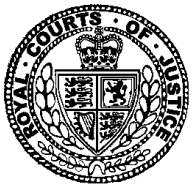

Neutral Citation Number: [2024] EWHC 931 (Ch)

Appeal Reference: CH-2023-000174

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
On appeal from the orders of Chief ICC Judge Briggs dated 21st June 2023 and 20th July 2023 (Case No. CR-2021-001454)

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

23rd April 2024

Before :

MR JUSTICE EDWIN JOHNSON

- -

Between :

PAUL LORIMER-WING

Appellant

and

IDREES HASHMI

Respondent

- -
- -

The Appellant, **Paul Lorimer-Wing**, in person
Steven Reed (instructed by Joseph Sutton Solicitors) for the Respondent

Hearing dates: 14th and 25th March 2024

JUDGMENT

Remote hand-down: This judgment was handed down remotely at 11.00am on Tuesday, 23rd April 2024 by circulation to the parties and their representatives by email and by release to the National Archives.

Mr Justice Edwin Johnson:

Introduction

1. This is my reserved judgment on the hearing of two matters.

2. The first of these matters is an application for permission to appeal against orders made by Chief ICC Judge Briggs (**"the Judge"**) on 21st June 2023 and 20th July 2023, consequential upon a judgment handed down by the Judge on 21st June 2023. I will refer to this application as **"the Permission Application"**.

3. The second of these matters is an appeal against a costs order made by the Judge, in paragraph 9 of the order dated 20th July 2023. Permission for this appeal was granted by Miles J by an order dated 2nd November 2023 (**"the Costs Appeal"**). Miles J refused permission to appeal on the Appellant's other grounds of appeal. In respect of that refusal, the Appellant has exercised his right to renew the application for permission to appeal. This renewed application is what I am referring to as the Permission Application.

4. The Appellant appeared in person at the hearing. The Respondent was represented by Steven Reed, counsel.

5. The Appellant was accompanied at the hearing by his wife, Mrs Tania De Stefano. With my permission, and in the absence of objection from Mr Reed, I permitted Mrs De Stefano to intervene occasionally, in order to make her own points in support of the Appellant's case. Although I was required, for reasons of time, to impose a limit on one of Mrs De Stefano's interventions, it should be recorded that Mrs De Stefano's interventions were generally limited, sensible and helpful. I include in this reference a particularly powerful submission in support of the Costs Appeal made by Mrs De Stefano at the conclusion of the hearing. It should also be recorded that the Appellant showed himself to be an able and articulate advocate in his own submissions.

6. Where I refer generally to the Appellant's submissions in this judgment, I mean those submissions as supplemented by Mrs De Stefano's submissions.

7. References to Paragraphs in this judgment are, unless otherwise indicated, references to the paragraphs of the judgment handed down on 21st June 2023 (**"the Judgment"**). Italics have been added to quotations in this judgment.

The hearing

8. The hearing was originally listed for two hours, as a hearing of the Permission Application and the Costs Appeal, on 14th March 2024.

9. This time estimate turned out to be woefully inadequate. There were three reasons for this. The first reason was that the grounds upon which the Appellant was seeking permission to appeal were thirteen in number, supported by extensive written submissions from the Appellant. The second reason was that the Appellant spent a good deal of time, in oral submissions, going through the grounds of appeal at a level of detail which would have been more suitable for the hearing of a substantive appeal. The third reason was that the Appellant made two late applications, which I was obliged to deal with before I could come to the Permission Application.

10. The first of these late applications was an application made by the Appellant, by application notice issued on 8th March 2024, for an adjournment of the hearing (**"the Adjournment Application"**).

11. The second of these late applications was an application made by the Appellant, by application notice dated 14th March 2024, for permission to amend his grounds of appeal (**"the Amendment Application"**).

12. The net result of all this was that only limited progress was made at the hearing on 14th March 2024. I was able to deal with the Adjournment Application and the Amendment Application, but beyond that I was only able to hear the Appellant's submissions in support of the Permission Application. In these circumstances the hearing had to be adjourned to 25th March 2024, in order to complete the submissions on the Permission Application and in order to hear the Costs Appeal.

13. For the reasons set out in a judgment which I delivered at the hearing on 14th March 2024 I refused the Adjournment Application. I also refused the Amendment Application, for the reasons set out in a separate judgment delivered at that hearing.

14. This leaves the Permission Application and the Costs Appeal, which I deal with in this judgment.

The parties

15. The Appellant, Mr Lorimer-Wing, is a director and shareholder in a company known as Fore Fitness Investments Holdings Limited (**"the Company"**).

16. The Respondent, Idrees Hashmi, is also a shareholder in the Company. The Respondent was also a director of the Company but was the subject of a purported removal as a director in circumstances which the Judge determined in the Judgment to have been unlawful.

The Petition

17. On 10th August 2021 the Respondent presented a petition (**"the Petition"**), pursuant to Section 994 of the Companies Act 2006, alleging unfair prejudice.

18. There were originally three respondents to the petition proceedings. The Second Respondent to the Petition was James Gilbert, a director of the Company. The Petition is no longer pursued against Mr Gilbert, following a settlement between the Respondent and Mr Gilbert. The Third Respondent to the Petition is the Company itself. The First Respondent to the Petition is the Appellant, Mr Lorimer-Wing.

19. As I am concerned with an appeal and an application for permission to appeal in this judgment, I will continue to refer to Mr Lorimer-Wing as the Appellant, and to Mr Hashmi as the Respondent. It should be kept in mind that the Respondent is the Petitioner in respect of the Petition, while the Appellant is the First Respondent to the Petition.

Relevant background

20. I can take the relevant background fairly briefly. I can do so because the background to the Petition is fully set out and explained in the Judgment. For the purposes of this

judgment, it is only necessary to set out a short summary of what has happened in the Petition.

21. The relief sought in the Petition was (i) an order for the buy-out of the Respondent's shares by the Appellant and/or the Company, at fair value, and subject to certain valuation assumptions, (ii) such other order as the court might think fit, and (iii) costs.

22. By an order dated 28th March 2023 ICC Judge Prentis directed that there should be a split trial. ICC Judge Prentis directed that the first part of the split trial should deal only with the following matters:
    (1) whether the Respondent had been unfairly prejudiced and, if so;
    (2) the ways in which the Respondent had been unfairly prejudiced; and
    (3) the nature of the appropriate remedy and, insofar as is necessary and possible, the valuation date.

23. It is convenient to refer to the trial heard by the Judge, that is to say the first part of the split trial, as **"the liability trial"**. I will refer to the second part of the trial, the purpose of which is to determine the price which the Appellant must pay in order to buy out the Respondent's shares in the Company, as **"the quantum trial"**.

24. The liability trial was heard before the Judge, over four days, on 15th – 18th May 2023. Both the Appellant and the Respondent gave oral evidence and were cross examined. The Judge reserved his judgment. The Judgment was handed down on 21st June 2023.

25. For the reasons set out in the Judgment, the Judge concluded that unfair prejudice had been established. The Judge found that unfairness had been established for reasons which he summarised at Paragraphs 141-161. The Judge found that prejudice had been established for the reasons which he summarised in Paragraphs 162-164, which I set out:

> *"162. I can deal with prejudice shortly. Prejudice is made out by Mr Hashmi for at least four reasons. First, Mr Hashmi was removed from the office of director unlawfully. Secondly, he has been prevented from accessing the Company systems since 24 February 2021 (prior to the alleged resolution). Thirdly, he has been excluded from financial information. Lastly, the Consultancy Agreement was terminated without regard to its terms.*
>
> *163. Mr Reed makes the following submissions all of which are made out (see generally paragraph 39 above):*
>
> *i) As CEO Mr Lorimer-Wing has never called a general meeting.*
>
> *ii) In breach of the Investment Agreement Mr Lorimer-Wing has failed to cause the Company to prepare and send to the shareholders monthly management accounts within 20 business days of the end of each month.*
>
> *iii) There has been a general failure to provide management accounts and other financial information when requested.*
>
> *iv) On 5th January 2022 Mr Lorimer-Wing was asked to provide the Company's register of members pursuant to section 116(2) of the Companies Act 2006 and copies of the Company's records of resolutions pursuant to section 358 of the Companies Act 2006. A copy of the register of members and two resolutions were provided over a year later on 24th February 2023.*

> *164. I do not consider any of the purported failings of Mr Hashmi's reduces the effect of the prejudice he suffered. Mr Lorimer-Wing has failed to make good his case that Mr Hashmi wished or had decided to resign as director or otherwise cease to have any involvement in the Company. The prejudice is substantial."*

26. The Judge summarised the outcome of the liability trial in the following terms, at Paragraphs 165 and 166:

> *"165. Mr Hashmi, as member of the Company, succeeds on the Petition that the Company's affairs have been conducted in a manner that is unfairly prejudicial to his interests for the reasons I have given.*
>
> *166. I will hear submissions as to the next stage of this petition at the consequential hearing which is to be fixed."*

27. The Judge made two orders consequential upon the Judgment. By the first of these orders, dated 21st June 2023, the Judge made a declaration that the affairs of the Company had been conducted in a manner unfairly prejudicial to the interests of the Respondent. The Judge also gave directions for a further hearing to deal with matters consequential upon the Judgment.

28. This further hearing (**"the Consequential Hearing"**) took place before the Judge on 20th July 2023. The Judge made a further order, dated 20th July 2023, dealing with the consequential matters. By paragraph 1 of this order the Judge made an order for the Appellant to purchase the Respondent's shares in the Company, in the following terms:

> *"1. The First Respondent shall purchase the Petitioner's shares in the Company at fair value on the basis that: i) there is a willing seller and willing buyer, ii) 100% value of the shares in the Company are to be valued as a going concern taking into account the assets (including goodwill), profitability and future prospects of the Company at a date properly selected and (iii) there is no discount for minority."*

29. In the remainder of the order of 20th July 2023, the Judge gave directions for the quantum trial, refused the Appellant permission to appeal, and ordered the Appellant to pay the costs of the Petition, up to and including the handing down of the Judgment. In relation to these costs the Judge deferred detailed assessment and the question of whether the Appellant should be ordered to make an interim payment on account of these costs until the determination of the value of the Appellant's shares in the Company, either by the court or by agreement. The Judge also ordered that the costs of the Consequential Hearing should be costs in the remainder of the Petition.

30. I will refer to the orders made by the Judge on 21st June 2023 and 20th July 2023 as **"the Orders"**. I will refer to the first of these orders as **"the June 2023 Order"** and to the second of these orders as **"the July 2023 Order"**.

31. The appellant's notice, by which the Appellant seeks to challenge the Orders, as made by the Judge consequential upon the Judgment, was filed on 11th August 2023. As I have explained, Miles J granted permission for the Costs Appeal by his order of 2nd November 2023. By the same order permission to appeal was refused on all the other grounds of appeal.

The Permission Application – general introduction

32. There are two sets of grounds of appeal produced by the Appellant, which are contained in documents dated, respectively, 10th August 2023 and 15th September 2023. In his oral submissions the Appellant relied upon the grounds of appeal set out in the document dated 15th September 2023 as his grounds of appeal. Accordingly, it is these grounds of appeal which I am considering in the Permission Application.

33. These grounds of appeal, which I will refer to as **"the Grounds"**, were the grounds of appeal considered by Miles J, on the paper determination of the Permission Application. The document dated 15th September 2023 contains 14 grounds of appeal, described as *"Appeal issues"*, and numbered from 1-14. I find it convenient to refer to each Appeal issue as a Ground. Ground 1 corresponds to Appeal issue 1 and so on.

34. Miles J refused permission to appeal on Grounds 1-13. Miles J granted permission to appeal on Ground 14, which is the Costs Appeal. The Permission Application is therefore concerned with Grounds 1-13.

35. In his oral submissions at the hearing on 14th March 2024 the Appellant reduced the scope of the Permission Application to five of the Grounds. Using my numbering system, these reduced grounds of appeal corresponded to Grounds 4, 6, 8, 9 and 10. The Appellant said that he had done this because he had assumed that he would only have a limited time to present the Permission Application. At the adjourned hearing the Appellant took advantage of the additional time to re-expand the Permission Application back to the original 13 Grounds, supported by a further lengthy written submission, which arrived on the morning of the adjourned hearing. Mr Reed protested, with what seemed to me to be some justification, at the Appellant's practice of submitting documents at the last minute but, sensibly, did not object to the re-expansion of the Permission Application.

36. In dealing with the Permission Application my general references to the Grounds mean Grounds 1-13. As I have explained, permission to appeal has been granted in relation to Ground 14.

The Permission Application – the test

37. The test to be applied on the Permission Application is contained in CPR 52.6. The question in relation to the Grounds relied upon by the Appellant, taken individually or collectively, is whether there is a real prospect of success or some other compelling reason for the appeal to be heard.

The Permission Application – preliminary points

38. Before considering each of the Grounds, there are four preliminary points to be made in relation to the Permission Application.

39. First, the detail of the Appellant's arguments in support of the Permission Application made it easy to lose sight of the fact that I am only concerned, in the Permission Application, with the question of whether all or any of the Grounds satisfy the test for permission to appeal. It is important to keep this fact in mind, because it necessarily controls the nature of the exercise in which I am engaged.

40. Second, and following from my first point, I have kept my analysis of each Ground as brief as possible. The Appellant's oral submissions in support of the Permission

Application and the Costs Appeal occupied at least a day of court time, of which the vast majority was devoted to the Permission Application. In addition to this I received a quantity of written submissions from the Appellant, in various documents, and further submissions/evidence in the Appellant's witness statements for this hearing. It is very unusual for an appellant to be allowed the benefit of such extensive submissions and such extensive court time for an application for permission to appeal. While I have taken all of these submissions and evidence into account in my decision on the Permission Application, it is neither necessary nor appropriate to go through all of this material in setting out my decision on each Ground.

41. Third, it was apparent from the Appellant's written and oral submissions that the Appellant either did not understand or was failing to respect the distinction between an appeal and a trial. A substantial part of the Appellant's submissions was devoted to trying to re-fight issues, principally in relation to the findings of fact made in the Judgment, which were matters for the Judge. Mr Reed drew my attention to the well-known extract from the judgment of Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, at [114]:

> ***"[114]*** *Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: Biogen Inc v Medeva plc [1977] RPC 1; Piglowska v Piglowski [1999] 3 All ER 632, [1999] 2 FCR 481, [1999] 1 WLR 1360; Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23, [2007] 4 All ER 765, [2007] 1 WLR 1325; Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33, [2013] 3 All ER 929, [2013] 1 WLR 1911and most recently and comprehensively McGraddie v McGraddie [2013] UKSC 58, [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include:*
>
> *i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.*
>
> *ii) The trial is not a dress rehearsal. It is the first and last night of the show.*
>
> *iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.*
>
> *iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*
>
> *v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*
>
> *vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."*

42. The warnings contained in this extract are particularly apposite in relation to the Permission Application.

43. Fourth, it was also apparent from the Appellant's written and oral submissions that little or no consideration had been given to the question of whether the argument raised by each Ground actually went anywhere, in terms of securing the setting aside of the decision of the Judge that there had been unfair prejudice and in terms of securing the setting aside

of the Orders. There is no purpose in granting permission to appeal in respect of a particular argument if that argument, even if successful, is not capable of affecting the decision in relation to which permission to appeal is sought.

The Permission Application – Ground 2

44. I start with Ground 2 because, as became apparent in the submissions, it is Ground 2 which requires the most analysis. The essential complaint is that the Judge failed to consider an offer made to the Respondent, which was said by the Appellant to engage a defence to the Petition based upon the decision of the House of Lords in *O'Neill v Phillips* [1999] 1 WLR 1092. *O'Neill* was concerned with an unfair prejudice petition. In his speech in the House of Lords Lord Hoffmann took some time to explain the basis of the law of unfair prejudice. In particular, Lord Hoffmann explained that the exclusion of a minority shareholder as a director of the relevant company or from substantially all his functions as a director would not be unfair if a reasonable offer is made to buy out the shares. As Lord Hoffmann explained, at 1106H-1107C:

> *"In the present case, Mr. Phillips fought the petition to the end and your Lordships have decided that he was justified in doing so. But I think that parties ought to be encouraged, where at all possible, to avoid the expense of money and spirit inevitably involved in such litigation by making an offer to purchase at an early stage. This was a somewhat unusual case in that Mr. Phillips, despite his revised views about Mr. O'Neill's competence, was willing to go on working with him. This is a position which the majority shareholder is entitled to take, even if only because he may consider it less unattractive than having to raise the capital to buy out the minority. Usually, however, the majority shareholder will want to put an end to the association. In such a case, it will almost always be unfair for the minority shareholder to be excluded without an offer to buy his shares or make some other fair arrangement. The Law Commission Report on Shareholder Remedies, at pp. 30-37, paras. 3.26-56 has recommended that in a private company limited by shares in which substantially all the members are directors, there should be a statutory presumption that the removal of a shareholder as a director, or from substantially all his functions as a director, is unfairly prejudicial conduct. This does not seem to me very different in practice from the present law. But the unfairness does not lie in the exclusion alone but in exclusion without a reasonable offer. If the respondent to a petition has plainly made a reasonable offer, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out. It is therefore very important that participants in such companies should be able to know what counts as a reasonable offer."*

45. The Judge made reference to an offer, at Paragraphs 156-158, in that part of the Judgment where the Judge summarised his reasons for finding that unfairness had occurred:

> *"156. To exclude Mr Hashmi was on the face of it unfair for the same reasons.*
>
> *157. I have used the term "on the face of it" as unfairness does not lie in exclusion alone but in exclusion without a reasonable offer. In closing Mr Lorimer-Wing took me to an offer made to Mr Hashmi for his shares at what he says was "fair value" as assessed by auditors acting for the Company.*
>
> *158. At this stage I do not know if the offer was reasonable. It can be said that it was not made in a timely manner or on 2 March 2021."*

46. The Judge did not identify this offer, but it appeared to be common ground between the parties that the Judge had in mind a letter dated 1st April 2021, which was written to the

Respondent's solicitors by the solicitors who were then acting both for the Company and the Appellant. The letter was written on behalf of the Company. In summary the letter was in the following terms:

(1) The letter made reference to the articles of the Company (**"the Articles"**) and explained what the consequences were, pursuant to the Articles, as a result of the Respondent being removed as a director of the Company.

(2) The letter asserted that, in the events which had happened, a deemed transfer of the Respondent's shares in the Company would take place to a person or entity to be determined by the Company.

(3) The letter asserted that the Respondent was deemed by the Articles to be a Bad Leaver, with the consequence that the consideration for the Respondent's A ordinary shares was the lower of their Fair Value or the Issue Price. The letter went on to identify the figures said to be due to the Respondent for the shares.

(4) The letter required the Respondent to sign the necessary forms for the transfer of the shares, so that the shares could be transferred to the entity or person, to be decided upon by the Company, who would be transferee of the shares.

47. For the sake of completeness, I should also make reference to an earlier email sent by the Appellant to the Respondent on 2nd March 2021, which was in much the same terms as the letter of 1st April 2021.

48. The Respondent's solicitors replied to the letter of 1st April 2021 by letter dated 22nd April 2021. It is easiest simply to quote the relevant part of their letter, in which the Respondent's solicitors responded to the letter of 1st April 2021 and other letters from the solicitors acting for the Company and the Appellant:

> *"2. Our client's position remains that his removal as a director was unlawful and unfairly prejudicial, substantially for the reasons set out in our letter of 8 March 2021 and our brief email exchange on 14 April 2021).*
>
> *3. Until the disputed matters are resolved, please confirm that no attempt will be made to divest our client of his shareholding in the Company. Our client reserves his rights to take such steps as may be necessary to protect his shareholding, including applying to the Court for interim relief"*

49. In relation to the correspondence at this time, my attention was also drawn, in particular, to a letter from the solicitors for the Company and the Appellant dated 5th August 2021. This letter addressed what was said to be the current position in the dispute and noted that no transfer of the Respondent's shares had taken place. In terms of the valuation of the Respondent's shares, the letter made the following proposal:

> *"<u>Share Valuation</u>*
>
> *In order to assist the process of concluding the dispute, our client has decided that the parties should continue to follow the procedure laid down in the Articles of Association, which includes provisions at Article 12 for the valuation of shares in the case of a Transfer Event. Our client considers that, if your client has a true understanding of the value of his shares, it will assist greatly the resolution of the dispute.*
>
> *Our client will therefore forthwith appoint the Company's auditors (Price Bailey) to value your client's A shares under Article 12. It is thought that the cost will be £7,500 plus VAT. The Company will ask Price Bailey to consider whether the parties should share the cost of the valuation. We are instructed that the valuation*

process will take a two or three weeks to conclude. We suggest that no precipitate action be taken before the share valuation has been issued.
Should you have any observations about what is proposed, we request that you make them by return."

50. The valuation referred to in this letter was carried out by Price Bailey, Chartered Accountants. Their valuation of the Respondent's shares is contained in a letter dated 9th September 2021, addressed to the directors of the Company. The valuation is expressed to have been carried out pursuant to Article 12. The advice of Price Bailey was that, given the financial position and circumstances of the Company, no value could be placed on any of the A Ordinary or B Ordinary shares in the Company. Although the valuation does not, so far as I can see, say this in terms, I take this to mean that the valuation advice of Price Bailey was that the Respondent's shares in the Company had no value.

51. Returning to the Judgment, at Paragraphs 159-160, the Judge made reference to the following events at and after the trial:
    "159. When this was brought to my attention Mr Reed invited the court to make findings of fact in respect of the removal and exclusion so that the parties may have an opportunity to discuss how they proceed or seek directions at the hand down of this judgment. Mr Lorimer-Wing did not disagree with the approach.
    160. Following trial both parties e-mailed the court. Mr Lorimer-Wing wanted to know if the issue of fairness remained outstanding and solicitors for Mr Hashmi explained that Mr Lorimer-Wing's late submission does not feature in his defence, that the legal team engaged by Mr Hashmi were not prepared to answer the issue when it was raised in closing and invited the court to ignore the submission."

52. Ultimately, the Judge was not persuaded that the offer affected the position. The Judge summarised the position, at Paragraph 161, in the following terms:
    "161. In my judgment the purported resolution to remove Mr Hashmi, his defacto loss of office and the e-mail dated 2 March 2021 that expressly referred to Mr Hashmi as a "bad leaver" answers the issue raised following trial. It was the intention of Mr Lorimer-Wing to receive the shares owned by Mr Hashmi at a value referrable to the "bad leaver" provisions. That was unfair. If he at a later stage made an offer for Mr Hashmi's shares that was for a "reasonable offer" and Mr Hashmi failed to accept the offer there may well be cost consequences but that does not alter the earlier unfair event."

53. It will be noted that the Judge referred to email communications sent to him after the trial. The first of these was an email from the Appellant, sent on 12th June 2023. By this time the Judge had circulated the Judgment in draft, for corrections. In his email the Appellant said that he had *"a few key questions which may well be better suited for the consequential"*. The Appellant then proceeded, at some length, to set out what he characterised as his understanding of the position. This understanding was, in summary, that the effect of the draft version of the Judgment was that unfair prejudice had not yet been fully proved, that the next stage of the Petition would be to determine whether the offer which had been made was fair, and that unfair prejudice might not be proven if it turned out that the Respondent's shares were worthless or had a value less than the offer.

The offer was not identified in the Appellant's email, but I take the reference to the offer to have been a reference to the letter of 1st April 2021, to which I have referred above.

54. The Judge's response to this email, as communicated by his clerk and sent on 12th June 2023, was in the following terms (bold print not added):

> ***"I am not able to advise Mr Lorimer-Wing but the essence of his understanding is correct both in terms of the decision being final. Time to appeal runs from the date of hand-down. I shall make more clear in my final judgment that although prejudice is made out unfairness is subject to paragraphs 157 and 158."***

55. The Appellant's email to the Judge provoked a lengthy email to the Judge, from the Respondent's solicitors, sent on 16th June 2023. For the reasons set out in the email the Respondent's solicitors contended that unfair prejudice had been established and that there had been no offer for the Respondent's shares capable of engaging the defence of a reasonable offer explained by Lord Hoffmann in *O'Neill*.

56. The response from the Judge to this email, as communicated by his clerk and sent on 16th June 2023, was in the following terms (bold print not added):

> ***"I shall not deal with submission in writing from either party. The hearing of consequential matters is the time to make submissions."***

57. The Appellant argued that the Judge had been both wrong and unfair to deal with the offer in this way. The Appellant's argument was that the Judge should have taken the offer into account. If the Judge had done so, the Appellant argued, the Judge should have concluded that it was a reasonable offer, in the sense identified by Lord Hoffmann in *O'Neill*. The letter of 1st April 2021 had offered a figure in excess of £50,000 for the Respondent's shares in the Company (I calculate the total figure as £50,124.02). The Respondent's shares in the Company had no value, so the Appellant argued, as confirmed by the valuation of Price Bailey, Chartered Accountants, dated 9th September 2021, which was carried out for the Company pursuant to the terms of the Articles. As such, it did not matter whether the Respondent had been classified as a Bad Leaver or a Good Leaver. The sum offered for the Respondent's shares, in the letter of 1st April 2021, was more than the Respondent was entitled to on either basis. As such, so the Appellant argued, the Judge should have found that unfairness was not established or, alternatively, should have concluded that he could not make a finding of unfairness until the reasonableness of the offer had been considered.

58. The Appellant was persuasive and tenacious in his arguments in support of Ground 2. Ultimately however these arguments seem to me to suffer from two fatal difficulties.

59. The first difficulty is that the Appellant's pleaded case for the liability trial did not include any case that a reasonable offer had been made for the Respondent's shares in the Company. There was no pleaded case that there could be no unfairness, even if the Respondent was unlawfully removed as a director of the Company, because a reasonable offer had been made.

60. If this case had been pleaded, both the directions for the liability trial and the trial would have taken a different course. On this hypothesis there would have needed to be expert valuation evidence, either by way of a joint expert or individual experts, in order to allow

the court to determine what would have constituted a reasonable offer for the shares. This did not happen because a case based on a reasonable offer was not pleaded.

61. The Appellant protested that he raised the argument of reasonable offer not just in the closing submissions at the trial, but also in his witness statement and skeleton argument for the trial. I do not see that this changes the position. There was nothing unfair or wrong in the Judge declining to take into account the offer to which he referred in Paragraphs 157 and 158. There was no case pleaded in relation to this offer, no expert evidence by reference to which the reasonableness of this offer could have been judged, and no application by the Appellant to amend his case to include the argument that there was no unfair prejudice by reason of this offer. If such an application had been made, it seems to me that the application would not have succeeded. The Respondent would clearly have been prejudiced by such an amendment being permitted at the liability trial.

62. The second difficulty is that the case on reasonable offer assumes that the letter of 1st April 2021 is capable of constituting a reasonable offer, within the meaning of Lord Hoffmann's speech in *O'Neill*. In the extract from Lord Hoffmann's speech which I have quoted above, Lord Hoffmann noted that it was important that participants in companies where unfair prejudice was alleged should know what counts as a reasonable offer. Lord Hoffmann then proceeded, at 1107D-1108B, to set out five conditions which needed to be satisfied, for an offer to qualify as a reasonable offer. The fifth condition relates to costs, and is not relevant in the present case, where the Petition was presented after the letter of 1st April 2021. The other four conditions are relevant. In my view it is quite clear that the letter of 1st April 2021 satisfied none of these conditions. This is not really surprising. It seems to me clear that the letter of 1st April 2021 was never intended as an offer. It was, as the Appellant stressed in his submissions, part of a process whereby the Appellant was, on his case, adhering to the procedures set out in the Articles. It seems to me therefore that if the Judge had been willing to entertain a defence to the Petition of a reasonable offer having been made for the Respondent's shares, the Judge would have been bound to dismiss that case because the Appellant could not point to anything conforming to the requirements of a reasonable offer. The letter of 1st April 2021 did not satisfy the relevant requirements, and I was not directed to any other communication which could have done duty as such a reasonable offer.

63. It was clear that the Appellant felt a sense of injustice arising out of the way in which the offer (as it was being characterised) was dealt with at the trial. By reference to the Appellant's email to the Judge sent on 12th June 2023 the Appellant believed that the question of whether there had been unfair prejudice was still up for argument, because it was not known whether the offer (as it was being characterised) for the Respondent's shares was a reasonable one. For the reasons which I have explained, this was a misunderstanding of the position. The defence of reasonable offer was not pleaded by the Appellant, and the Judge was in no position to entertain or resolve such a defence. Independent of this, it seems to me that the letter of 1st April 2021 could not have supported a defence of reasonable offer in any event. The Appellant may have believed that it was open to him to run the defence of reasonable offer at the trial, without having pleaded this defence and without any valuation evidence, but this belief was mistaken. In the circumstances the Judge was right, notwithstanding what may have been said at the trial, and notwithstanding the email communication from the Appellant after the trial, to reject the argument that there was an offer to consider which was or might constitute a reasonable offer of the kind referred to in *O'Neill*.

64. I therefore conclude that the arguments put forward by the Appellant in relation to Ground 2 have no real prospect of success. Nor can I see any other compelling reason for an appeal on Ground 2 to be heard.

65. As I have said, Ground 2 calls for the most analysis, with the result that I have dealt with Ground 2 at much greater length than would normally be appropriate for an application for permission to appeal. I can take the remaining grounds much more quickly.

The Permission Application – Ground 1

66. Ground 1 comprises allegations that the Judge misrepresented matters to the Appellant, combined with some generalised criticisms of the Judgment. None of this discloses any viable ground of appeal. The only point which merits specific mention in relation to Ground 1 is the Appellant's allegation that the Judge provided direct confirmation that the final judgment would be subject to a valuation. I take this to be a reference to the Judge's response to the Appellant's email sent on 12th June 2023. It will be seen that this particular allegation is part of the Appellant's case in support of Ground 2. I do not agree that the Judge gave any such confirmation. In his email in reply the Judge did not give any commitment as to what he would do in relation to the question of unfairness. The Judge's conclusion on unfairness is set out in Paragraph 161. For the reasons which I have already explained, I can see no basis for challenging that conclusion.

67. I therefore conclude that the arguments put forward by the Appellant in relation to Ground 1 have no real prospect of success. Nor can I see any other compelling reason for an appeal on Ground 1 to be heard.

The Permission Application – Ground 3

68. Ground 3 relates to legal advice which was referred to in Paragraphs 70-71. The Appellant's complaint is that he was misled, by the Judge and Mr Reed, into disclosing only part of the legal advice given to the Company. The Appellant's case was that he acted reasonably in the removal of the Respondent as a director of the Company, pursuant to Article 14.1(c), because he acted on this legal advice.

69. I can see no case for saying that the Appellant was somehow misled by the Judge or Mr Reed. This was one of a number of examples of the Appellant trying to blame the Judge and/or the Respondent's legal team for the failure of his case at the trial. I note that the Judge, who had the advantage of seeing and hearing the Appellant over the four days of the trial, both in his submissions and as a witness, made a comment to a similar effect at Paragraph 150.

70. The more relevant point is however that I cannot see where Ground 3 goes, even if one assumes that the Appellant has a case for saying that the Judge was somehow responsible for the partial disclosure of the legal advice. In considering whether the Respondent had been validly removed as a director, the Judge had to apply the relevant provisions of the Articles to the relevant facts, as the Judge found those facts. The Judge found, as a fact, that Mr Gilbert had not agreed to the removal of the Respondent as a director of the Company; see Paragraph 137. This finding of fact, which is unassailable on appeal, was the end of the Appellant's case that the Respondent had been removed lawfully as a director of the Company, pursuant to Article 14.1(c). The legal advice received by the Appellant or the Company did not affect this position. The question was whether the

Appellant had acted lawfully in removing the Respondent as a director, not whether the Appellant had acted reasonably.

71. I therefore conclude that the arguments put forward by the Appellant in relation to Ground 3 have no real prospect of success. Nor can I see any other compelling reason for an appeal on Ground 3 to be heard.

The Permission Application – Ground 4

72. Ground 4 accuses the Judge of assisting Mr Reed by highlighting the failure to call a meeting for the removal of the Respondent as a director in compliance with Model Articles 9 and 10. The Appellant complains that Model Articles 9 and 10 were not pleaded and that his defence at trial was prejudiced when the Respondent was permitted to rely on these Articles.

73. I should explain the reference to the Model Articles. On 20th March 2020 the Company adopted new articles of association which modified, but did not replace in their entirety, the Companies (Model Articles) Regulations 2008 (SI 2008/3229). My references to the Articles in this judgment therefore mean these Model Articles as modified. In the submissions on the Permission Application certain Articles were referred to as Model Articles, including Model Articles 9 and 10. I assume that this was because they were part of the original Model Articles of the Company which were retained after 20th March 2020, and were identified as such by the Judge; see Paragraphs 23 and 24. I find it convenient simply to refer to these and other Articles as Articles.

74. The Judge relied upon Articles 9 and 10 as an additional reason why there was no valid resolution for the removal of the Respondent as a director. At Paragraph 131 the Judge reached the following conclusion:

> *"131. Even if Mr Lorimer-Wing is correct there was no valid resolution by the Company's board of directors. No agenda was circulated to the directors and there was a failure to give notice of the Meeting to the directors in accordance with Model Article 9. There was a failure to comply with Model Article 10 to allow each director "to communicate to the others any information or opinions they have on any particular item of the business of the meeting"."*

75. I can see nothing in the pleading point which the Appellant seeks to raise. It was a matter for the Judge to decide whether to take Articles 9 and 10 into account. It is not clear to me whether the Appellant made any objection to the Respondent relying upon Articles 9 and 10 at the trial, but any such objection would have had no merit. The Petition denied, at paragraphs 26 and 27, that the Respondent had been lawfully removed as a director of the Company. In addition to this, in a request for further information, dated 28th February 2022, the Respondent raised the following request:

> *"**Requests***
>
> *44. Does the First Respondent accept that Article 7(1) of the model articles as applied to the Company requires that any decision of the directors must be a majority decision at a meeting and that Article 9 of the model articles as applied to the Company requires that notice of a directors' meeting must be given to each director?"*

76. In his response to this request the Appellant said this:

> *"**Reply:***

Not entitled. This is a matter for submissions and is in any event explained at para. 61.b. of the pleaded Defence."

77. Article 9 was therefore specifically identified as being relied upon in this request. I note that the request did not meet with the objection that the Petition had not pleaded Article 9.

78. As Mr Reed pointed out, the Judge did not need to rely upon Articles 9 and 10 for his conclusion that the Respondent had been unlawfully removed as a director. The conclusion could have rested upon the Judge's finding that Mr Gilbert never agreed to the removal of the Respondent as a director. I can however see no basis for saying that the Judge went wrong in permitting the Respondent also to rely upon the failure to comply with Articles 9 and 10.

79. I therefore conclude that the arguments put forward by the Appellant in relation to Ground 4 have no real prospect of success. Nor can I see any other compelling reason for an appeal on Ground 4 to be heard.

The Permission Application – Ground 5

80. Ground 5 seeks to take issue with the Judge's findings in Paragraph 152:

"152. Lastly, given Mr Lorimer-Wing's admission that he had in mind the bad leaver provision within the Bespoke Articles when attempting to remove Mr Hashmi I conclude that he would knowingly gain an advantage by obtaining the shares owned by Mr Hashmi at nominal value. This is evident from the extraordinary letter he wrote on 2 March 2021 to Mr Hashmi informing him that he had been removed as a director, his bad leaver status and how his shares would be purchased. There is no evidence that Mr Lorimer-Wing disclosed the advantage before or at the Meeting in breach of duty."

81 The Appellant stressed, both in relation to Ground 5 and generally in his submissions, that he had followed the provisions of the Articles in dealing with the Respondent. So far as Ground 5 is concerned however, the findings in Paragraph 152 were findings of fact made by the Judge, who saw and heard the Appellant give his evidence at the trial. There is no basis upon which the Appellant can challenge these findings. Nor is it clear to me how it would assist the Appellant if he was able to challenge these findings. Paragraph 152 only set out part of the reasons why the Judge found that the Appellant had removed and excluded the Respondent from the Company in order *"to gain the advantage of obtaining his shares at nominal value"*; see Paragraphs 144-151.

82. I therefore conclude that the arguments put forward by the Appellant in relation to Ground 5 have no real prospect of success. Nor can I see any other compelling reason for an appeal on Ground 5 to be heard.

The Permission Application – Ground 6

83. Ground 6 contains a generalised attack on the Judge's conclusion that the Respondent did not voluntarily exclude himself from the Company and its business. In oral submissions the Appellant concentrated upon the complaint that he was not able to rely upon a list of 14 meetings which, so the Appellant alleged, had been missed by the Respondent. The Appellant said that the Respondent's solicitors had failed to include the list of 14 meetings in the trial bundle, that his protests in this respect were ignored by the Judge and that, in

closing, he was wrongly restricted to a position where he could only rely on two of these meetings; see paragraphs 70-111 of the witness statement of Appellant, dated 13th March 2024, in support of the Permission Application.

84. The Appellant's witness statement for the trial only mentioned two of these meetings specifically, although the Appellant stressed to me that he had made it clear that these two meetings were referred to as examples only of missed meetings. I was told by Mr Reed that there was no cross examination of the Respondent in relation to these missed meetings. The Appellant also stressed that his pleaded case had made reference to all 14 meetings alleged to have been missed. In this context, my attention was drawn by Mr Reed to the request for further information dated 28th February 2022. One of the requests which was made was for details of the meetings alleged to have been missed by the Respondent. The request and the Appellant's response were in the following terms:

> *"**Requests***
>
> *34. Please identify with as much particularity as will be relied upon at trial the meetings it is alleged that the Petitioner missed.*
>
> ***Reply:***
>
> *This is not a necessary or proportionate request for information required to understand the pleaded Defence. To the extent relevant, this is a matter for evidence."*

85. Ultimately, I do not think that it matters whether the Appellant was or was not wrongly deprived of the ability to rely on all of the alleged missed meetings. The problem for the Appellant in this respect is that the Judge devoted a substantial section of the Judgment to considering the question of whether the Respondent voluntarily withdrew from the Company; see paragraphs 78-116 of the Judgment. The Judge reviewed the evidence in detail, and with great care, and concluded that there had been no such voluntary withdrawal. Even if one assumes that the particular complaint raised by the Appellant is well-founded, I see no prospect of success for the argument that the Judge went wrong in his conclusion that the Respondent voluntarily withdrew from the Company.

86. For this reason, I cannot see that investigation of the entire list of missed meetings was material to the Judge's ultimate conclusion that the case was not one of voluntary exclusion. The Judge reached this conclusion on the basis of his findings in relation to all of the evidence. I cannot see that this conclusion would be undermined if the Judge was wrong not to consider the alleged missed meetings in their entirety. I agree with Mr Reed that the appeal court cannot interfere with the Judge's finding of no voluntary withdrawal.

87. I should also point out that what I have said above assumes that the Judge was wrong to take the line which he apparently took in relation to what the Appellant says was the full list of missed meetings. If, which is less than clear to me given that I was not present at the trial, the full list of alleged missed meetings was excluded by the Judge, it seems to me that the Judge was quite entitled to take this course. The Appellant had declined to give particulars of these meetings, when asked to do so. In these circumstances, I cannot see that the Judge was wrong, in the exercise of his discretion in managing the trial, to restrict the Appellant to the two meetings expressly referred to in his witness statement. Beyond this, if Mr Reed was right in telling me that there was no cross examination of the Respondent on these meetings, I have difficulty in seeing how the Judge could attach any weight to the allegation that any of these meetings were missed by the Respondent.

88. I therefore conclude that the arguments put forward by the Appellant in relation to Ground 6 have no real prospect of success. Nor can I see any other compelling reason for an appeal on Ground 6 to be heard.

The Permission Application – Ground 7

89. Ground 7 relates to notes which Mr Gilbert was using when giving his evidence at the trial. When the Judge noticed this, he put a stop to it. There was no procedural irregularity here. The Judge saw and heard Mr Gilbert give his evidence. I am entitled to assume that the Judge, in weighing the evidence of Mr Gilbert, considered all the relevant circumstances including, so far as the Judge considered this relevant, Mr Gilbert's use of notes. There is no basis for challenging the Judge's assessment of the evidence of Mr Gilbert. It follows that Ground 7 has no real prospect of success. Nor can I see any other compelling reason for an appeal on Ground 7 to be heard.

The Permission Application – Grounds 8, 11 and 12

90. I take these Grounds together because they all engage arguments that the Judge was wrong to find that the Respondent was deprived of information.

91. The Judge made findings, at Paragraphs 162 and 163(iii), that the Respondent had been excluded from financial information and that there had been a general failure to provide management accounts and other financial information to the Respondent. These were findings made on the basis of all the evidence heard by the Judge. I can see no basis on which they can be challenged.

92. The oral submissions of the parties in relation to these Grounds concentrated upon the question of whether the Respondent had any right to any of this information, either pursuant to the Articles or the investment agreement between the Company and its shareholders (**"the Investment Agreement"**). On the basis of these submissions I incline to the view that the question of whether there was a legal entitlement to the relevant information is one which raises matters which are arguable or, perhaps, more accurately, would benefit from further and more detailed argument. It seems to me however that this overlooks two key overriding points.

93. First, and as I have already noted, the Judge's findings at Paragraphs 162 and 163(iii) were findings of failure to provide information. Those findings do not seem to me have depended upon a finding that the failures also constituted a breach of a legal obligation to provide the information. These findings seem to me to stand independently of the finding, in Paragraph 163(ii), that there was a failure to provide management accounts, in breach of the investment agreement. Even if it considered that there is an arguable ground for challenging Paragraph 163(ii), I cannot see that this assists the Appellant in identifying a viable ground for challenging the findings in Paragraphs 162 and 163(iii).

94. Second, I accept the general point made by Mr Reed in his submissions in response to the Permission Application. This general point was that once the Judge had reached his conclusion, in the third sentence of Paragraph 162, that the Respondent had been unlawfully removed from the office of director, the Judge could have stopped there. This conclusion was sufficient to establish the case of unfair prejudice. The remaining conclusions and findings in Paragraphs 162 and 163 were not essential to establish the case of unfair prejudice. It seems to me that this is correct. As such, it seems to me that

Grounds 8, 11 and 12 cannot support an appeal, regardless of whether the Judge was right to find that there was a failure to provide information. It will be appreciated that, although I have not spelt this out in my discussion of Grounds 1-7, this same point, namely that the Judge could have stopped at the third sentence of Paragraph 162, very much applies to these Grounds, and to the Grounds which remain to be considered.

95. I therefore conclude that the arguments put forward by the Appellant, in relation to Grounds 8, 11 and 12, have no real prospect of success, either individually or collectively. Nor can I see any other compelling reason for an appeal on Grounds 8, 11 and 12 to be heard.

The Permission Application – Ground 9

96. The argument in Ground 9 is that the Judge was wrong to find that the consultancy agreement between the Company and the Respondent was terminated *"without regard to its terms";* see the final sentence of Paragraph 162. The Appellant showed me an email which he sent to the Respondent on 28th March 2021 which, so he submitted, gave the required 30 days notice to terminate the consultancy agreement. Mr Reed's answer to this point was that the Appellant had already brought the consultancy agreement to an end by his email of 2nd March 2021 which asserted, wrongfully, that the consultancy agreement had been terminated by mutual consent with effect from 31st December 2020. This, so Mr Reed submitted, was a wrongful repudiation of the consultancy agreement, which had the effect of terminating the consultancy agreement unlawfully.

97. I can see that there may be scope for argument about how the consultancy agreement was terminated, and whether that termination was unlawful. I cannot see however that this assists the Appellant, for two reasons. First, the Judge stated that the consultancy agreement was terminated without regard to its terms. So far as the email of 2nd March 2021 was concerned, it seems to me that this statement was essentially correct. In the email of 2nd March 2021 the Appellant treated the consultancy agreement as having come to an end in circumstances where there appears to have been no basis for doing so. This could be described as terminating the consultancy agreement without regard to its terms, or at least attempting to do so. What may be said to have been missing from the Judge's statement was consideration of the question of whether the Appellant retrieved the position by the notice of termination which he purported to give in the email of 28th March 2021. If however the position was so retrieved, I do not see how that materially assists the Appellant in challenging what the Judge did say in the last sentence of Paragraph 162. Second, if one assumes that the Judge was wrong in what he said in the final sentence of Paragraph 162, I cannot see where this goes. If one notionally removes the last sentence of Paragraph 162 from the Judgment, it seems to me that there is still ample to support the Judge's finding of prejudice.

98. I therefore conclude that the arguments put forward by the Appellant in relation to Ground 9 have no real prospect of success. Nor can I see any other compelling reason for an appeal on Ground 9 to be heard.

The Permission Application – Ground 10

99. The argument in Ground 10 is that the Judge was wrong to attach weight, at Paragraph 163(i), to the fact that the Appellant never called a general meeting of the Company.

100. It is not clear to me why the Judge considered this point to be material. As the Appellant pointed out, at Paragraph 139 the Judge specifically rejected the Respondent's submission that the Investment Agreement provided that only a general meeting of the Company could remove the Respondent as a director. This appears to undermine the Judge's finding in Paragraph 163(i). If the Appellant was not obliged to call a general meeting of the Company, it is not easy to see why the absence of a general meeting, taken by itself, constituted prejudice.

101. As with Ground 9 however, I cannot see anything material in Ground 10. If one notionally removes Paragraph 163(i) from the Judgment, there was still ample to support the Judge's finding of prejudice. I therefore conclude that the arguments put forward by the Appellant in relation to Ground 10 have no real prospect of success. Nor can I see any other compelling reason for an appeal on Ground 10 to be heard.

The Permission Application – Ground 13

102. Ground 13 returns to the Appellant's case that the Respondent's shares in the Company had no value, and that this was confirmed by the Price Bailey valuation of 9th September 2021. There are, essentially, four complaints in Ground 13. The first is that the Respondent was given the opportunity to engage with the valuation of the Respondent's shares, pursuant to the Articles, but failed to take up that opportunity and instead presented the Petition. The second complaint is that the Petition has been case managed in such a way that the Appellant's case that he made a reasonable offer for the Respondent's shares has not been properly heard. The third complaint is that the Appellant is facing difficulties in preparing for the quantum trial. The fourth complaint is that the Respondent has not pursued the Petition in good faith and that the Petition should be struck out as an abuse of process.

103. None of these complaints disclose any viable ground of appeal. The Judge has, in the Judgment, determined that there was unfair prejudice. So far as the liability trial is concerned therefore, the Respondent has established his case. So far as the quantum trial is concerned, it remains to be seen at what *"fair value"* the Appellant will be required to buy the Respondent's shares in the Company. The determination of that fair value is for the quantum trial. As matters stand it cannot be said that the Respondent was not justified in presenting the Petition. So far as the split trial is concerned, this was directed by ICC Judge Prentis, by his order of 28th March 2023. There has been no appeal against this order, and it cannot be challenged now. In particular, in the absence of a pleaded case that there was no unfair prejudice because a reasonable offer was made for the Respondent's shares, there can be no criticism of the fact that the direction for a split trial did not include any direction for expert valuation evidence at the liability trial. In the absence of such a pleaded case there was no reason for anyone to think that valuation evidence would be required, in order to determine whether the valuation of the Respondent's shares in the letter of 1st April 2021 was a reasonable one and/or to determine whether the Price Bailey valuation was correct.

104. So far as the directions for the quantum trial are concerned, they are not the subject of any separate challenge by the Appellant. If the Appellant is having difficulty in complying with those directions, that is a separate matter to the Permission Application. Finally, and so far as it is asserted that the Petition is an abuse of process, this is also a separate matter to the Permission Application. The Appellant has not applied to have the

Petition struck out as an abuse of process, and there is no decision in this respect which could be the subject of an application for permission to appeal.

105. In summary, Ground 13 is essentially misconceived. The arguments put forward by the Appellant in relation to Ground 13 have no real prospect of success. Nor can I see any other compelling reason for an appeal on Ground 13 to be heard.

The Permission Application - conclusion

106. In conclusion on the Permission Application, I see no real, or indeed any prospect of success for any of the Grounds. Nor can I see any other compelling reason for an appeal to be heard on any of the Grounds. These conclusions hold good whether one considers the Grounds collectively or individually. It follows that the Permission Application must be refused.

The Costs Appeal

107. The starting point is the costs order made by the Judge. Paragraphs 9 and 10 of the July 2023 Order provided as follows:

> *"9. The First Respondent shall pay the Petitioner's costs of the proceedings up to and including the handing down of judgment on liability. Such costs shall be the subject of detailed assessment, if not agreed. However, the detailed assessment may not be commenced until the determination of the value of the Petitioner's shares either by the Court or by agreement between the parties.*
>
> *10. Consideration of whether to order the First Respondent to pay a reasonable sum on account of the costs ordered at paragraph 9 above, as required by CPR rule 44.2(8), is adjourned until the determination of the value of the Petitioner's shares either by the Court or by agreement between the parties."*

108. The Appellant was therefore ordered to pay the Respondent's costs of the Petition, up to and including the handing down of the Judgment. As I have noted earlier in this judgment, the Judge deferred detailed assessment of these costs (**"the Costs"**) and also deferred the question of whether the Appellant should make an interim payment on account of the Costs. The Judge also ordered that the costs of the Consequential Hearing itself should be costs in the remainder of the Petition.

109. Ground 14 contains the Appellant's arguments in support of the Costs Appeal. The essential argument of the Appellant in support of the Costs Appeal is that the Judge failed to take account of an offer to buy the Respondent's shares in the Company. In his oral submissions, the Appellant confirmed that he was relying upon the letter from the Company's solicitors, dated 1st April 2021, as supplemented by the letter dated 5th August 2021, written by the solicitors on the Appellant's behalf. I have explained the terms of each of these letters in my analysis of Ground 2, earlier in this judgment. In dealing with the Costs Appeal I will refer to the letter of 1st April 2021 as **"the April Letter"**.

110. For ease of reference, I set out again Paragraphs 157 and 158 of the Judgment, where the Judge made reference to what he characterised as *"the offer"*. As I have said, I understood it to be common ground between the parties that the Judge was referring to the April Letter:

> *"157. I have used the term "on the face of it" as unfairness does not lie in exclusion alone but in exclusion without a reasonable offer. In closing Mr Lorimer-*

Wing took me to an offer made to Mr Hashmi for his shares at what he says was "fair value" as assessed by auditors acting for the Company.

158. At this stage I do not know if the offer was reasonable. It can be said that it was not made in a timely manner or on 2 March 2021."

111. The Judge then returned to this offer, as he characterised it, at Paragraph 161. For ease of reference, I also repeat my earlier quotation of this Paragraph:

> *"161. In my judgment the purported resolution to remove Mr Hashmi, his defacto loss of office and the e-mail dated 2 March 2021 that expressly referred to Mr Hashmi as a "bad leaver" answers the issue raised following trial. It was the intention of Mr Lorimer-Wing to receive the shares owned by Mr Hashmi at a value referrable to the "bad leaver" provisions. That was unfair. If he at a later stage made an offer for Mr Hashmi's shares that was for a "reasonable offer" and Mr Hashmi failed to accept the offer there may well be cost consequences but that does not alter the earlier unfair event."*

112. The Appellant submitted that the April Letter constituted a more than fair figure for the Respondent's shares, in circumstances where Price Bailey subsequently advised that the shares had no value. Valuation of the shares was also a matter to be determined by the Articles, which the Appellant was following. In these circumstances there was no justification for the Respondent presenting the Petition so hastily, and without engaging with the process of valuing the shares. If the Respondent had engaged with the valuation process, the Petition could have been avoided.

113. The ultimate position of the Appellant on the Costs Appeal, as set out in his oral submissions, was that the Judge should have reserved the Costs to the determination of the quantum hearing, at which point there would be a decision of the court on the value of the Respondent's shares, and it would be apparent whether the Petition had been worth pursuing. The Appellant's essential point was that if the value of the Respondent's shares turned out to be nil, or a sum less than the £50,000 odd referred to in the April Letter, then the Petition would not have been worth pursuing. The expense of proceedings could have been avoided if the Respondent had accepted the figure in the April Letter, or co-operated with the valuation process which the Appellant sought to initiate prior to the presentation of the Petition.

114. Where I refer to the reservation of the Costs in this judgment, I should make it clear that this means the costs of both parties to the date of the handing down of the Judgment. If the Judge had reserved these costs, they would have been the costs of both parties, with a decision on the question of who should pay whose costs deferred to the quantum trial.

115. In granting permission to appeal in relation to the Costs Appeal, Miles J gave the following reasons:

> *"16. Ground 14 concerns costs and the impact of the offer to buy-out Mr Hashmi. Mr Lorimer-Wing argues that if Mr Hashmi fails to do better than the offer that should be relevant at least to costs. The judge ordered that Mr Lorimer-Wing should pay the full costs of the trial on liability. This is arguably inconsistent with para 161 of the Main Judgment where the judge said "If [Mr Lorimer-Wing] at a later stage made an offer for Mr Hashmi's shares that was … a "reasonable offer" and Mr Hashmi failed to accept the offer there may well be costs consequences but that does not alter the earlier unfair*

event." It is realistically arguable that in the light of this part of the judgment the judge should have reserved the costs of the first trial to the second one."

116. I do not have a transcript of the Consequential Hearing, so that I have no record of the oral submissions made in respect of costs at the Consequential Hearing. I also do not have a transcript of the judgment given by the Judge on the question of costs at the Consequential Hearing. I was told by Mr Reed that there was no recording of the Consequential Hearing. This was later clarified by the Respondent's solicitors to mean that there was a recording of the Consequential Hearing, but that the quality of the recording was so poor that the transcribers (Opus 2) advised that this was a rare occasion where the recording was deemed to be incapable of transcription. In referring to this clarification I should make it clear, for the avoidance of any doubt, that I am not suggesting that I was in any way misled by what I was told by Mr Reed at the hearing. The net result of all this is that there is no transcript available, either of the Consequential Hearing or of the judgment given by the Judge on costs.

117. At the hearing of the Costs Appeal I was not invited by either party to consider any note of the Consequential Hearing, agreed or otherwise. In addition to this, it was not suggested by either party that these matters constituted an impediment to my dealing with the Costs Appeal. Neither party suggested that I could not deal with the Costs Appeal, in the absence of knowledge of the actual reasons for the Judge's decision in relation to the Costs. Both parties proceeded with the Costs Appeal, at the hearing, on the basis that I could decide the Costs Appeal without actual knowledge of the Judge's reasoning.

118. Following the hearing, and after reflecting on the matter, I concluded that I should see any note which either party had of the judgment on costs delivered by the Judge at the Consequential Hearing. I therefore requested the parties to provide me with any such note that they had. Both parties responded to this request with notes, neither of which was agreed by the other party. The provision of these notes did confirm what I had assumed to be the case at the hearing; namely that the Judge did deliver a judgment on the question of costs at the Consequential Hearing, the outcome of which was the order that the Appellant should pay the Costs to the Respondent. I will refer to this judgment as **"the Costs Judgment"**.

119. The note provided by the Appellant, which was dated 11th April 2024, was not a contemporaneous note of the Costs Judgment. The note was described as constituting the Appellant's recollection of *"the gist of what was said by Chief ICC Judge Briggs at the consequential hearing"*. I assume from this that the Appellant has no note of his own of the Costs Judgment or the Consequential Hearing, but was reconstructing, from his memory, what the Judge said at the Consequential Hearing. It was also apparent from the note that the Appellant was setting out his recollection, in very summarised form, of what he submitted to the Judge on the question of costs and what the Judge said. Given the lapse of time since the Consequential Hearing, and given the brevity of the Appellant's note, I do not consider that the Appellant's note can be considered a reliable record of the Costs Judgment.

120. The note of the Costs Judgment provided by the Respondent's solicitors was described as an amalgamation of the notes taken contemporaneously by the Respondent's counsel and the Respondent's solicitor at the Consequential Hearing. As this note has been produced from notes which were taken at the Consequential Hearing, I treat this note as

a more reliable record of the Costs Judgment, albeit one which is, necessarily, not a verbatim transcript of the Costs Judgment.

121. What I have also been provided with, pursuant to a request which I made at the hearing itself, are the written submissions of the parties for the Consequential Hearing.

122. Mr Reed submitted a skeleton argument for the Consequential Hearing, in which he contended that the court could and should make an award of costs there and then, notwithstanding the split trial. Mr Reed's submission was that the Respondent had won on every point in the liability trial, and that this victory should be reflected in a costs order in favour of the Respondent. Mr Reed also made express reference to what he referred to as *"the purported offer"*, but advanced arguments as to why this offer should not affect the position in relation to costs. In terms of what fell to be taken into account, in relation to *"the purported offer"*, Mr Reed made reference to the email of 2nd March 2021, the April Letter and the Price Bailey valuation. In support of his argument on costs, Mr Reed relied upon the decision of Nicholas Thompsell (sitting as a Deputy Judge of the High Court) in *Langer v McKeown* [2021] EWHC 451 (Ch), as upheld by the Court of Appeal ([2022] 1 WLR 1255 [2021] EWCA Civ 1792).

123. For his part the Appellant submitted two sets of written submissions for the Consequential Hearing. The first of these submissions dealt with the Appellant's application for permission to appeal. The grounds of appeal identified in these submissions included reference to the April Letter, albeit not specifically in the context of costs. The submissions concluded with the point that if the value of the Respondent's shares was determined to be nil, there would have been no unfair prejudice. The second set of submissions took up in more detail the argument that a reasonable offer had been made for the Respondent's shares. It is not entirely clear to me what the primary purpose was of this second set of submissions, in terms of what the Judge had to decide at the Consequential Hearing. The submissions did however address the question of costs in clear terms. The submissions concluded with an argument that the costs of the liability trial should be stayed until the establishment of the value of the Company. This argument was based on the April Letter. The argument was put in the following terms, at paragraphs 19-23 of these submissions:

> *"19. In the Final Judgement it is stated that "there may well be cost consequences" if Mr Hashmi failed to accept a "reasonable offer".*
>
> *20. Given that the offer was made on 1 April 2021, pre-action, that a further offer made to participate in a valuation exercise, again pre-action on 5 August 2021, that any costs of the liability trial be stayed until the establishment of the valuation of the Company.*
>
> *21. It would be unfair, unreasonable and unconscionable to make one party incur substantial costs where it was all avoidable had the "reasonable offer" being accepted by the Petitioner.*
>
> *22. The court should not be used to simply prove a point without regard for the court's time and disproportionate quantum of resources involved.*
>
> *23. As stated above I would like to rely on the Price Bailey valuation report and Fair Value Certificate but have no objection to any firm Mr Hashmi selects for the Valuation Trial, provided it is a top 30 firm by revenue. The costs however must be borne by Mr Hashmi who is the party that distrust the findings of Price Bailey."*

124. This second set of submissions, filed by the Appellant for the Consequential Hearing, concluded in the following terms, at paragraphs 26 and 27:

> *"26. Mr Hashmi has always known the true value of the Company because he is an intelligent man. He voluntarily left the Company as he could see the writing on the wall, but it would appear that he took offence at his removal by Mr Gilbert and myself. Given that he comes from a family of extreme wealth, he has wanted to and has so far succeeded in showing his financial power in hurting me and my young family, knowing full well that I have very little.*
>
> *27. I urge the court to see through this whole charade, to wait until we have the additional expert valuation (in addition to the Price Bailey report), and only then, to determine the consequences of what should, if justice is served, be at best, a pyrrhic victory for Mr Hashmi."*

125. It is clear from the written submissions filed for the Consequential Hearing that both parties advanced arguments on costs which made reference to the April Letter. On the Appellant's side the argument was put to the Judge that a reasonable offer had been made, and that the costs of the liability trial should await the outcome of the quantum trial. This is in fact confirmed by the Appellant's note of his recollection of the Consequential Hearing, which does record that the Appellant put the argument to the Judge that an offer had been made for the Respondent's shares in circumstances where Price Bailey had valued at the shares as having no value. On the Respondent's side the argument was put to the Judge, on various grounds, that the April Letter and associated documents should not affect the fact that the Respondent had won on all points at the liability trial, and that the costs order should reflect that victory. Accordingly, I infer that the Judge had well in mind, in making his decision on costs, what he had said at Paragraph 161. I also infer that the Judge had well in mind the arguments over the effect on costs or otherwise of the email of 2nd March 2021, the April letter, the letter of 5th August 2021 and the Price Bailey valuation.

126. All this is confirmed by the note of the Costs Judgment produced by the Respondent's solicitors. The note shows that the reasoning of the Judge in relation to the Costs was, essentially, as follows:
    (1) The Judge made brief reference to the terms and outcome of the Judgment.
    (2) The Judge then directed himself by reference to CPR 44.2, which provides as follows:
        > *"(2) If the court decides to make an order about costs—*
        > *(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but*
        > *(b) the court may make a different order."*
    (3) The Judge then considered the question of who was the successful party, and considered *Langer v McKeown*.
    (4) The Judge then stated that CPR 44.2 was intended to do justice and that, at that stage, it was not possible to say whether an offer would be beaten.
    (5) The Judge then went on to reason as follows, using the note provided by the Respondent's solicitors:
        > *"Seems to me that unfair because the Petitioner has been put to cost in making claim. I accept Langer that regardless of offer costs of the trial should go to the successful party. But not persuaded costs should be paid immediately - that*

would be an error. It would create disproportionate unfairness to PLW because at least arguable that offer made.
PLW shall pay the Petitioner's costs of proceedings but not payable until after determination of split trial."

(1) The Appellant is recorded as then having queried how this decision on costs could sit with Paragraph 161. The Judge's response to this query is recorded to have been that the Appellant was being ordered to pay the costs to date. The Respondent might have to pay the costs of the quantum trial. I take this to mean that the Judge accepted that the existence of an offer for the Respondent's shares might affect the costs of the quantum trial, but was not persuaded that the same reasoning should apply to the liability trial.

127. I now turn to my decision on the Costs Appeal.

128. There was clearly an argument to be made, in relation to the Costs, that the question of who should pay those costs should abide the outcome of the quantum trial. The Appellant's case was, and indeed remains, that the Respondent's shares in the Company had and have no value. In addition to this it is the case that a sum of around £50,000 was effectively being offered for the Respondent's shares by the April Letter. While I have already concluded that the April Letter was not capable of constituting a reasonable offer, within the terms of *O'Neill*, this did not necessarily mean that the April Letter could not have an effect on costs, if the Appellant was ultimately required to buy the Respondent's shareholding for a figure less than that referred to in the April Letter. In these circumstances there was clearly an argument to be made that the question of who should pay the Costs, that is to say the costs of the Petition up to and including the liability trial, should await the determination of the quantum trial, at which point it would be possible to compare the price at which the Appellant would be required to buy the Respondent's shares with what the Respondent could or might have achieved, if he had accepted the proposal in the April Letter.

129. I stress, for the avoidance of doubt, that I am not making any decision of my own on the merits of the argument set out in my previous paragraph. I am simply recording that, in my view, there was an argument to this effect which was available to be put to the Judge at the Consequential Hearing and, it is clear, was put to the Judge at the Consequential Hearing. Indeed, the Judge had himself foreshadowed an argument of this kind, at Paragraph 161. In granting permission to appeal Miles J considered it realistically arguable that the Judge should have reserved the Costs to the quantum trial. I respectfully agree that there was a realistic argument to this effect, which was put to the Judge at the Consequential Hearing.

130. The difficulty which confronts the Costs Appeal is however that the Judge had a discretion as to what order he should make in relation to the Costs. I can only interfere with the decision of the Judge in relation to the Costs if the Judge went wrong in law or in the exercise of his discretion. In relation to the exercise by the Judge of his discretion as to costs it is not sufficient that I might happen to disagree with the Judge's decision. It must be demonstrated that the Judge went wrong in such a way that his decision fell outside the broad margin of his discretion. It has to be demonstrated that the Judge went wrong in law, or left out of account something which he should have taken into account (in such a way as to vitiate the exercise of his discretion), or took into account something which he should have left out of account (in such a way as to vitiate the exercise of his

discretion), or simply arrived at a decision as to the Costs which no reasonable judge, properly directing themselves, could have made.

131. In the present case there is no evidence that anything of this kind occurred. To the contrary, there was support in authority for the Judge's decision that the Appellant should pay the Costs. Mr Reed drew my attention to *Langer v McKeown*, which he also relied upon before the Judge. This case was also concerned with an unfair prejudice petition, in respect of which a split trial had been ordered. The directions for the split trial provided that the purpose of the first stage of the trial was to determine whether the respondent had engaged in unfairly prejudicial conduct and, if so, the basis of the relief to be granted. At the first stage of the split trial the judge decided that there had been unfairly prejudicial conduct and that the principal relief to be granted was an order for the respondent to buy out the petitioner's shares in the relevant company, on the basis of a valuation to be determined in accordance with the principles set out in the judgment given by the judge on the first stage of the split trial. The reported judgment in *Langer* at first instance, to which I have been referred, was a judgment dealing with matters consequential upon the first stage trial; specifically the directions to be given for the second stage trial and costs.

132. The petitioner sought an order that all her costs of the petition up to and including the first stage trial should be paid by the respondent. This required the judge to consider whether he should make an order at that stage of the petition, when it remained to be seen what the valuation of the shares would be. The judge commenced by making the point that the petitioner had been the successful party at the first stage and that, absent any other considerations, he would have had no hesitation in awarding costs at that stage to the petitioner, notwithstanding the split trial and the fact that valuation was still to come. As the judge explained, at [12]:

> *"12. In the December Judgment I found, in relation to the matters determined in that judgment, fairly comprehensively in favour of the Petitioner and there can be no doubt that the Petitioner is the successful party at this stage. Absent any other considerations, I would have no hesitation in awarding costs at this stage to the Petitioner, notwithstanding the split stage trial and that we have another part of this to come, relating to valuation. This reflects the modern emphasis of the CPR rules on using costs to encourage parties not to take unmeritorious points by being ready to award costs according to who has won at different stages in the action, rather than taking a "winner-take-all" approach at the end of the action. The desirability of this approach was summed up by Lord Woolf, Master of the Rolls, in Phonographic Performance Ltd v AEI Redifussion Music Ltd [1999] 1WLR 1507 (Phonographic) when he said:*
>
> > *"It is now clear that a too robust application of the 'follow the event principle' encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so."*

133. After reviewing certain authorities, the judge came to what he described as the one other consideration which could be important; namely whether there had been any offer to settle. It was argued for the respondent that there was such an offer to purchase the petitioner's shares, which had been made in open correspondence and repeated in the respondent's points of defence to the petition. It was also argued for the respondent that

once the shares had been valued in the second stage trial, they might turn out to be worthless, or less than the sum offered for the shares. The judge, after hearing the arguments on this question, came to the conclusion that the existence of this offer should not affect what would normally be the position in a split trial, which was that if the petitioner won at the first stage the petitioner should get her costs of the first stage; see the judgment at [18]-[23].

134. It is right to point out that there were reasons in *Langer*, as recorded in the judgment, for the judge to think that the offer which had been made for the shares would turn out to have been insufficient. The judge considered it highly unlikely that the petitioner's ultimate recovery at the second stage would leave her in a lesser position than she would have been in if she had accepted the offer; see the judgment at [24]. This is a point of distinction with the present case, where the only valuation which I have seen, and I assume the Judge saw, is the Price Bailey valuation, which advised that the Respondent's shares had no value. Nevertheless, the judge in *Langer*, in common with the Judge in the present case, did not know what valuation of the shares would emerge from the second stage of the split trial. The judge summarised the position, where an open offer has been made, in the following terms at [32] and the first part of [33] (underlining also added):

> *"32. If this Respondent, or indeed any litigant, wishes to protect himself in costs they are free to do so by making an offer under Part 36. There are also other possibilities in an action of this type (an unfair prejudice action) to make an O'Neill offer. Had the Respondent wanted to protect himself in costs at this stage, knowing that this was going to be a split trial, he could have protected himself by one of those routes, so I do not accept the principle that because Part 36 offers are considered to be a good idea, that costs principles applicable to those offers should be read across to other more informal types of offers.*
>
> *33. Where an offer of this type is made, unlike a Part 36 offer which has set costs consequences, the existence of an admissible offer is one that need to be taken account of in the judge's discretion. <u>The judge may look at the offer and may decide that despite the offer being there it will not affect his decision to award costs at all or at this stage</u>."*

135. The case then went to appeal, although the point on the appeal related to a Calderbank offer which the judge had declined to take into account on the basis that it had not been shown to him. The respondent argued that the existence of this offer had the effect that costs should not have been dealt with until the conclusion of all stages of the litigation. The Court of Appeal dismissed the appeal, essentially on the basis that the judge had been acting within the broad scope of his discretion in deciding to make an award of costs the first stage of the split trial and in deciding not to take the Calderbank offer into account. The issue before the Court of Appeal was not therefore quite the same as the issue in the present case. The Court of Appeal were considering the respondent's argument that the judge should have treated the Calderbank offer as the equivalent of a Part 36 offer and, on that basis, should have deferred a ruling on costs until the second stage of the split trial.

136. For present purposes, the significance of the decision of the Court of Appeal in *Langer* lies in what was said about the consideration of admissible offers to settle following the first stage of a split trial. The judgment in the Court of Appeal was given by Green LJ, with whom Nugee and Lewison LJJ agreed. As Green LJ explained, at [31]-[35] in his

judgment, the judge was not dealing with a Part 36 offer, but with a Calderbank offer. As such, the judge had been exercising his discretion as to costs contained in CPR 44.2. In the exercise of that discretion an admissible offer to settle was a relevant matter which the court was required to take into consideration, but the court was not compelled to give effect to an admissible offer to settle. The weight, if any, to be given to such an offer was a matter for the court. The prescribed consequences of a Part 36 offer did not apply. This was consistent with what the judge had said, in particular in the section of his judgment, at [33], which I have underlined above.

137. Green LJ then turned, in his judgment, to issues of policy which, in his view, had justified the approach taken by the judge. At [37] Green LJ stressed the advantages of costs following the issue rather than the event:

> *"37 First, there is a general "salutary" rule that costs follow the issue rather than the "event". This is because an overly robust application of a principle that costs should follow the final event discourages litigants from being selective as to the points they take in litigation and encourages an approach whereby no stone or pebble, howsoever insignificant or unmeritorious, remains unturned: Phonographic Performance [1999] 1 WLR 1507, 1523A; Mean Fiddler Holdings Ltd [2003] EWCA Civ 1058 at [30]; and Merck KGaA v Merck Sharp & Dohme Corpn [2014] EWHC 3920 (Ch) ("Merck") where Nugee J (as he then was) stated (at para 6) that it was "in general a salutary principle that those who lose discrete aspects of complex litigation should pay for the discrete applications or hearings which they lose, and should do so when they lose them rather than leaving the costs to be swept up at trial". In the present case the merits were overwhelmingly in favour of the respondent and the judge recorded his displeasure at the taking of unmeritorious points by the appellant."*

138. At [39] Green LJ made the following comments specific to unfair prejudice petitions:

> *"39 Thirdly, the principle of equality of arms plays a part as was recognised by Lord Hoffman in O'Neill [1999] 1 WLR 1092, 1107H. This is also reflected in the overriding objective at CPR r 1.1(2)(a) which instructs courts, when exercising any of the powers in the CPR, to have regard to the object of "ensuring that the parties are on an equal footing and can participate fully in proceedings . . ." This applies to the exercise of a discretion to order costs: See e g Attwood v Maidment [2011] EWHC 3180 (Ch) at [40]. An inequality of arms can be manifested in a variety of different ways, such as in an asymmetry of information as between the parties (as recognised by Lord Hoffman in O'Neill). In some types of litigation, of which minority shareholders' suits might be an illustration, a claimant may be poorly placed to assess the reasonableness of an offer to settle not being in possession of the internal financial documents of the company. A similar scenario may confront a successful litigant in an intellectual property case who seeks an account of profits but who may have no knowledge of what profits the defendant has earned. Such situations may be contrasted with a successful claimant in, for example, a personal or clinical injury case or a routine case for breach of contract, where the relevant facts needed to determine quantum may be largely in the possession or under the control of the claimant. It is consistent with the above considerations that costs rules should encourage the making of reasonable offers to settle such that a refusal by a litigant to accept a reasonable offer can militate against the making of a costs order in the successful party's favour. However, a refusal on the part of a petitioner to accept what might turn out subsequently to be a reasonable offer might weigh*

less heavily against that party where there is asymmetry of access to information and this obviously includes where there has been inadequate disclosure by the party in possession of the relevant information."

139. This has obvious resonance in the present case. In the present case the April Letter was not couched as an offer. The common theme of the email of 2nd March 2021, the April Letter, the letter of 5th August 2021 and the Price Bailey valuation was that the Respondent was being told that he was a Bad Leaver and that his departure from the Company was being determined by the Articles. In these circumstances it seems to me that there is a substantial question mark over whether any of these documents, taken individually or collectively, should properly be treated as the equivalent of a Calderbank offer.

140. The overriding point which seems to me however to emerge from *Langer*, both at first instance and in the Court of Appeal, is that the Judge, in deciding what order to make in relation to the Costs, was not bound to treat the case as one where the costs had to be reserved. If, which I regard as questionable, the April Letter and/or the associated documents were properly to be treated as an admissible offer to settle or admissible offers to settle, the judge was not bound, in the exercise of his discretion, to conclude that the Costs must be reserved to the quantum trial. It seems to me that the Judge was entitled, in the exercise of his discretion, to take the view that an issues based approach was justified, and that the Appellant should pay the Costs.

141. Following the hearing of the Costs Appeal the Appellant produced a yet further written submission, which was described as case law in support of the grounds of appeal. The further written submission comprised extracts from a number of cases. The Appellant also provided, with this further submission, copies of the relevant cases. I understood this further submission and the specified case law to be directed to the Costs Appeal rather than the Permission Application. In his email to my clerk, under cover of which these documents were sent to me by the Appellant, the Appellant stated that I had requested that the Appellant provide case law in support of his case in the Costs Appeal. I am bound to say that I do not recall authorising the Appellant to make further submissions on the case law, following the hearing of the Costs Appeal. I have looked at my notes of the hearing, which do not record any such authorisation. I have not however seen a transcript of the hearing of the Costs Appeal and my memory may be at fault in this respect. In any event I have considered the further case law provided by the Appellant, in particular by reference to the extracts from that case law highlighted in the Appellant's further submission.

142. As I recall pointing out to the Appellant in the course of argument, his principal difficulty in the Costs Appeal was that I had not been shown any authority which established that the Judge was obliged, in the circumstances of this case and by reason of the existence of what was described as the offer, to reserve the Costs to the quantum trial. None of the further six cases produced by the Appellant seems to me to fill this gap in the Appellant's case. I have read all six cases, but I cannot see that any of them establish that the Judge went wrong in the exercise of his discretion or was obliged to reserve the Costs. It is not necessary to go through all six cases individually, but I should make specific reference to the second case referred to by the Appellant, which is *HSS Hire Services Group plc v BMB Builders Merchants Limited* [2005] EWCA Civ 626. I do so because this case, of

the six cases, seemed to me to come closest to what the Appellant needed to establish, in order to get the Costs Appeal off the ground.

143. The Court of Appeal were, in this case, dealing with an application for permission to appeal, including permission to appeal against a decision on costs. The first defendant in the action, BMB, was the unsuccessful party on the first part of a split trial, which dealt with liability. The judge ordered BMB to pay the costs of the trial on liability. BMB argued, in support of its application for permission to appeal, that the judge at first instance had been wrong to treat as irrelevant a Part 36 payment which BMB had made. The Court of Appeal considered that there was great force in this point and granted permission to appeal. The Court of Appeal reversed the exercise of the judge's discretion on costs, leaving the Court of Appeal free to consider the question of what was the right approach to the question of costs, at the conclusion of a preliminary issue hearing, if there had been a Part 36 payment covering the trial as a whole. The Court of Appeal concluded that the judge had been wrong to deal with costs in the way in which he had done. The judge should have reserved the costs of the liability trial to the subsequent quantum trial. In his judgment in the Court of Appeal, at [35], Waller LJ (with whom Mance LJ and Sir William Aldous agreed) said that where a judge was told of the existence of a payment in, when dealing with the costs of a preliminary issue which left the quantum of damages unresolved, the court should, in any but perhaps the most exceptional circumstances, reserve the costs of the preliminary issue until after determination of the damages.

144. So far as I am aware there has been no Part 36 offer in the present case. This is clearly an important difference between the present case and the *BMB* case, where the provisions of Part 36 were engaged. Nevertheless, in *BMB* the Court of Appeal did consider the question identified above both in relation to Part 36 payments and in relation to offers to settle within the terms of CPR 44.2(4)(c). The core of the relevant reasoning of Waller LJ can be found in his judgment, at [28]-[30]:

> *"28. In defending the judge's approach and in answer to the question as to what apart from paying into court the defendants could do to protect themselves against an order for costs on the liability issue, Mr Dunning QC robustly argued, it was open to them to concede liability, and if they chose not to do so then liability for costs followed if they lost the issue. If that approach is right it seems to discourage the arguing of preliminary points.*
>
> *29. The contrary approach is that parties should be encouraged to make Part 36 payments in and/or offers; they should also be encouraged to try preliminary points if that could lead to the saving of costs overall. If payments in are to be totally ignored at the conclusion of the trial of a preliminary issue, that will discourage applying for the trial of the same, and may even discourage part 36 offers where preliminary issues have been ordered. The proper approach at the conclusion of a trial of a preliminary issue where there has been a part 36 payment in or a part 36 offer, should therefore normally be to adjourn the question of costs pending the resolution of all the issues including damages, at which stage the quantum of the Part 36 offer can be revealed and the discretion in relation to costs exercised in the knowledge of it.*
>
> *30. I have no doubt that the provisions of Part 36 and of Part 44 encourage the latter approach. Mr Dunning strove manfully to argue that the provisions allowed the judge to take the view he did. He argued (1) even where there had been a payment in, there was no rule which expressly prevented the judge dealing with the costs of the trial of the issue of liability or which required*

him to reserve the question of costs until after the issue of damages had been resolved; (2) the modern approach was to encourage stage based orders; (3) it was the defendants who wanted a split trial and the claimants resisted it; (4) the defendants could have admitted liability but chose to fight it; (5) the claimants were entirely successful; (6) it was a case where the dispute was about what was said, and the evidence of HSS had been entirely accepted, and the witnesses of the defendants had been severely criticised – Mr Harrison was described as "disingenuous" and Mr Sowton as "totally unreliable", and reference was made to CPR 44.3(4) under which it was material to take into account the conduct of the parties; (7) it is the judge who has heard the issue who is based placed to deal with the costs. Thus he argued that the judge having been correctly informed of the fact that there had been a payment in as he was entitled to be under CPR 36.19 (3)(c), was equally entitled to hold that it was immaterial."

145. I can see that this reasoning provides strong support for the argument that when a court comes to consider costs, at the conclusion of a trial on liability which the defendant has lost, the existence of an admissible offer to settle should cause the court to reserve the costs of the liability trial until the quantum trial, at which point it can be seen whether the recovery exceeds what was offered. I do not think however that it is possible to extract any rule of law to this effect from the judgment of Waller LJ. The point remains that, in their actual decision in this case, the Court of Appeal were considering the impact of a Part 36 payment upon the costs of a preliminary issue, where damages remained to be determined. In my view therefore, *BMB* does not go so far as the Appellant needs it to go, in order to provide the required platform for his argument based on what was characterised as the offer in the present case. The same is true of the other five cases relied upon by the Appellant in this context.

146. I can see that the position might have been different in the present case if the Judge had taken a different course. If, which I regard as a questionable assumption, one is prepared to treat the April Letter as the equivalent of an offer of settlement, it could have been said that the Judge had gone wrong in the exercise of his discretion if the Judge had forgotten about the April Letter and the associated documents when he came to make his decision on costs. The same would be the case if the Judge had decided that he was bound to leave the April Letter and associated documents out of account, in exercising his discretion as to costs. By CPR 44.3(4)(c) the Judge was required to have regard to what was characterised as the offer in exercising his discretion as to costs.

147. It is however clear that an omission or failure of the kind referred to in my previous paragraph did not happen. The offer, as it was characterised, was fairly and squarely before the Judge when he came to make his decision on costs at the Consequential Hearing. There was therefore no question of the Judge having forgotten the offer. The note of the Costs Judgment produced by the Respondent's solicitors confirms, as one would expect, that the Judge did not treat himself as bound to disregard the offer. The Judge took the offer into account. Unfortunately for the Appellant, the Judge, who heard the liability trial and produced the Judgment, came to conclusion, in the exercise of his discretion as to costs and in all the circumstances, that the existence of the offer was not sufficient to persuade him to reserve the Costs to the quantum trial.

148. Drawing together all of the above analysis, I cannot see any basis on which I can interfere with the Judge's decision on costs. It is true that the Judge contemplated the possibility, in Paragraph 161, of a reasonable offer having costs consequences, but if it is assumed that there was such a reasonable offer to be considered at the Consequential Hearing this did not compel the Judge to reserve the Costs, as opposed to awarding the Costs to the Respondent. Indeed, as the Judge appears to have explained, when dealing with the query from the Appellant on the Costs Judgment, the Judge considered that an offer might affect the costs of the quantum trial, but should not affect the costs of the liability trial. The most that the Judge was willing to do for the Appellant, on the basis of the offer, was to provide that the Appellant should not have to pay the Costs until the conclusion of the quantum trial, either by way of interim payment or following a detailed assessment of the Costs. I cannot see why, in the exercise of his discretion, the Judge was not entitled to take this particular course, so far as his decision on costs was concerned.

149. There is the potential difficulty in the present case that I do not have an actual transcript of the Costs Judgment. It seems to me however that this is not a reason for allowing the Costs Appeal. I have what I regard as an adequate record of the reasoning of the Judge in the note provided by the Respondent's solicitors. I also highlight the following two points, in this context.

150. First, as I have already noted, neither party suggested that I could not deal with the Costs Appeal, in the absence of knowledge of the actual reasons for the Judge's decision in relation to the Costs. As it happens, I do now have what I regard as a reliable record of the Judge's reasoning in the Costs Judgment. Both parties did however proceed with their arguments in the Costs Appeal, at the hearing, on the basis that I could decide the Costs Appeal without actual knowledge of the Judge's reasoning.

151. Second, and as I have also already noted, the Judge had the arguments before him at the Consequential Hearing concerning the effect or otherwise of the April Letter and the associated documents. *Langer* was also cited to the Judge. In these circumstances I would have regarded myself as entitled to assume, even without knowledge of the Judge's reasoning, that the Judge, in the exercise of his discretion, decided that an issues based approach to the Costs was justified, notwithstanding the April Letter and the associated documents. I would also have regarded myself as entitled to assume that the Judge noted the potential points of difference between the present case and *Langer*, but did not consider them sufficient to displace an issues based approach. As it turns out, the note of the Costs Judgment provided by the Respondent's solicitors provides confirmation that these assumptions, if I had had to make them, would have been correct.

152. As I have said, I cannot see any basis on which I can interfere with the Judge's decision on costs. I should however also add this point.

153. If I had come to the conclusion that the decision of the Judge on costs should be set aside, on the basis of some flaw in the exercise by the Judge of his discretion as to costs, this would have given rise to the question of what should then happen. On that hypothesis, it seems to me that the sensible course would have been for me to exercise my own discretion in relation to the costs, and to re-make the decision on costs.

154. If however I had taken that course, assuming that the Judge's decision fell to be set aside, my own decision would not have been any different to that made by the Judge. My own

view is that the Judge was right to make the decision as to the Costs which he made. Taking into account all the relevant circumstances it seems to me that the Respondent was entitled to be awarded the Costs. In particular, given the comprehensive victory which the Respondent achieved at the liability trial, it seems to me that the present case was one where, when it came to the Costs, this victory trumped the argument that, following the quantum trial, it might turn out that the Respondent would have done better to accept the figure stated in the April Letter. It follows that if I had a discretion of my own to exercise in relation to the Costs, I would have reached the same decision as the Judge. I would not have been prepared to reserve the Costs to the quantum trial.

155. In a powerfully expressed submission in reply to Mr Reed's submissions on the Costs Appeal, both the Appellant and Mrs De Stefano argued that the Judge had stepped outside the legitimate scope of his discretion. They argued that it made no sense to give the Respondent all of the Costs, in circumstances where *"the game was not worth the candle"*. They argued that the Respondent's shares might turn out to be worthless and the Petition pointless. I see the argument, but it does not persuade me that the Judge went outside the broad scope of his discretion in the decision which he made. Equally, if the decision on the Costs was one for me to make I would, taking into account all the relevant circumstances, have come to the same decision as the Judge.

156. It follows that the Costs Appeal fails. The Costs Appeal is therefore dismissed.