relationships in Paragraph 92, whereby she accepts my relationship with each client is vital to the Company's performance. Hence, the only viable solution was for me for me to buy the Second Respondent's shareholding."

114 The proposal to approach True Potential was first made by the Respondent in December 2021. No response to this proposal was

[12] While not having looked into the question, it is difficult to see how the Company could pay the costs of the Respondent for taking legal advice to sell her shares to the Petitioner. *Quaere,* whether this would not be *ultra vires*.

[13] See also para. 8 of the same witness statement in which he said that the proposal to approach True Potential was not viable because "True Potential offers 'restricted' retail packaged products to mass market, which is incompatible with bespoke 'whole of market' solutions necessary".

provided by the Petitioner until the service of his second witness statement. This was despite a reminder being sent by the Respondent to the Petitioner to the Petitioner's solicitors on 1 September 2022 and a reminder being sent by her to the Petitioner on 4 October 2022. Even if the Petitioner is correct that this proposal was not viable – and I have serious misgivings about that – not to have responded to her until his second witness statement is difficult to understand. But, as I have pointed out above, this letter shows not only that the Respondent was not being obstructive with negotiations but perfectly willing to consider any proposal which did not undervalue the value of her shareholding in the Company. The Petitioner's response to this proposal, made for the first time in his witness statement, demonstrates that the only proposal he was prepared to consider was a sale of the Respondent's shares to him.

115 It is correct that the offer made by the Petitioner's former solicitors in their letter dated 15 December 2020 referred to her having full access to the accounting information of the Company to enable her to consider the offer they were making on behalf of the Petitioner, but that was only if she agreed to the terms suggested in that letter. In addition, although the valuer could take into account the matters set out in the letter[14], there was no express provision enabling the valuer to take into account in the valuation how the Petitioner had run the Company following her purported removal as a director and any attempt to do so would have resulted in the same impasse which the Petitioner complains about. Not unsurprisingly, her concerns were fully vindicated by the few documents she was able to produce on the final day of the trial in which the Petitioner is clearly seen to be using the Company's intellectual property in connection with one of his new enterprises Whitehall Partnership LLP – again, inexplicably, not

[14] It is to be noted that the terms of the valuation were that the valuer could take into account the several matters referred to in that letter, the relevant terms of which are set out above. A court-appointed valuer would have been able to take into account the Petitioner's conduct after the Respondent's removal as a director from the Company: see *Scottish Cooperative Wholesale Society v Meyer*, above. Note also that the valuation had to be "as of the date of this letter", which, arguably, meant that the valuation could not take into account the manner in which the business of the Company had been conducted by the Petitioner since his removal of the Respondent from having any say in the affairs of the Company.

included in the Bundle nor disclosed to her in the course of the proceedings.

116 Nor is there any substance in the suggestion that she did not cooperate with the Petitioner or the court in seeking to engage with the directions made by the court for the appointment of an independent valuer.

117 She plainly did, as is clear from her email to the Petitioner's present solicitors dated 1 March 2022, which was also not included in the Bundle, but produced by her on 28 February 2023, the last day of the trial. When the point was first made by Mr Willetts, on behalf of the Petitioner that the Respondent had failed to cooperate with the appointment of an independent expert, I was left with the clear impression that she was being difficult and refusing to engage with the Petitioner and the Court in progressing the matter forward in accordance with the directions given by the court for appointing an independent valuer. However, nothing could have been further from the truth. Her email states that she does not agree to any of the three names put forward on behalf of the Petitioner because none of them seemed to her to be independent and she gave full reasons why. She had perfectly valid reasons for taking that view. She said that she was prepared to invite the court to appoint one in the absence of a suitable expert being agreed between them. She made that clear, stating in the final paragraphs of her email the following:

> "I can't see why it is such an issue for Mr Taylor he has had no previous contact with … or is not within the local area in which the [Company] operates and builds connections … I will be asking the court to select an expert of their own choosing rather than from Mr Taylor's list … I would consider a consent order to that effect".

118 I should add that I have not seen any response to that letter (if there is one) but it seems to me clear that she was perfectly entitled to be satisfied that court-appointed the valuer should have no prior connection with the Petitioner. She believed – in my judgement, rightly – that the Petitioner was manipulating the whole process relating to the purchase of her shares and that she could only trust the court to put forward a name that was independent. She even agreed to provide

her consent to a proposed order for that to be done. I was told on 28 February that having applied to the court to nominate an expert, the Petitioner discontinued the Unfair Prejudice Petition before the court could determine that application.

119 In the course of the trial, I broached with Mr Willetts the possibility of the Company being placed into administration. I said that I saw why that could be more advantageous than the winding up of the Company. An administrator would be able to continue to run the business of the Company and sell its goodwill and assets as going concern, which a liquidator would not be able to do.

120 Mr Willetts made two points in response. First, he said that the Company could not be put into administration without the cooperation of the Respondent and suggested that the Respondent might not cooperate with that course of action, though, of course either party could apply to the court for an administration order. There is no substance in that point. If the parties had discussed this or if the Petitioner – who was being advised by solicitors and counsel – had put this to the Respondent and the Respondent had taken advice about it, including seeking the advice of an insolvency practitioner, it is difficult to see why she should not have accepted that this was a better course for her than the winding up of the Company. In any event, the Petitioner could have applied to the court for the making of the administration order, even if the Respondent refused to cooperate with him in making an "out of court" appointment. While of course, not in any way being in a position to say definitively, on the material before me, it is difficult to see why a court would refuse to do so.

121 The second point made by Mr Willetts that as the Company was able to pay its debts as and when they fell due, the court was unable to make an administration order as a result of the application of para. 11 of Schedule B1 to the IA 1986, which he indicated expressly stated that a company had to be unable to pay its debts before the court could make an administration order. This was wrong. When I indicated to

him that I thought the court make one in relation to a company which might not be able to pay its debts in the future, Mr Willetts had to accept that this was correct and that para. 11 also dealt with that situation.

122 The requirement that the company cannot pay its debts does not just encompass a company which is "cash flow" insolvent but also a company which is "balance sheet" insolvent: see para. 111 of Schedule B1 to the IA 1986, which adopts the definition contained in s. 123 of the IA 1986 as to what is meant by the expression "unable to pay its debts". I am satisfied, for the reasons stated below, that even if the Company is not "cash flow" insolvent, it is almost certainly balance sheet insolvent. In addition, I agree with the Respondent that even if this is wrong (i.e., that the Company is neither cash flow nor balance sheet solvent), it is likely soon to be in that position. The requirement in para. 11 is, therefore, amply satisfied.

123 If the Respondent is correct – and I appreciate that the Petitioner did not have an opportunity properly address this – that the Company has no prospect of recovering the amount of £33,758.38 referred to under "other debtors" in the draft balance sheet included in the Bundle, then the figure for current (and overall) assets would have to be reduced appropriately. Also, if the Respondent is correct that the draft balance sheet does not appear to include some £62,500 owing to the directors or their associates, then the Company is, now, "balance sheet" insolvent with little prospect of a dividend being paid to the members towards their shares. This is more so the case when one adds the significant costs and expenses which will be associated with the Company being placed in compulsory liquidation.

124 Even if I am wrong that the Company is presently insolvent, in my judgment, the Company is likely shortly to become insolvent if the Petition is dismissed. This comes from the Petitioner's own evidence. The Petitioner said to me that if I dismissed the Petition, he would relinquish his directorship in the Company. Neither he nor Mr Willetts disagreed that if that were to happen, the Company would soon

become insolvent if – as they both suspect – the Respondent is unable to run it without the Petitioner.

125 The placement of the Company into administration was a strategy available to the Petitioner and ought properly to have been considered by him (as being obvious to him and his advisers) before he needlessly launched the Present Petition. If the court was not satisfied that an administration order should be made on that application, it could have ordered the Company to be wound up: see para. 13 of Schedule B1 to the IA 1986. This would have provided the Petitioner with the outcome he presently seeks from the court.

126 I do not agree with Mr Willetts that this remedy or option falls within what Lord Briggs described in *Lau v. Chu* as the court imagining "every potential alternative remedy". It was an obvious course of action which should have been pursued by the Petitioner. The reason it was not was – as I find – the alternative of a winding up petition would be more beneficial for the Petitioner in the sense that having diluted the value of his and the Petitioner's shareholding by the manner he conducted the business of the Company, including wrongly using the Company's intellectual property for the benefit of his LLP – and possibly transferring or taking away (or intending to) the contacts and clients of the Company at no cost to him. Although there is no evidence of the Petitioner having done this at present – the Petitioner having said that he has not taken any of the clients of the Company to his new enterprises – there is no question in my mind that this is what he intends to do and this is clear from his own communication to which I have referred above. Whether he is entitled to or not is not for me to decide on this petition – and to that extent, the cases relied upon by Mr Willetts (such as *Faccenda Chicken Limited v. Fowler* [1987] Ch 117) are not relevant to the determination of the Petition. So far as the Petitioner states that he has not taken away any clients or customers of the Company, the Respondent rightly stated that she was unable to test this point, at this stage, because of the failure on the part of the Petitioner to provide proper disclosure, but she strongly suspected that

this is what the Petitioner has done. The complete failure on the part of the Petitioner to give disclosure on this issue – combined with the fact that he is already using some of the intellectual property of the Company – appears to me to suggest that even if he has not done so now (about which I have grave misgivings), he almost certainly intends to do so in the future.

127 So far as it is suggested by the Petitioner that the Respondent could have considered the possibility of placing the Company into administration but did not, there are two points that are appropriate for mention: first, she has appeared in person throughout (i.e., both in connection with the Unfair Prejudice Petition and the Present Petition), and could not have thought about the possibility of this remedy being available to her until I mentioned it; but, second, and perhaps more importantly, she does not seek a winding up order and there is no requirement on her part, therefore, to demonstrate that she pursued an alternative remedy.

128 The possibility of the placement of the Company in administration was mentioned by me several times in the course of the trial. The Petitioner could have considered whether that might have been a better strategy than winding up, not least because if he claims that he has not been guilty of any wrongdoing, he must be as interested as the Petitioner in getting the best value for the assets of the Company and this can best be achieved by an administration, as opposed to a winding up. But the reason for pursuing the winding up – or the only inference which can be derived from pursuing this as the only remedy available to him – is that if the Company is wound up, the Petitioner will not have to pay anything towards the shares of the Respondent and will be able to trade in his new enterprise with – as the Respondent suggests – a significant (if not substantial) number of former clients following him into his new enterprise, a point which the Petitioner alludes to at para. 28 of his second witness statement in which he says (referring to the Respondent's statement) that '[his] relationship with each client is vital to the Company's performance. <u>Hence, the only viable solution was for</u>

me for me to buy the Second Respondent's shareholding. (My emphasis). Whether that is a breach of duty is not for me to decide on the Petition, but if the Respondent is correct – and in my judgment, she is, based on his having used the intellectual property of the Company without the consent of the Company – then the motive for bringing the Present Petition is not to achieve an orderly realisation of the assets of the Company. It is to provide an improper collateral benefit to the Petitioner, which, based on the Petitioner's wrongful conduct (whether or not it is unlawful), he should not be entitled to do.

129 One further point is appropriate for me to mention: as I have already said, the Petitioner made an open offer on the second day of the trial to waive his entitlement to the return of any dividend on his shareholding and not to seek the costs of the Petition if the Respondent agreed to an order being made that the Company should be wound up.

130 There is nothing of substance in the offer. For the reasons referred to above, there is unlikely to be any dividend paid to the shareholders, given how the affairs of the Company have been run since the Respondent was excluded from being involved in them. So far as the Petitioner's costs of the Petition are concerned, the Petitioner is not entitled to assume that even if the Company is wound up, the Court would order all of his costs to be paid by the Respondent. By the second day of the trial, it became apparent that the Petitioner might, at least partly, be responsible for some of his own costs, and perhaps some of the Respondent's costs also, given that, even on his case, he accepted that he must bear some responsibility for the loss of trust and confidence between him and the Respondent. In addition, the Respondent has the benefit of recovering the costs she has incurred (albeit only as a litigant in person) as a result of the discontinuance of the Unfair Prejudice Petition, for which the Petitioner would also have to give at least some credit.

131 Mr Willetts indicated that the offer to waive dividend and costs was the only offer available to the Respondent because "much water had flowed under the bridge". The only reason that an offer to purchase the Respondent's shares in the Company is not available is that the Petitioner has put himself in a position (lawfully or not) where he stands to take all of the clients and customers of the Company without having to pay for having done so. That the Respondent believes this to be so is set out in para. 13 of the Respondent's first witness statement in which she says:

> "The Petitioners desire to wind up the firm will mean that the firm (and shareholders) will receive a low return for its assets, including the client book (sometimes referred to as the "assets under management" or "AUM") – yet he has not responded to previous suggestions I made, which would provide us both with much more than he has offered me, including:
>
> (a) exploring an offer from True Potential, a platform, like the ones we currently use. From early 2020, they were offering 8 x assets under management. Half up front, then the Petitioner had the option of continuing to run the firm and receive the other half when he chose to retire …
>
> (b) exploring the 10 x recurring income, which I found he had noted (in his own hand) during a meeting with a broker firm named Harrison Spence. They put firms who are wanting to sell and purchase financial advisor practices in touch with one another and assist to broker a deal".

132 While purporting to deal with para. (a), above in his second witness statement, the Petitioner provides no observations about the Respondent's allegations. It is difficult to see how the statement made by the Respondent is incorrect. The shareholding of the parties is bound to be substantially diminished by the winding up of the Company.

133 Mr Willetts made the remarkable submission that if I found that the Petitioner was unlikely to succeed on his Unfair Prejudice Petition, I could conclude that the only available remedy for him was to seek the winding up of the Company. The Unfair Prejudice Petition is not before me so I am not able to make any definitive finding on it, though it is based on evidence which I believe is not just weak and flimsy but also inherently inconsistent. But, on the facts, even if Mr Willetts is right, I am unable to accept that the Petition has reasonably pursued all the

remedies properly available to him. In any event, if I were to allow the Petitioner to succeed on the premise advanced by Mr Willetts, it would mean permitting the Petitioner to benefit from his own egregious conduct. In addition, in such a case, the Petitioner would not be able to persuade me to make a winding up order based on the "clean hands" principle or on the basis that his motive for bringing the petition was not to seek an orderly winding up of the affairs of the Company but to derive an improper collateral benefit from the making of the winding up order against the Company.

134 In the circumstances, I come to the clear conclusion that the Petitioner did not reasonably pursue any alternative remedy – or more accurately – that having decided to pursue it, did not reasonably see it to a proper conclusion.

135 Accordingly, on this basis alone, it would be inappropriate for me to exercise my discretion to make a winding up order in favour of making it. The Petition must, therefore, be dismissed.

136 While that makes it unnecessary for me to go on to consider the "clean hands", "some tangible benefit" and "motive" points, it is appropriate, for the sake of completeness, that I do so.

Clean hands

137 There is no question in my mind that the behaviour of the Petitioner towards the Respondent has been unacceptable and inexcusable. As I have already indicated, I am unable to accept his assertion that the removal of the Respondent's SMF3 authorisation or the purported removal of her as a director was a genuine error designed to enable him to run the Company more efficiently. If there was any truth in that, the Petitioner would not have sought to remove the SMF3 authorisation for the second time once he was asked by the FCA to reinstate her authorisation after he had done so on the first occasion.

138 The Petitioner does not deny the statement made by the Respondent at para. 76 of her second witness statement dated 17 September 2022 in which she says that her SMF3 was withdrawn on two occasions by the Petitioner and, on both occasions, was reinstated by the FCA, though he disputes the reason advanced by the Respondent about why he decided to withdraw it.

139 The Petitioner sought to avoid discussing his bad behaviour towards the Respondent in his witness statements and sought to minimise it in the course of giving evidence. Throughout his communication with the Respondent, both before and after the presentation of the Unfair Prejudice Petition and the Present Petition, he has, as I have said, sought to portray himself as the victim, whereas, in reality, it is the Respondent who is the victim. He also threatened to call the Police for harassment when the Petitioner wrote to him seeking various information relating to the Company, which she was perfectly entitled to do. It is extraordinary that he decided to do so. It can only be because he did not want to answer some of the searching questions that he was being asked by the Petitioner.

140 While accepting that his conduct may have been reprehensible, the Petitioner states that the court must also take into account the conduct of the Respondent which is alleged to have led to the deadlock in the Company or the complete loss of trust and confidence between the parties.

141 As I have already indicated, I accept as impeccable logic the substance of that proposition. However, I am unable to find that the Respondent was in any way guilty of culpable conduct which can be said to be the cause of the breakdown in the business relationship of the Petitioner and the Respondent or the loss of confidence between her and the Petitioner.

142 Let me first deal with the Petitioner's conduct. There are several aspects of this which are of grave concern. I have already alluded to

some of these. The first is his deliberate and unilateral exclusion of the Respondent to be involved in the running of the Company (including attempting to remove her as a director) and to withdraw her SFM3. As I have pointed out above, this happened not just once but twice. It is significant that there is little reference to this in either of his witness statements. It is arguable that when seeking a remedy of this nature, a petitioner has a duty of candour to the court (i.e., to provide full and frank disclosure to the court of all relevant matters, including matters which were unfavourable to his case) in order to enable the court to decide how it should exercise its discretion to wind up the Company under s. 122(1)(g) of the IA 1986.

143 Mr Willetts took the Respondent through a substantial amount of the documentation in the Bundle. Rather than support the case of the Petitioner, it demonstrates that the Petitioner acted as if the Company belonged to him; specifically, he considered it right to decide how he should run it and did not believe that the Respondent had any say in the matter.

144 While I am not bound by the decision of the Employment Tribunal, I make no findings about the matters (such as "duress") which the Respondent sought to maintain in her responses to the questions she was asked. Nor – purely in an employment context – do I seek to go behind the findings made by the Employment Tribunal. Just as the Employment Judge Wilkinson stated in his judgment that he did not wish to trespass into my territory, I do not wish to trespass into his.

145 But even accepting – as I do – the decision of the Employment Tribunal on the employment issues which arose from the claim made by the Respondent against the Company, the following exchanges[15] between the parties, in an employment context only, give a flavour of how the Petitioner felt that he was in charge of the Company, that the Respondent was no more than an employee and that he could run it as he saw fit:

[15] I have referred to many others in this judgment.

From: John Taylor Sent: 17 January 2019 16:58 To: Jo Taylor

Following our meeting on the 10th January, I write to confirm that I can no longer allow you to take every Friday off work. I have been very explicit about the reasons for my decision, including the current workload and our urgent need to address the risks placed against the Firm and its clients. As stated, you are now required to work 5 days per week with immediate effect, commencing tomorrow. You have insisted that you need every Friday off work to pursue alternative employment. However, this is a personal matter and should be addressed outside normal working hours of the Firm. I would be grateful if you would confirm your commitment in this regard. (My emphasis).

From: Jo Taylor: 17 January 2019

Thank you for your email. I refer you to my response during our meeting on 10th January 2018, my reasons were not as you have outlined below. I will continue to work the agreed four day week. I also refer to my many, many past requests (indeed desperate begging), dating back many years for you to not take 'poets day' and put in extra hours so that I did not have to work late into evenings and weekends. I was left by you to work myself into serious ill health both mentally and physically, without any care for me OR this business. May I remind you that over the last 5 to 6 years, you have taken MORE personal time and haven't even worked a full four day week for much of the time. Again without much care for me or this business.

From: John Taylor: 18 January 2019

Jo,

Further to your email. Besides being untrue, your opinions are completely irrelevant in serving the needs of the Firm going forward. I'm not asking you to work late or during any personal time at weekends; only normal working hours (Mon-Fri) until matters are resolved. You have a responsibility to ensure this Firm, along with its clients are protected during periods of need. I have made this situation very clear to you on several occasions, but your refusal to adequately engage places this Firm at risk. I am personally working beyond all expectations, including weekends to ensure we meet the standards I feel are necessary and you need to do the same. You are placing me in a very uncomfortable and awkward position, so | respectfully ask you to reconsider your position as a matter of urgency." (My emphasis).

Letter dated 14 January 2020 from the Petitioner's former solicitors:

"We have been instructed by your former husband, John Taylor who is, as you are aware, a director of the above company. He instructs us that steps have been taken for you to be removed and cease to be a director and also to be removed from any controlling function in relation to the company's activities. We are further instructed that although no active and productive work has been done by you in connection with the company since August 2019, you have been paid on a monthly basis up to the December payment and, in effect, from the instructions you have received in respect of salary and dividend during that period, you have received the sum of £17,276.15. Our client instructs us to write to you that any future payments will now cease. Further, from the company's bank account at Handelsbanken, the sum of £51,300 has been transferred to a new company account with the Yorkshire Bank. This leaves £25,000 in the account at Handelsbanken to cover your loan/indebtedness and will remain there until the financial issues concerning the company between you and our client have been finalised and settled. Kindly acknowledge receipt of this letter and, of course, should you require, take your own legal advice in relation thereto". (My emphasis).

146 In his first witness statement, the Petitioner confirms that the ThreeSixty Report was commissioned by him unilaterally, without the consent of the Respondent, apparently "out of necessity and concern to ensure that the Company remained compliant".

147 There is nothing in the ThreeSixty Report dated 29 August 2018 which supports the Petitioner's assertion that the Respondent was performing her functions in the Company poorly. The most that can be said was that the Respondent was over-zealous in the attention that she gave to the affairs of the Company's clients. But – as the Respondent said and I accept – the system which the Company had in place for this was agreed between the Petitioner and the Respondent many years previously (since 2004/5) and, as the Respondent also said in evidence, if she departed from it, she might not be considered as "doing her job properly". It is clear that when ThreeSixty suggested that the system was "over-engineered" and would need to change, the Respondent readily accepted that suggestion: see the Respondent's letters dated 10 September 2018 and 5 June 2019.

148 Whether or not the Respondent was intimidated at the meeting which ThreeSixty had with the parties, as she suggested, I agree with Mr Willetts that ThreeSixty highlighted various matters at the meeting about the operation of the Company, including the fact that she and the Petitioner found it difficult to work together in the Company. But over and above that, I am unable to accept that the ThreeSixty report supports the case being advanced by the Petitioner.

149 I do not read the ThreeSixty Report as confirming that the parties were deadlocked or had lost trust and confidence in each other at the time when the meeting between them and ThreeSixty took place; rather the converse of that situation seems to me to be correct. It is correct that para. 1 of the report states that the parties had "decided … that it [was] not prudent to continue as business partners" but there is no indication that, at that stage, the parties could not make joint decisions on behalf of the Company (as they had been doing previously

for some time following the breakdown of their marriage) or that they had lost trust and confidence in each other. The ThreeSixty report was primarily focussing on how the existing *modus operandi* of the Company could be improved and, in that context, the report was not being critical of one party or the other, but was advising on how the existing systems in place for looking after the interests of clients could be improved and the profitability of the Company enhanced by cutting out unnecessary work which was being undertaken in the Company. Mr Willetts sought to lay the blame for this on the Respondent but that is palpably incorrect as is the Petitioner's assertion in his first witness statement that the "Respondent refused to engage meaningfully" with the proposals made by ThreeSixty and others about the apparent deadlock which had arisen in the Company. Nor am I prepared to accept the statement made by him in the witness statement that he "immediately began overhauling the Company's systems and controls to follow the recommendations" and that this "was met with opposition by the … Respondent". The plain fact is that when these points were made to the Respondent in the course of her cross-examination by Mr Willetts, she had a satisfactory answer to each and every one of them and Mr Willetts was unable to develop any of the criticisms he sought to make good on behalf of the Petitioner. There was, I find, no opposition to what was being proposed, as is clear from the Respondent's letters dated 10 September 2018 and 5 June 2019. If there was any failure to put in place the recommendations put forward by ThreeSixty, it was down to the Petitioner who failed to respond (or respond satisfactorily) to the communication sent to him by the Respondent about what was being proposed by ThreeSixty.

150 I find, as a fact that, at the time of the ThreeSixty meeting, the parties were not "deadlocked" or lost trust and confidence in each other, as the Petitioner would have me accept. At the stage of the ThreeSixty meeting, the Respondent had, as I state above, willingly agreed to put in place the new systems which ThreeSixty had recommended for the Company. There is no question that the relationship of the parties was deteriorating and had reached a difficult situation. But it is wrong to

say that it had reached a point where they were deadlocked or had lost mutual trust and confidence in each other. For example, in her letter dated 10 September 2018, in which the Respondent agrees to implement the recommendations of the ThreeSixty Report, the clear impression is that that whilst they were both exploring a parting of ways, the situation had not developed between them as to suggest deadlock or loss of mutual trust and confidence. The time when the deadlock and loss of confidence arose was much later. It occurred when the Petitioner sought to remove the Respondent as a director of the Company and sought to withdraw the SMF3 authorisation of the Respondent in December 2019.

151 This largely kicks into the long grass Mr Willetts' submissions, based on his interpretation of the observations of Lord Oliver in *Vujnovich v Vujnovich*, that the court should concentrate on the cause, as opposed to the consequences, of a petitioner's conduct in deciding whether the petitioner was coming to the court with clean hands. In other words, the court should look at conduct leading to the deadlock or loss of trust and confidence, as opposed to conduct taking place after such deadlock or loss and confidence. But I should make it clear that if I had found that there was no such link, I would nonetheless have found that the Petitioner did not satisfy the "clean hands" principle. I say that for several reasons.

152 I am unable to accept that there is some sort of precondition or requirement that a court cannot exercise its discretion to dismiss a contributory's petition simply because the conduct complained of occurs after the deadlock or loss of trust and confidence. The making or refusal to make a winding up order on a contributory's petition involves the exercise of a discretion. The discretion is a wide, subject only to the requirement that it should be exercised judicially. It seems to me to be contrary to principle that the discretion of the court to dismiss a petition cannot be exercised where a person has been guilty of serious misconduct but that misconduct has arisen after the parties are deadlocked or have lost trust and confidence in each other.

153 In my judgment, it would be wrong for the discretion of the court to be exercised in favour of the making of a winding up order if the petitioner has conducted himself in the manner in which I have found the Petitioner to have done in the present case. I consider that the error that Mr Willetts has fallen into is thinking that each factor that informs the decision of the court on how it should exercise its discretion should be considered independently, so that if any one factor is determined in favour of the petitioner, the court should exercise its discretion in favour of the petitioner. I consider that the correct approach of the court is to look at all the factors and decide whether the overall conduct of the petitioner warrants the exercise of the discretion of the court to be undertaken in his favour. In other words, the court should take a holistic approach to the question whether the petitioner has behaved badly, of which the causal connection between the misconduct and the deadlock (or loss of confidence) may be one factor for the court to consider. In my judgment, none of these factors, including the pursuit of an alternative remedy, which is a requirement that the court must consider under s. 125(2) makes it necessary for the court to exercise its discretion in a particular way, though the existence of an alternative remedy which the petitioner has not pursued is almost always likely to militate against the making of a winding up order. In the present case, it would be unconscionable for the Petitioner to benefit by the discretion being exercised in his favour where he has behaved so badly, and it would be wrong for the court to exercise the discretion in his favour on the basis that the causal link referred to was missing.

154 But even if I am wrong about that, the motive of a petitioner in seeking a winding up order is important, so even if the causal link (or lack of it) warrants the court deciding the "clean hands" principle in favour of a petitioner, the motive for bringing the Petition would make it appropriate for the discretion of the court to be exercised against him.

155 I do not believe that what I have said above is inconsistent with the observations of Lord Oliver in *Vujnovich v Vujnovich*. If, and so far, as it is, I respectfully disagree with them.

156 As I have said, throughout these proceedings – including at the trial – the Petitioner has sought to minimise his appalling behaviour, while seeking, in every way, to portray the Respondent in the worst possible light. While describing the setting up by the Respondent of her jewellery company (Loco Jo Ltd) as a breach by her of her duties as a director (see paras. 54 and 55.2 and 55.3 of the Petitioner's first witness statement and para. 24 onwards of the Unfair Prejudice Petition), he totally failed to give the court any account of the enterprises which he set up in what appears to be a position of direct conflict with the business which the Company carries out. It is no surprise that Mr Willetts made scant mention of the Respondent's new enterprises. He could hardly do so if the Petitioner's own conduct on this issue was so wanting.

157 But what the Petitioner says is that the Respondent's conduct must also be taken into account and there is a lot to complain about how she has behaved. The Petitioner says she is partly at fault for the deadlock or the loss of confidence. If that is correct, then the decision of the court should be exercised in favour of the relief which the Petitioner seeks on the Petition, i.e., the making of a winding up order.

158 I cannot see how any of the matters about which the Petitioner complains can be said to have contributed to the deadlock or loss of trust and confidence. As I have said, the Petitioner has sought to portray himself as the victim in the matters relating to the breakdown of his relationship with the Respondent while portraying the Respondent as the person guilty of all the wrongdoing which is meant to have led to the collapse of their business relationship, including, on one occasion, threatening to report her to the Police for harassment (see his letter dated 11 September 2021) because she wrote to him on various occasions complaining that she did not agree with the way he

was conducting the affairs of the Company. In reality, the converse of this situation is true.

159 The complaints made by the Petitioner against the Respondent are of a wide and generic nature, unsupported by any detail or evidence. Where any detail is provided by the Petitioner, it is usually either untrue or does not withstand proper scrutiny when analysed in detail.

160 Leaving aside issues relating to the application of employment law, and the decision of the Employment Tribunal, I cannot see how the Respondent's refusal to work the additional days which the Petitioner insisted upon can amount to culpable conduct on her part. Whether (as the Respondent asserted) she had little work to do at the time or whether he was asking her to work an extra day without pay, the plain fact is that she was perfectly entitled to refuse to work the extra day. The Petitioner sought, unilaterally, to increase the number of days she worked and she was perfectly entitled to refuse to do so. There is no suggestion – and if there is I reject it – that she did not, or could not, discharge her directorial duties by continuing to work the number of hours she did.

161 That the Petitioner sought to impose his will on the Respondent on this issue is demonstrated by the exchange between the parties referred to above in which the Petitioner stated that he "[could] no longer allow you to take every Friday off work. I have been very explicit about the reasons for my decision". (My emphasis).

162 I am not sure the extent to which – having referred to this at paras. 28 and 29 of his first witness statement – the Petitioner relies upon the forming of the Respondent's jewellery company (Loco Jo Ltd) as supporting his premise that the Respondent was guilty of culpable conduct.

163 What is quite remarkable is the statement made by the Petitioner at paras. 27-29 of his first witness statement in which he says:

> "On 1 May 2019 the Second Respondent was appointed as a director of another company, Top Church Training Limited. … This appointment was taken without consent from either the Company or me … On 3 June 2019 the Second Respondent caused another company, Loco Jo Limited (CRN: 12028990) to be incorporated … The Second Respondent is registered at Companies House as the sole director and shareholder… It is my view that the above actions not only put the Second Respondent in a personal conflict of interest, but further made it clear that she was no longer prepared to work for the Company on a full-time basis or possibly at all".

164 Some of the contents of these paragraphs of his witness statement are simply untrue. The Petitioner knew full well about the Respondent's involvement with Top Church Training Ltd, the Respondent having properly disclosed that to him in the course of her communication with him. The following extracts of the exchanges between them by email on 3 April 2019 make this clear:

> "[Respondent to Petitioner]
>
> Just to let you know that in order to solve some of the problems I'm facing finding work, I've taken up a voluntary role as trustee of a charity. Because I'm sitting on a board and am in charge of a team of staff, this may overcome some of the obstacles I've encountered as a result of my having looked after The Whitehall Partnership's needs first - instead of my own employability. I'm also in the process of becoming a compliance consultant. The company I will be working for only has a small amount of excess work at the moment, maybe a couple of days a month - therefore it shouldn't affect my role at The Whitehall Partnership. However, it may grow into a source of income that will support me and I will have direct contact with IFAs, insurers, DFMs and all other types of FCA approved companies who may have roles available…"
>
> [Petitioner to Respondent]
>
> Thanks Jo, Can you confirm whether your trustee role is being undertaken outside Whitehall's normal hours of business?
>
> [Petitioner to Respondent]
>
> Thank you and I wish you well in the Trustee role.

165 This point is also confirmed by Judge Wilkinson at para. 27(e) of his judgment dated 30 April 2021, from which Mr Willetts quoted extensively in seeking to undermine the evidence of the Respondent. It is difficult to see why the Petitioner decided to rely upon this as one of his complaints about the conduct of the Petitioner against the Respondent in his first witness statement when Judge Wilkinson had made an express finding to the effect Loco Jo Ltd was a dormant company and Top Church Ltd was a charitable enterprise.

166 While complaining that the Respondent gave him no information about these companies before setting them up, the Petitioner makes no mention of having set up (without informing the Respondent) his own enterprises doing the same or similar business to the Company, in what would appear to be a direct situation of conflict with the business being conducted by the Company. If the Company were to be wound up, there might also be the question about whether the Petitioner had "taken over" the name (and the goodwill associated with it) of the Company, by trading in the same name as the Company, including whether the Petitioner might be in breach of s. 216 of the IA 1986.

167 Nor can I see any basis upon which it is possible for the Petitioner to deduce that by setting up a new company and working as a charity trustee, the Respondent "was no longer prepared to work for the Company on a full-time basis or possibly at all". This statement is, at best, a complete *non-sequitur*; it is not just unsupported by the evidence but is a complete distortion of the truth. That there is no substance in this allegation of wrongdoing made by the Petitioner against the Respondent is plain from the fact that the Petitioner did not pursue the allegation further in his second witness statement following the response to the allegation provided by the Respondent in her first witness statement. Nor did Mr Willetts seek to cross examine the Respondent on this topic.

168 I cannot see how the claim made by the Respondent about her employment to the Employment Tribunal can be seen to be culpable. The Respondent was perfectly entitled to make the claim, and the fact that she was unsuccessful in it cannot support any basis for suggesting that she was wrong to make it. She had a legitimate sense of grievance about how she had been treated by the Company (acting solely through the Petitioner) and was perfectly entitled to exercise her right to bring a claim to see whether she might have been wronged. There is no conduct in bringing the claim which can be capable of criticism.

169 There is nothing in the judgment of the Employment Tribunal which helps the Petitioner. The Employment Judge made it clear that the judgment only dealt with employment issues and that often the parties sought to conflate the issues which were before him by making allegations and cross-allegations that were more appropriate for determination in the Unfair Prejudice Petition which was before this court at the time.

170 Nor am I bound by the factual findings which Employment Judge Wilkinson arrived at. So far as it is thought that the findings I make in the Present Petition are inconsistent with the findings which the Employment Judge made, I am not bound by the latter findings. It has not been suggested by Mr Willetts that departing from the findings made by the Employment Judge would amount to an abuse of process and I am clear in my mind that there can be no abuse of process for me to do so, based on decisions such as *Hunter v Chief Constable of the West Midlands* [1982] AC 529 and *Re Queens Moat House plc, Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321.

171 The complaint made by the Respondent to the Financial Services Ombudsman is another reason relied upon by the Petitioner in alleging that the Respondent contributed to the deadlock or the lack of trust and confidence between the Parties. The Petitioner states that the Respondent had no proper grounds for complaining to the Ombudsman. I do not agree. Whether or not she did, she was perfectly entitled to complain to the Ombudsman about the way she felt that the Company had dealt with her retirement planning. She claimed that the Company had advised her not to take out a personal pension plan and that, as a result of her position as director of the Company, she would benefit from the future sale of the company which would provide her future retirement provision.

172 As she pointedly observed, during the course of her submissions, the issue for the Ombudsman was whether he was able to investigate the

complaint, rather than whether the complaint had any merit. As the Ombudsman observed in his review decision dated 9 March 2022:

> "I don't dispute Mrs T's version of events here, but I would need some corroborative evidence to demonstrate that Whitehall provided regulated advice and this wasn't simply Mr T's own personal thoughts and suggestions on what would be best for them both prior to, and in retirement. In the absence of such evidence it simply isn't fair to conclude that a regulated activity took place. The same principle applies to Mrs T's assertion that she was provided with ongoing advice not to pay into a PPP. Much of Mrs T's submissions centred upon the problems she now faces in her battle to maintain the value of the company shares she owns. She says her ex-husband is manipulating the value of the shares and that will eventually reduce her retirement provision. Mrs T has told us about the ongoing legal challenge she is involved with regarding these matters. I can understand Mrs T's frustration that she seems unable to do anything to stop the erosion of her 'retirement' savings and I have sympathy for her position. But these are also unregulated activities – not covered by the DISP rules. So were unable to consider these actions as part of Mrs T's complaint. Ultimately the available evidence here doesn't support the position that Whitehall gave regulated advice for Mrs T not to contribute to a PPP. Unfortunately, that means it isn't a regulated activity and we can't consider her complaint".

173 This was not a spurious complaint, as the Petitioner would have me accept. She complained to the Ombudsman because she did not have the funds to bring a claim against the Company in the civil courts, one reason for that being that she was starved of any income as a result of the actions of the Petitioner. She did the next best thing she could. She complained to the Ombudsman, which did not involve her in any cost. The complaint was legitimate but unsuccessful because it was not supported by the evidence that the Ombudsman would have liked to have seen.

174 At para. 21 of his second witness statement, the Petitioner also criticises the complaint made by the Respondent to the Information Commissioner about the wrongful use by the Company of her personal data, though this complaint is not included in the summary of allegations set out at para. 55 of his first witness statement. Other than simply mentioning the fact of the complaint having made by the Respondent, he says nothing else about it. What he completely fails to mention is that the complaint was upheld by the Information Commissioner who directed that the Company should take steps to remedy the breach. The Respondent statement that the Company has

failed to take those steps was not challenged on behalf of the Petitioner.

175 I have dealt with the complaint by the Petitioner about the reduction of her working hours. The suggestion that she needed to work more hours or an additional day and that she contributed to the deadlock or the loss of trust and confidence by not doing so is a complete fallacy. At paras. 42-45 of her first witness statement, she provided the following explanation about this:

> "I had been working the four-day week we agreed since January 2017, I strongly dispute my attendance was sporadic, I have always maintained good work ethic, mainly of above and beyond. However, I had begun to complain about the Petitioner's lack of attendance. Neither of us had any specific working hours. The Petitioner had (since we moved to the new offices) chosen to start earlier than the commonly adopted start time of 9am and left earlier than the commonly adopted end of 5/5.30pm … I don't recall the Petitioner asking me to increase my hours during 2018, but he did ask me in January 2019. Within a month of this, he was blocking me out of even more of my usual work and asking me to do jobs like cleaning the windows [Page 124 of Exhibit TWP1]. By this time the contradictory pressures I faced regarding the Petitioner wanting me to leave the firm, but also wanting me to work more hours (on a decreasing workload) and the ongoing difficulties with decision making was taking its toll on me. After freezing me out completely at the end of 2019, he employed a new member of staff (without my knowledge) on a three-day week [Page 146 of Exhibit TWP1], one day less than the four-day week he told me wasn't enough".

176 The exhibits to which she refers in these paragraphs largely support what she says. The Petitioner's case on this was, in the main, to refer to the decision of the Employment Tribunal but there is little in it which assists him. The plain fact is that, on this issue, the Respondent's evidence was clear and consistent and the evidence of the Petitioner untrue, evasive and uncertain.

177 At para. 55.4 of his first witness statement, the Petitioner states that the Respondent refused to cooperate with him with the Financial Conduct Authority ("FCA"). He elaborates upon this at para. 35 of that witness statement in the following terms:

> "On 7 August 2020 the FCA wrote to us requesting that the Company set out a formal action plan with appropriate and reasonable timescales to resolve the concerns expressed about the Company's ability to be able to comply with its regulatory requirements. The FCA specifically requested that the Second Respondent and I conclude the buy-out of each other's shares which would allow corresponding changes to the structure and governance of the Company to be made that meets and complies with the regulatory requirements … The FCA

required a joint agreed action plan within 14 days failing which they would consider the use of their formal powers against the Company. The Second Respondent refused to accept any of my proposals or engage in buy-out talks and continued to make unreasonable demands, including working for the Company again remotely from home. It is my belief that the Second Respondent's actions were designed to make my life extremely difficult, and by failing to take any steps she placed the Company at serious risk of the FCA taking enforcement action against it".

178 In the first place, it is appropriate to point out that it was the Petitioner's purported unilateral withdrawal of the Respondent's SMF3 withdrawal that led to the FCA writing to the parties on 7 August 2020. The relevant excerpts of that letter are set out above, but what is clear from it is that the FCA did not think that the Petitioner was open and upfront with them. There is no criticism of the Respondent, though the FCA rightly indicated to both parties that it was important to resolve the disputes which arise between them.

179 However, what is important is the Respondent's response to the FCA letter. On 12 August 2020, the Respondent wrote to the Petitioner setting out an action plan about how they could address the concerns which the FCA had raised – concerns which were primarily of the Petitioner's making.

180 The Respondent made it clear that these were simply her suggestions. She set out, at length, how it might be possible for them to demonstrate to the FCA that whatever their past differences, they would ensure that the Company "would forthwith operate in the manner the FCA expects". The Petitioner responded to that email on the same date[16] by stating that he and the Petitioner were miles apart and that he could simply not work with the Respondent again, stating, "I'd rather pay you to stay home, because I'm not going to run this business with your involvement. I'm sorry I just can't go through that again".

181 The Petitioner had no answer to this in his oral evidence. Whether – as he appeared to suggest – the letter was "overly-complicated", the response it elicited from the Petitioner was that he would not discuss

[16] I cannot reconcile the times in the two emails but it is unchallenged that this was the Petitioner's response to the Respondent's email attaching the action plan.

the matters raised with the Respondent and would rather pay her to stay home. When I took him through the first few points in the action plan, it was plain, there was nothing complicated or controversial about it. The Respondent was simply seeking the Petitioner's observations to the action plan in an attempt to persuade the FCA that they had addressed, or were in the course of addressing, the FCA's concerns. The letter may have been lengthy. Some aspects of what the Respondent suggested may even have been unacceptable to the Petitioner. But the Respondent was not insisting that the Petitioner agree with her suggestions. She was doing little more than attempting to ensure that the Company's compliance and other procedures were put on a proper footing. To point-blank reject the proposals and then to complain that the Respondent had not responded appropriately to the FCA's concerns is a gross distortion of the truth.

182 Two other points about the alleged conduct of the Respondent should also be mentioned: first, her refusal to sign the company accounts. She was perfectly entitled to refuse to do so. It is difficult to see how the Respondent could sign the accounts if she did not agree with their contents (as she made clear to the Petitioner on several occasions – see, for example, her email dated 8 September 2021 to the Petitioner) and was blocked from accessing any of the accounting records of the Company in order to satisfy herself that the accounts were correct. It was not that she was refusing to take steps for the Company to adopt proper accounts. As late as 25 August 2022, she had written to the Petitioner reminding him, among other things, to deal with the auditing of the accounts, which she had requested the Petitioner to agree to with her, sometime previously. Despite this, the Petitioner unilaterally submitted unapproved accounts to Companies House. The same applies to any other approvals that were required from the Respondent which the Petitioner claims the Respondent was unreasonably withholding. For large periods after the Petitioner removed her from having any say in the Company, including withdrawing her SMF3 authorisation, the Respondent had no idea what her status in the Company was. It is difficult to see how she could have been expected

to assist in the completion of forms and documents while her status in the Company remained uncertain. The Petitioner may consider these to be empty formalities. The Respondent is right not to.

183 Second, the suggestion that the Respondent did not cooperate with the holding of a meeting to approve the accounts of the Company or to transact any of the other business of the Company requiring board approval is not correct.

184 It is correct that she refused to attend a face-to-face meeting with the Respondent, but she put forward other ways to deal with meetings with the Petitioner as her email clearly dated 8 September 2021 clearly sets out:

> "I cannot attend a meeting alone at the offices, I would be vulnerable to more false claims. My request for agreement by another method is not unreasonable. I'm feeling that your failing to engage with my concerns means you intend to attempt to penalise me for not having submitted to what could be constituted as pressure to submit to a situation I have valid concerns about".

185 Whether or not the Petitioner agrees with why the Respondent refused to attend face-to-face meetings with him, the Respondent was entitled to feel threatened by meeting the Petitioner in person. But she indicated to the Petitioner that she was open to alternative suggestions to meet, and, as she correctly observed when giving evidence, she would have been perfectly prepared to attend a remote meeting or to deal with any outstanding matters by way of a written resolution which she had suggested in her earlier email of the same date to the Petitioner[17] and which, as a matter of pure company law, a company is perfectly entitled to do in order to make decisions.

186 It must follow from what I have stated the Petitioner does not come to court with clean hands. He was entirely responsible for the deadlock and the loss of trust and confidence between him and the Respondent. Nor can the Respondent be stated in any way to have contributed to the deadlock or the loss of trust and confidence between the parties.

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[17] The email stated that she was "happy to work towards discussing & agreeing the accounts in writing. That is best also because you struggle to understand what I say, which was still evident in the court hearing".

Tangible Benefit

187 The best way of demonstrating that a petitioner may receive some tangible benefit as a result of the winding up of a company is to prove that there is likely to be a distribution of dividend to the shareholders, which includes the Petitioner. This has to be balanced carefully with the motive of a petitioner in seeking a winding up. For example, it cannot be correct for a shareholder-director to dissipate the assets of a profitable company with the result that the company will pay a significant smaller payment to its shareholders on a winding up and to assert that the company must be wound up because he will receive a return of capital on his shares and, thereby, derive a benefit from the winding up. I deal with the motive of the Petitioner below.

188 Will the Petitioner receive some tangible benefit from the winding up of the Company?

189 So far as a return on his capital is concerned, I do not believe, for the reasons already stated, that he will. But it is said, on his behalf that as the Company is deadlocked and all mutual trust and confidence between the parties has been lost such, the Company should be wound up on the basis that if it had been an unincorporated partnership, the partners would be entitled to, and be interested in, bringing the partnership to an end by way of a dissolution. In addition, it has to be in the interests of the Petitioner and the Respondent that a company which is “dysfunctional” should be put to bed by a winding up order being made to bring its operations to a close.

190 I am unable to accept this submission. If these matters informed the decision of the court on what was a “tangible benefit”, they would exist in every situation where a company was run as a quasi-partnership or where a company had ceased to function, such that an orderly winding up of its affairs would be beneficial for the petitioner.

191 It seems to me to be plain from the authorities I have mentioned above that in order to establish that a petitioner will receive a "tangible benefit", it is necessary for him prove that he will receive some benefit *qua* shareholder which he would only (or best) be able to obtain if the company was wound up. One example where this requirement might be said to be satisfied is where a director-shareholder has been guilty of fraudulent or wrongful trading. In such a case, a shareholder who was not a director would have a legitimate reason to place the company into liquidation on the basis that such a claim may only be pursued by a liquidator (or administrator) of the company and, if successful, provide a return towards his holding of shares.

192 In the present case, it is difficult to see how the Petitioner can claim to derive a tangible benefit from the winding up of the Company. It is plain that he will derive no such benefit if the Company is wound up.

Motive of the Petitioner

193 It has long been held that the making of a winding up order on a creditor's petition involves the petitioner exercises a "class right", i.e., he pursues the remedy for himself and for the benefit of all the other creditors of the Company, though it would be an unusual course for the court to refuse to make a winding up order if the petitioner can prove both that the company is indebted to him and cannot pay the amount due to him: see, by way of examples, *Bowes v Directors of Hope Life and Insurance Guarantee Co* (1865) 11 HL Cas 389 per Lord Cranworth at 402; and *Re Chapel House Colliery Co* (1883) 24 Ch D 259, CA. In such a case, he would usually be entitled to a winding up order *ex debito justitae*.

194 It has long also been established that it is an abuse of process to pursue a winding-up petition for a collateral purpose, such as protecting the petitioner's interests in some capacity unrelated to his shareholding: for examples, see *Re Bellador Silk Ltd* [1965] 1 All ER 667; and *Re JE Cade & Son Ltd* [1991] B.C.C. 360.

195 This is exactly what the Petitioner is seeking to do in the present case. He attempted to remove the Respondent as a director, sought twice to unilaterally remove her SMF3 authorisation, prohibited her from having any access to the accounts of the Company, conducted the business of the Company as if he were the sole director and shareholder of it, tried to purchase the Respondent's shares on the basis of her conduct, including instigating an unfair prejudice petition against her and then discontinuing it, set up competing enterprises, used some of the intellectual property of the Company without the Respondent's knowledge or consent, failed to provide disclosure of documents to enable the Respondent to enquire into his conduct of the Company and unjustifiably sought to challenge the Respondent's conduct in the conduct of the business of the Company while he was in control of the Company throughout this period. He is likely to have substantially reduced the value of the Respondent's shareholding in the Company as a result of all of that. Having behaved in this appalling way, he now seeks to wind up the Company, knowing he is likely to be able to take over all of the former clients and customers of the Company without having to pay for them. His motive is to profit from his wrongful actions, even if he claims that those actions are not unlawful.

196 If the Company were wound up in such circumstances, the Petitioner would derive a collateral benefit for his wrongful actions at the expense of the Respondent. It would, in my judgment, be neither just nor equitable to wind the Company up in such a case. Indeed, it would be wholly unconscionable for the court to exercise its jurisdiction in favour of the Petitioner by making a winding up order on the Petition.

CONCLUSION AND MATTERS ARISING

197 The Petition is, therefore, dismissed.

198 Issues relating to costs and any other matter arising from this judgment (including the basis upon which they should paid, i.e., whether they should be awarded on the standard or indemnity basis) may be dealt with when judgment is handed down. I will ask my clerk to list the matter for a short hearing, with an estimated length of 1 hour. I would prefer a face-to-face hearing, though if this proves difficult for either party, I will consider directing the hearing to take place remotely.