

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

IN THE MATTER OF WESTSHIELD LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: 15th February 2019

Before :
HIS HONOUR JUDGE EYRE QC

Between :

1) AUSTIN MICHAEL WALDRON	<u>Petitioners</u>
2) GERARD DERMOT WALDRON	
3) MARIAN WALDRON	
- and -	
1) PATRICK JAMES WALDRON	<u>Respondents</u>
2) WESTSHIELD LIMITED	

Mr. Mark Cawson QC (instructed by **Gunnercooke llp**) for the **Petitioners**
Mr. David Casement QC (instructed by **McHale & Company**) for the **First Respondent**

Hearing dates: 4th, 5th, 6th, 7th, 10th, and 11th September 2018

JUDGMENT

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

HH Judge Eyre QC:**Introduction.**

1. The Petitioners and the First Respondent are siblings. They are all shareholders in the Second Respondent (“the Company”), a company incorporated by their father. To avoid duplication and for clarity in this judgment I will normally refer to each of the family members by his or her first name. The First Respondent, Patrick, is the managing director of the Company; the First Petitioner, Austin, is the other director; and the Second Petitioner, Gerard, is the company secretary. Until their dismissal in August 2016 Austin and Gerard worked in the Company. The Third Petitioner, Marian, formerly worked in the Company but has not done so since 2005 at the latest. The Petitioners assert that Patrick’s actions were unfairly prejudicial to their interests in a number of respects culminating in the dismissal of Austin and Gerard and that they are entitled to relief under section 994 of the Companies Act 2006. Patrick denied this disputing the factual basis of some of the matters of complaint and saying in relation to others that his actions were justified and/or done with the agreement of his brothers and/or were not unfairly prejudicial to the Petitioners

2. The relief sought was an order for the purchase of the Petitioners’ shares by Patrick and for that purchase to be without any discount reflective of the minority status of those shares. On 2nd February 2018 District Judge Bever ordered that there be a split trial as to liability and quantum. It was accepted on behalf of Patrick that for the purposes of establishing whether his actions were unfairly prejudicial no distinction was to be drawn between Marian’s position and that of her brothers with Patrick accepting that behaviour which was found to be unfairly prejudicial to Austin and Gerard was also to be regarded as unfairly prejudicial to Marian. Patrick also conceded that if I were to find that he had acted in breach of his fiduciary duties as a director of the Company in any of the respects alleged by the Petitioners then it was appropriate for me to regard such a breach as amounting to unfair prejudice and as such potentially giving rise to an order for a buying out of the Petitioners’ interests. In other words he was not taking any point that any of the breaches alleged were, if established, not capable of amounting to unfair prejudice. This concession did not extend, however, to the basis on which such purchase was to be made. Patrick did not accept that such purchase should be without discount and also said that there was scope for different bases of valuation being applicable as between Marian and Austin and Gerard. Moreover, the concession did not extend to the Petitioners’ entitlement to relief nor was it an abandonment of the contention, at paragraphs 21 and 22 of the Defence, that in respect of certain of the alleged breaches there had been acquiescence disentitling the Petitioners to relief as a matter of the court’s discretion. Accordingly, I am to determine whether there was unfairly prejudicial conduct on the part of Patrick entitling the Petitioners to relief (and to do so in the light of the concession as to the potential effect of the breaches alleged) and the basis on which any consequent purchase of the Petitioners’ shares is to be conducted but not the value of the shares in such circumstances.

3. At the conclusion of the hearing on 11th September 2018 I urged the parties to make a final attempt to see if they could resolve matters by agreement in the

period before I gave judgment. On 3rd October 2018 the solicitors acting for both sides asked that I defer further work on my judgment because the parties were seeking to achieve a resolution through mediation. I agreed to do so. On 26th November 2018 I received a further joint communication explaining that the date for mediation had been delayed and that the mediation would not take place until the end of December 2018 and asking that completion of the judgment be deferred until the beginning of 2019. I again agreed to defer further work on this judgment pending the outcome of the mediation. Unfortunately the parties were unable to resolve their differences and I was informed of this on 7th January 2019. At that stage I allowed time for short further written submissions in respect of two authorities one having come to light after the hearing and the other being a judgment which was handed down after the hearing. I commend the parties for their attempts to reach an amicable resolution but their failure to do so and the time which has been occupied in that exercise and in preparation of the further submissions mean that this judgment is being finalised and will be handed down considerably longer after the hearing than it would otherwise have been.

The Factual Background in Outline.

4. Austin Waldron senior (“Austin senior”) and Catherine Waldron are the parents of the Petitioners and the First Respondent. The Company was incorporated in 1977 and Austin senior and Catherine were the directors. The Company was and is engaged in construction and civil engineering works.
5. Originally Austin senior and Catherine each held 50% of the shares in the Company. By the mid-1980’s Catherine had transferred part of her holding so that she held 20% of the shares; Patrick, Marian, and Austin each had 10%; and Austin senior retained 50%. In 1997 Catherine made a further transfer of shares this time to Gerard who became the holder of 10% of the shares.
6. Patrick began working for the Company in 1994. Marian came to work for the Company in 1997; Austin in 1998; and Gerard in 2002. There was conflicting evidence as to the circumstances in which the various siblings came to be working in the Company. In essence Patrick said that the Petitioners were given jobs because they had not been able to find work elsewhere whereas the Petitioners said that they were encouraged to engage in the work of the Company because of the needs of the Company and because of their father’s desire that his children should be employed in what he regarded as the family company. I accept in general terms the Petitioners’ account of this aspect of the history. As I will explain below I found Patrick’s evidence and his recollection of matters to have been markedly affected by his feelings of grievance towards his siblings and by the belief that he had made contributions to the Company far exceeding theirs. I find that this was particularly so in respect of his evidence as to the circumstances in which his siblings came to work for the Company. Although, as will be seen, there were a number of important respects in which I was unable to accept the evidence of Austin and Gerard and in which I had to regard Marian’s evidence of limited weight I do accept what they said about how they came to join the Company. I found their recollection of their father’s desire to have his children in the family business convincing. In particular I found persuasive Marian’s evidence of her father’s desire for her to work in the

business despite her wish to have a different career and her evidence that she was offered a directorship in an attempt to dissuade her from leaving. I find that evidence was based on a genuine recollection and was unaffected by the animosity towards Patrick which undermined the reliability of other aspects of her evidence. In the light of that I also accept that Austin was persuaded to switch from studying civil engineering to studying quantity surveying because his father and Patrick said that this would be good for the Company's business and would mean that the two brothers had complementary skills.

7. In 2000 Patrick was appointed as a director of the Company. He says that then and subsequently his father assured him that he, Patrick, would end up with more than 50% of the shares in the Company.
8. Marian left the employment of the Company in 2005. There is a dispute between her and Patrick as to the amount of work she had actually done in the preceding years when she was combining work in the Company with a university course but that is immaterial for present purposes.
9. In 2007 the four siblings and their parents met at Players restaurant in Hale. In the course of the meal Austin senior and Catherine explained changes which were being made in the ownership and governance of the Company. Austin senior had transferred part of his shareholding to Patrick so that Patrick and Austin senior each held 30% of the shares while Catherine, Marian, Austin, and Gerard each had 10%. At the same time the appointment of Austin as a director and of Gerard as company secretary was announced. Patrick became managing director of the Company although it was not clear in the evidence whether this appointment coincided with this meeting. In my judgement this meeting is significant as indicating the approach which Austin senior and Catherine took towards the Company and to the involvement of their children in it. The nature and significance of the meeting are to be assessed against the finding I have already made as to how the siblings came to be employed in the business. In turn the events at the meeting reinforce that finding. In my judgement those events show Austin senior and Catherine explaining to their children as a group the steps which were being taken in relation to the Company. They explained the arrangements for a further distribution of shares with Patrick having a greater share than his siblings but with this being balanced by the appointments of Austin and Gerard.
10. In the aftermath of the economic downturn from 2008 onwards the Company began to encounter difficulties. The Company had banking facilities provided by National Westminster Bank plc ("the Bank") and that bank required further comfort if it was to continue to provide facilities. Patrick had responsibility for the Company's dealings with the Bank and it was Patrick who put the Bank's proposals to his fellow shareholders. There were negotiations in circumstances of some acrimony between Patrick and his siblings and the outcome was a variation of the shareholdings. Austin senior and Catherine gave up their shareholdings and Marian gave up part of hers. Those shares were distributed to Patrick and his brothers and to West Register (Investments) Ltd, now called SIG 1 Ltd ("SIG"). Following that redistribution Patrick held 35.23% of the shares; Austin and Gerard each held 18.41%; Marian held 8.01%; and SIG held 19.94%. The transfer of shares to SIG was part of the price for the continued

provision of banking facilities. There was some disagreement in the course of the trial as to the precise relationship between SIG and the Bank but for present purposes it can be regarded as an arm of the Bank. On 24th December 2009 the Company, SIG, and the four siblings entered a deed (“the Subscription Deed”). This provided for SIG to subscribe for the 19.94% shareholding. The Subscription Deed defined Patrick, Austin, and Gerard as the “Managers” and Marian as the “Non-Manager”. It provided for undertakings from the Company and the Managers as to the future conduct of the Company’s business and the Managers were each subjected to restrictive covenants requiring them to devote their working time solely to the affairs of the Company and imposing restrictions on their activities following any termination of their engagement with the Company.

11. I find that the events leading up to the redistribution of the shareholdings and to the entry into the Subscription Deed were a turning point in the relationship between Patrick and Marian. Patrick believed that he was taking the steps necessary to secure the survival of the Company and that the alternative to the arrangements he had put in place would have been the insolvent liquidation of the Company. In addition he believed that he had obtained a good deal for his parents by ensuring that they recovered money owed to them by the Company. In this regard it is of note that at the date of the Subscription Deed the Company’s outstanding indebtedness to the Bank was in excess of £3.4m. Patrick believed that the other members of the family were hindering those arrangements and that they failed to understand the gravity of the situation or to appreciate how much he had done for them, their parents, and the Company. Marian believed that Patrick had forced her parents out of the Company and that he had been trying to bounce the other members of the family into giving him control of the Company. Marian’s anger at Patrick’s conduct and her resentment of what she believed to have been the shabby treatment of her parents have, in my judgment, coloured her perception of Patrick’s actions then and since and have influenced her recollection of the various dealings.
12. In April 2009 Saber Construction Ltd (“Saber”) was incorporated and in December of that year Sky Blue Associates Ltd (“Sky Blue”) was incorporated. I will set out below my findings as to the factual disputes in relation to those companies.
13. The respite provided by the Bank’s continued support following the Subscription Deed turned out to be short-lived and on 7th December 2010 the Company entered a company voluntary arrangement. It had been envisaged that this would last three years and would yield a return of 20p in the pound to the Company’s creditors. In fact it lasted until August 2015 and the return to creditors was only 2.39p in the pound.
14. DCT Holdings Ltd, DCT Plant Ltd, and DCT Civil Engineering Ltd (collectively “DCT”) constituted a group of companies engaged in civil engineering. They went into administration on 6th January 2014. The administration of DCT meant that those companies’ assets became available for purchase. These included items of plant and equipment and the benefit of a number of contracts. On 12th January 2014 there was a discussion between Patrick and Austin in which the administration of DCT and the availability of

the assets were mentioned. There was considerable dispute in the evidence as to what was said and agreed between the brothers in this and in subsequent conversations about DCT in January 2014. I will consider that dispute in detail in due course. The uncontroversial facts are that West Tunnelling & Utilities Ltd (“Tunnelling”) was incorporated on 16th January 2014 with Patrick as its sole director and shareholder. On 21st January 2014 Tunnelling acquired the benefit of contracts to which DCT had been party and of plant and equipment owned by DCT. Subsequently those contracts were novated to the Company. There were dealings between the Company and Tunnelling in relation to these contracts and involving the Company’s hire of the plant and equipment from Tunnelling. These dealings resulted in payments being made to the Company from third-parties and to Tunnelling by the Company. The Petitioners say that Patrick acted in breach of his fiduciary duties in causing Tunnelling to acquire these assets and to make charges to the Company and this alleged breach of duty is an important element in the allegation of unfair prejudice. Patrick says that he acted with the prior agreement of Austin and Gerard and that his actions benefited the Company.

15. Patrick had acquired Ashcroft House at Bredbury and in September 2014 the Company entered a lease of that property. The property needed refurbishment. The Company undertook the necessary works and moved its operations to Ashcroft House in October 2015. The Petitioners say that the terms of the lease were more onerous and the amount of the rent paid greater than was appropriate and that Patrick acted in breach of his duties by benefiting at the expense of the Company.
16. In July 2015 Patrick approached SIG with a view to buying the shares which SIG held. After his initial meeting with SIG Patrick informed Austin and Gerard of his intentions. This compounded the existing difficulties between the brothers. Patrick wished to buy the shares for himself and thereby acquire a majority shareholding. He was not willing to contemplate an arrangement in which the shares were returned pro-rata to the shareholders nor was he prepared to continue in the business without being the majority shareholder. Austin, Gerard, and Marian resisted Patrick’s plans. A meeting with the Company’s accountants followed but matters were not resolved. Patrick said that he had told Austin and Gerard that they should not contact the Bank directly and had explained that for the Bank to learn of the dispute could jeopardise the renewal of the Company’s facility with the Bank. Despite this Austin and Gerard did contact the Bank. The meeting which they had with the Bank alerted it to the dispute in the Company and caused it to contact Patrick to check on the position. Patrick says that he was “infuriated” by the actions of Austin and Gerard. He regarded those actions as undermining his position as managing director. In his witness statement and in his oral evidence Patrick said that at this stage his siblings were conspiring to take control of the Company. I do not accept that latter assertion. It is apparent that relations were poor between the family members and that Austin, Gerard, and Marian were resistant to any arrangement which would give Patrick control of the Company but I do not find that they were deliberately plotting with a view to gaining control at his expense.

17. Paul Gee is an IT consultant who provided IT services to the Company. Initially his point of contact in the Company had been Austin but in January 2016 Patrick contacted him and said that thereafter he, Patrick, would be Mr. Gee's contact point. Until then Austin and Gerard had had access to the e-mail mailboxes of the other employees of the Company. In practice this seems to have taken the form of e-mails sent to others being forwarded automatically to Austin and Gerard. In January 2016 Patrick instructed Mr. Gee to lock down Austin and Gerard's access so that thereafter they only had access to their own mailboxes. This was in reaction to the actions of Austin and Gerard, in particular their contact with the Bank and, Patrick says, in reaction to learning of Austin's involvement in Saber and Sky Blue. It was coupled with their removal as signatories on the Company's bank account and with the cessation of their expense accounts. A state of dispute and hostility then continued until the dismissal of Austin and Gerard.
18. Mr. Gee gave evidence of his dealings with Austin and Gerard after that ending of e-mail access. He said that in May 2016 Austin had pressed him to reinstate Austin's access to Patrick's mailbox. Mr. Gee declined to do so saying that as Patrick was the managing director of the Company it was Patrick's instructions which he had to follow. Austin then told him that he was "backing the wrong horse" in following Patrick's instructions in preference to those of Austin. There had been other occasions before and after May 2016 on which Austin and Gerard had pressed Mr. Gee to give them access to Patrick's e-mails. These culminated in an incident on 3rd August 2016 when Mr. Gee attended at the Company's offices at the request of Austin. Mr. Gee gave evidence of a conversation with Gerard but in the presence of Austin and in Austin's office. In this conversation Gerard said that Mr. Gee had "backed the wrong horse" in removing Patrick's computer (something which Mr. Gee had done at the request of Patrick to prevent others having access to it while he was away on holiday). Gerard then asked Mr. Gee to give him and Austin access to Patrick's mailbox. When Mr. Gee declined to do so Gerard proceeded to offer him money to do so with an initial offer of £100 being made which was then increased to £200. Mr. Gee said that he declined those offers and left.
19. Austin and Gerard say that Mr. Gee has misunderstood what was happening and has misinterpreted as serious suggestions comments which were made by way of jocular banter. They deny saying that he had backed the wrong horse. Gerard said that he addressed Mr. Gee as "horse" because that was a term which he would use among friends as a form of address and which he used then and on other occasions when addressing Mr. Gee. The two brothers say that the offer of money to provide access to Patrick's e-mails was a joke and was regarded as such by Mr. Gee because Mr. Gee was laughing at the time as were Austin and Gerard.
20. On 9th August 2016 Patrick wrote to Austin and to Gerard dismissing them as employees of the Company. In those letters it was asserted that Austin and Gerard had allowed the dispute "on the shareholding front" to "enter into the work environment". The letters said that this had involved Austin and Gerard neglecting their work and engaging in "gross insolence" and "insubordination" towards Patrick. Reference was made to the attempt to obtain access to e-mails

which was said to have been “misuse and improper conduct”. Further grounds were said to be what was described as a “surreptitious” approach to the Bank and being in competition with the Company. It was that dismissal which ultimately led to the current proceedings.

The Issues.

21. Against that background I have to determine the following issues. First, whether the parties’ relations in respect of the affairs of the Company were governed by equitable considerations restricting Patrick’s exercise of his legal powers as managing director or, using the potentially misleading shorthand, was the Company a quasi-partnership? Second, if the Company had formerly been a quasi-partnership did it cease to be such either by reason of the Subscription Deed or by reason of its entry into the company voluntary arrangement? Third, in that context, had the actions of Patrick amounted to conducting the affairs of the Company in a way that was unfairly prejudicial to the Petitioners? The Petition set out nine respects in which Patrick’s conduct was alleged to have been unfairly prejudicial to the Petitioners. As will be seen not all of these were pursued and a number were subsidiary to the main thrust of the Petitioners’ case. The two central elements of the Petitioners’ case were the assertions, first, that Patrick’s actions in relation to the acquisition by Tunnelling of the assets of DCT had been in breach of his fiduciary duties as a director of the Company and had thereby been unfairly prejudicial to their interests and, second, that the dismissal of Austin and Gerard and their exclusion from involvement in the business of the Company had been unjustified and was accordingly unfairly prejudicial. Determination of that last question requires me to make findings as to the conduct of Austin and of Gerard and to conclude whether their dismissal had been justified. Finally, if Patrick’s conduct had been unfairly prejudicial to the interests of the Petitioners in the respects alleged were they entitled to relief and, if so, in what terms?

The Approach to be taken.

22. The applicable legal rules are well-established and they were largely but not entirely uncontroversial as between the parties. The relevant parts of section 994 of the Companies Act 2006 provide that:

“(1) A member of a company may apply to the court by petition for an order under this Part on the ground–

(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself)…”

23. The parties were agreed that the approach to be taken was that set out by Lewison J in *Hawkes v Cuddy (No)* [2007] EWHC 2999 (Ch), [2008] BCC 390 saying at [202]:

“It follows that for a petition to be well-founded the petitioner must establish that:

- (i) The acts or omissions of which he complains consist of the management of the affairs of the company;
- (ii) That the conduct of those affairs has caused prejudice to his interests as a member of the company and
- (iii) The prejudice is unfair.”

24. Whether conduct in the management of the affairs of a company which is prejudicial to a party’s interests is unfairly so will depend on the particular circumstances.

25. Dealings between members of a company are normally governed solely by the legal rights and obligations deriving from the company’s articles of association and from legislative provisions of general application. A shareholder normally cannot complain of conduct which is permissible under the relevant articles or by virtue of those general provisions even if such conduct has a prejudicial effect on his interests (see per Hoffmann LJ in *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 17i – 18a).

26. There are, however, circumstances in which different considerations come into play. Thus there are (per Lord Hoffmann in *O’Neill v Phillips* [1999] 1 WLR 1092 at 1099 A):

“cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.”

27. What are the circumstances in which those considerations come into play? They are akin to and “run parallel” those in which the court will order the winding up of a company on the ground that it is “just and equitable” that it should be wound up (see *Re Saul D Harrison & Sons plc* at 19a - g and *O’Neill v Phillips* at 1099 B). Such circumstances are commonly referred to as being those where the company is a “quasi-partnership”. That is a convenient term providing a short and well-known description of such circumstances. However, it is important to remember that it is a convenient description or label and not a definition of the circumstances in which equitable considerations can make it unfair for those in control of a company to rely on their strict legal powers. As the Hong Kong Court of Appeal said in *Re Yung Kee Holdings Ltd* [2014] 2 HKLRD 313 at [107] “... the expression of ‘quasi-partnership’ is nothing more than a convenient label. The use of such a label should not be allowed to subvert the underlying question: whether a petitioner can pinpoint matters giving rise to an equitable consideration which makes it unfair for those conducting the affairs of the company to rely upon their strict legal powers.” In *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 Lord Wilberforce set out, at 379 F, the elements which “typically” can give rise to such equitable considerations. However, the passage in which those typical elements were set out began with Lord Wilberforce saying that “it would be impossible, and wholly undesirable, to define the circumstances in which these considerations [sc the equitable considerations in question] may arise.” In addition he then proceeded to say that to refer to such situations as giving rise to a quasi-partnership “may be

convenient but may also be confusing”. That confusion can arise if the whole apparatus of partnership law is seen as relevant in such circumstances but there can also be confusion if an attempt is made to say that there must be something closely akin to a partnership before equitable considerations can operate to restrict the legal powers of those in control of a company. While not being constrained by the shorthand term “quasi-partnership” I must be conscious that although the circumstances in which such considerations might arise cannot be defined that (per Lord Hoffmann *O’Neill v Phillips* at 1009 G):

“does not mean that there are no principles by which those circumstances may be identified. The way in which such equitable principles operate is tolerably well settled and . . . it would be wrong to abandon them in favour of some wholly indefinite notion of fairness.”

28. Thus I have to look at the circumstances of the company in question and of the parties’ dealings as a whole to see if they are such as to generate equitable considerations which could render unfair the exercise of their strict legal rights by those in control of the company. In doing so I have to guard against an unduly restricted view of the circumstances which can generate those considerations. However, I must also remember that a company is primarily a commercial arrangement and that the identification of such circumstances is to be undertaken in the light of established principles rather than an abstract notion of fairness. The parties were agreed that HH Judge David Cooke expressed matters correctly in *Pinfold v Ansell & others* [2017] EWHC 889 (Ch) at [59]. Having referred to the elements which Lord Wilberforce had identified in *Ebrahimi v Westbourne Galleries Ltd* as “typically” giving rise to such considerations Judge Cooke said:

“The three matters mentioned are thus indicators of cases where the courts may impose equitable considerations on the exercise of shareholders rights, but not a set of tests that must be satisfied. They need not all be present in every case, though often they will be. It is a matter for the court’s overall assessment in any case whether conduct of a company’s affairs which may or may not be in accordance with its constitution, the Companies Acts or other general law is to be regarded as in breach of equitable obligations owed by the shareholders to each other as part of the overall arrangements under which they conduct business through a limited company.”

29. In carrying out that overall assessment and in having regard to the established principles I must remember the fact that the company in question is a small one or a private company does not, without more, give rise to such considerations (see *Ebrahimi v Westbourne Galleries Ltd* per Lord Wilberforce at 379 E). A family company can be one in which such equitable considerations are present (see for example *Fisher v Cadman & others*) [2005] EWHC 377 (Ch), [2006] 1 BCLC 499). However, those considerations will not be present in every family company and something more is needed for them to be present than the ownership of the shares in a company by the members of the same family and more even than the mere fact that family members are officers of or employed by the company in question. Where the equitable considerations are said to derive from an agreement or understanding between the members of a company a degree of precision is required. The agreement does not have to have the

degree of certainty which would be necessary for an agreement to be enforceable as contract but there must be “a sufficient degree of agreement that it can be said that there has been a breach of good faith in departing from it” (*Khoshkhou v Cooper & others* [2014] EWHC 1087 (Ch) per HH Judge David Cooke at 24).

30. On behalf of Patrick Mr. Casement QC argued that even where there was or had been such an understanding between some members of a company the fact that there are other members of the company who are not parties to the understanding means that the company cannot be regarded as being a quasi-partnership. Mr. Casement said that if there are such other members at the outset of a company’s life their presence prevents equitable considerations of the relevant kind arising in the first place and that if such persons become members at a later stage in the life of a company where such considerations had obtained then the presence of those new members means that such considerations can no longer constrain the exercise of the powers given by the articles and by the general law. Mr. Casement contended that the presence of such other members is to be regarded as having this effect as a matter of principle. Those other members will have a legitimate expectation and understanding that the affairs of the company in question will be conducted in accordance with the articles and with the law generally applicable and, Mr. Casement says, an understanding between some other members of the company cannot operate to cause there to be some further or different restriction on the conduct of the affairs of the company.
31. The argument put forward by Mr. Casement was in substance that which had been considered by the Hong Kong Court of Appeal (Lam VP and Kwan and Barma JJA) in *Re Yung Kee Holdings Ltd.* That court had upheld the trial judge’s decision that he had no jurisdiction under the Hong Kong equivalent of section 994 in the particular circumstances and it had expressly said that it was not coming to a conclusion as to whether there had in fact been unfair prejudice. Nonetheless it proceeded to address the question of “whether the existence of third-party shareholders who were not party to the mutual understanding negates the equitable consideration to restrain the exercise of legal rights in accordance with the articles of association of the Company” [127]. That consideration was accordingly obiter and was expressed to be brief but it involved a reasoned analysis of the question.
32. The court concluded, at [127] – [133], that although the presence of third-party shareholders was a relevant and potentially a highly relevant factor when a court was determining whether equitable considerations existed such as to impose restraints on the exercise of the legal powers of those controlling the company it did not necessarily preclude a finding that such considerations were present. Rather it was one of a number of matters which must be considered with the court looking at the circumstances as a whole. The court said, at [128], that:

“as a matter of law there is no absolute bar to prevent the operation of equity ...and whether an equitable restraint arises depends primarily on the facts of the case. The court must have regard to the circumstances of each case to determine whether on its factual matrix the exercise of legal rights by a respondent is in contravention of some equitable principles which a petitioner can pray in aid.”

33. In reaching that conclusion the court had regard, at [129], to the wide scope of the court's powers which would enable relief to be given which did not impinge on the rights of the third-party shareholders. It was also greatly influenced, see at [131 – 133], by its understanding of “the jurisprudential basis for the imposition of equitable constraints” [132] on the powers of those in control of the company. It had regard to the analysis set out by Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* and by Lord Hoffmann in *O'Neill v Phillips*. It concluded that the imposition of equitable constraints of the relevant kind is not confined to situations where the company is to be seen as a quasi-partnership in a narrow sense. The principle “rests on a wider basis than the concept of partnership in the guise of a corporation” [132]. The court held that it extended to companies that could not be regarded as quasi-partnerships and that “the crucial question is whether there are any equitable considerations arising from the dealings between the shareholders which call for restraints over the exercise of the strict legal rights on the particular facts of the case” [133].
34. In *Estera Trust Ltd v Singh* [2018] EWHC 1715 (Ch) Fancourt J considered the question, identified at [130], of “whether a quasi-partnership can exist (and give rise to equitable constraints of the type identified in the authorities) where some only of the shareholders are said to be within the scope of the agreement or understanding about participation in management”. Fancourt J's consideration of this question was also obiter because he had concluded on the facts that there had been no understanding that the family members in question would be able to participate in the management of the company whose affairs he was considering. Fancourt J made it plain, at [139], that he was not deciding whether as a matter of law a quasi-partnership could subsist where there are minority shareholders who were not party to the personal relationships giving rise to the quasi-partnership. Nonetheless Fancourt J did give reasoned consideration to this question and had regard to the views expressed by the Hong Kong Court of Appeal in *Re Yung Kee Holdings Ltd*.
35. Fancourt J said, at [134], that he was “very doubtful” that the relevant equitable restraints could arise where there were shareholders who were not parties to the underlying understanding “except perhaps in a case where the shareholders that are not party to the equitable considerations are either a very small minority or are closely connected to the quasi-partners... such that the established quasi-partnership character of the company does not change.”
36. There appear to have been three reasons for Fancourt J's conclusion.
37. The first, at [134], was his understanding that the source of the constraint was the character which the company had. Thus he said:
- “The quasi-partnership status of a company arises not just from an informal understanding arising between some or all shareholders (which would otherwise be unenforceable as a matter of contract) but from the particular character that the company has where there is a mutual relationship of trust and confidence, akin to a partnership, and where the agreement or understanding affects the conscience of the members of the company:

“Equitable considerations, affecting the manner in which legal rights can be exercised, will arise only in those cases where there exist considerations of a personal character between the shareholders which makes it unjust or inequitable to insist on legal rights or to exercise them in a particular way.” (per David Richards J in *Re Coroin Ltd (No.2)* [2012] EWHC 2342 (Ch); [2013] 2 BCLC 583 at para [635])”.

38. Second, at [135], Fancourt J said that the “understanding is enforceable in equity because of its mutuality” with the relationship of trust and confidence affecting “the conscience of each member equally”. If the majority of the members were not bound by “such mutual rights or understanding” then the company would “not have the characteristics of a partnership”.
39. Third, at [136], Fancourt J had regard to the difficulties which would arise in respect of the rights of shareholders not party to the relevant understanding if there were held to be a quasi-partnership between other members. Fancourt J was concerned as to the effect the finding of a quasi-partnership in such circumstances would have on the right of those shareholders who were not parties to the relevant understanding to have the affairs of the company conducted in accordance with its constitution and having regard to the best interests of the members as a whole.
40. It is of note that Fancourt J placed considerable emphasis on the character of the company in question and referred to the need for the company to have a character “akin to a partnership” [134] or to have “the characteristics of a partnership” [135]. It is also of note that Fancourt J did envisage some circumstances albeit exceptional ones in which the relevant equitable constraints could apply even though not all the shareholders were parties to the relevant understanding. He envisaged such circumstances as potentially arising where “a very small minority” [134] or “a small shareholding” [135] was held by a person or persons who were not parties to the relevant understanding.
41. In considering those two approaches I have concluded that of the Hong Kong Court of Appeal is to be preferred for the following reasons.
 - i) The partnership analogy is an analogy and is not the basis for the intervention by the court to control the exercise of their legal rights by those in control of a company. Rather, as appears from *Ebrahimi v Westbourne Galleries Ltd* and *O’Neill v Phillips*, the basis for such intervention is that the particular circumstances of the company and of the dealings between the members are such that it would be inequitable or unconscionable for those in control of the company to exercise their strict legal rights without regard to the understanding between them and other members.
 - ii) Where there is a close analogy between the character of the company and that of a partnership it is more likely than in other circumstances that there will be equitable considerations which will warrant intervention to control the exercise by the majority of their legal rights. Similarly, the further removed the circumstances of a company are from the analogy with a partnership and the less akin to a partnership the company is then

the less likely it is that the powers of those controlling the company will be subject to equitable constraints. However, that is to be seen as a matter of fact rather than of law. The position is simply that the less apt the analogy with a partnership is then the less likely it is that a member of the company will be able to point to the relevant equitable considerations protecting his or her position and restricting the majority's legal powers.

- iii) If, as Fancourt J envisaged as a possibility albeit an exceptional one, such equitable considerations can be present even when not all the members of a company are parties to the relevant understanding then the question becomes one of fact and degree and not of principle. This accords with the view that the presence of third-party rights is a potent factor in determining the existence of the equitable constraints on the majority rather than an absolute bar to such constraints.
- iv) The reason for the court's intervention in quasi-partnership cases is that there are circumstances making it inequitable for those controlling a company to use their strict legal powers in a particular way. It follows that there must be a particular person or persons who are subject to the constraints and that the constraints must arise because it is unconscionable for that person or those persons to act in a particular way. This means that the focus is to be on the members of the company (and in particular those in control of it) rather than on the company itself as distinct from its members. If it is right that the focus is on whether particular members can act in a certain way then there can wholly sensibly be circumstances in which some members of a company but not others are subject to constraints. As a matter of general principle A may have an understanding with or may have had particular dealings with B which constrain the former's conscience and render it unconscionable for him to take certain actions in relation to B even though C who has no such understanding or dealings is not so constrained in his actions in relation to B. The fact that A, B, and C happen to be members of the same company does not, in my judgement, affect the application of that general principle to their actions in relation to the company. As a matter of principle it is possible to envisage circumstances where particular shareholders are entitled to complain about actions by or brought about at the instigation of certain other members of the company when the same shareholders would not be able to complain if those same actions had resulted from the instigation of other persons who happen also to be members of the same company.
- v) The last point is in part the answer to the concerns expressed by Fancourt J about the effect on the position of members of a company who are not parties to the relevant understanding. In that regard it is also relevant to note as was said in *Re Yung Kee Holdings Ltd* at [129] "the wide range of powers" which the court has under section 994. It does not by any means follow that the exercise of the court's powers will inevitably harm the rights of third-party members. It will often be open to the court to craft relief which upholds the equitable constraints "without impinging upon the rights of the third-party shareholders" or where that is not

possible to say that those rights preclude relief in the particular circumstances.

42. It follows that in my judgement the Hong Kong Court of Appeal was right to say, at [133], that “the crucial question is whether there are any equitable considerations arising from the dealings between the shareholders which call for restraints over the exercise of strict legal rights on the particular facts of the case.” The existence of third-party rights and of third-party involvement in and membership a company of can be very significant in deciding whether such equitable considerations are present and also in deciding whether constraints which were formerly present have passed away. They may as the Hong Kong Court of Appeal said, at [131], “present real and insurmountable difficulties” to the grant of relief in particular circumstances. They are not, however, conclusive or without more determinative of those questions. Where such constraints are found to exist then the existence of such third-party rights will again be relevant to the question of the appropriate relief.
43. The effect of that analysis in the circumstances of this case is that I must determine whether such equitable considerations operated to control the exercise of strict legal rights before the entry into the Subscription Deed and the creditors’ voluntary arrangement and then determine whether those events brought any such constraints to an end. I am to do so having regard to the particular circumstances and not on the footing that the presence of third-party rights in relation to the Company automatically precluded or terminated such constraints.
44. Even when a company is one where equitable considerations of this kind are present the extent to which they operate to make conduct which would otherwise be unexceptionable unfair will again depend on the particular circumstances. The use of particular rights and powers may be constrained in one way in one set of circumstances and in a different way in a different set of circumstances even though in both instances there are equitable considerations restraining the use of the controlling party’s strict rights. What is unfair in one case might not be unfair in a different case even if in both cases fairness operates to constrain the exercise of the rights given by the articles. “Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. ... the context and background are very important” (*O’Neill v Phillips* per Lord Hoffmann at 1098 F). Mindful of the different ways in which conduct can be said to fair or unfair I have also to be mindful of the care which is needed before concluding that conduct which would be permissible in the absence of particular equitable considerations is rendered unfair by those considerations. In that regard I bear in mind the cautionary note sounded by Lord Hoffmann in *O’Neill v Phillips* at 1098 D – E). As Jonathan Parker J said in *Re Guidezone Ltd* [2000] 2 BCLC 321 at [175] for these purposes unfairness:

“is not to be judged by reference to subjective notions of fairness, but rather by testing whether, applying established equitable principles, the majority has acted, or is proposing to act, in a manner which equity would regard as contrary to good faith.”

45. The test of fairness and unfairness is objective in the sense that the court is determining that question by reference to a standard derived from principle and authority. This means that a party can be found to have acted in an unfairly prejudicial manner even if he or she is subjectively acting in good faith and believing that he or she is acting fairly and properly. Bad faith on the part of the person concerned is not needed for that person's actions to be found to have been unfairly prejudicial to another member of the company. Conversely a person affected by certain actions may not have been subjected to unfairly prejudicial conduct even if that person subjectively believes the actions in question to have been grossly unfair. See *Re Saul D Harrison & Sons plc* at 17 f – h and *Re R A Noble & Sons (Clothing) Ltd* [1983] BCLC 273 at 290d – 292 b where Nourse J adopted and amplified the approach set out by Slade J in 1981 in the unreported case of *Re Bovey Hotel Ventures Ltd*.
46. In deciding whether the conduct of which complaint is made was objectively unfair regard must be had to all the circumstances including the conduct of the party now complaining. See the passage just cited in *Re R A Noble & Sons (Clothing) Ltd*; *Re London School of Economics Ltd* [1986] 1 Ch 211 at 222 A – C; and *Grace v Biagoli* [2005] EWCA Civ 1222, [2006] 2 BCLC 70 at [64].
47. In the passage just cited from *Grace v Biagoli* Patten J giving the judgment of the court said the judge below had been entitled to have regard to the petitioner's conduct in considering "whether his removal as a director by the respondents was a proportionate and justifiable response to what they had discovered." For the Petitioners Mr. Cawson QC mounted an argument based in part on the use by Patten J of the word "response". Mr. Cawson said that where the court is considering the fairness or unfairness of the exclusion of a person from involvement in the work a company then for that person's conduct to be relevant to the fairness or otherwise of the exclusion then there has to have been a causal connexion between the conduct in question and the exclusion.
48. In my judgement this argument places an undue emphasis on the word "response" which must, in any event, be seen in the context of the particular case. In *Grace v Biagoli* the Court of Appeal was considering a case where the discovery of the petitioner's conduct had occurred before the actions on the part of the majority of which complaint were made and had been the trigger for those actions (see at [49 – 50]). In that case the exclusion had in fact been in response to the petitioner's conduct and the Court of Appeal explained that the judge had been entitled to consider whether the response had been proportionate and justifiable. The court was not saying that in considering the fairness and unfairness of the actions in question a judge is limited to consideration of those aspects of the overall circumstances which were known at the time and which in fact caused the actions.
49. Moreover, it would be wrong as a matter of principle to impose a requirement of causal connexion before account can be taken of an excluded party's conduct when addressing the fairness or unfairness of an exclusion. The exercise for the court is to determine whether conduct which was prejudicial to the party complaining was unfairly so. In the context of exclusion that involves a determination of whether the exclusion was unfair. That determination is an objective one as I have already explained and is not dependent on the subjective

intention with which particular acts were done. The objective nature of this exercise indicates that the court should undertake it in the light of all the circumstances known to the court. Fairness or unfairness is to be determined in the light of those circumstances seen as a whole. Just as a genuine belief by a party that he or she was acting properly in excluding another party is not determinative of the question and does not prevent a finding of unfairness so an exclusion is not to be regarded as having been unfair if circumstances existed warranting the exclusion. This is so even if those circumstances were not known at the time of the exclusion or were not the reason for it. The existence or otherwise of a causal connexion between a petitioner's conduct and his or her exclusion is likely to be a factor relevant to the court's consideration of the fairness of the exclusion. If particular circumstances were not the cause of an exclusion then it is likely to be harder for a respondent to argue that those circumstances justified the exclusion particularly if they were known at the time and even more so when they had occurred some time before the exclusion. However, that is a matter of argument and of assessment of the evidence and is very different from the contention, which I reject, that as a matter of law a respondent cannot rely on particular circumstances to say an exclusion was fair if those circumstances did not in fact cause it. Mr. Cawson's argument would require the court to treat as unfair actions which would not be so regarded if account were to be taken of all the circumstances of the case and of the parties' dealings. That would be incompatible with the nature of the exercise being undertaken by the court and which requires a conclusion as to unfairness. The alleged unfairness is to be assessed in the context of equitable considerations constraining the powers of those controlling the company the presence or absence of considerations which is to be determined by reference to the circumstances as a whole. Having found in the light of the circumstances as a whole that there are such equitable considerations operating to constrain one party's rights then it follows that the court has to determine the question of fairness in the light of those same considerations. In doing so it is again to have regard to the circumstances as a whole. It would be perverse if the court were permitted and required to look to all the circumstances of the case in order to decide whether the relevant equitable considerations are present but required to look only to some of the circumstances in order to decide whether a particular action was unfair and so precluded by those considerations.

50. In practice it is likely that the adoption or rejection of Mr. Cawson's causal connexion requirement would make little difference to the outcome in most cases. This is because even if a petitioner's conduct were held not to be relevant to the fairness of an exclusion which it had not caused it would still be highly relevant to the question of the appropriate relief. In considering what relief is appropriate the court is then bound to look to the circumstances as a whole and a petitioner's conduct would be of great significance at that stage. Nonetheless I reject this argument and will proceed on the basis that in determining whether the exclusion of Austin and Gerard was justified or unjustified, fair or unfair, I am to look at the circumstances as a whole.
51. A breach of the articles does not necessarily constitute unfairly prejudicial conduct let alone conduct in respect of which relief will be granted (see per Hoffmann LJ in *Re Saul D Harrison & Sons plc* at 18 g – i). A rather different

approach is, however, to be taken to breaches of the fiduciary duties of directors. A breach of such duties “will generally indicate that unfair prejudice has occurred” (per Arden LJ in *Re Tobian Properties Ltd* [2012] EWCA Civ 998, [2013] BCLC 567 at [22]). It follows that while a breach of such duties does not necessarily amount to unfair prejudice the court’s starting point is to be that such a breach will have been unfairly prejudicial conduct. The duties on directors including the duty of avoiding conflicts of interest are strict. A director must account for benefits derived from opportunities obtained by virtue of his or her position as such even if the company has suffered no loss and even if the company itself could not have benefited from that opportunity (*Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443). The breach of director’s duties which was being addressed in *Re Tobian Properties Ltd* took the form of the payment of excessive remuneration and so clearly amounted to the conducting of the affairs of the company in question. There will be cases where a breach of a director’s duty does not amount to the management of the affairs of the company and so cannot be unfairly prejudicial conduct for the purposes of Section 994. However, such cases will be rare and any argument on behalf of a defaulting director to the effect that his or her breach of duty did not amount to management of the affairs of the company will need to be scrutinised with particular care.

52. The court has a discretion as to whether to grant relief under section 994 and also as to the form that any relief is to take. When considering the relief, if any, which is to flow in circumstances where the unfairly prejudicial conduct has consisted of the breach of a director’s fiduciary duties the court must guard against any watering down of the stringency with which those duties are to be enforced. Nonetheless, the court is unlikely to grant relief to a person who has knowingly acquiesced in the breach by a director of his or her duties and who subsequently asserts that such conduct has been unfairly prejudicial to his interests (see *Re Tobian Properties Ltd* at [42]).

My Assessment of the Witnesses.

53. There were stark conflicts between the evidence of Patrick and his siblings in relation to a number of matters and between Paul Gee on the one side and Austin and Gerard on the other as to the dealings between them. In assessing that competing factual evidence I am to take account of the demeanour of the witnesses and the impression I formed having seen them in the witness box. However, in doing so I have to be conscious that by itself demeanour can be an unreliable guide to the reliability of a witness’s evidence. What might appear to one judge to be evasion and a reluctance to answer questions indicative of unreliability in the evidence of a particular witness might to another judge be seen as commendable caution and care in giving evidence indicative of the reliability of the same witness’s evidence.
54. I have to be conscious of the fact that each witness was inevitably recollecting matters from a particular viewpoint. I also have regard to the common human capacity and tendency for a witness genuinely but mistakenly to recollect past events as having actually happened in the way in which the witness now with hindsight believes they would, or indeed should, have happened.

55. It follows that I am not to place undue weight on the impression derived from a witness's demeanour when giving oral evidence. I must look at the witnesses' evidence through the prism of the contemporaneous documents; of those events which are accepted or clearly demonstrated to have happened; and of inherent likelihood. The impression made by the demeanour of a witness must be set against those matters and to the extent that the contemporaneous documents in particular show a picture different from that depicted by a particular witness it is the former and not the latter which I should regard as more likely to be an accurate account of what happened.
56. I am satisfied that Patrick genuinely believed that his actions had been in the best interests of the Company. I am also satisfied that he was genuine in his belief that he had worked harder and borne greater burdens than his siblings. His sense of grievance was real. I make no finding as to whether it was justified but I do find that it had caused him to lose his sense of proportion in recollecting and explaining past events with the effect that his recollection and perception had become distorted. Patrick was unable to distinguish to any significant degree between his interests and those of the Company and was not able to deal with situations in which his views were challenged. This had the effect that Patrick had come to believe that his siblings had been conspiring against him. In giving his evidence Patrick demonstrated an obsessive concern to vindicate his actions rather than focussing on addressing the matters which were put to him. Because of this I was unable to regard his evidence as reliable particularly where it contrasted with the impression derived from the contemporaneous documents. I am reinforced in this assessment because there were instances where I find that Patrick's evidence was not only unreliable but simply cannot have been correct and where if he had been able to view matters dispassionately he would have had to concede that his account was wrong: something which he was unwilling or unable to do so. Thus the account which Patrick gave in relation to the checking of the Company's cash flow position at the time when payments were made to Sky Blue contrasted starkly with the convincing evidence given on his behalf by Janet Wall. Similarly, Patrick refused to accept that an impasse had been reached between himself and his siblings at the time his brothers went to see the Bank in November 2015 when that was clearly the position. When giving evidence about the expenditure on properties he had owned Patrick failed to address the questions he was asked and was not forthcoming in his answers. His evidence about the arrangements as between Tunnelling and the Company and about the financial affairs of Tunnelling was similarly opaque. I was driven to the conclusion that this was a deliberate approach and that Patrick was unwilling to give frank evidence about those matters in respect of which he felt he should not be called to account.
57. Marian had minimal direct involvement in the affairs of the Company after she stopped working in the business in 2005. Moreover, as explained above I find that her anger and resentment at what she perceived to be Patrick's actions and intentions at the time of the Subscription Deed have permeated her recollection and her perception of subsequent events. It follows that her evidence did not give any material assistance in my assessment of the more recent events and dealings. However, I do find that when describing the actions and intentions of her parents, and in particular of her father, Marian was giving evidence which

was reliable and which did assist in determining the nature of the Company and of the footing on which the family members participated in the Company and in its business.

58. In answering questions in cross-examination Austin was markedly evasive such that even reminding myself of the caution to be exercised in drawing conclusions from a witness's demeanour I was unable to regard his evidence as reliable. This impression was reinforced by a number of other matters. Thus in his witness statement Austin had said that he had received a bonus "until about 2005 after which I received no more bonuses although ... other employees did". In fact, however, as he later accepted, Austin had received bonuses of £40,000 in 2006; of £100,000 in 2007; and of £15,000 in 2009. I have to conclude that Austin was seeking deliberately to give a false impression in his witness statement. He was coy and evasive in answering questions about advice he had received from a gentleman called John Birchall. As I will explain below there were aspects of Austin's evidence in respect of the affairs of Saber and Sky Blue which I have concluded were simply not credible. Perhaps the most telling aspect of Austin's evidence was his account of the dealings which he and Gerard had with Paul Gee. I will address the dispute between Mr. Gee's evidence and that of Austin and Gerard below but it is sufficient here to say that I accept Mr. Gee's account of those matters. There was no scope for misunderstanding or misrecollection in this regard and I am driven to the conclusion that in relation to these dealings Austin was giving evidence which he knew to be untrue and was doing so because he believed that the truth would be harmful to his case. In those circumstances I am unable to accept Austin's evidence where it conflicts with the impression given by the contemporaneous documents; with inherent likelihood; or with the evidence of those witnesses without a direct stake in the dispute. Even where there is no such conflict I have to exercise considerable caution before accepting Austin's evidence. However, I do accept Austin's evidence of how and on what basis he came to be involved in the Company. I also accept that the notes he made of dealings with Patrick at the time of the acquisition of DCT by Tunnelling were made effectively contemporaneously with the dealings they record and this will be of relevance in my findings as to those dealings. In his evidence about aspects of his dealings with Patrick Austin said that he had discovered wrongdoing on Patrick's part but had chosen to do nothing about it because it would have been pointless to do so and because "the horse had bolted". Austin said this in particular in relation to the purchase of the business of DCT by Tunnelling and the rental paid for Ashcroft House. I found this explanation hard to accept and will have to consider whether the absence of challenge or complaint was in reality because Austin did not regard Patrick's actions as inappropriate or was otherwise prepared to accept them as benefiting the Company notwithstanding any impropriety.
59. Gerard was similarly evasive and unpersuasive in his answers to cross-examination. He was not forthcoming, deliberately so in my assessment, when asked about the performance of works on his home arranged through the Company or by Patrick. As with Austin the most significant feature was the account which Gerard gave of his dealings with Paul Gee. I find that in this regard Gerard gave an account which was untrue and which he must have known was untrue and which was given because he believed that the truth would

harm his case. It follows that I cannot regard his evidence as reliable. There were, however, aspects of Gerard's evidence which did accord with inherent likelihood and in particular I found persuasive his description of the Company as being a family business in which a member of the family would be allowed to participate if he or she wished to do so but where entitlement to hold a particular position depended on the person's ability to perform the rôle in question.

Did Equitable Considerations exist such as to constrain Patrick's Legal Powers?

60. This question could be rephrased as asking whether the Company was to be seen as a quasi-partnership but particularly in the circumstances of this case that is potentially misleading. The question I have to address in this case is whether the dealings between the shareholders were such as to give rise to equitable considerations restricting the use of their strict legal powers by those in control of the Company. I have to address that question separately in respect of the periods before and after the entry into the Subscription Deed and the company voluntary arrangement and consider whether either of those events caused the equitable considerations, if any, subsisting before no longer to be effective.
61. There are a number of matters which support the view that there were such considerations and that there was an understanding that control of the Company was constrained. I have explained above that I accept the evidence of Marian and of Austin as to how they came to be involved in the Company together with Gerard's description of the approach which was taken to family members. I find that Austin senior and Catherine regarded the Company as a family business in which they wanted their children to participate and where decisions as to the distribution of shares and the appointment of the officers of the Company were announced and explained at a family meeting. The conduct of Austin senior and Catherine at the family lunch at Players is a powerful indication that the affairs of the Company were treated as matter for arrangement and agreement within the family and not just a matter of arm's length commercial agreement. The increase in Patrick's shareholding and his appointment as Managing Director were balanced by the appointments of Austin and Gerard as director and company secretary respectively. Austin and Gerard became employees of the Company in the context of that understanding as to the family nature of the business.
62. It is apparent that Austin and Gerard were regarded as having major rôles in the affairs of the Company. Rôles which, in part, derived from their standing as family members. Thus John Evans and Ian Coll both had business dealings with the Company and regarded Austin as playing a major part in the business. Similarly, Julie Dawson was involved in providing human resources consultancy to the Company for a number of years. Miss. Dawson dealt primarily with Gerard and regarded him as being in charge of human resources issues. Miss Dawson believed that Gerard was a director of the Company. She explained that she formed that belief because she regarded the Company as a family business in which Gerard had a key rôle working alongside his brothers. Miss. Dawson had dealings with Patrick, Austin, and Gerard separately and together. She said that on the occasion when she had a meeting with all three brothers they all appeared to be present as decision makers although Patrick was

the dominant figure. The Subscription Deed identified Patrick, Austin, and Gerard as “managers” and imposed restrictions on each of them. Patrick contended that one of the purposes of the Bank in relation to the Subscription Deed had been to ensure his continued involvement in the Company. Although that may well have been part of the Bank’s motivation it is apparent that it took a similar approach with regard to Austin and Gerard.

63. It was common ground that the three brothers went for a drink together immediately after the approval of the company voluntary arrangement. Patrick said that this was simply a social occasion and that there was no discussion of substance as to how the Company was to operate during the currency of the company voluntary arrangement. In that regard he pointed to the detailed proposals which it had been necessary to draw up in order to obtain the approval for the company voluntary arrangement. Austin and Gerard said that the discussions when the three brothers were drinking together on that occasion involved them in working up the details of how the Company would move forward. I find that Patrick’s account of that meeting markedly underplays the rôle which his brothers had at that time. Patrick was right to say that proposals had already been prepared in some considerable detail but in respect of the meeting the evidence of Austin and Gerard was persuasive. The account they gave of the circumstances and of the measures which were drawn up was credible and Patrick’s description of it as a purely social occasion is inconsistent with the fact that the meeting and discussions were in the immediate aftermath of the approval of the company voluntary arrangement. It is also inconsistent with his assertion that social relations between himself and his brothers had ceased after the falling out over the Subscription Deed. The explanation which Austin and Gerard gave of what happened at the meeting was consistent with the fact that each of the brothers took a pay cut. Notwithstanding the detail in the proposals which had been put to the Company’s creditors more work was needed on the implementation of those proposals and I find that Patrick, Austin, and Gerard each took part in drawing up the plans for that implementation. In my judgement this was indicative of the three brothers approaching the matter as members of a family team rather than being bound solely by their commercial and legal relations.
64. Light is also, in my judgement, thrown on the nature of the parties’ involvement in the Company by the treatment of the Waldron Filter. This was a form of filter for road drainage invented by Austin and arising out of the Company’s civil engineering projects. There was some disagreement in the evidence as to the extent to which this was entirely Austin’s work but it was clear that Austin was the principal originator of the design. A patent was obtained in June 2015 and the three patent holders were the wives of Patrick, Austin, and Gerard. Again this is indicative of a family arrangement not confined to commercial considerations with the family members (or at least those involved in the work of the Company) being seen as entitled to share in the fruits of the Company’s business.
65. Patrick said that his father had promised him that he would have more than 50% of the shares in the Company and that he understood he would become the owner of 52% of the shares. He said that it was on this basis that he committed

his energies to the Company. Austin and Gerard accepted that Patrick had told them that a promise had been made in those terms but they said that their father had denied to them that he had made any such promise. I need not determine whether the alleged promise was actually made because I accept that Patrick came to believe that he had been promised that he would have more than 50% of the shares and that his father's failure to arrange this was a large element in Patrick's feeling of grievance. However, it is significant that Patrick did not assert that he was to have by any means all the shares in the Company. Even on Patrick's understanding a very substantial part of the Company's share capital was to remain in the hands of other family members. In my judgement this indicates that even taking Patrick's case in this respect at its highest there was to remain involvement in the Company on the part of other family members.

66. Mr. Casement argued that it was relevant that neither Austin nor Gerard had introduced any capital into the Company. It is correct that the introduction of capital is a factor which can indicate the presence of a quasi-partnership. However, it is not a necessary pre-condition of such an arrangement. There can be cases where a person who has not introduced funds into the capital of a company is nonetheless entitled to say that there are constraints on the exercise of another's powers of control. Indeed, the position of succeeding generations in a family company is a classic instance of a case where it is possible for there to be such constraints notwithstanding the absence of any capital introduced by those in those succeeding generations.
67. It was apparent that Patrick, and before him his father, took the lead in decision making and that Austin and Gerard, at least to a degree, accepted his entitlement to do this. Patrick was 'primus inter pares' in relation to his brothers and arguably regarded as even more of a leader than that term would suggest. That does not, however, mean that his power was untrammelled nor does it mean that there could not be equitable constraints on his power.
68. The family element in the relationship between the three brothers as officers and employees of the Company was significant. I find that there were equitable considerations operating to restrain the exercise of Patrick's powers. Austin and Gerard were not entitled to be involved in the Company regardless of any misconduct on their part and their involvement had to be on the footing that Patrick was entitled to exercise leadership. They entered the life of the Company on the footing that they were entitled to be involved under Patrick's leadership and were entitled to remain involved on the footing that they were not to be removed without due cause and Patrick knew that they had done so. A removal of Austin or Gerard from employment in the Company without due cause would not simply be an unfair or wrongful dismissal but would also be unfair prejudice because it would be contrary to the family understanding which governed their involvement.
69. I have to consider whether the entry into the Subscription Deed or the approval of the company voluntary arrangement brought those equitable constraints to an end in the light of the approach I have set out at [42]. In my judgement there is no basis for a conclusion that they did so. Rather the evidence in fact supports the view that the previous understanding and arrangements continued to operate.

70. Mr. Casement contended that the provisions in the Subscription Deed about the conduct of the Company's business and the involvement of Patrick, Austin, and Gerard as the "managers" superseded any family understanding which had existed before. In my judgement that is not what happened. The context of the Subscription Deed is significant. The involvement of SIG as a shareholder was intended as protection for the Bank and was akin to the grant of security. That explains the core provisions of the Subscription Deed which relate to the conduct of the affairs of the Company in relation to the outside world. Thus SIG's consent was needed for the acquisition or disposal of assets other than in the ordinary course of business; for entry into a joint venture, partnership, or consortium; for the creation of charges; and for the appointment or dismissal of employees earning over £30,000 and of directors. Those provisions were to bolster and protect SIG's position as were the provisions ensuring the active involvement of those identified as the "managers" and the imposition of post-termination restrictive covenants on them. Those provisions were not inconsistent with the continuation of the understanding between the family members. Indeed, the identification of Patrick, Austin, and Gerard as "managers" is best seen as a recognition of the nature of their involvement. The essential nature of the Company and of the relations between the family members remained unchanged. The events leading up to the execution of the Subscription Deed soured relations between the family members and in particular between Patrick and Marian but there was not a change of understanding as to how the affairs of the Company were to be conducted as between those family members.
71. After the approval of the company voluntary arrangement as I have just found the three brothers shared in the necessary pay cuts and worked together to plan out the way forward. In that regard I reject Patrick's contention that he was the sole decision maker at the time of the company voluntary arrangement and thereafter. He exercised leadership then as before but his brothers continued to participate in decision making and there was no change in the understanding between the family members. In that regard it is of note that it was in June 2015, some 4½ years after the company voluntary arrangement, that the Waldron Filter was patented and the arrangements set out at [64] made.
72. Austin and Gerard may well not have been able to invoke their protection against dismissal without cause if their removal had been brought about at the instigation of the Bank or SIG or by reference to the terms of the Subscription Deed. Similarly their protection would not have availed them against steps which the supervisor or the creditors required to be taken in relation to the company voluntary arrangement. That does not mean that the constraints to which Patrick's control of the Company had been subject in relation to his brothers fell away. The presence of third parties with rights in relation to the Company did not automatically remove the constraints flowing from the understanding between the family members and there is no basis for saying that that had in fact happened in this case. Accordingly, the restraints remained in place and were effective to constrain Patrick from seeking to exclude either defendant without due cause and to apply to his conduct at the time Tunnelling acquired the assets of DCT.

Other Significant Factual Disputes.

73. There were a considerable number of factual disputes between the parties. I have already set out my conclusion as to the nature of the Company. Not all of the other disputes need to be resolved in order to determine the issues in this case and some can be disposed of in the course of addressing the alleged acts of unfair prejudice. There are, however, four areas of dispute which can be dealt with discretely and which I will address before turning to the question of unfair prejudice.

Saber

74. Saber was incorporated in April 2009. The original shareholders were Austin and Seamus Murphy, a cousin, with Austin being a director. Subsequently the shares were transferred to nominees and Austin was replaced as a director by his father.
75. Austin said that he had been concerned in 2009 that the Company might fail and that he had set up Saber as a lifeboat in the sense of being a vehicle through which the family members could trade if the Company went under. He said that he had discussed this in advance with Patrick and that Patrick had agreed with this approach.
76. A natural reading of the account of this which Patrick gave in his witness statement is that he was told in advance of Austin's plan to incorporate Saber but was told that it was a vehicle to obtain contracts which the Company could not obtain and in respect of which the Company would do the work and receive payment with Saber being a conduit for this. In cross-examination Patrick said that this was not the correct reading and that he had only been told this in 2012.
77. That aspect of Patrick's account of his knowledge of Saber was unsatisfactory, partly because of his reluctance to engage directly with Mr. Cawson's questions in relation to it. Austin's evidence in relation to that company was, however, even less satisfactory and was one of the factors causing me to conclude that I could not regard his evidence as reliable. Thus Austin said the transfer of the shares to nominees and his resignation as director at been at the instigation of Patrick in order to conceal his involvement in that company from the Bank. That suggestion was made for the first time when Austin was being cross-examined as was his assertion that the beneficial interest in the shareholding was his wife's. Austin was markedly evasive when answering questions about those matters as he was in respect of his father's appointment as a director of Saber at a time when Austin senior's faculties were at least beginning to fail. Similarly Austin initially accepted that he had remained the driving force in respect of Saber even after his resignation but he then sought to resile from that acceptance when he realised that the answer might have been harmful to his position. It is of note that Paul Dickinson of Crossley & Davis accountants accepted that all the instructions in relation to the affairs of Saber received by his firm came from Austin throughout the life of the company. I reject Austin's evidence as to the beneficial ownership of Saber and as to Patrick's alleged instigation of the share transfer. I accept on the balance of probabilities that Patrick was not told in advance of the creation of Saber and I find that it was Austin's company created

perhaps as a lifeboat but as a lifeboat for him alone rather than for him and Patrick.

78. The significance of this evidence and of my findings in respect of it lies not in Austin's ownership of Saber. Patrick also formed companies of which he was the owner. The significance lies in the steps which Austin took to conceal his ownership of Saber and in the fact that he put forward unreliable evidence in that regard at the trial.

Sky Blue

79. This company was incorporated in December 2009. It had two directors: Joan Cook and John Cook. They are a married couple. Joan Cook is the mother of Alison Waldron who is Austin's wife and John Cook is Alison Waldron's step-father. The company's registered office was the home address of Mr. and Mrs. Cook in Blairgowrie. The annual return of December 2010 gave the occupation of each of Mr. and Mrs. Cook as "none". The company had two shareholders: Joseph Rice-Jones and Alison Waldron. Alison Waldron was at that time a school teacher with no involvement in or experience of civil engineering save that gained through being married to Austin. Mr. Rice-Jones is a longstanding friend of Austin. He is an experienced construction/civil engineering professional and in 2009 was employed by Costain as a project manager. Sky Blue made payments of £20,000 to Alison Waldron and £15,000 to Cara Waldron, Gerard's wife.
80. Mr. Rice-Jones said that Sky Blue was his venture formed with a view to him performing and being paid for ad hoc consultancy work. He said that he had not been a director of Sky Blue because the terms of his employment with Costain forbade this. He said that he had caused Alison Waldron to have a 50% shareholding because he hoped to persuade Austin to leave the Company and to join him in this venture. Mr. Rice-Jones said that having Alison Waldron as a 50% shareholder furthered that objective by demonstrating the seriousness of his offer to Austin and by making it clear that there would be a place for Austin in Sky Blue (seemingly on the footing that Austin would take over his wife's shareholding). In his witness statement Mr. Rice-Jones had described Mr. and Mrs. Cook as professional people and had not indicated their relationship to Alison Waldron. However, in his oral evidence he indicated that he caused them to be the directors because of that relationship. The payment of £20,000 to Alison Waldron was, on Mr. Rice-Jones's account, not a payment of dividends but was paid to her at the instigation of her mother and step-father in lieu of them receiving directors' fees for work done by way of filing returns, banking payments, and the like. The payment of £15,000 to Cara Waldron was a fee for consulting services.
81. Austin said that he had no involvement in Sky Blue other than being aware of the initial conversations between his wife and Mr. Rice-Jones about setting the company up. In his oral evidence Austin sought to distance himself from Sky Blue even going so far as initially saying that Mr. Cook was not related to him.
82. The assertion from Austin and from Joseph Rice-Jones that Austin had no involvement in Sky Blue cannot be sustained in the light of the evidence from

Mr. Dickinson. In that evidence Mr. Dickinson said that that Crossley & Davis had acted for the company and that save for one e-mail from Mr. Rice-Jones received towards the end of the engagement the instructions on behalf of the company had come from Austin. This contrasted with the evidence of Mr. Rice-Jones who said that he had engaged Crossley & Davis. It was not suggested that Mr. Dickinson had any reason deliberately to give false evidence about this matter nor was there any reason suggested as to why he might be mistaken. I accept the evidence of Mr. Dickinson and find that Austin was engaged in giving instructions to the accountants on behalf of Sky Blue.

83. Even without Mr. Dickinson's evidence the account given by Austin and by Mr. Rice-Jones was implausible and could not be accepted. I cannot accept that Alison Waldron was given a 50% shareholding as a way of inducing Austin to join the company nor do I accept that it was simply a matter of convenience which caused Mr. Rice-Jones to arrange for Mr. and Mrs. Cook to be the directors of the company he had set up and through which he generated income (albeit while he also had other employment). The only credible explanation for the way in which Sky Blue was structured is that it was in reality a joint venture between Austin and Mr. Rice-Jones and I find that it was indeed such a joint venture.
84. As with Saber the significance of my findings in relation to Sky Blue is not that Austin was involved in that company. The significance is rather the impact on the credibility of his evidence which comes from the facts that he went to considerable lengths to conceal his involvement in Sky Blue; that he persisted in giving a false account of these matters at the trial; and that he caused, as I find he must have done, Mr. Rice-Jones to be a party to that concealment and to the giving of that false account.

The Purchase by Tunnelling of DCT's Assets.

85. The DCT companies went into administration on 6th January 2014. Tunnelling was incorporated on 16th January 2014 with Patrick as its sole director and shareholder and on 21st January 2014 Tunnelling acquired the bulk of the DCT assets. The key factual dispute is whether this was done with the knowledge and approval of Austin and Gerard. Marian does not contend that she should have been consulted separately. Her position is that Patrick was at fault in failing to keep Austin and Gerard involved in the Company. In any event prior approval by Austin and Gerard would preclude any contention that Patrick had acted in breach of duty in this regard.
86. The Petition asserted that there had been an agreement between Austin, Gerard, and Patrick that the Company would acquire the DCT assets. The purchase of those assets by Tunnelling was contrary to that agreement and had not been authorised by the Company. The Defence denied any such agreement.
87. The Defence was somewhat unclear and indeed contradictory in respect of the precise extent of Austin and Gerard's involvement in and knowledge of the proposed purchase. Thus at [21] it said that Patrick's actions in relation to DCT and Tunnelling "were acquiesced in and authorised by the Petitioners". At [22] it said that Austin and Gerard "were aware of the purchase of DCT and the

reason for it and raised no objections whatsoever at the time”. However, at [26] reference is again made to the purchase of DCT’s assets and it is said that “Austin and Gerard had never been involved in making such decisions previously and they were not on this occasion either however given their involvement and lack of objection they must be taken to have consented and acquiesced on behalf of the Company.”

88. Patrick’s position was set out more clearly in his witness statement and in his oral evidence. Patrick said that he had met with Austin on site in Rochdale on 12th January 2014 and at that meeting he had explained that he was planning to acquire DCT’s assets through a new company which he was forming. Patrick said that he explained to Austin that the Company would not be able to fund the acquisition. He went on to offer Austin an opportunity to be involved in the new company but explained that this would require Austin to make a financial contribution by way of providing personal guarantees and putting money into the new venture. Austin declined the offer to become involved saying that he had no spare funds and did not want to put his assets at risk. However, he agreed that Patrick should go ahead with the deal through Patrick’s new company. Patrick says that on the same day he also explained what was proposed to Gerard and that Gerard had also agreed that Patrick should proceed as he had intended to do.
89. Austin agreed that he and Patrick had met at Rochdale on 12th January 2014 and that there had been a discussion about the acquisition of the assets of DCT. That was effectively the limit of the common ground between them. Austin said that he was not told that Patrick was buying DCT’s assets through a new company and that there was no suggestion that he might become involved in this. Rather Patrick said that the purchase was to be by a conglomerate of which the Company would be a member. Austin said that he believed until after the purchase had been completed that the Company would be participating in the purchase and it was only after the purchase that he learnt that not only had the purchase not been by the Company but also that it had been by a new company formed by Patrick.
90. Gerard similarly denied that he had been told in advance that the purchase was to be by Tunnelling or any new company formed by Patrick. He said that only learnt of this after the purchase and that until then he had believed that the purchase was to be by the Company.
91. I have already explained why I could not regard any of Patrick, Austin, and Gerard as reliable witnesses. There are no independent witnesses who can throw any material light on the dealings between the brothers in January 2014 but I have been assisted by a number of contemporaneous documents.
92. Austin said that it had been his practice to maintain a diary of meetings on site. He had a meetings book with him on site in which he wrote in manuscript notes of what occurred during the day. The entries recorded the plant and labour used; the works completed; and, under a section headed “other works”, details of meetings and discussions. The entries were made in manuscript but Austin then typed up the record doing so on the same day or shortly thereafter. I accept that this was Austin’s practice. The extracts which have been provided show a

working document of the kind described by Austin dealing with the daily activities on site. I accept that the entries were compiled in typed form shortly after the matters described and that the typescript was based on manuscript entries which had been made at the time of the various conversations described or almost immediately thereafter.

93. The relevant notes are as follows:

i) That of 12th January 2014. This records Patrick as having told Austin that he would probably have to leave the Rochdale site to concentrate on “the DCT works” in about 7 days’ time. It then said:

“We went through where and what he was up to with the deal. He said nothing is sorted out as yet but all should be sorted by tomorrow. He explained about a conglomerate being involved of five people. [the Company]/DCT/Consensus (property company – where he advised that he didn’t want anything to do with the property) but didn’t say anything about the other two parties.”

ii) The note of 14th January 2014 records contact from Patrick and that he and Austin “also spoke about the works issues concerning DCT etc”.

iii) The note of 15th January 2014 records a further conversation “about the DCT works” with Patrick saying that Yates had made a bid for the works.

iv) Finally, there is a note of 21st January 2014. This records Patrick as having said that Tunnelling was a separate company which was to be set up. The works were to be sub-contracted to Tunnelling but the “management and materials will be done so by [the Company] and deducted from the bills going into [Tunnelling]”. The contracts were to be novated to the Company. The note set out discussions about accounting arrangements and recovery of monies outstanding to DCT on the contracts which had been novated. It then recorded discussion about plant and stated:

“Also there is a separate plant firm that all the plant will be through. [Patrick] never explained that this was all his plant company, only that this will be another cost separated out etc”.

The note concluded by summarising the “crux” of what Patrick had said as that the Company had “taken over DCT for the reported figures are £3.5m”; that DCT’s contracts were to be novated to the Company; and that the Company would issue contracts to Tunnelling.

94. Patrick said that the note of the 12th January 2014 meeting was incomplete and incorrect. He did not accept that it accurately recorded what had been said and maintained that the conversation had been as I have summarised at [88] above. I find that the note is very significant. I accept that it is a document which Austin compiled shortly after the relevant conversation. The only sensible interpretation of it is that Austin believed that the assets of DCT were being

acquired by a conglomerate of which the Company was to be a member. It is wholly inconsistent with Patrick's assertion that he explained the Company would not be acquiring DCT's assets but that the purchase would be by his new company which he gave Austin a chance to join. It is not credible to suggest, as Patrick must, that Austin wrote the note in those terms despite having had a conversation such as Patrick describes.

95. The reference in the note of 21st January 2014 commenting in respect of the plant company that "[Patrick] never explained that this was all his plant company, only that this will be another cost separated out etc" raises the question of the contemporaneity of that document. Austin said that this passage was made at the same time as the rest of the note and that the whole was contemporaneous with the discussion on 21st January 2014 and recorded what Austin heard and believed at the time. That explanation does not fit readily with the words used. Those words are most naturally read as being a comment written later after the ownership of Tunnelling had come to light and as reflecting that this had not been explained at the 21st January 2014 meeting. Alternatively they could be read as indicating that it was at the meeting on 21st January 2014 Patrick had disclosed that he owned the plant company and that such ownership had not been disclosed before the meeting. I have reflected whether this indicates that the note was not contemporaneous with the discussion being described. I find that this entry was by way of comment added when the notes were being typed up. However, that does not detract from the substantial contemporaneity of the record of the other entries in the note. Rather a natural reading of it indicates that Austin learnt of the ownership of the plant company very shortly after the meeting and that he was at that stage recording that this had not been disclosed at the meeting.
96. At one point when he was cross-examined about the note and about the meeting of 21st January 2014 Austin accepted that he was told in that meeting that Tunnelling was acquiring the assets of DCT. The acceptance by Austin is not, however, consistent with the wording of the note and he modified in later in cross-examination and explained in re-examination that although he was told in the meeting of the existence of Tunnelling he still believed that the Company was acquiring DCT's assets. It was said on behalf of Patrick that the completion of the purchase took place after the meeting recorded in the note but later on the same day. That may well have been the chronology but regardless of the precise chronology it is apparent that the note does not show that on 21st January 2014 Patrick was seeking or being given approval for the purchase of DCT's assets by Tunnelling. His case was that he had been given this approval on 12th January 2014. The note indicates and I find that Austin still believed that the Company would be acquiring DCT's assets. Although Tunnelling was to be a separate company it would be operating as a sub-contractor in respect of the works.
97. The conclusions flowing from the note of 12th January 2014 are compelling. In the light of that note supplemented by the other notes I reject Patrick's evidence that on 12th January 2014 or at any time before the purchase of DCT's assets he disclosed that the purchase was to be by a company formed and owned by him let alone that he obtained the agreement of Austin and Gerard to this course. I find that the situation was as described in paragraph 26 of the Defence namely

that Patrick took the decision to proceed in that way without consulting Austin or Gerard.

98. When did Austin and Gerard learn that DCT's assets had been acquired not by the Company but by a company owned by Patrick? In the Reply they say that they became aware of this in "about February 2014" but that it was not until February 2015 on taking legal advice that they realised that any action was available to them. At one point in cross-examination Austin appeared to concede that he knew of Tunnelling's acquisition of the assets in the meeting on 21st January 2014. I have rejected that interpretation of the history. However, I do accept as accurate the contention that Austin learnt the true position very shortly after the purchase had taken place. He accepted that he did so in "less than weeks" after the purchase. Similarly Gerard accepted that he learnt what had happened "within days" of the purchase.
99. Although Austin and Gerard both knew very shortly after the purchase that DCT's assets had been acquired by Tunnelling and not by the Company they took no action in that regard. They both accepted that they did not even remonstrate with or complain to Patrick about this. They explained their inaction in similar terms saying that there was no point in doing so; that "the horse had bolted"; and that "what had been done had been done. There was no undoing it".

The Dealings between Austin, Gerard, and Paul Gee.

100. I have summarised at [17 -19] the different versions which Paul Gee and Austin and Gerard gave of their dealings in 2016. I am satisfied that the account which Mr. Gee gave was accurate and that of Austin and Gerard was not only inaccurate but that it was an account which Austin and Gerard knew was untrue.
101. I reach that conclusion because of the following matters. I have already set out the impression I formed from the demeanour of Austin and Gerard when giving their oral evidence. This is to be contrasted with the oral evidence of Mr. Gee which was given straightforwardly, calmly, and directly. Mr. Gee was an impressive witness and even when regard is had to the limited weight which can be given to the demeanour of witnesses the contrast between his demeanour and that of Austin and Gerard was telling. The impression given by Mr. Gee's evidence and his account of matters were, moreover, supported by inherent likelihood and the surrounding circumstances. It was not put to Mr. Gee that he had deliberately invented a false account of these matters and I find that he was seeking to give his honest recollection of what had happened. It is significant that Mr. Gee reported the actions of Austin and Gerard to Patrick as having involved an attempt improperly to persuade him to allow access to Patrick's e-mails. This is indicative that shortly after the August 2016 incident Mr. Gee had a genuine belief that Austin and Gerard had been offering him money to provide them with access to Patrick's e-mails and had been doing so with a serious intention that he should agree to their request. The scope for that belief having arisen through some kind of misunderstanding or misinterpretation on Mr. Gee's part is so minimal as to be discounted. Mr. Gee would not only have to have misunderstood jocular references calling him "horse" and incorrectly to have interpreted those as saying, on two occasions, that he had backed the wrong

horse but would also have had to have misinterpreted jocular banter for a serious attempt to bribe him. I cannot accept that such a misinterpretation could have arisen. In that regard the explanation from Gerard of his use of the word “horse” was simply not credible. Similarly, it is inconceivable that Mr. Gee would have so badly misinterpreted what was happening to mistake a joke for an attempt to bribe him. It follows that I find that the only credible explanation for Mr. Gee’s belief as to what happened is that he was recounting an accurate recollection of the events.

102. I take account of the ease with which a person can persuade him or herself that matters happened in the way he or she with hindsight wishes that they had happened. Nonetheless, I have to conclude that there was also no scope for misunderstanding or misrecollection on the part of Austin or Gerard. The consequence of my acceptance of Mr. Gee’s evidence must be a finding that Austin and Gerard were giving evidence which they knew to be untrue. I have already explained the impact which that conclusion has on my assessment of the reliability of their evidence. It is also significant as meaning that by August 2016 Austin and Gerard were saying that there were two sides as between them and Patrick; were seeking to persuade Mr. Gee to support their side against Patrick; and were offering him money if he would do so by giving them access to Patrick’s e-mails.
103. Mr. Cawson sought to argue that a distinction could be drawn between the behaviour of Austin and that of Gerard in relation to Mr. Gee. He invited me to conclude that Austin had taken no part in any attempt to bribe Mr. Gee but that any such attempt had been made by Gerard alone. I reject such an analysis as unrealistic and as verging on the fantastical. The effect of Mr. Gee’s evidence was that Austin had previously told him that he was backing the wrong horse. Although the offer of payment in return for providing access to Patrick’s e-mails was made by Gerard it was made in a conversation in Austin’s office with Austin being present. Mr. Gee clearly believed that it was an approach being made on behalf of both brothers. Although when he was cross-examined Austin sought to say that he did not take part in the conversation and did not hear all of it the effect of his evidence was that even on his account he heard sufficient of the conversation to be able to give evidence of his belief that the exchange was jocular and went so far as to say that he was laughing along with Gerard and Mr. Gee. I have rejected that interpretation of what was said and I find that although the offer of money was uttered by Gerard it was made on behalf of both brothers and with the knowledge and support of Austin.
104. In the light of my assessment of the witnesses and of those findings of fact I will turn to the matters which are said to constitute unfair prejudice. The petition set out nine respects in which Patrick’s actions were said to have been unfairly prejudicial. Those relating to the incorporation by Patrick of a number of companies have been abandoned and some of the others can conveniently be dealt with together.

The Acquisition of DCT by Tunnelling and the Dealings between Tunnelling and the Company.

105. The first of the remaining matters relates to Patrick's conduct in incorporating Tunnelling and in causing that company to acquire the assets of DCT. It is appropriate to consider this alongside the allegation that Patrick acted improperly in causing the Company to pay hire charges to Tunnelling for plant and machinery. The allegation that the hire charges were excessive is logically distinct from the alleged breach of fiduciary duty but in reality the contentions are linked. The use by the Company of the equipment which Tunnelling had acquired from DCT was an integral element of the arrangements for the purchase of DCT's assets. Moreover, the Petitioners have provided no substantiation of their allegation that the charges levied were excessive.
106. The essence of the case against Patrick in relation to Tunnelling is that in breach of his duties to the Company he used Tunnelling to benefit himself at the expense of the Company by acquiring the assets of DCT and using those assets to obtain payment from the Company. As explained at [51] a breach by a director of his fiduciary duties will be unfairly prejudicial conduct unless exceptionally the case is one where the breach does not relate to the director's management of the affairs of the company in question.
107. Patrick sought to say that the opportunity to acquire the assets of DCT had not come to him in his capacity as a director of the Company. He said that he learnt of the forthcoming administration of DCT and so of the potential availability of its assets while having a pre-Christmas drink in the Railway public house in Hale. I accept that this was when Patrick first heard of the impending administration and that information about it from Gerard came later. Nonetheless it is wholly artificial to suggest that this was an opportunity which did not come to Patrick by virtue of his position in the Company. It was because of his position in the Company and hence in the construction industry that others would know that he might be interested in such information. More significant is the fact that the opportunity to acquire DCT's assets was in reality only or principally of benefit and interest because of the synergy with the operations of the Company. The Company's assets and workforce were to be used to complete the outstanding DCT works and so gave value to the novation of DCT's contracts. Similarly the Company was a potential user for DCT's equipment. It was Patrick's ability to cause the Company to complete those contracts and to hire DCT's plant which made the purchase of DCT's assets worthwhile. The opportunity which came to Patrick cannot be seen separately from that ability to cause the Company to engage in those activities and so is to be seen as coming to him by reason of his position in the Company. This analysis is reinforced by the evidence of Paul Thompson. Mr. Thompson was a director both of DCT Civil Engineering Ltd and of Consensus Property Ltd a major creditor of DCT. It is apparent from Mr. Thompson's statement that it was Patrick's involvement in the Company which caused Peter Greenhalgh, DCT's managing director, to contact Patrick and which caused Mr. Thompson to be supportive of the negotiations with Patrick.
108. Similarly, it could not be said that Patrick's actions did not relate to his management of the affairs of the Company. He took advantage of an opportunity which came to him as a director of the Company and used his control of the Company to cause it to engage with Tunnelling. As just explained it was that

engagement on the Company's part with Tunnelling which made the arrangements work and that clearly flowed from and was part of Patrick's conduct of the affairs of the Company.

109. Patrick said that the Company would not have been able to acquire the assets of DCT. He pointed to the fact that the Company was in a creditors' voluntary arrangement and to the Company's financial difficulties as precluding purchase by the Company. Patrick said that support from Austin and Gerard by way of financial contribution and/or personal guarantees would have been needed and that those were not forthcoming. I have already rejected Patrick's evidence that he offered his brothers a chance to become involved. However, I do find that a purchase by the Company was not achievable. I am unconvinced by the assertions by Austin and Gerard that the Company could have afforded the purchase and that they would have been prepared to contribute to it. However, even more significant is the evidence of Karl Kirkpatrick and of Mr. Thompson as to the likely impact of the Company's voluntary arrangement status on the availability of funding; on delay; and on the likely attitude of the administrators to a sale. I find that the Company would not itself have been able to obtain funding or at least would not have been able to do so in the short time period which would have been needed if there was to be a sale of DCT's assets to the Company. It follows that the Company would not itself have been able to acquire the assets. That, however, is not an answer to the assertion that Patrick acted in breach of duty (see [51] above).
110. Patrick contended that the arrangement benefited the Company because it obtained work which it would not otherwise have got and without which it would otherwise have been in difficulties. The arrangement does appear to have been of benefit to the Company. I accept that Patrick genuinely believed that this was the case and that the Company was benefiting. However, it was also of benefit to Patrick. Tunnelling acquired valuable assets and made a profit on its dealings with the Company. Patrick did not suggest that his interest in Tunnelling or the benefits resulting from the arrangement were held for the Company. He was markedly reluctant to answer questions about the financial affairs of Tunnelling and the benefits he had derived from his ownership of that company. Patrick was frank in expressing his belief that as he had taken the initiative in setting up Tunnelling and had borne the risks involved to generate a benefit for the Company it was right that he should also receive the benefits. I find that this was indicative of his general failure to distinguish between his interests and those of the Company or to acknowledge that his assessment of the Company's interests and of the appropriate distribution of the benefits flowing from the Company's activities was not automatically conclusive. The fact of a benefit having been generated for the Company did not mean that Patrick was not potentially in breach of his duty by obtaining a benefit for himself from an opportunity which came to him as a director of the Company.
111. Accordingly, the issue of whether Patrick's actions in acquiring the DCT assets through Tunnelling and causing the Company to rent equipment from Tunnelling were in breach of his duties and thereby unfairly prejudicial depended on whether those actions had been approved in advance by the Company. As explained above I have rejected Patrick's contention that he

obtained the prior approval of Austin and Gerard. Instead he proceeded without consulting them and without informing them of what was proposed until after Tunnelling had acquired the DCT assets. That conduct was unfairly prejudicial for the purposes of section 994.

The Terms of the Lease of Ashcroft House.

112. No complaint is made in respect of Patrick's acquisition of Ashcroft House. Moreover, although the petition criticised the fact of the Company renting premises from Patrick that element of the complaint was not pursued at trial. In that regard Austin and Gerard knew that Ashcroft House was the property of Patrick and did not challenge the fact that rent was being charged to the Company. It follows that there was acquiescence in the conflict of interest which arose between Patrick and the Company in that regard. However, it is said that the rent was excessive and the terms of the lease more onerous than would have been the case in a lease on commercial terms particularly given the work which the Company funded on Ashcroft House. The allegation is that Patrick was using his control of the Company and his power to enter the lease to profit at the Company's expense. Patrick disputed this. He said that the terms were appropriate and that it was in the interests of the Company to be in high quality premises. The evidence put forward in support of this complaint was unpersuasive. Austin and Gerard said that the latter had rung round to local agents and surveyors and had obtained information about market rental and lease terms which had shown that the rent being paid was excessive and the terms unduly onerous. However, no details were forthcoming identifying those to whom Gerard was said to have spoken nor, save in the most general terms, as to their responses. Still less was there any independent or expert evidence as to either the appropriate rental for Ashcroft House or the appropriate commercial lease terms. Austin and Gerard accepted that they took no action after they had learnt that the Company was paying an excessive rent and say that this was because there was no point in doing so and it would have made no difference. I found this an unconvincing explanation and their failure to make complaint or to take any other action at the time indicates that they did not in fact find the rent to be excessive. In those circumstances the evidence put forward came nowhere near establishing this as unfairly prejudicial conduct on the part of Patrick.

The Taking of Unjustifiable Expenses and Expenditure on Patrick's Personal Property.

113. Complaints 6 and 8 are conveniently addressed together. The former alleges that Patrick claimed as expenses and recovered reimbursement for expenditure which was not connected with the business of the Company. The latter asserts that Patrick caused the Company to carry out development works on his personal properties. The complaints are related in asserting that Patrick was improperly using the Company's funds and resources for his own benefit.
114. Patrick says that the expenses for which he was reimbursed were for the benefit of the Company. He accepts that works on his personal property were undertaken by the Company but says that this was an accepted arrangement and that his brothers also had works performed on their properties by the Company's

workforce. I accept this evidence. It is apparent that Patrick could be somewhat high-handed and that he was unwilling to accept any questioning of what he regarded as being in the interests of the Company but I accept that he genuinely regarded the sundry expenditure for which he was reimbursed as being in the interests of the Company. The decision in that regard was well within the scope of his remit as managing director in the circumstances of this business. It was not in fact disputed by Austin and Gerard that works had been performed on their properties and that of their parents by the Company although Gerard said that the cost of the works on his property had been accounted for as a bonus. I find that it was an accepted part of the arrangements in respect of the Company that such works would be done and Patrick's actions in this regard are not to be seen as having been unfairly prejudicial to the Petitioners. However, the fact of the expenditure on the properties of family members is to be seen as a further factor supporting my conclusion that the dealings between the shareholders are not to be regarded as governed solely by commercial considerations or their strict entitlement under the articles.

The Appointment of Staff contrary to the Terms of the Subscription Deed.

115. Clause 7 of the Subscription Deed contained undertakings as to the conduct of the business of the Company given by the Company and by the Managers to SIG. By Clause 7.1.13 no employee with a salary of more than £30,000 was to be appointed without the prior written approval of SIG. Complaint 9 identifies five such employees whom Patrick engaged without the approval of SIG. Two of these were engaged before the dismissal of Austin and Gerard and three thereafter. There had been some discussion between the brothers as to the former two and a degree of disagreement or lack of support for the appointments. Austin and Gerard were not consulted about the latter three appointments.
116. It was apparent that there was some disagreement as to the qualities of those appointed and as to whether those qualities merited the salaries which were being paid. However, there was no basis for concluding that in making the appointments Patrick was acting other than in what he regarded as being in the best interests of the Company nor that this was not a view which it was legitimate for him to adopt. The making of these appointments may have been a breach of the undertaking given to SIG but it cannot be seen as conduct which was unfairly prejudicial in relation to the Petitioners.

The Dismissal and Exclusion of Austin and Gerard.

117. In opening the Petitioners' case Mr. Cawson put the dismissal of Austin and Gerard and their exclusion from participation in the business of the Company at the forefront of that case. I have already set out my finding that there were equitable considerations governing the parties' dealings and restricting the powers which might otherwise be exercisable. The parties were engaged in the Company on the footing that Patrick was entitled to exercise leadership and to take decisions as managing director but the other family members were entitled to participate in the business and to question Patrick's decisions. This did not mean that Austin and Gerard were immune from dismissal regardless of their conduct but it did mean that the decision to dismiss them had to take account of the expectation that they would be allowed to participate in the life of the

Company and that a dismissal without proper cause would amount to unfair prejudice in addition to any other consequences it might have.

118. It follows that it is necessary to consider whether the conduct of Austin and Gerard warranted their dismissal and their exclusion from the business of the Company. The dismissal and exclusion would be unfair prejudice if the circumstances at that time did not warrant such action. The exclusion of Austin and Gerard would not have been justified solely because Patrick wished to take control of the Company and was no longer willing to put up with the participation of his brothers. Mr. Cawson said that this was in fact the reason for the dismissal. He invited me to conclude that the other matters now alleged against Austin and Gerard had not actually caused the dismissal and so were to be disregarded. I have already explained, at [47 -50], my conclusion that it is not necessary for there to be a causal connexion between an exclusion and the matters which are said to justify it and which might lead the court to find that it did not constitute unfair prejudice. Instead in considering whether an exclusion was unfairly prejudicial I am to look at matters in the round and determine whether it lies in the mouth of a person excluded from the life of a company to say that the exclusion was unfair. The motive for and the reasons which actually caused the exclusion will be relevant to the extent that if an exclusion was in fact for an unjustified reason then the court will need to examine with greater care and potentially with a degree of scepticism an argument that there were other matters which although not motivating the exclusion happened to justify it. This is particularly so if those matters had been known at the time of the exclusion. In the circumstances of this case if I were to find that the exclusion was caused by Patrick's decision that he no longer wished his brothers to be involved in the business and wished to have outright control (matters which would not justify the exclusion) then I would have to consider with care the contention that the other circumstances meant that the exclusion was not unfair.
119. In his witness statement Patrick said that when he was told by Mr. Gee that Austin and Gerard had offered him money to provide access to the e-mails he concluded that his "only option in order to protect the Company and its employees" was to dismiss them immediately. The Petitioners say that this was not the real reason for the exclusion of Austin and Gerard. They say that Patrick took this step because he wanted to break the deadlock about the share holdings and to take control of the Company. I reject the Petitioners' contention in this regard. It was undoubtedly the position that Patrick welcomed the exclusion of his brothers and the ending of what he saw as their interference in his conduct of the affairs of the Company. Nonetheless I find that he was correct to say that it was the information provided to him by Mr. Gee which caused the dismissal. In particular I find that Patrick is not putting that forward as the reason for an exclusion which was in truth made for other reasons. The key factor causing me to reach that conclusion is the timing of the dismissal. The dismissal letter was sent on 9th August 2016. It was not disputed that Patrick had returned from holiday on 8th August 2016. I accept Patrick's evidence that while he was on holiday he had been told by Mr. Gee that Austin and Gerard had sought access to his e-mails and that on 8th August 2016 Mr. Gee told Patrick that they had offered him money to provide the access. The dismissal letter followed the day after and was, I find, triggered by that information. It follows that Patrick was

correct in his account of the matters which caused him to exclude his brothers. I will have to consider whether those matters did justify the exclusion but I am satisfied that the reasons given in the dismissal letter were the true reasons causing Patrick to act as he did and were not put forward to justify an exclusion flowing in truth from a different motivation.

120. The Defence sets out a number of respects in which it is said that the actions of Austin and Gerard justified their dismissal with the effect that this did not amount to unfair prejudice even if the Company is to be seen as a quasi-partnership.
121. The first such matter relates to Sky Blue. The Company paid Sky Blue £79,000 in 2011 and £69,000 in 2012. These sums were paid in response to a number of invoices rendered by Sky Blue. Mr. Rice-Jones said that the invoices were genuine and related to various items of work he had done for the Company. Patrick says that no such work was done and that the invoices were fabricated as a device to cause the Company to pay money which was not due to a company which was in reality owned by Austin. It was his case that the rendering of the invoices was a deliberately planned deception.
122. I have already set out my reservations as to the reliability of the evidence of Austin and of Mr. Rice-Jones. I did not accept their contentions as to the ownership and purpose of Sky Blue. However, the question of whether they fabricated a series of entirely bogus invoices and submitted them to cause unjustified payments to be made out of the Company is a different matter. The allegation here amounts to one of fraud. In addressing such an allegation I am to make the finding sought by Patrick if he has shown on the balance of probabilities that the more likely explanation is that the invoices were bogus. In assessing the probabilities I have to keep in mind that the more serious the allegation and the more unusual the conduct alleged the less likely it is to have occurred. I have to remember the inherent probability or improbability of the actions said to have taken place (see *Re H* [1996] AC 563 per Lord Nicholls at 586 C – 587 G).
123. The conduct alleged here is the fabrication of a series of false invoices with a view to defrauding the Company of substantial sums of money. That is a serious matter and the allegation is of conduct which is inherently unlikely in that deliberate planned and organised dishonesty of the kind alleged is fortunately markedly rare. The allegation here is supported by Patrick's evidence that he was not aware of the Company having engaged Sky Blue or having received services from that company; that the Company had not needed to engage contractors; and that he had neither seen the invoices nor approved payment. I have regard to that evidence but in doing so I note that I have already set out my findings that Patrick's sense of grievance had caused his perception of matters to become distorted. He had come to believe that his siblings had been conspiring against him over a number of years and he interpreted all their actions in the light of that belief. Not only does Patrick's evidence in respect of the invoices lack support from any other source but the predominance of the evidence points to the genuineness of the invoices. Mr. Rice-Jones gave evidence explaining the work that had been done and to which the invoices related. I was unimpressed by his evidence as to the ownership of Sky Blue but

I do not find that in relation to the invoices he was giving detailed false evidence to cover up a fraud to which he had been a party (which must have been the position if the invoices had been false). Moreover, I accept that the Company's accounts do provide support for the assertion by Austin and Mr. Rice-Jones that in this period the Company had reduced the number of directly employed staff and had made greater use of consultants. However, the most telling evidence on this issue was that of Janet Wall. Mrs. Wall is and was the Company's Office and Accounts Manager. She explained that Austin had provided her with the Sky Blue invoices and had asked for them to be paid. The payment of those invoices went through the Company's normal payment processes and the invoices and the payments were apparent in the Company's records. Mrs. Wall explained that on a monthly basis a list was compiled of all the invoices which had been rendered to the Company and the payments which had been made in respect of them. That list was shown to Patrick and he was able to see the payments made and the recipients of the payments. Mrs. Wall could not recall the payments to Sky Blue being on a particular monthly list but accepted that if the normal procedure had been followed then they would have been on the relevant list. In the light of that evidence I find on the balance of probabilities that within a month or so of the payments having been made Patrick saw a record of the payments and raised no challenge. Even more significant is the fact that Austin was aware of the system whereby a monthly list of payments and payees was shown to Patrick. Accordingly, if Austin was causing payments to be made to Sky Blue when it had no right to them then he would have known that this was likely to be discovered quickly because the payments and Sky Blue as payee would have appeared on a list being put before Patrick. If a fraud was being committed it was one which would have been likely to have been exposed quickly. When this point was put to Patrick he said that Austin had acted in this way because Austin was "stupid" and Mr. Casement made the same contention more elegantly saying that it was Patrick's case that Austin was a thief in this regard but not that he was a skilled or clever thief. In my judgement, however, it is simply not credible that Austin would have acted in the way alleged. Patrick's case requires Austin to have had the foresight and skill to arrange a series of invoices which appear genuine but which have no legitimate basis while at the same time lacking the foresight to realise that he was running the risk of exposure. Such behaviour is, of course, possible but it would have been highly unlikely. I reject the allegation that these invoices were false and find that the payments related to services which Mr. Rice-Jones had provided and for which Sky Blue was entitled to payment.

124. The Defence then alleges that payments totalling £24,000 were made to Saber for work which "could and should have been undertaken by the Company". Patrick's position was that Austin improperly diverted work to Saber and arranged for it to perform work and receive payment as a sub-contractor of the Company when the Company could itself have performed the work directly. Austin's position was that the invoices related to works at Preston Brook. He said that there was an electrical element in the works which the Company had been engaged to perform there. However, the electrical sub-contractor, HOH Electrical Ltd, was not willing to work with Patrick and was not prepared to be engaged by the Company but was prepared to be engaged by Saber. In those circumstances it is said that Saber engaged HOH Electrical Ltd to perform the

work in question and was responsible for paying that company but then itself rendered invoices to the Company. Austin said that Patrick had initially rejected the idea of this arrangement but had then accepted it because the Company was obliged to get the electrical works performed. Notwithstanding my reservations about the reliability of Austin's evidence I found his account of these dealings persuasive. Again it is of note that these invoices were processed through the Company's normal systems. It follows that if Austin had been acting without the knowledge of Patrick and had engaged Saber to perform work which the Company should have done he could have expected that behaviour to be exposed. In those circumstances I reject this allegation and accept Austin's explanation for these payments to Saber.

125. Next it is said that Austin and Gerard acted improperly in having a meeting with the Bank in December 2015 without Patrick being present. It is said that this resulted in confidential information being disclosed to the Bank and caused the Bank to reduce the Company's overdraft facility. I find that the dealings which Austin and Gerard had with the Bank did not amount to misconduct and did not warrant their exclusion from the management of the Company. Patrick had been entitled to enter negotiations with SIG and with the Bank with a view to acquiring the shares held by SIG. Just as he was entitled to do that so Austin and Gerard would have been. I accept that the meeting which Austin and Gerard had with the Bank did adversely affect the Bank's relationship with the Company. It did so because it revealed to the Bank that there was disharmony and dispute between the shareholders and between Patrick and his fellow director. There was not only a dispute but there was an impasse. For the Bank to have knowledge of this would be likely to cause the Bank to reconsider the facilities provided to the Company but it was a matter of the Bank learning of the true position and that was something it was entitled to know. If the Bank had questioned Patrick as to the effect of the proposed sale of the shares held by SIG on relations between the shareholders he would himself have had to disclose the true position (the alternative would have been for him to allow the Bank to continue providing facilities on a false basis). Once a dispute had arisen Patrick was not entitled to require that he should conduct all the dealings with the Bank nor to criticise Austin and Gerard for approaching the Bank on their own behalf.
126. In the Defence it is said that Austin and Gerard failed to carry out their duties as director, in Austin's case, and as employees, in both their cases, with the consequence that the payment of their salaries could not be justified. This echoes the assertion in the dismissal letter that there had been neglect of their rôles in the work place. However, the allegation was not further particularised in either the Defence or in the dismissal letter. In his witness statement Patrick again made an allegation that Austin and Gerard were neglecting their duties but did so in the most general of terms. He expanded a little on this in answering questions in cross-examination but again without any degree of particularisation. In those circumstances there is no basis for a finding that either Austin or Gerard had neglected their duties (something which they deny) and I do not make any such finding.

127. In the dismissal letter Patrick asserted that there had been “gross insolence” and “insubordination” on the part of Austin and Gerard. This was not further particularised in that letter nor was it a matter relied on in the Defence and rightly not. It was apparent that relations were poor between the brothers and that Patrick was angry at having his decisions and leadership challenged but such challenge and disagreement even if expressed in strong terms would not justify the exclusion of Austin and Gerard from involvement in the management of the Company.
128. The Defence invokes the actions of Austin and Gerard in relation to Paul Gee as a matter justifying their exclusion. It follows from the findings I have just made that this is the only potential justification for the exclusion which remains. I have already explained that I accept Mr. Gee’s account of what happened. Thus Austin and Gerard were party to an attempt to cause Mr. Gee to provide them with access to the e-mails of other employees and in particular of Patrick and sought to bribe Mr. Gee to do this.
129. Mr. Cawson said that this conduct has to be seen in the light of Patrick’s actions in removing the access which Austin and Gerard had formerly enjoyed to employees’ e-mails. He says that Patrick’s action was itself improper because Austin as a director was entitled to full access to all the affairs of the Company. Austin had, Mr. Cawson says, a right to see the e-mails and so was entitled to take steps to circumvent the restrictions which Patrick had placed on his access to them. That being so the approach to Mr. Gee was not improper and was not a proper ground for excluding Austin and Gerard from involvement in the Company.
130. I do not accept this analysis. It is right that a director as director is entitled to the information necessary to enable him or her properly to undertake the duties of a director. It is also right that a company’s board as board is entitled to full information about every aspect of a company’s affairs. That does not, however, mean that a director is simply by virtue of his position as director entitled to see all e-mails or other documents generated in the course of the company’s business. In particular there can be circumstances where a managing director or board chairman needs to deal with matters confidentially from another director or has conduct of matters with which another director has no reason to be concerned. There can be no confidentiality from the board of a company acting as the board but that does not mean that a director is, without board approval, entitled to see every document which a company has.
131. Moreover, Mr. Cawson’s argument was detached from the reality of what happened in this case. I find that Austin and Gerard were not seeking access to Patrick’s e-mails because they believed they needed that access to perform their rôles as director and company secretary. They had made no request in those capacities for access and had not sought to convene a board meeting to obtain a formal decision to that effect. The reality is that they were seeking access to Patrick’s e-mails on the footing that there was a dispute between them and Patrick and they wanted that access to further their position in that dispute. Austin and Gerard sought that access secretly and through offering a bribe. It would be fanciful to suppose that if Mr. Gee had agreed to the request and had given them access to Patrick’s e-mails that Austin and Gerard would then have

told Patrick that they had such access. This was manifestly improper conduct. This is demonstrated by the fact that Austin and Gerard gave false evidence in an attempt to deny what they had done. Their stance in giving evidence was not to accept that they had spoken to Mr. Gee in the way he says but then to say that they had been entitled to try to get access to the e-mails. Instead they falsely denied having sought to suborn Mr. Gee. The denial was because Austin and Gerard knew that they had acted wrongfully.

132. In my judgement this was rightly seen as serious misconduct. The stark facts are that Austin and Gerard sought to bribe a contractor so as to gain covert access to Patrick's e-mails with a view to advancing their interests in their dispute with Patrick. That was behaviour which justified their removal from further involvement in the management of the Company even in the context of the family arrangements. They were not to be removed from that involvement without proper cause but their actions in this regard amply justified that removal.
133. This means that the dismissal of Austin and Gerard and their exclusion from participation in the management of the Company did not constitute unfair prejudice.

Conclusion as to Unfair Prejudice.

134. It follows that I have rejected the sundry allegations of unfair prejudice save in relation to Patrick's actions in acquiring the DCT assets through Tunnelling and in causing the Company to rent equipment from Tunnelling at a profit. Those actions were breaches of Patrick's duties to the Company and were unfairly prejudicial conduct in relation to the Petitioners.

Should Relief be granted to the Petitioners?

135. The grant of relief under section 994 is discretionary. Acquiescence in the relevant conduct by those who subsequently allege unfair prejudice can cause the court to decline relief. In *Re Tobian Properties Ltd* at [42] Arden LJ explained that a case where a petitioner had "made a covert strategic decision to leave [the respondent] with the burden of running [the company] and free to continue drawing excessive remuneration with a view to seeking to recover it from him at a later date" was one where relief would be likely to be refused.
136. In this case Austin and Gerard knew the true position in respect of Tunnelling and the acquisition of the DCT assets within a very short time of the relevant events. They made no complaint of what had happened. They say that they remained silent because making a complaint would have been pointless and, in the Reply, that it was only in February 2015 (which was still 2½ years before the Petition) that they knew of the possibility of legal redress. I do not find that they were deliberately allowing matters to continue with a view to making a claim at a later date. However, they were prepared to allow matters to continue without complaint and delayed in taking action even after, on their case, they learnt of the possibility of legal redress in February 2015. I find that they did so either because they did not in reality regard Patrick's behaviour as having been inappropriate or because they were content for the Company to continue to derive the benefits which flowed to it from the arrangement notwithstanding

that there were also benefits for Patrick. I am satisfied that matters would have continued if not without argument at least without the commencement of proceedings if Austin and Gerard had not been dismissed and excluded from participation in the management of the Company. It was that exclusion in August 2016 which triggered these proceedings and it was that exclusion which was put at the forefront of the case when it was opened to me. I have found that Patrick was justified in excluding Austin and Gerard because of their conduct. In those circumstances the longstanding acquiescence in the consequences of Patrick's actions in January 2014 precludes relief and I decline to grant relief to Austin and Gerard on the Petition.

137. There was no suggestion that Marian had been told in February 2014 of the position in relation to Tunnelling. However, by then she had by her own choice ceased to take any part in the life of the Company and did not do so again until the events of 2015. Marian was content to take a back seat and to leave her brothers to run the Company. Approval in advance of Patrick's actions by Austin and Gerard would have meant those actions would not have been a breach of duty and would not have been unfairly prejudicial regardless of ignorance on the part of Marian. The acquiescence on the part of Austin and Gerard similarly disentitles Marian to redress. Having decided to take no part in the life of the Company and having been content for her interests to be protected by her brothers Marian is to be seen as having acquiesced in such matters in relation to the Company as were accepted by her brothers.
138. In the light of those conclusions it is not necessary for me to reach a conclusion on the redress which would have been appropriate if relief had been granted. In particular I need not determine whether any order for the buying out of the shares of Marian, Austin, and Gerard should be on a discounted or non-discounted basis. Having received submissions on the question I will, however, briefly set out the conclusion which I would have reached. The approach to be adopted is that summarised by HH Judge Hodge QC in *Re Lloyds Autobody Ringway Ltd* [2018] EWHC 2336 (Ch) at [113 - 114]. Marian's alignment of her position with that of Austin and Gerard in the conflict means that no distinction is to be drawn between her and her brothers. My conclusion that the exclusion of Austin and Gerard was justified is significant in this regard. The fact that the exclusion was justified and the nature of the conduct leading up to are of considerable relevance in determining the relief to be granted. In the light of those findings if I had found it appropriate to grant relief in respect of the unfair prejudice arising out of Patrick's acquisition of the DCT assets through Tunnelling I would nonetheless have directed that any buying out of the Petitioners' shares be on a fully discounted basis. Conversely if I had found that the exclusion had not been justified I would have ordered that the shares be bought on a non-discounted basis.