



Neutral Citation Number: [2019] EWHC 2939 (Ch)

Case No: 160 of 2018

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

Civil Justice Centre
Bristol

Date: 5 November 2019

Before :

PHILIP MOTT QC
Sitting as a Deputy High Court Judge

Between :

RICHARD GEORGE
- and -
(1) ROBERT McCARTHY
(2) GOSS INTERACTIVE LIMITED

Petitioner

Respondents

Charles Newington-Bridges (instructed by **Gregg Latchams**) for the **Petitioner**
Hugh Miall (instructed by **Michelmores**) for the **First Respondent**

Hearing dates: 15, 16, 17, 18, 21, 22 October 2019

Approved Judgment

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

Philip Mott QC:

1. This is an unfair prejudice petition brought under section 994 of the Companies Act 2006. Although the Points of Claim allege various breaches of duty under the Companies Act and breaches of contract by the First Respondent, in the end these are relied on only to support the claim for relief under section 994, not as freestanding causes of action.
2. The principal parties to this litigation, the Petitioner Mr George and the First Respondent Mr McCarthy, are 50 per cent shareholders in the Second Respondent company, Goss Interactive Limited. It is agreed that the relationship between them has irretrievably broken down, but that is not enough to justify the court's intervention under section 994 (see per Lord Hoffmann in *O'Neill v Phillips* [1999] 1 WLR 1092, at page 1104C-1105B).
3. The analogy with divorce proceedings drawn by Lord Hoffmann is apt to the extent that Mr George in particular has sought to carry out an investigation of the whole history of the relationship between the parties over a period of twenty years, rather than to focus on specific issues arising in the more recent past. At times the complaints have seemed more suited to a defended divorce than an unfair prejudice petition. Such extensive investigation is not uncommon in such cases, and is the reason for active case management by the court.
4. Such case management, together with the cooperation of counsel on both sides, has succeeded in limiting the length of time taken in court, but the complaints are still very widespread. There was an order at the costs and case management conference for the parties to agree a form of Scott Schedule to "identify the specific facts and points of dispute for trial". That document was produced, and I have encouraged the parties to limit their cases and submissions to what is contained therein.
5. In the end, it seems to me that a number of questions arise for my determination in this judgment, and may be grouped together as follows.
6. First, did the involvement of Mr George and Mr McCarthy in Goss Interactive amount to a "quasi-partnership", in the way in which that term is used in the authorities? That issue involves a consideration of at least some of the questions set out in paragraphs 1 to 9 of the Scott Schedule, but is not limited to those matters.
7. Secondly, was Mr George subject to unfairly prejudicial conduct in any of the following respects?:
 - i) Dubai – Mr George alleges that when he was living in Dubai between 2012 and 2016 Mr McCarthy was unsupportive of his work for the company [Scott Schedule paragraph 40]; that there was a failure to pay his remuneration promptly [43, though this is not now pursued]; and that there was a failure to pay his rent as expenses [46].
 - ii) Exclusion – Mr George alleges that, at least from April 2014 and more clearly after his return from Dubai in 2016, he was excluded from his proper role in the affairs of the company. This took various forms:

- a) Mr McCarthy failed to call Board meetings [12], REM committee meetings [14] and an AGM when requested [16]. When Board meetings were held, Mr McCarthy unfairly edited and thereby manipulated the minutes [26].
 - b) Mr McCarthy failed to bring important matters to the Board for decision. These included the failure to submit major contracts with high risk clients or slow payers for approval [32]; the making of senior management appointments without approval [38]; and cutting the marketing budget without approval [34, though this is not now pursued].
 - c) Mr George was denied access to financial information. His direct access to Sage via the G drive was removed [18]; the extent of financial information distributed to directors was reduced [20, 30]; he was denied access to the financial controller Mr Gilkes [24]; and he was effectively removed from control of the bank account by a change in the mandate [28].
 - d) Mr George was physically excluded from the company's premises, because the locks were changed during his absence in Dubai and he was refused a key on his return [22].
- iii) Acquisition opportunities – Mr George alleges that Mr McCarthy failed to follow up a number of opportunities to buy or, more often, to be bought out by other companies [36]. The principal example of this was an offer from Agile Applications Limited in May 2017.
- iv) Dividends – Mr George alleges unfair prejudice because his dividends were paid late between July 2015 and November 2017, and not at all after November 2017 [10]. In addition, he asserts that the recent declaration of a dividend, and its payment to Mr McCarthy, was unlawful and unfairly prejudicial.
8. Thirdly, what is the correct valuation of the company as at the date of the hearing? Do any of the matters complained of above amount to mismanagement of a character which would lead to an enhancement of that valuation so far as Mr George's shareholding is concerned? Should there be any, and if so what, discount applied to the valuation of Mr George's shares to reflect the fact that it is not a majority shareholding?
9. Although strictly the valuation of the company only arises if I find unfair prejudice, it was agreed by both parties that I should hear the expert evidence and state my conclusions in principle in any event. As to the precise figures, it is agreed that the latest information, especially as to cash reserves, may affect the calculation and that written submissions or agreement about such adjustments should be made, if required, after this judgment. It is also agreed that relief is discretionary and the parties should be entitled to make further written submissions about whether it should be granted, and in what form, after my findings are known.

Historical background

10. Goss Interactive Limited was incorporated as an off-the-shelf company under the name of Merglan Limited on 28 April 1998. Its name was changed on 24 September 1999, and the first set of accounts suggest that it started trading at about that time. Initially Mr George was the Managing Director, Mr McCarthy was the Technical Director, and there were four other parties involved.
11. Its business is described in Mr Newington-Bridges' opening skeleton argument as "web and digital platform provision". It was not necessary to go into this in any detail in the evidence before me. Broadly I understand that it started building websites, but has broadened into dealing with content management and database systems. Its customers include a high proportion of local authorities, but also private sector companies. One of the principal customers prior to 2015 was Brittany Ferries.
12. On 19 September 2001 all six parties entered into a Shareholders' Agreement, which I shall consider in more detail later. By this date Mr George and Mr McCarthy each had 34.5% of the total shareholding. Pete Goss, the international yachtsman who gave his name to the company, had 19.5%. The remaining 11.5% shareholding was split between Mark Orr, Nicholas Booth, and a company Ward Financial Holdings plc. I was told that these other shareholders were bought out in 2004, since when Mr George and Mr McCarthy have each had 50% of the shareholding in the company.

Witnesses

13. I heard evidence from Mr George and Mr McCarthy. Cross-examination of each took just over a day. Mr George called supporting evidence from Mr Bowen, of Agile Applications Limited; Ms McQueen, who started dealing with the company accounts in 2001 and was employed in the finance department from 2003 to June 2017; Mr Peake, who was Marketing Director and a Board member from early 2012 to early 2016; and Mr Witts, who was employed on the sales and marketing side between 2010 and 2018. Mr McCarthy called supporting evidence from Mr Smith, who started in sales in November 2006 and progressed to a position on the Board in 2010, remaining as the only other director now; Ms Stillman, who was the Director of Finance from 2009 to 2013; and from Mr Gilkes, who started as Director of Finance (though not a Board member) in January 2015 and is still employed by the company.
14. It was apparent from the evidence of other witnesses, and from my own observation of them over an extended period in evidence, that the two principal parties have very different characters. Mr George is a salesman, naturally expansive, outgoing and optimistic. Mr McCarthy has a background in computing, is more technical, cautious and reserved. Although they worked together in a previous company, Netserv (UK) Limited, and in Goss Interactive in a reasonably constructive manner until at least 2014 according to Mr Peake, Ms McQueen described what was always "a very volatile relationship".
15. In the documents before me the friction between them can be seen from as early as 8 April 2005, when Mr George stated in an email that their relationship was intolerable, "one of us has to leave and leave the other to lead it". The following day he wrote again asking for £3m and saying "You are probably the most selfish person I have met and a complete idiot in dealing with people".

16. Making all due allowance for this difference in character, and the length of the bad feeling between them in business, I nevertheless have concluded that I cannot accept Mr George's evidence where it is not supported by contemporary documentation. In my judgment he has shown himself quick to bend facts to his own purposes, both in this litigation and in the years leading up to it, and was unwilling to acknowledge the true position when confronted with it in evidence. It may assist if I give just a few examples of this.
- i) In September 2011 Mr George became dissatisfied with the actions of Simon Chamberlain, then a non-executive Director of the company. He made contact with outside parties connected with a bidding process in a manner which was clearly prejudicial to the company's interests. He also discovered that Mr Chamberlain's appointment as Director was not registered at Companies House, and sought to use that mistake to undermine his position although he (Mr George) had supported Mr Chamberlain's appointment as such in 2009. This was being manipulative for his own interests. In fact Mr Chamberlain resigned as Director on 11 November 2011, and died in March 2017.
 - ii) The Board minutes for 29 October 2015 contain a section on the Middle East, and the discovery that Mr George had set up a new entity called Evolution, marketing Goss products and services without Board approval. The Board concluded that this was inappropriate. Mr George in evidence sought to rely on implied authority because Mr Peake had given him some information and Mr Gilkes had been sent some details of Evolution. The reality, I am satisfied, is that he thought he knew best and was not prepared to wait for Board approval.
 - iii) Mr George's email of 17 March 2016 asks for a "unit key" as a container of his stuff was arriving from the Middle East and he needed to store it. Mr McCarthy's reply shows that he did not refuse this request but asked Mr George to speak to Mr Gilkes about it. When asked about this in cross-examination Mr George was initially very reluctant to accept that the "unit" was the storage space at the back of the company premises, or that his request then was in connection with storing his property, as it might weaken his complaint about being excluded from the property generally.
17. Another good example of this evidential unreliability comes in relation to Mr George's involvement in 2017 with Mr Bowen and Agile Applications Limited, Mr Bowen's company, which I shall deal with in greater detail later in this judgment.

Quasi-partnership

18. I have received detailed submissions from the parties in their written skeleton arguments. The principal authorities are from the House of Lords in *Ebrahimi v Westbourne Galleries Limited* [1973] AC 360 and *O'Neill v Phillips*. In particular, I was referred to Lord Wilberforce's speech in *Ebrahimi* at page 379E-G. Thus the fact that a company is a small one, or a private company, is not enough. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements:
- i) An association formed or continued on the basis of a personal relationship, involving mutual confidence;

- ii) An agreement, or understanding, that both shareholders shall participate in the conduct of the business;
 - iii) Restriction on the transfer of shares – so that the aggrieved shareholder cannot simply sell his shares and go elsewhere.
19. In addition I note the comments of Mr Philip Sales (as he then was), sitting as a Deputy High Court Judge, in *Fisher v Cadman* [2006] 1 BCLC 499, at paragraph [84]. Lord Wilberforce’s list is not exhaustive and the term “quasi-partnership” is simply a shorthand label. The underlying question is whether the circumstances surrounding the conduct of the affairs of a particular company are such as to give rise to equitable constraints on the behaviour of other members.
20. This is not the place for a detailed or academic exposition of the law, which is not in dispute. I do not propose to set out extensively the comments in other authorities to which I have been referred and which I take into account.
21. The short summary of the historical background above is sufficient to show that this is not a case of a partnership converted into a limited company. There is no evidence that the previous corporate joint enterprise, Netserv, was a quasi-partnership. Certainly at the beginning Goss Interactive was a commercial undertaking involving a number of different parties and what appears to have been a funding institution. Thus it does not bear the hallmarks of a quasi-partnership from its formation.
22. Of course the equitable principles covered by the label quasi-partnership may arise later. The next stage is the Shareholders’ Agreement of September 2001. At this stage the other parties still had their interests in the company, so to that extent it was still an arm’s-length commercial undertaking. The key features of this agreement are as follows:
- i) By clause 5, both Mr George and Mr McCarthy have the right to remain as Directors of the company for as long as they remain as shareholders.
 - ii) Clause 6 places restrictions on the power of the company to make decisions on certain aspects of its business without the prior written consent of shareholders holding 75% of the voting rights of the company. It is noteworthy that at this date the combined shareholding of Mr George and Mr McCarthy was only 69%, so that the effect of this clause was to prevent them imposing their joint will on those with much smaller shareholdings.
 - iii) Particularly relevant to this case are the restrictions in clause 6.1.10 on declaring or paying dividends, and in clause 6.1.12 on making any material change to any contract of employment with any Director or senior manager of the company.
 - iv) Clause 7 requires the shareholders to procure that the company conducts and carries on its business and affairs in a proper and efficient manner; that all business of the company, other than routine day to day business, shall be undertaken and transacted by the Directors; and that each shareholder shall be kept fully informed of all material developments concerning or affecting the company. To balance that, each shareholder is required to use all reasonable

and proper means in his power to maintain, improve and extend the business of the company.

- v) Clause 10 contains limited restrictions on the transfer of shares. In essence, it allows a shareholder to sell shares to a third party at any price, but simply requires that existing shareholders be given the option to purchase them at that price. That is not a share restriction in the terms contemplated by Lord Wilberforce in his third category, which is probably why there is no question in the Scott Schedule relating to it. In closing, Mr Newington-Bridges referred me to clause 10.5 which, he said, effectively imposed a restriction on transfer as the remaining shareholder could simply offer to purchase a small proportion of the shareholding on a pro rata valuation, thereby making the rest less valuable. That, it seems to me, is a late addition to the case which does not appear in the pleadings. It also does not elevate the pre-emption rights into the kind of restriction envisaged by Lord Wilberforce.
 - vi) Clause 13.5 provides that the Shareholders' Agreement is an entire agreement, which cannot be waived or varied except in writing signed by all shareholders.
 - vii) Clause 13.7 states that "Nothing contained in this agreement shall constitute a partnership between the parties or any of them".
23. It seems to me to be clear that this Shareholders' Agreement negates the concept of a quasi-partnership as at that date. It self-evidently does not rely on a personal relationship involving mutual confidence, but instead seeks to set up a series of checks and balances which will expressly prevent the oppression of a minority by the majority. There is no room, in my judgment, for an equitable agreement or understanding to sit alongside this formal express agreement, nor is there any evidence of any unwritten agreement or understanding complementary to or conflicting with this written agreement.
24. Moreover, clause 13.5 states that it is an entire agreement. The effectiveness of such clauses has recently been affirmed by the Supreme Court in *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2019] AC 119. An example in this context is to be found in *UTB LLC v Sheffield United Limited* [2019] EWHC 2322 (Ch), especially at paragraphs [170] to [180].
25. What happened after this is that the working relationship between Mr George and Mr McCarthy deteriorated. I have already set out the intemperate emails of April 2005. On 12 January 2006 Mr George emailed Mr McCarthy to say that he was serious about not wishing to remain as Managing Director. Later that year he set up a new business called Scream Technologies Limited. On 23 February 2007 he sent an email to all managers of the company stating as follows:

"After serious thought today I, like everybody around the table, am sick of the bickering and arguments at Management Team level between myself and Rob [McCarthy]/Dave S. I have, therefore, taken the decision to remove myself from day to day operations and management of the business.

This means I will no longer be responsible for direct management. I will continue as CEO and concentrate on the other 50% of my role in promotion and strategic business opportunities.

...

I will be attending Board Meetings once a month with Rob [McCarthy] and Simon Orme to discuss and agree strategic requirements and approval of business cases etc.”

26. Following this, on 30 May 2007, Mr George sent a further email to Mr McCarthy stating “I have lost the will following a conversation with Simon last Friday pm so I would rather find a go alone resolution. I want to exit the business somehow”. Then on 18 July 2007 Mr George proposed a press release stating that “GOSS have appointed Rob McCarthy to lead the Company into a new era. ... Richard George, the current CEO is to become Chairman”.
27. That appears to reflect the position as it in fact developed, with Mr McCarthy taking over all the day-to-day management responsibilities. The precise timing is not wholly clear, nor do I need to resolve that. Certainly the minutes of the Board meeting of 24 September 2010 show Mr George as Chairman outlining a new company structure. At the previous meeting, on 8 June 2010, Mr George is minuted as expressing “a desire to cease his involvement in Goss”, feeling that it was “time for him to move on, on the grounds that he does not have a complete role at Goss”.
28. In 2011 Mr George was involved in an appeal hearing at the Child Support Agency. In his written evidence he stated that he handed the MD role to Mr McCarthy in March 2007, that Mr McCarthy assumed full operational responsibility, and he (Mr George) only remained a director because he had to under the terms of the Shareholders’ Agreement and to protect his investment. He stated “I was well and truly out of working in GOSS as any member of staff will substantiate”.
29. On 11 November 2011 Mr George resigned his position as Chairman of the Board, and Mr McCarthy took over temporarily. On 25 May 2012 Mr George wrote an email stating “I am not involved now in operational day to day”. In early 2012 he went to Dubai to engage in powerboat racing. By 2013 he was permanently resident there.
30. Looking at the position as it had developed by the end of 2012, there is no basis for suggesting a continuing personal relationship involving mutual confidence. Nor is there any expectation that both shareholders should participate in the conduct of the business, save to the extent protected or required by the Shareholders’ Agreement.
31. Mr Newington-Bridges spent a lot of time during the evidence, and in his closing submissions, emphasising the work done by Mr George for the company, largely in the form of what he called “special projects”. But when asked he expressly accepted in closing that nothing in the evidence of what Mr George did after 2007 necessarily goes further than the rights and duties contained in the Shareholders’ Agreement. It does not support his submission that there was an agreement or understanding that Mr George would be involved in the management of the company.

32. If there was by this time such an equitable agreement or understanding, Mr George must have been in breach of it. His actions in stepping away from involvement, first by resigning as Managing Director in 2007, then by resigning as Chairman in 2011, and finally by moving permanently to Dubai in late 2012, make it clear that there was no such agreement or understanding. I find that the relationship between Mr George and the company was governed expressly by the Shareholders' Agreement, and that Mr George was therefore free to stand back from the operational responsibility as he did.
33. I have already expressed the view that the limited restriction on the right to sell shares does not come within Lord Wilberforce's third category. Even looking at the matter more broadly, and accepting that the categories of quasi-partnership are not closed, there is nothing in the evidence here to suggest, let alone establish, an equity in favour of Mr George.
34. My conclusion, therefore, is that this was not a quasi-partnership.

Unfair prejudice

35. "Unfairly prejudicial" is a broad concept, which is very much case-specific. But the authorities clearly establish that the conduct complained of (which must be of the company's affairs) must be both unfair and prejudicial. Conduct which is unfair may not cause any, or any sufficient, prejudice to justify the court's intervention. Conduct which is prejudicial may not be caused by unfairness.
36. It is apparent from authorities such as *Re Guidezone Limited* [2000] 2 BCLC 321 that unfairness is an objective concept, to be judged according to established equitable principles, and requires the conduct complained of to be such as is contrary to good faith. Mere incompetence or inadvertence is not enough, unless it is so extreme as to amount to mismanagement to the prejudice of the shareholders.
37. A finding that conduct was not in accordance with the Articles of Association, or the Shareholders' Agreement, does not necessarily mean that it was unfair, still less that the court will exercise its discretion to grant relief (see *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, at p.18g).
38. Finally, the prejudice must be to the interests of the shareholder in his capacity as a member, not in any other capacity. Thus a failure to pay salary does not come within actionable unfair prejudice. Mr Newington-Bridges accepted this, and as a result did not pursue the complaint in paragraph [43] of the Scott Schedule.
39. Again I merely summarise the key principles, bearing in mind the authorities cited to me, as there is no real dispute of law in this case, and certainly no new propositions on which I need to rule.
40. I therefore turn to consider the specific complaints made, as listed above. Towards the end of the evidence, before the weekend when counsel would have time to consider and prepare their final submissions, I encouraged them to follow the structure of the Scott Schedule. Mr Miall did, at least briefly, deal with all the complaints which had not been conceded. Mr Newington-Bridges, sadly, addressed me in detail only on Dubai rent [46], financial information provided to Directors [20, 30], acquisitions [36]

, and dividends [10]. When I asked whether the remaining complaints were no longer pursued, he conceded the cut in the marketing budget [34], Dubai remuneration [43], and the appointment of Simon Chamberlain [38]. All other complaints, he said, were “not conceded”. I therefore have only his opening skeleton argument and the pleadings to elucidate these. In the circumstances of a case like this, with substantial documentation and very wide-ranging evidence, that is far from satisfactory, but I shall attempt to do justice to Mr George’s case nevertheless.

Dubai – lack of support [40]

41. On 31 January 2012 Mr McCarthy visited Mr George in Dubai. By that date Mr George had some accommodation there, although I accept it may have been only temporary. There were a few business meetings during this visit, but not as many as Mr McCarthy had expected, and they seemed to lead nowhere. The driving force behind Mr George’s decision to be in Dubai was powerboat racing.
42. Towards the end of 2012 the two had another meeting in Dubai. By this time Mr George was permanently resident there, and said he expected to be there for an extended period of time. Mr McCarthy agreed that he should look into opportunities and the marketplace whilst he was there. Nothing was said about expenses or financial assistance.
43. Thereafter, for the next three years or so, Mr George presented his Middle East plan ideas to Board meetings. It is right to say that Mr McCarthy was never enthusiastic. As he told me in evidence “Dubai would not be my choice for overseas development”, and that is hardly surprising. But there is no evidence that he did anything to stop Mr George investigating the possibilities. Indeed, he accepted that he may well have made a remark to Mr Peake in late 2014 or 2015 to the effect that he was happy for Mr George to stay out there. Mr Peake’s recollection, which I accept, is that Mr McCarthy went on to say “As long as he is not in my hair then I don’t care what he does”. Mr McCarthy accepted that this reflected his sentiments at that time.
44. In 2013 Mr George put a proposal to the Board for a Goss sales arm in the Middle East. It included the recommendation that the company should hire a man called Nish. He was interviewed via a somewhat unsatisfactory internet link but was generally considered to be unimpressive. Prior to a Board meeting, each of the Directors expressed his or her views on Mr George’s proposal in emails copied to all the others. Mr McCarthy was unsupportive, saying that in his view the plan and the financials did not stack up. He repeated his opinion that they would not be considering this region if it weren’t for the fact that Mr George was based there and had interests there. The other Directors were in favour to a greater or lesser extent. Mr Peake supported it. Mr Smith thought they should commit to it, whilst acknowledging the risks. Ms Stillman took a similar view to Mr Smith.
45. So it looked as if Mr George’s proposal would be approved by a majority of the Board, subject to a clear financial limit. However the very next day Mr George withdrew his proposal as Nish had found a job elsewhere. His email of 6 September 2013 said “the time has come again for me to seek an exit from the business”, saying that he would be looking for a price of £2.25m for his 50% stake.

46. It is apparent from this that there was a genuine and honest disagreement about the commercial wisdom of Mr George's proposal. Mr McCarthy was perfectly entitled to be cautious, and even to decline to support it. He might have been in a minority had the matter gone to a vote at a Board meeting, but that never happened. There is nothing in the allegation of unfair prejudice in this respect.
47. I note the way the case is put in paragraph 16.7 of the Reply. The assertions there do not seem to be supported by the evidence. In Mr Newington-Bridges' skeleton argument, at paragraph 113(a)(i) the only complaint about Board meetings not taking place is after August 2016, by which time Mr George had returned from Dubai. The complaint of lack of support for investment in the Middle East comes only in paragraph 122 of that skeleton argument, which is directed at the issue of mismanagement. Any suggestion that the different view expressed openly by Mr McCarthy amounts to mismanagement is hopelessly misconceived.

Dubai – rent [46]

48. The possibility that the company would pay Mr George's rent in Dubai was first raised by him in an email on 17 January 2013 to Mr McCarthy. He said that he needed support for accommodation. In reply, Mr McCarthy very clearly stated: "Goss are not paying for your accommodation. You're the one who's chosen to go there, why would we start paying for your accommodation?". Mr George's response was not to challenge that in principle but simply to ask for a contribution. Mr McCarthy flatly refused that request, saying "You have chosen to do this for yourself. You weren't asked to do it".
49. Mr George's next Middle East report to the Board, for the meeting on 16 April 2013, states "Currently (as stated at the last Board meeting) I am self funding accommodation and living expenses". On 20 June 2013, in a private email to Mr Peake, Mr George said "I wonder if I'll get some help for my extortionate rent ... [or other costs] ... Oh I do dream!". On 18 July 2013 he told Mr Peake in an email "I am funding myself here which is expensive to say the least".
50. In October 2014 there was an email argument between Mr George and Mr McCarthy about the latter's refusal to agree that the company would pay for the cost of a visa. Mr McCarthy repeated that Mr George had chosen to live in Dubai, and followed this up with "I am not having history being re-written to show that GOSS sent you to Dubai. As we both know that is not the truth". Mr George's reply was to say "I didn't say they sent me".
51. Mr George's report to the Board meeting on 27 February 2015 stated "I have sacrificed a lot personally and financially to exist and attempt to promote the business here". An email from Mr George to Mr Gilkes on 18 March 2015, in relation to fees, dividends and expenses spoke of "rent which I am funding myself".
52. The first time any claim of right for repayment of rental costs was made by Mr George was on 25 October 2016, long after his return to the UK. He sent Mr McCarthy an invoice for £34,584.62. It was refused by Mr McCarthy and has never been paid.

53. In cross-examination, Mr George accepted that he was not sent to Dubai by the company. If he had thought at the time that he could properly claim for his rent he would have done so, as he was financially stretched. It was only after this return that it was suggested to him that he had a right to repayment under the Articles of Association.
54. The Points of Claim allege an implied term, which argument was not pursued at the end of the trial. Alternatively, reliance is placed on paragraph 8.6 of the Articles of Association, which is the only argument put forward by Mr Newington-Bridges in closing. That change is not surprising, given the wealth of the contemporaneous documentation and Mr George's own evidence.
55. Paragraph 8.6 of the Articles provides that:
- “The directors shall be reimbursed by the Company for all expenses incurred properly by them in the discharge of their duties ...”
56. Reliance on this provision begs the question whether Mr George's Dubai rent was incurred in the discharge of his duties as a Director. It is quite apparent from all the evidence that he was not sent to Dubai, he went by his own choice in order to engage in powerboat racing and offered to look at business opportunities whilst there. Mr Peake and Mr McCarthy both stated expressly in their evidence that if he had wanted to come back the Board would not have stopped him. Mr McCarthy was not challenged about that assertion, and Mr Peake was one of Mr George's own witnesses. It is quite untenable to suggest that this was an expense falling within Article 8.6.

Exclusion – general

57. An understanding of Mr George's case on exclusion requires first a broad outline of events following his return to the UK in early 2016.
58. In March 2016 Mr George contacted Mr McCarthy about a possible sales lead. Mr McCarthy's reply directed him to Simon Smith, who headed the UK sales team. Mr George, somewhat frustrated, asked Mr McCarthy for a meeting to “discuss how best to use my time and how to support the business”. On 19 May 2016 Mr George made a diary entry as follows:
- “... now the fun starts with McCarthy who clearly doesn't want me in the building. Well that will have to change I'm afraid as I intend to start nudging my way back into the business, starting from next week. I may have to shock Rob & Co by simply turning up for work. Maybe then McCarthy will stop ignoring my requests for a meeting to discuss the future. I will remain positive but don't see why I should be banned from the office.”
59. That neatly points up the different approaches which lie behind much of this litigation. Mr George took the view that, as a 50% shareholder, he was simply entitled to be involved in the management of the company. Although he had voluntarily resigned that role in 2007, he believed he had an absolute right to return. Mr

McCarthy, whilst acknowledging that Mr George retained his rights as a Director and shareholder, was not prepared to allow him to return to run sales or day to day management.

60. My findings about the absence of any quasi-partnership mean that I conclude Mr McCarthy was right. Mr George had no right to return to management, without the support of the Board which would not be forthcoming. However frustrating he found that, his right to be involved in the running of the company was limited to what was set out in the Articles and the Shareholders' Agreement. His complaints about exclusion must therefore be considered in that context.
61. It is clear that by the end of 2016 Mr George had taken legal advice about his potential remedies, and was contemplating these proceedings. On 3 March 2017 a letter before action was sent which alleged unfair prejudice and mismanagement. It stated that Board meetings were a waste of time because Mr McCarthy was always supported by the only other Director, Mr Smith. The complaints about the absence of meetings after that date must be viewed in this context.
62. During the course of 2017 there was the involvement of Mr Bowen with Mr George, about which I shall say more later. Suffice it to say at this stage that the suspicions of Mr McCarthy about the reasons for Mr George seeking financial information were fully justified, and any reluctance to cooperate must be looked at in that context.

Exclusion – meetings and minutes [12, 14, 16, 26]

63. The Points of Claim assert a failure to hold meetings of various sorts, but are singularly unspecific about details. As a result, save for an admission that Board meetings had not been held since August 2016, the Defence could not plead to this allegation. Paragraph 25 of the Reply answered this by pointing to directions at Board meetings on 24 April 2014, 27 February 2015, 29 October 2015 and 6 April 2016 to arrange strategic meetings and remuneration committee meetings. So it would appear that there is no complaint in respect of Board meetings themselves prior to late 2016. Despite this apparent concession, the Supplemental Points of Prejudice and Loss, in paragraph 18, alleges that Mr George “has repeatedly and properly requested Board meetings”, without giving any particulars of the dates and nature of those requests. It is not even clear whether the failure is intended to relate only to the period since August 2016 or prior thereto as well. This well illustrates the practical difficulty caused by the lack of focussed and consistent submissions from Mr Newington-Bridges, who has pleaded his client's case throughout.
64. Paragraph 113(a)(i) of his opening skeleton argument tends to suggest that the complaint in respect of Board meetings is limited to the period after August 2016. No specific submissions were made by Mr Newington-Bridges in closing. Mr George in cross-examination agreed that any Director could call a Board meeting, and no one did. He also agreed that he had agreed to postpone the Board meeting fixed for December 2016, and the adjourned meeting in 2017 was cancelled following the letter before action from his solicitors on 3 March 2017. He asserted that he had tried to call Board meetings since 2017, but there is no documentary evidence to support this assertion and I cannot accept it.

65. As to the failure to hold Board meetings after March 2017, Mr George cannot sensibly complain of prejudice when his own solicitors stated that such meetings were a waste of time.
66. Remuneration (“REM”) committee meetings were very infrequent during the life of this company. They are not required by the Articles or the Shareholders’ Agreement. Sometimes they dealt with the pay and dividends to be paid to the two shareholders. When an issue in respect of that arose for consideration at the Board meeting on 2 August 2016, the Board decided that it was best left to Mr George and Mr McCarthy to discuss, rather than be dealt with by the REM committee. No specific prejudice is alleged as a result of the absence of REM committee meetings. The delay in paying dividends I deal with separately below.
67. The company did not historically hold AGMs. The only pleaded request for one was on 8 October 2013 (Reply paragraph 28). As far as I can see, the minutes of the Board meeting referred to say nothing about a request for an AGM. Mr George’s statement refers to a request in October 2011, and the Board minutes for 11 October 2011 do report a request from Mr George for an AGM, which was to be held on 22 November 2011. It may not have taken place, but at the next Board meeting, when Mr McCarthy was in the chair as Mr George had resigned as Chairman, but Mr George was also present, there is no complaint that the AGM was not held. Whatever was the reason for the AGM not being held, Mr George appears to have acquiesced. There is accordingly no basis for suggesting that it was unfair or prejudicial.
68. The allegation of manipulation of minutes is not dealt with in Mr Newington-Bridges’ opening skeleton argument, nor did he deal with it in closing. The allegation first arose in the Supplementary Points of Prejudice and Loss, at paragraphs 29-33, so has not been properly pleaded. The complaint appears in Mr George’s statement at paragraphs 207, 266, 277, 291 and 326. It centres principally around the minutes for a Board meeting on 27 February 2015. It appears that the minute-taker, Elizabeth Johnson, sent a draft to Mr McCarthy which he edited in a file sent out to other Directors with tracked changes. When the edited minutes were sent out by Mr Gilkes on 13 April 2015 he reminded the Directors that the minutes were part of the company’s records and might be disclosable to third parties, therefore they should not normally “record all details of extended discussions”. The matter was then discussed at the next Board meeting on 29 October 2015. Mr George had proposed changes to the minutes of the previous meeting. These were noted but not agreed by the majority of the Board, and the minutes were approved without his changes. All this was done openly and Mr George’s amendments were included in the Board pack for the meeting. At the next Board meeting on 6 April 2016, the minutes of the October meeting, including this discussion and its resolution, were unanimously approved. Mr George attended this meeting and therefore must have voted in favour of agreeing those minutes. When the minutes of that April 2016 meeting were circulated, Mr George again proposed amendments, but did not challenge the assertion that the October minutes had been unanimously approved. The amendments he did propose were discussed at the following Board meeting on 2 August 2016 and that discussion minuted. Again Mr George circulated comments about the draft minutes of this August meeting.
69. All this shows clearly the state of friction, even deadlock, between Mr George and Mr McCarthy, but there is nothing to substantiate an assertion of unfair manipulation of

the minutes. All was done openly. The fact that generally Mr McCarthy's amendments were accepted, while Mr George's were not, simply reflects the reality of the position where Mr McCarthy had been running the company on a day to day basis since 2007 and clearly had the support of his other Directors, save for Mr George. It is, in other words, another example of the very understandable frustration for Mr George at the position he found himself in, but not unfair or prejudicial.

Exclusion – failing to bring important matters to the Board [32]

70. This too was not dealt with by Mr Newington-Bridges in closing, so again I must do the best I can from the pleadings and his opening skeleton argument. Paragraph 21.6.3 of the Points of Claim, referred to in paragraph [32] of the Scott Schedule, merely asserts that “No major contracts with high risk clients and/or slow payers have been submitted to the board for approval”. There is nothing to state what contracts should have been so submitted. Nothing is said about this in the opening skeleton argument.
71. Mr George's statement appears to deal with this complaint at paragraph 397, which speaks of “major contracts”, but gives only one example, that between the company and Agilysis. That contract did not feature in the evidence, and Mr McCarthy was not asked about it in cross-examination.
72. There was some attention drawn in the course of the evidence to the position of Radar Homes as a high risk client. Quite apart from the fact that nothing has been pleaded in this respect, and there is no complaint in Mr George's evidence, there is nothing in the documentation to which I was taken to suggest that they were dealt with improperly. Indeed, a key feature is that the relationship with Radar Homes was continually reported to the Board.
73. Accordingly there is nothing in this complaint.

Exclusion – senior management appointments [38]

74. The only pleaded complaint relates to the appointment of Simon Chamberlain. Understandably, Mr Newington-Bridges did not pursue that, as his own client claimed to have introduced Mr Chamberlain in 2009. The falling out came in 2011 as set out above. Mr George's misuse of the mistake at Companies House to put pressure on Mr Chamberlain does him no credit, but it adds nothing to this allegation of unfair prejudice.
75. In his opening skeleton argument Mr Newington-Bridges sought to raise two further complaints, not pleaded hitherto. The first concerned the commission payment agreed for Mr Smith in January 2010. This was known to, and raised by, Mr George at a REM committee meeting on 17 May 2010. The compromise agreed at that meeting was to initiate a formal quarterly review of performance to ensure that Mr Smith could not simply benefit from an increase in turnover if very low margins meant there was little effect on profit. It is far too late for this to be revived now as an allegation of unfair prejudice.
76. The second new complaint related to the recruitment in 2015 to a new position, Head of Creativity. This, I was told by Mr McCarthy and accept, was not a senior manager

position. There was therefore no requirement under clause 6.1.12 of the Shareholders' Agreement to obtain Mr George's approval.

77. Finally, paragraph 245 of Mr George's statement makes a complaint about the process of appointing Mr Gilkes in November 2014. Mr George had not been involved, whereas the three other executive Directors had been. That is hardly surprising as Mr George was then living in Dubai. The complaint was not pursued in evidence before me, and rightly so.

Exclusion – cutting the marketing budget without approval [34]

78. This complaint was expressly abandoned by Mr Newington-Bridges in closing.

Exclusion – denial of access to financial information [18, 20, 24, 28, 30]

79. The first complaint at [18] is that Mr George's access to the company's G drive was removed. So far as financial information is concerned, this meant he no longer had direct access to the Sage accounts software. Mr McCarthy said this was the case for all Directors, and all staff except for two directly involved in managing the finances. It would in my judgment be unusual to have widespread access to accounts software, for fear of inadvertent corruption of the key information. In general, directors and managers need management accounts and information, readily accessible and in a digestible format.
80. Accordingly, there is nothing in this complaint. The veiled suggestion that lack of access to his company email account has prevented full discovery in this case was not developed, and there is nothing internally in the documentation to which I was taken to suggest that there is a missing tranche of emails.
81. The next and major complaint concerns the printed financial summary information made available to Mr George and other Directors for Board meetings [20, 30]. This was provided in what was known in this company as a "Dashboard". It is clear that the format for this changed from time to time. In 2014 there was a template setting out month by month the budget figures for sales and costs, with the actual figures being added as they occurred. Thus the example before me ran to two A3 pages, with the actual figures being shown only for the first three months of the financial year. That document also showed the cash balance held by the company at each month's end.
82. In January 2015 Mr Gilkes joined the company as head of finance. He altered the format of the Dashboard so as to keep it to a single A4 sheet. In addition, a narrative Finance Report was circulated. The first such revised Dashboard, for the October 2015 meeting, shows what to my mind is a far easier analysis to understand. It shows the year to date figures at a glance for last year and this year compared with the budget, with percentage variances for each element. The same analysis is shown also for the full year. Insofar as there is a complaint about this change, it is to my mind wholly unfounded and unjustified.
83. The same Dashboard format, broadly speaking, can be seen right up to May 2017. In September and October 2017 there is some change in format, so that the forecast and budget columns no longer appear, but there is still a column showing actual performance in 2017 versus budget. The November 2017 Dashboard has no forecast or budget figures, but has extensive analysis of performance versus previous years, both in the year to date and the full year figures. That new format seems to be maintained to date.
84. Looking at these Dashboard reports, it is difficult to understand the complaint made by Mr Newington-Bridges in closing that they are inadequate. He submitted that, because there were no longer any express forecast figures, it was a material development which should have been brought to the attention of Mr George under clause 7.1.3 of the Shareholders' Agreement. But the change, if it was in fact material which I very much doubt, was apparent to Mr George as he saw the Dashboard figures month by month.

85. Mr Newington-Bridges expressly accepted in closing that there was no evidence of bad faith. He said “it may or may not be the case that it is simply how the Dashboard developed”. The format of the Dashboard report was decided by Mr Gilkes, who seemed to me to be a very careful financial controller. It was not suggested to him that the changes were imposed by Mr McCarthy for the purpose of excluding Mr George, as Mr George seems to think. Nor was that suggested to Mr McCarthy in cross-examination. He simply said that the Dashboard had been simplified over time but still had all the information required for management.
86. There is a part of Ms McQueen’s evidence, at paragraph 23, where she says that Mr McCarthy told her she was not allowed to send Mr George documents after the arrival of Mr Gilkes. This was not pursued in cross-examination of Mr McCarthy. It seemed to me that Ms McQueen felt herself in a very difficult position between the two shareholders as the relationship between them deteriorated. On the one hand she had Mr George demanding unlimited financial information, and on the other hand there was Mr McCarthy telling her that it had to be done through Mr Gilkes and the Board. None of this supports an assertion of bad faith amounting to unfair prejudice.
87. Mr Newington-Bridges also relies on the minutes of the Board meeting held on 24 April 2014. It records the difficulties caused by the absence of a financial controller. Ms Stillman had left in September 2013 and Mr Gilkes did not arrive until January 2015. In the interim period it appears that there was no access to management accounts, which was clearly a problem. At least on an interim basis, it was agreed that at least a set of management, profit and loss, and cashflow accounts should be issued and made available to the Board at a set time. It appears likely that this was the start of the Dashboard in its various forms. The complaint made by Mr Newington-Bridges is that the latest Dashboard reports no longer show cashflow. This is correct, but the format of information provided to a Board is not set in stone, and the Shareholders’ Agreement does not specifically require the provision of either forecasts or cashflow figures.
88. Since this has always been a cash-rich company, because of payments in advance from customers, cashflow is not a practical problem. It is impossible to show any prejudice from the absence of either cashflow or forecast figures from the Dashboard. The format seems to me to be eminently sensible and sufficient for a Board to assess the performance of the company. If they wanted more information, they could require it to be provided by resolution at a Board meeting.
89. The next complaint under this head is that Mr George was denied access to, or prevented from meeting, the management of the company [24]. In reality this refers solely to access to Mr Gilkes for further financial information (see Supplementary Points of Prejudice and Loss, paragraphs 9-10). In particular, complaint is made that in November 2017 Mr Smith directed Mr Gilkes to refuse to meet Mr George further. The background to this is clear from the evidence and not disputed. At a meeting with Mr Gilkes on 9 November 2017 Mr George came with a long list of questions pre-prepared which seemed to Mr Gilkes (rightly as it seems to me) to be directed at the litigation which was by then threatened, rather than the duties of Mr George as a Director. Mr Gilkes decided not to answer all the questions and not to sign the list. Mr Smith became involved and corresponded with Mr George by email, telling him that the questioning was inappropriate because “Your requests have been made for the sole or primary purpose of securing disclosure of documents and/or obtaining

information that might assist you in your threatened petition”. It was not suggested to Mr Smith that this was unreasonable or unfair. It seems to me, having seen what Mr George was up to in 2017, to have been thoroughly justified.

90. Finally under this head there is a complaint about a change in the bank mandate in November 2013 [28]. Again there is no dispute about the facts. The intention was to remove Ms Stillman from the company bank mandate at HSBC, as she had left the company in September 2013. Ms McQueen contacted the bank on 23 October 2013 to amend the authority. The bank replied that a new mandate would be needed, and a form was attached to the email. By mistake Ms McQueen only sent back pages 2 and 3, the specimen signatures, with Mr McCarthy’s signature on page 3. The bank pointed out that page 1 was missing and asked for a signed form of that page, adding “I can fill the rest in if you wish”. Ms McQueen, when shown the completed page 1 held by the bank, said that it is not in her writing. I conclude, therefore, that it was filled in by the bank as they offered to do. As it was completed, it gives full authority to any one signatory, who might be Mr McCarthy, Mr Smith or Ms McQueen, but also Mr George. In fact no one appreciated this until it was picked up by the auditors some years later, and the account in practice was operated as before.
91. Given this evidence, it is surprising that the complaint is still pursued by Mr George. Yet Mr Newington-Bridges specifically relied on this in closing, submitting that its potential effect was to exclude Mr George from any control over the bank account. He accepted that there is no evidence that the expanded authority was ever used, and I accept the evidence that it was not, because no one appreciated that it existed until the auditors spotted the mistake. It is, to my mind, another example of Mr George seeking to turn an innocent mistake to his advantage, as he did in 2011 with the error at Companies House over the appointment of Simon Chamberlain.

Exclusion – physical exclusion from the company premises

92. Whilst Mr George was in Dubai the locks on the company premises had to be changed. It is accepted that this occurred for a proper reason and no complaint is made about that. On 17 March 2016 he asked for a key to the “unit” at the back of the premises as he had a container arriving from the Middle East and needed to store “some stuff” for a couple of months. That seems to have been sorted amicably without Mr George having a key.
93. Then in May 2016 a meeting was arranged with Mr Gilkes away from the company premises. I accept that this was because Mr George tended to become loud and aggressive when dealing with financial information, and Mr McCarthy did not want the staff to be exposed to this. Mr George wrote an email to Mr McCarthy on 26 May 2016 saying “I do understand your position on this ... There is absolutely no point in returning to conflict”. In other words, for whatever reason (and he may simply have been trying to ease himself back into management), Mr George accepted the decision to hold the meeting off site.
94. There is no other evidence of complaint or difficulty. Mr George could have access during normal working hours by ringing the bell. As he was not working in the business, but merely a Director, he did not need a key. Mr Newington-Bridges accepted in closing that there was no evidence of contact with potential or actual customers after Mr George’s return from Dubai, let alone any who wanted meetings at

the company premises out of hours. There was, he accepted, no immediate financial impact, though he submitted that it could have occurred in the longer term.

95. I can well understand the emotional effect on Mr George of this very visible sign that he was not involved in the day to day running of the company, and could not simply walk back into such a role because he wanted to. But to suggest that it amounted to unfair prejudice is a non-starter.

Acquisition opportunities [36]

96. The Points of Claim refer to approaches from Idox plc in 2014 (paragraph 22) and from Agile Applications Limited in 2017 (paragraph 23). Mr Newington-Bridges referred to both in paragraph 120 of his opening skeleton argument. In closing he restricted his submissions to Agile. This is not surprising as the evidence, shortly put, shows that the Idox approach, even if the interest was genuine, went nowhere. Idox never got as far as making any offer.
97. On the face of it Agile did make an indicative offer which should have been very attractive. On 18 May 2017 Mr Bowen, Director of Agile, wrote an email to Mr George and Mr McCarthy suggesting a tie up between the two companies. This led to a meeting in Bristol on 12 June 2017. Following this, on 12 July 2017, Mr Bowen wrote a letter to Mr George and Mr McCarthy “Without Prejudice and Subject to Contract” indicating that “Based on the limited public information available, our offer would be in excess of £4m”. Mr McCarthy responded by email with various queries, including one about funding. Mr Bowen said they would have to raise the money, but they had done that sort of thing before. He asked for a reply “by the end of next week”.
98. In fact the deal went nowhere, largely because of suspicions by Mr McCarthy about its genuineness. The further evidence now available shows those suspicions to have been well-founded.
99. On 3 March 2017 Mr George’s solicitors sent a letter before action. The options for settlement involved one party buying out the other’s share in the company. In practical terms, Mr George was looking to get Mr McCarthy to buy him out for the highest price possible. Three days later, on 6 March 2017, Mr George contacted Mr Bowen with an email to Mr Bowen’s private email address at 1 am saying “I need to have a strict in confidence chat. I have started a legal process and I need to get prepared with a future plan”. He sent Mr Bowen a Non-Disclosure Agreement to sign, referring to confidential information to be provided to Agile. It was signed by Mr Bowen and dated 30 April 2017. On 15 May 2017 it was agreed that Mr George should visit Mr Bowen the next day, and stay at his house, to discuss a merger with Agile. None of this was disclosed to Mr McCarthy. Mr George’s note in his diary about the visit to Mr Bowen reads as follows:

“Went to stay with Tim Bowen for dinner – 2 wines in return for stay.

He is suggesting a merger + two more planned roll ups to AIM.

But no place on main Board.

Got royally pissed.

Tim has a smart plan and knows his numbers.”

100. The initial email from Mr Bowen was sent the next day. When Mr McCarthy emailed Mr Bowen to ask for further information on 14 July 2017, it was forwarded by Mr Bowen to Mr George, who commented on it in his diary entry of the same day. The request by Mr Bowen for an answer by the end of the following week coincided exactly with the date set for a mediation between Mr George and Mr McCarthy, at which presumably the valuation of the company would be an issue. When the mediation date was put off, Mr McCarthy received a phone call from Mr Bowen extending his deadline to the same date as the mediation.
101. The suspicions of Mr McCarthy led to correspondence between solicitors. On 23 August 2017 Mr George’s solicitors wrote with an assurance that “At no stage has our client imparted confidential information to Agile or its representatives”, and a promise that “he will not disclose any information to any third party”. By letter of 4 October 2017 his solicitors repeated their assurance. Despite this, Mr George was collecting as much financial information as he could, as part of a plan to oust Mr McCarthy. On 9 November 2017 he had the meeting with Mr Gilkes at which he sought answers to a list of pre-prepared questions. On 12 November 2017 he was putting together a substantial PowerPoint slide deck on what he called “Project Rexit”. He agreed in evidence that this was the plan to remove Mr McCarthy. The slides, or at least the outline, were sent to Mr Bowen by email to his private email address late on 21 November 2017. The slides which have been disclosed show the inclusion of substantial amounts of confidential information, not least the full financial figures from the latest Dashboard, with forecasts which Mr George says he produced himself from those figures. The plan set out in those slides is for a new management team to consist of Mr George, Mr Peake (who by then had left the company) and Mr Bowen. Mr Peake said he would not have been interested, but agreed that he had met Mr Bowen for a drink at Portishead at some time.
102. When asked about the disclosure of confidential information contrary to the two assurances from his solicitors, Mr George rather lamely suggested that he believed they only referred to new third parties, not Mr Bowen with whom he had an existing relationship. When pressed, he admitted that the position he felt he had been put into made him feel that it was proper to act behind the back of Mr McCarthy and the Board, and in a way which would otherwise have been wholly improper and inappropriate.
103. As to whether this was ever a genuine offer from Agile, I have grave doubts. Mr Bowen says it was, but like Mr George his witness statement omits most of the damning evidence about their private contacts. There can be no doubt that he knew he was being asked to help Mr George in his dispute with Mr McCarthy, and agreed to do so. Whether he was persuaded by Mr George that his indicative figure of £4m was realistic, and if so on the basis of what information, I cannot determine. Either way I can place no reliance on the figure of £4m when it comes to considering valuation.
104. On this aspect of the case, far from there being any proper complaint that Mr McCarthy failed to take the offer seriously, all the evidence shows that his suspicions were well-founded and he cannot be blamed for the fact that it went no further.

Dividends [10]

105. Both in his opening skeleton argument and in closing, Mr Newington-Bridges put this complaint at the forefront of his arguments. The starting point is an agreement in July 2013 that both Mr George and Mr McCarthy should reduce their salaries (in Mr George's case billed as consultancy fees through Scream) and take part of their emoluments as dividends. It appears probable that this was the result of advice from the company's accountants as being more tax-efficient.
106. The new arrangement was to start from 1 August 2013. Although salary and consultancy fees might be payable monthly, dividends would normally be paid at the year end, with possibly an interim dividend at the half-year point. Since the company's year end was on 30 June, the earliest expectation of a dividend payment would have been some time in early 2014. In fact the first payment was apparently in March 2014.
107. On 2 July 2015 Mr George asked if he could be paid his dividends quarterly in advance. Strictly speaking, dividends should only be paid out of profits, which would have to wait until the year end to be confirmed, but there is nothing wrong in paying interim dividends, the profits had historically been sufficient to cover the proposed payments, and Mr McCarthy agreed informally to this arrangement.
108. Mr George wanted the payments to come in time for his rent payments, due on the 9th of each month. There was no specific agreement about this, but Mr Gilkes said he would try to achieve it. There is a schedule based on the 9th as the due date which shows that payments were broadly speaking on time, or even early, while Mr George was in Dubai. On his return in early 2016 delays crept in, only a couple of weeks for the first two payments in February and May 2016, but increasing to about four weeks for the November 2016 and February 2017 payments. The last two payments, due according to the schedule in May and August 2017, were not paid until 3 July and 24 November 2017 respectively.
109. This, Mr George says and I accept, caused him financial prejudice. All the contemporaneous evidence shows that he was financially stretched, for various reasons which I need not set out in this judgment.
110. Was it unfair, in the sense that equity would see objective bad faith? In my judgment that is not made out. The quarterly payment was a matter of informal arrangement only, not a matter of right. Mr Gilkes said, and I accept, that he was responsible for the payment of salaries and these dividend payments. He would ask for a written resolution before paying dividends and it was not always immediately provided. The payments needed the signature of Mr McCarthy, and often he was very busy so there may have been delays. The delays affected Mr McCarthy as well, and there is nothing to suggest that Mr George's payments were deliberately held back to put pressure on him. Such a step would be counter-productive for Mr McCarthy, who clearly was happy for Mr George to stay in Dubai for as long as possible.
111. Mr Newington-Bridges relies on paragraph 12 of Mr Gilkes' statement, which says that delays in dividends being paid were "usually as a result of friction between the shareholders". The inference, said Mr Newington-Bridges, was that Mr McCarthy deliberately delayed the payment of dividends to Mr George. When asked about

paragraph 12 in cross-examination, Mr Gilkes said that Mr George had threatened litigation and made allegations of fraud. The dividends, he said, were paid just about quarterly until November 2017. It follows that the “friction” he spoke of was the reason for the dividends stopping in November 2017, not any delay prior to that. When Mr McCarthy came to be cross-examined, it was not put to him that he had deliberately delayed the payment of dividends to Mr George.

112. Even if objectively the late payment of dividends up to November 2017 amounted to unfair prejudice, the prejudice was only temporary until payment. It has not been submitted that there was any lasting or irredeemable prejudice arising from the delays. Moreover, the last payment, which was over three months late, was delayed at a time when there was deep and justified suspicion over the Agile deal and that Mr George planned to disclose financial information to third parties.
113. In November 2017 the dividend payments stopped. In normal circumstances the continued total non-payment of agreed dividends might well amount to unfair prejudice. In the present case, however, there are particular circumstances which apply. By November 2017, as will be apparent from the discussion above, Mr George was alleging serious mismanagement and threatening legal proceedings, which in fact started in May 2018. He made a series of allegations of breach of trust in a statement to the Board meeting on 8 February 2018. He also refused in March 2018 to sign off the accounts to 30 June 2017 on this ground.
114. As the Court of Appeal made clear in *Grace v Biagioli* [2006] 2 BCLC 70, at p.93g:

“The use by the majority of the powers and voting rights conferred by the articles cannot be regarded as contrary to good faith where they are invoked to protect the company from conduct which is itself either in breach of a relevant agreement, or otherwise detrimental to the well-being of the company and its assets.”
115. In those circumstances it seems to me to have been reasonable to suspend the payment of dividends after November 2017, which affected both shareholders alike.
116. Shortly before the trial, Mr McCarthy proposed a dividend of £150,000 should be paid to each of the two shareholders. This was approved at a Board meeting on 1 October 2019 by Mr McCarthy and Mr Smith, but not by Mr George. The sum of £150,000 has been paid to Mr McCarthy but Mr George has declined to take his dividend. If correctly declared, it will appear in his Director’s loan account and carry interest.
117. Mr Newington-Bridges submits that this dividend was not properly declared, as it is in breach of clause 6.1.10 of the Shareholders’ Agreement, which requires the support of the holders of at least 75% of the shares in the company. Mr Miall points out that this provision only applies to dividend payments outside the provisions of clause 4, which requires the payment of surplus profits as dividends where the amount of the surplus is agreed by the shareholders or certified by the auditors. Although the shareholders have not agreed, and the matter has not been put to the auditors, it is inconceivable that they would find the profits available for distribution to be less than £300,000 as the experts agree there is surplus cash of at least £750,000. Accordingly, he submits,

whether or not the proper formalities have been complied with, there can be no doubt that the company finances justify this large dividend, especially where no dividends have been paid for two years.

118. This allegation is a new one, not mentioned in any pleadings and not the subject of any application to amend. I agree with Mr Miall that any breach of the Shareholders' Agreement is a technical one, not amounting to unfair prejudice. It is difficult to see how the declaration of a dividend which would more than remove the prejudice relied on by Mr George in his pleaded case can itself amount to unfair prejudice. At best it is an indication of the way in which the company is run, prayed in aid to support Mr George's complaints.
119. For these reasons I do not find that the late or non-payment of dividends amounted to unfair prejudice.

Conclusion on unfair prejudice

120. I have sought to deal with all the complaints made by Mr George which have not been expressly withdrawn, even those on which no submissions have been made by Mr Newington-Bridges in closing. For reasons stated above, I do not find any, taken alone, to amount to unfair prejudice.
121. Before leaving the topic of unfair prejudice I should, however, step back and look at the complaints cumulatively, against the background of all the evidence in the case. There is much to show suspicion on Mr McCarthy's part, and a reluctance to allow Mr George back into the business on a day to day basis. For the reasons set out above, I find that the suspicion was well-founded. In any event, having voluntarily withdrawn from management, Mr George's rights were limited to those set out in the Articles of Association and the Shareholders' Agreement. Despite a few hiccups, I find that there was no overall interference with those rights which was both unfair (applying objective equitable principles) and prejudicial.
122. Mr George's frustration at not being allowed back into the day to day running of the business, and at being consistently outvoted at Board meetings, is palpable and understandable. It explains, but does not excuse, his attempts to use any mistake to improve his position, and to plot to oust Mr McCarthy from the company. But it does not amount to unfair prejudice.
123. It follows from my conclusions above that I find no evidence of mismanagement of the company.

Valuation

124. As explained above, it was agreed on both sides that I should hear the valuation evidence and state my conclusions, even if I were not to find unfair prejudice. It would save costs if my conclusions on unfair prejudice were to be overturned, but also it may assist the parties in negotiating a purchase of the shares of one by the other.
125. I heard expert evidence from Caroline Stephens for Mr George, and from Roger Isaacs for Mr McCarthy. Both are forensic accountants. Mr Isaacs in addition has

been a licensed insolvency practitioner for 20 years, which will have given him some practical experience of valuations. Neither is an expert in the particular field in which this company operates.

126. Following the preparation of detailed reports, the two experts met and produced a joint statement signed on 7 June 2019. The joint statement accepts that it is for me to determine whether the company was a quasi-partnership, and whether it has been mismanaged.
127. Both experts agree that the company should be valued by applying an appropriate multiple to its adjusted earnings and adding to the product a sum representing the company's surplus cash. They also agree that an alternative approach is to apply an appropriate multiple to its fee income and adding the surplus cash.

Adjusted earnings

128. The starting point is the historic trading figures for the past three years. The appropriate figure for each year is that of earnings before interest, taxation, depreciation and amortisation, referred to by the somewhat less than catchy acronym "EBITDA".
129. There is little or no difference between the two experts as to the appropriate EBITDA figures for the years to 30 June 2016, 2017 and 2018. Ms Stephens' figures are £209k, £196k and £197k respectively. Mr Isaacs has £209k, £198k and £195k. It is not necessary to investigate the small differences, as the average for the three years in each case is £201,000.
130. Mr Isaacs applied a weighting to the three years, putting more emphasis on the most recent figures, but this led only to a slight downward adjustment to £198,000. Since this is a company with fairly steady profits, which are relatively modest in comparison with its turnover, I propose to ignore that weighting.
131. Mr Isaacs also looked at some forecast figures, suggesting a drop in profits for the future. There are a number of difficulties over that adjustment. First, the small profit margin means that a mere 1 per cent error leads to a very different profit figure. Secondly, as he understood the position, this company had not forecasted in this way in the past; it was an exercise performed for the purpose of this litigation. Thirdly, the company accounts show that it had achieved a consistent level of profit in the past, and over a period longer than the three years used for the experts' calculations. Finally, the forecasts are inconsistent with what appears to be shown by the latest Dashboard figures. For all those reasons I reject this additional adjustment. Mr Miall in closing did not press me to do otherwise.
132. Accordingly I take as my base figure maintainable earnings of £201,000 per annum. This figure needs further adjustment to remove any non-recurring items and non-arm's length transactions, replacing the latter with appropriate market rates. The principle is agreed between the experts, but the details are in dispute. I take each in turn.
133. It is agreed that the salaries paid to Mr George and Mr McCarthy should be replaced by an appropriate market rate. Mr Isaacs accepts Ms Stephens' figure of £135,000 for

the market rate, including pension contributions. The directors' salaries and national insurance contributions included in the accounts are £211k, £157k and £137k for the three years in question. The difference between a simple average of these three figures and the agreed market rate is £33,000 per annum. That is the adjustment Ms Stephens argues for. However, the 2016 accounts include at least part of the salary paid to Mr Peake, who left the company on 26 February 2016. He was replaced, but not at director level. I have no evidence of the pay rate for his replacement, compared to his, but some allowance must be made for this in the calculation. I therefore substitute the salary figures of £82k plus £15k national insurance for 2016, as they are in 2017 and 2018. This produces a simple average of £152k and a difference between this and the market rate of £135k of £17,000.

134. The next adjustment is for the employment of Mr McCarthy's father as caretaker. In fact, according to the schedule in the joint statement, his duties go far beyond simple caretaking, but he is still a family member, not employed on an arm's length basis. His actual pay is £26,000 per annum. Ms Stephens suggests that a market rate is £17,000 per annum on a full-time basis, and this should only be a 50% time job. Mr Isaacs believes that the extended role performed by Mr McCarthy's father justifies the salary he receives. This issue is not dealt with in the witness statements, and was not raised with Mr McCarthy in cross-examination. As a result I cannot make any clear findings of fact, but must bear this in mind when considering the figures overall.
135. Ms Stephens next adds back the bad debt figures appearing in the 2016 and 2017 accounts, as being unusual and non-recurring figures. In fact these are credit notes issued to customers (generally local authorities, so not strictly bad debts). They reflect occasions when there has been a dispute over the level of service provided, and a credit note had been issued to keep the relationship sweet. Such items are likely to occur from time to time, and thus are properly treated as deductions from maintainable profit. I prefer Mr Isaacs' approach on this, which is to make no adjustment.
136. The next heading is insurance, where the figure in the 2017 accounts is about £10,000 higher than in the other two years. However, this is explained by the need for health and safety and employment law consultancy, which is a recurring, though not an annual, cost. For this, and the other reasons set out in the joint statement, I prefer the approach of Mr Isaacs, and make no adjustment. Ms Stephens did concede in cross-examination that the adjustment she originally suggested might not be necessary.
137. Legal and professional fees show an increase in each of the three years included in the calculation, when compared to previous years. Mr Isaacs carried out a more detailed analysis, set out in the joint statement, which shows that the only non-recurring fees amounted to £5,034 spread over the three years, which is minimal. I accept this and make no adjustment under this head.
138. Finally, audit and accountancy fees were challenged by Ms Stephens, the audit fees because this company is below the level where audits are required by law. She understood that they were carried out because Mr George required them. In fact, since a very high proportion of the company's customers are local authorities, the bidding process for contracts requires the provision of audited accounts. Ms Stephens accepted that in those circumstances audit fees should not be added back. The

variation in accountancy fees in my judgment is not significant. Accordingly no adjustment is needed under this head.

139. Looking at the figures overall, and making some allowance for the potential excessive salary paid to Mr McCarthy's father, I conclude that the correct adjusted maintainable earnings figure is £225,000.

Multiples

140. Ms Stephens set out in her report a wide selection of published figures showing actual figures paid for companies in the past. Where the information is available, the EBITDA figure can be calculated, and therefore the multiple notionally applied to this to reach the agreed sale price.
141. Mr Isaacs made the telling observation that the published figures show only the profitable businesses, which have attracted buyers. The present company has a very low profit margin which, though stable, might make it less attractive. It is, as he put it, “solid but unexciting”.
142. Both experts agreed that the correct multiple could not be arrived at purely arithmetically. There has to be an element of judgment applied. In her report, Ms Stephens clearly uses that judgment to discount certain of her published multiples, but thereafter takes a simple arithmetical average to arrive at her figure of 10.0 (see her paragraph 5.19). Mr Isaacs, on the other hand, uses his practical experience to say that multiples of this order “occur rarely for small owner-managed enterprises” such as this company (see his paragraph 5.24). Having heard both in evidence, I prefer the evidence and assessment of Mr Isaacs, and conclude that Ms Stephens’ multiple of 10.0 is too high.
143. Mr Isaacs initially proposed a multiple of between 4 and 5. This was on the assumption that the forecast drop in profits was reliable. If the forecasts are left out of account, he accepted in evidence that the multiple would increase, in his view to between 5 and 6. I note from his analysis of deals relied on by Ms Stephens that he would arrive at an arithmetical figure of 7.0 (see joint statement page 8), but said that in his experience multiples of 6 or more are typically only achieved in relation to the sale of businesses that are achieving growing profits.
144. I bear in mind that this is not an exact science, that the field in which this company operates is a specialist and fast-changing one, and that nevertheless it has maintained steady growth and profits over a number of years. Given the small profit margin at present, I am satisfied that a purchaser would see some opportunity to improve the margin whilst maintaining the turnover. As a result, I think the appropriate multiple is a little more than 6 but not as high as 7.
145. Taking the adjusted maintainable earnings of £225,000 and applying that range of multiples, an approximate mid-figure is £1.45m, which I take as the appropriate valuation on this basis, subject to the cash surplus.

Sales multiple basis

146. Ms Stephens used a sales multiple of 1.3 to check her valuation. The average adjusted sales income was £3.4m per annum. The result was a valuation of £4.4m subject to the addition of any cash surplus.
147. Mr Isaacs, in the joint statement, suggests a multiple as low as 0.33. He points to the approach from Idox, which was applying a rule of thumb of 1.0 times overall revenue.

148. Mr Newington-Bridges, in closing, relied on the EIBS deal (referred to in Ms Stephens' Appendix 11) as a comparable, where the multiple was 0.78. Applying that to the average sales income of £3.4m produces a figure of £2.652m.
149. In the end, Ms Stephens was suggesting no more than that this could be a useful check on the figure produced on the earnings basis. The wide variety of multiples derived from actual deals, as well as proposed in this case, simply shows how difficult such a calculation is with a small company. Furthermore, since an unusual feature of this company is that its profits are very low as a proportion of its turnover, I do not find this method provides a useful or reliable approach to valuation.

Cash surplus

150. The figure for cash at bank used by both experts was that in the accounts to 30 June 2018, namely £2,154,000. Ms Stephens had been given a figure of £2,117,000 for 28 February 2019. It was suggested in evidence that the current sum is nearer £3m, but no precise figure was available. I therefore need to consider only the proper method of calculation, leaving that to be applied to the correct up-to-date figure.
151. The principal source of dispute at trial concerned the way of dealing with the large sum of £1,287,000 of deferred income. Put shortly, Ms Stephens assumed that most of the company's costs associated with the contracts were incurred at the start, whereas the contract price paid in advance was allocated evenly across the life of the contract. In this way, large amounts of deferred income would appear in the accounts when little or no costs were still required. Accordingly, she allowed only £200,000 out of the deferred income figure for the true cost of servicing those contracts. Added to this, a sum of £742,000 was required to be retained for working capital. That leaves, in round figures, a sum of £1.2m as a cash surplus.
152. It is clear that there are calculation errors in Ms Stephens' initial figures. Her report at paragraph 5.32 put forward two alternative methods of assessment. The first deducted only the working capital requirement, with nothing for the deferred income, so reaching a figure of £1.4m, instead of the £1.2m if £200,000 is allowed for deferred income. The second method starts with a calculation of excess of current assets over current liabilities. Her method inevitably brought her to the figure of £1.2m because she was simply stripping out the deferred income of about that sum. She then added to this the £200,000 she assessed as being the true cost of servicing the contracts, so reaching the same figure of £1.4m. In cross-examination she accepted that this was an error, and the £200,000 should have been deducted. In the end it is clear that the alternative method of calculation was deeply flawed and should be ignored.
153. Mr Isaacs disagreed about the deferred income. The auditors should have looked carefully at the deferred income figure, and been satisfied that it truly reflected the future cost of servicing the contracts. This is the principle of "maturing", which does not simply allow a pro rata division of income over the period of the contract. Since these were computer software contracts, he did not agree that the bulk of the cost to the company was at the start of the contract. The cost was not in the installation, but in the servicing on a day to day basis. The existence of the credit notes, mentioned above, shows that a continuing high level of service is expected by customers.

154. For these reasons Mr Isaacs maintained that the full sum of deferred income should be deducted from the cash reserves when assessing the surplus. He allowed in addition just over £100k for working capital, leaving £750,000 as the cash surplus (see his paragraph 6.8).
155. I prefer Mr Isaacs' evidence on this. Neither Mr Gilkes nor Mr McCarthy was asked for any details about the business to undermine what Mr Isaacs said, nor to support Ms Stephens' rather surprising suggestion that the gulf between the deferred income in the accounts and the true needs of the company was in excess of £1m.
156. Accordingly the figure of £1.45m for capitalised earnings should be increased by the current cash reserves, less the full amount of deferred income and a further £100,000 for working capital. On the basis of the 30 June 2018 figures, that would produce a final valuation of this company at £2.2m, but that sum may need adjusting to reflect more up-to-date cash and deferred income figures.

Mismanagement

157. It follows from my conclusions on the allegations of unfair prejudice that I find there is no evidence of mismanagement of this company, especially bearing in mind that differences of commercial judgment are not enough and such conduct needs to be fairly egregious for a court to intervene. For this reason, there is no room for an enhancement of the valuation on this account.

Offers

158. It is correct to say that an expert valuation is only an educated guess at what the market will produce. A genuine market offer will be the most powerful evidence of that. I was therefore urged to take into account two offers for this company.
159. The first is the indicative offer in excess of £4m made by Agile in July 2017. I have dealt with this above, and concluded that I can place no reliance on it as any guide to the true market value of this company for the reasons stated.
160. The second is an open offer made by Mr George on 3 July 2019 through his solicitors. Subject to satisfactory due diligence, the proposal was that the company would buy back 20,720 of Mr McCarthy's shares for £1.4m, Mr George and/or an external third party would buy a further 7,030 shares for £475,000, and the remaining 9,250 shares would be converted to non-voting shares to be bought by the company (if permissible) or by Mr George over a 10 year period at £62,500 per year. The total of these figures, at the end of the 10 year period, would be £2.5m, thus valuing the company at £5m.
161. The problems with this offer, which was not accepted within the 14 day time limit, are as follows. First, it was backed by Mr Bowen, as Mr George accepted in cross-examination, and bears all the hallmarks of another contrived offer to boost the negotiating position of Mr George. Secondly, it largely proposes to use the cash surplus for the immediate payment. Since any profits, under the terms of clause 4 of the Shareholders' Agreement, are to be distributed as dividends, the additional benefit to Mr McCarthy would be only a half of the £1.4m. Thirdly, the payment of the balance of £625,000 would be spread over 10 years. It is not necessary to calculate the

present value of such a payment, as the real risk is that the company could be put into liquidation so as to avoid paying it at all. It is not surprising to me that it was rejected.

162. In any event, if the surplus cash element of £1.4m is removed from the equation, the capitalisation of the maintainable earnings is seen to be £425,000 plus £625,000 over ten years. The gross total of £1.05m would need some discounting to reflect the deferred payment of the major part of this. Depending on the assessment of the risk of non-payment, that discount could be quite large. It is far from clear that the capitalised value of the whole company, excluding any cash surplus, would be significantly greater than the figure of £1.45m at which I arrived above.
163. The short answer is that I cannot rely on this as a genuine offer, any more than the one from Agile two years earlier.

Minority discount

164. In general, where a purchaser is offered a tranche of shares in a company such as this which does not carry with it a majority of the voting power, a “minority discount” will be applied to the arithmetical calculation of the value of that shareholding as a proportion of the total value of the company. This is raised by Mr Isaacs in his report, where he suggests a discount of 20% (paragraph 7.6) but not covered by Ms Stephens in her report or in the joint statement. In cross-examination she agreed the principle of the discount, if the company were not a quasi-partnership. She also agreed that this discount would normally be 20% if there was a market for the shares, but could be as much as 40-50% if there were no market. Mr Isaacs’ suggestion of 20% was not challenged in cross-examination.
165. Mr Newington-Bridges did not make submissions on this discount in closing. There was a faint suggestion in the course of the evidence that a 50% shareholding might be in a different position to a true minority shareholding, but I do not see why it should. The reason for the discount, as I understand it, is that the purchaser would not obtain control of the company. That is the case whether the shareholding is 50% or 5%. A larger shareholding may sometimes be a more attractive proposition, but that will depend on the circumstances of the case. Where there is longstanding shareholder deadlock, it may actually depress the value further.
166. In my judgment the standard 20 per cent minority shareholder discount should be applied here, if a sale were to be ordered by the court. In view of my findings on unfair prejudice, that does not arise in this case.

Conclusion

167. For the reasons set out above, this petition fails on all grounds. I will ask the parties to agree the form of the order to be issued when this judgment is handed down, together with costs and any supplemental orders. If there are any disputes, I shall determine them on written submissions.

Costs

168. Since this judgment was sent to the parties in draft form, I have received written submissions on costs.

169. The Petitioner accepts that an order for costs should be made against him. The issues are (a) whether that should be on the standard or indemnity basis; and (b) what proportion should be paid as an interim payment pending detailed assessment.
170. My discretion on the basis of costs is a wide one. I take into account, without repeating them, the detailed written submissions made on both sides.
171. The claim here was very wide-ranging, and at times somewhat nebulous. But it cannot be called extremely thin throughout, nor has it been pursued seeking publicity adverse to the company. The fact that the Petitioner has failed comprehensively is not enough of itself to justify an award of indemnity costs. Although the Petitioner has sought to use everything, including innocent mistakes, to his advantage, he has not generally been guilty of dishonesty or moral blame. On the contrary, the reasons for his genuine feelings of unfairness are only too clear and understandable, even though misguided and not amounting to unfair prejudice in law.
172. The presentation of the Petitioner's case has been less than comprehensive, and at times inconsistent, but these are forensic failings not caused by the weakness in the Petitioner's case.
173. The extensive nature of the allegations, and the problems of dealing with a "moving target", are reflected in the costs budget, and the amendment of that following the pre-trial review. These difficulties are not on their own sufficient to justify an order for indemnity costs.
174. For these short reasons, I am satisfied that the correct order is for the payment of costs on the standard basis.
175. Since the advent of costs budgets, there is little room for the approval of estimated costs to be challenged. In this case the originally approved budget of £210,251.50 plus VAT (a total of £252,301.80 including VAT) included less than £35,000 incurred costs. For this reason the percentage to be awarded as an interim payment of costs should be a high one, in my judgment not much less than 90 per cent.
176. The First Respondent's costs budget has been amended by order of HHJ Matthews dated 1 November 2019. This decision was made after the conclusion of the trial, and after circulation of my draft judgment, but HHJ Matthews was not aware of the result or the reasons for my decision when making his order allowing amendment of the costs budgets. His order allows the uplift of £35,920 plus VAT, save for the sum of £5,400 plus VAT for the expert's fee for attending the trial.
177. It follows that the revised costs budget of the First Respondent now amounts to about £240,771 plus VAT.
178. Basing my decision on this amended figure, I consider that a fair interim payment on account of costs is the sum of £216,000 plus VAT.