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Case No: CR-2021-000247

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

Business and Property Courts of England and Wales
7 Rolls Buildings, London, EC4A 1NL

Date: 26 July 2022

Before :

Ashley Greenbank (sitting as a deputy judge of the High Court)

IN THE MATTER OF BAKER & METSON LIMITED AND IN THE MATTER OF
THE COMPANIES ACT 2006

Between :

Samuel Metson

Petitioner

- and -

(1) David Metson
(2) Andrew Montlake
(3) Baker & Metson Limited

Respondents

Hugh Jory QC (instructed by Goodman Derrick LLP) for the Petitioner
Martin Young, counsel (instructed by GSC Solicitors LLP) for the First and Second
Respondents

Hearing dates: 28, 29, 30, and 31 March 2022, and 1, 4, 5, 6, 7, 8, 11 and 13 April 2022

APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand-down is deemed to be 10.30am on Tuesday 26 July 2022

Mr Ashley Greenbank (sitting as a deputy judge of the High Court):

INTRODUCTION

1. This case concerns a Petition under s.994 of the Companies Act 2006 (“CA 2006”) in relation to the affairs of Baker & Metson Limited (“B&M” or the “Company”).
2. B&M is a family-owned company. It owns land around Little Dunmow in Essex, which is used for farming and the operation of a commercial shoot. From time to time, the Company also pursues various opportunities for the development of its land for housing or the installation of solar energy projects.
3. The petitioner is Mr Samuel Metson (“Sam”). Sam is a director of the Company and holds 6,100 ordinary shares of £1 each in the Company, representing 37% of the ordinary shares in issue, and 3,125 cumulative preference shares of £1 each in the Company, representing 40.3% of the preference shares in issue.
4. The first respondent is Mr David Metson (“David”). David is Sam’s younger brother. David is also a director of the Company and also holds 6,100 ordinary shares of £1 each in the Company, representing 37% of the ordinary shares in issue, and 3,125 cumulative preference shares of £1 each in the Company, representing 40.3% of the preference shares in issue.
5. Full details of the shareholdings in the Company are set out at [28] below.
6. The second respondent is Mr Andrew Montlake. Mr Montlake was the Company’s solicitor at the time of many of the events which are the subject of this Petition. He was also, at the outset of the matters that are referred to in the Petition, a consultant at Tolhurst Fisher, a firm of solicitors. As a consequence of the events to which I refer below, Mr Montlake became registered as a director of the Company, although the validity of his appointment is challenged by Sam as one of the matters referred to in his Petition.
7. The background to the Petition is an acrimonious dispute over the governance of the Company. I have set out the facts in more detail below (at [56] to [186]). In summary, Sam claims that David and Mr Montlake have pursued a course of action designed to seize control of the Company by, amongst other things, the invalid appointment of David’s wife, Mrs Diana Metson (“Diana”), as a director of the Company, and the manipulation of events surrounding a general meeting of the Company to secure the appointment of Mr Montlake as a director of the Company and the confirmation of Diana’s appointment as a director. Sam also claims that, without the authority of the board of the Company, David used that control to procure that the Company entered into an agreement with Grange Sporting Limited (“GSL”), a company controlled by David and Diana’s son, Mr

Richard Metson (“Richard”), which granted valuable rights to operate a commercial shoot on the Company’s land.

8. Sam asserts that the affairs of the Company have been conducted in a manner which is unfairly prejudicial to his interests as a shareholder and the interests of other shareholders. In his Petition, Sam seeks a bespoke remedy in the form of an order from the court that a shareholders’ meeting is convened at which resolutions are put to remove each of the directors currently registered at Companies House and, if the relevant director so wishes, to re-elect each of the directors subject to various directions as to how voting on those resolutions shall be conducted. Sam also seeks various other forms of relief including an order for rectification of the register of members of the Company.

THE WITNESSES AND THE EVIDENCE

9. The trial bundles contained copies of witness statements served on behalf of the petitioner, Sam, given by: Sam; his wife, Mrs Claire Metson (“Claire”); and Lady Angela Chadwyck-Healey (“Lady Angela”), Sam’s half-sister. They were all cross-examined on their statements.
10. The bundles also contained witness statements served on behalf of the respondents, David and Mr Montlake, given by:
 - i) David;
 - ii) Mr Montlake;
 - iii) Diana;
 - iv) Richard;
 - v) Mr Daniel Cox, a game-keeper, who has been responsible for the commercial shoot that has been operated on the Company’s land;
 - vi) Mr Robert Gazeley, a farming consultant and agronomist, and a partner in Ceres Rural LLP, who from time to time, supervised and administered the contract farming agreement between the Company and its farming contractor; and
 - vii) Mr Paul Fosh, a chartered surveyor and a senior director with Strutt & Parker, who had advised the Company, and David and Sam, on real estate matters including development opportunities, boundary disputes, land sales, compulsory purchases and landlord and tenant issues.

11. David, Diana, Richard and Mr Montlake were all cross-examined on their statements. The evidence of Mr Cox, Mr Gazeley and Mr Fosh was not challenged.
12. In his closing submissions, Mr Jory QC, for the petitioner, referred me to various cases providing guidance as to the caution required in evaluating the reliability of witness evidence and the importance of testing the veracity of such evidence by reference to the contemporaneous documents in the case. He referred me, in particular, to the judgment of Jacobs J in *CJ and LK Perks v NatWest Markets Plc* [2022] EWHC 726 (Comm) in which Jacobs J refers (at [154] to [155]) to the classic statement of Robert Goff LJ (as he then was) in *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1 at page 57 and to the passage in Males LJ's judgment in *Global Assets Ltd v Ikon Finance Ltd.* [2019] EWCA Civ 1413 at [48]. He also referred me to the decision of Eason Raja QC, sitting as a Deputy High Court Judge, in *Nejc Kodric v Bitstamp Holdings NV* [2022] EWHC 210 (Ch) in which the deputy judge refers (at [6] to [9]) to the judgment of Lord Kerr in *R. (on the application of Bancoult) (No. 3) v Secretary of State for Foreign and Commonwealth Affairs* [2018] UKSC 3 at [100] to [101] and the observations of Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [15] to [20]. The approach as set out in those decisions is not controversial so I will not set out large tracts of those decisions here. I have taken into account the observations made in those cases in my assessment of the evidence in this case.
13. I will deal with the evidence in some detail later in this judgment, but I should make some general comments at this stage on the witnesses and their evidence.
14. Sam is a sensitive man. He found the process of giving evidence difficult. Mr Jory QC described Sam as having been bullied by his younger brother, David. I do not accept that description entirely. There were times at which Sam was easily led by David and also dominated by him, but the facts demonstrate that Sam was equally capable of being stubborn and refusing to accept an alternative view. For the most part, however, I have accepted his evidence, although there were times at which his evidence was vague and his recollections unclear.
15. Claire's evidence was largely limited to the event of the meeting on 3 February 2020 to which I refer below. Her evidence was supportive of her husband's evidence. For the most part, I have accepted her evidence, although, in common with Sam, her recollections were sometimes vague and unclear.
16. Lady Angela was clear in her recollections, and direct and to the point in her answers in cross-examination. She accepted that she had from time to time changed her view of the events as they were unfolding. However, she gave

concise and clear reasons for her approach that were consistent with the surrounding documentary evidence. I have accepted her evidence.

17. David is a determined and, at times, stubborn man. He is also a man of detail and prone to giving lengthy answers packed with irrelevant detail in response to relatively straightforward questions. I am prepared to accept that, to an extent, that is simply his style. However, his answers in cross-examination were often evasive and argumentative, and his explanations of his motives for some of his actions were simply not credible. I refer, in particular, to his insistence that the timing of the payment of the preference share dividends (to which I refer at [120] to [132] below) was not motivated at least in part by a desire to deprive the holders of those shares of the right to vote at the forthcoming general meeting and that his decision to report Sam to the police for forgery and conspiracy (see [165] to [168]) was not intended to intimidate Sam into giving up his claims. I have therefore come to the conclusion that I must treat David's evidence with some caution except where his explanation is aligned with the objectively justifiable facts.
18. Diana was at pains to ensure that her evidence did not contradict her husband's and to that extent I must also treat her evidence with some caution. However, I disagree with Mr Jory QC's attempts to paint her evidence of that of a "dutiful wife to a bullying husband". She was measured in her responses and not afraid to state her clearly independent view. For example, she accepted that the payment of the preference share dividends was intended to ensure that the holders of those shares could not vote at the forthcoming meeting and expressed herself as "shocked" at David's decision to report Sam to the police.
19. Richard was also straining to be as supportive as possible of his father's case. This was particularly so in his evidence on the relationship between Sam and David. In addition, his explanation of GSL's need for a 10-year agreement for the shooting rights did not bear much scrutiny. However, subject to those matters, his evidence regarding the development of the Company's commercial shooting operations was clear and consistent. I have accepted that evidence.
20. Mr Montlake was a difficult witness. Although Mr Montlake has acted from time to time as a solicitor to both Sam and David as well as the Company, it is clear that from a relatively early stage in the matters that are the subject of this Petition he sided with David. His responses in cross-examination to questions on his approach to matters of conflicts of interest and basic contract law were hardly credible. He is an experienced commercial solicitor, and I can only conclude that he was being deliberately obtuse. It is difficult not to see Mr Montlake as the prime-mover in many of the events that I describe below. I have concluded that I must also treat Mr Montlake's evidence with caution except where it is consistent with the objectively justifiable facts.

21. The evidence of the remaining witnesses who were not cross-examined on their statements – Mr Cox, Mr Gazeley and Mr Fosh – was limited. Mr Cox’s statement was largely supportive of Richard’s explanation of the development of the shooting operations. Mr Gazeley and Mr Fosh’s evidence was restricted to the probity of David’s dealings with them.

THE FACTUAL BACKGROUND

22. I have set out below an outline of the factual background as I find it. I will then turn to my findings of fact on the events that form the substance of this Petition.

The Company’s constitution

23. The Company was incorporated on 8 April 1960 with an authorized share capital of £30,000 divided into 16,500 ordinary shares of £1 each (“ordinary shares”) and £13,500 cumulative preference shares of £1 each (“preference shares”). The objects of the Company as set out in its Memorandum of Association are consistent with its carrying on a farming business.
24. The rights attaching to the preference shares are set out in paragraph 6 of the Memorandum of Association as follows:

6. The following special rights and privileges shall attach to the cumulative preference shares:

(a) The right to a fixed cumulative preference dividend of 5% per annum on the capital for the time being paid thereon. The said dividend shall be deemed due and payable on the 31st March in each year or on such day in each year as the Company shall from time to time determine.

(b) The right in a winding up to have the capital paid up thereon and all arrears of dividend up to the date of the commencement of the winding up paid off in priority to the payment off of capital on the ordinary shares but with no further or other right to participate in the profits or assets of the Company.

(c) The right to one vote at any meeting of the Company in respect of each preference share on which any part of the dividend due shall be in arrear for a period of more than twelve months. Save as above no voting rights shall attach to the said shares.

25. Although the Company had, at times, been profitable, no dividend had been paid on the preference shares before the events that I describe below. No dividend has ever been paid on the ordinary shares.

26. The Company adopted the regulations set out in Part I and Part II of Table A in the First Schedule to the Companies Act 1948 (“Table A”) subject to certain exclusions and variations as set out in its Articles of Association, most of which are not relevant for present purposes, except that the Articles of Association of the Company provided (in article 4) for the number of directors to be “not more than five nor less than two”.
27. For ease of reference, I have set out in the Appendix to this judgment the provisions of Table A that are relevant to the issues arising in this case.

The Company’s shareholders

28. At all material times, the issued share capital of the Company was £24,250 comprising 16,500 ordinary shares and 7,750 preference shares, the registered holders of which were as set out in the table below.

| | Ordinary shares | Preference shares |
|--|------------------------|--------------------------|
| Samuel Metson | 6,100 | 3,125 |
| David Metson | 6,100 | 3,125 |
| David Metson and Samuel Metson as trustees of the Trust (see [30] below) | 4,300 | |
| Lady Angela Chadwyck-Healey | | 500 |
| Colin Bingham-Wallis | | 500 |
| Jennifer Smith-Daye | | 500 |

29. Colin Bingham-Wallis is the widower of Sam and David’s other half-sister, Pauline Bingham-Wallis, who is referred to by the family as “Sue”. Sue died in 1992. Jennifer Smith-Daye (“Jennifer”) is Sam and David’s sister.

The Trust

30. As can be seen from the table at [28] above, the ordinary shares that are not held by Sam and David personally are registered in the names of David and Sam as the trustees of a settlement, referred to by the parties as the “Girl’s Trust” and to which I shall refer as the “Trust”. The Trust was settled by their mother, Mrs

Mary Louisa Hasler Metson, by a deed of settlement dated 5 April 1965 for the benefit of Lady Angela, Sue and Jennifer and their children.

31. Sam and David were appointed as the trustees of the Trust by a deed of appointment dated 26 September 1985. The then surviving existing trustee, Mr Geoffrey Bradley, retired as a trustee at the same time leaving Sam and David as the only trustees. The deed of appointment names Sam and David in that order i.e. the older brother first. However, in the register of members of the Company, David's name appears in the register as the first-named trustee. The manner in which the Trust's holding of 4,300 ordinary shares (the "Trust shares") was registered is a matter of dispute between the parties to which I will return later in this judgment.
32. In the period following their appointment and before the events that form the substance of this Petition, if and to the extent that any administration of the Trust's affairs was required, it was done by David. For example, David dealt with the returns made to HMRC regarding the 10-year charge to capital transfer tax or inheritance tax and was involved in seeking the opinion of counsel as to whether the Trust could be reorganized to allow Jennifer more direct control over her proportion of the Trust's assets. Sam had little or no involvement. However, for some time before the events that gave rise to this Petition, the Trust was effectively dormant: the Trust received no income; it made no distributions to its beneficiaries; and the trustees did not communicate with the beneficiaries about its existence or its assets.

The officers of the Company

33. Sam and David were appointed directors of the Company on 1 January 1985. Following the death of their mother in December 1995, they were the only two directors of the Company until the events that form the substance of this Petition.
34. Before Sue's death in 1992, Sue and Jenny held the role of company secretary for various periods. David became company secretary on 7 July 1992.

The Company's business before 2018

35. The Company was established by Sam and David's parents to own and manage farmland near Little Dunmow, Essex. The Company's land at one time comprised three farms: Grange Farm, Brook End Farm, and Brickhouse Farm. Brickhouse Farm and Brook End Farm were initially operated as a single unit by the Company. Grange Farm was (and still is) let to and farmed by tenants (the Kirby family).

36. Following their parents' retirement in the late 1970s, David and Sam took on the day-to-day management of the farm. David's wife Diana provided assistance with the administration of the business. Sam and David, with the assistance of Diana, managed the farming operations on the land together for some years, but, in the late 1990s, Sam decided that he wanted to step back from the day-to-day management of the farming business to pursue other interests. David describes himself as having been "devastated" by Sam's decision as he had always assumed that they would spend their working lives managing the farm together. I have accepted that evidence.
37. Sam's decision coincided with a period during which he experienced some serious mental health issues and was going through some difficulties in his marriage to Claire. Sam's mental health issues persisted for some time over the next few years and have resurfaced from time to time.
38. In or around 2001, at the instigation of Sam, the Company sold some land including the farmyard and farmhouse at Brickhouse Farm for residential development. The profits from the sale were paid to Sam and David as additional remuneration. No dividend was paid on the preference shares or the ordinary shares.
39. Brickhouse Farm had been David and Diana's family home. They resented the enforced move. Following the sale, David and Diana moved to another property in Little Dunmow, Michaelmas Cottage, which remains their current home. The registered office of the Company was changed to Michaelmas Cottage at this time.
40. After Sam's decision to step back from the farming business around 2000, Sam's involvement in the Company's day-to-day business was peripheral until, from about 2018 onwards, he was involved in some of the arrangements for the establishment by the Company of a commercial shoot to which I refer below. In the intervening period, Sam undertook some share trading, although not very profitably, and later qualified as a nutritional therapist.
41. Brickhouse Farm had also been the centre of the Company's farming operations. The sale of the land affected the viability of the farm and so, following the sale, the Company also sold its farm machinery. The remaining land was farmed by contractors. David and Diana continued to run the business, which largely involved the management of the contract farming arrangements, and the investigation and pursuit of opportunities to develop the land.

The governance of the Company's affairs

42. Throughout the period following the death of their mother and before the events that are the subject of this Petition, Sam and David conducted their business as

directors of the Company in an informal manner. No formal notice was given of board meetings. No agendas for or minutes of board meetings were produced. Decisions regarding the Company's business were made in discussion between the two brothers from time to time. Although Sam's involvement in the day-to-day running of the Company was limited after 2000, David continued to provide information to Sam on significant issues and the two brothers continued to make decisions concerning the Company in the same informal manner.

43. The only meetings of the shareholders in the Company in this period were annual general meetings that were held to approve the accounts for the previous financial year. Minutes were produced of meetings held on 17 November 1998, 30 September 2008, 30 September 2009, 26 August 2010 and 28 August 2013. The only shareholders who attended those meetings were David and Sam. There is no evidence that the holders of the preference shares, who would have been entitled to attend and vote as the preference share dividend was in arrears, were given notice of those meetings.
44. There is some dispute between the parties as to whether or not the general meetings took place and, if so, whether they took place at the location set out in the minutes. In the minutes for the meeting held on 17 November 1998, David is described simply as a director of the Company. The minutes for the meeting held on 30 September 2008 contain a resolution appointing David as Chairman. In each of the other sets of minutes, David is described as Chairman. One of the issues in dispute between the parties is whether or not David was the Chairman of the Company. I will return to this issue later in this judgment. However, although Sam disputes that he attended the meeting in which the resolution was passed appointing David as Chairman, Sam accepted in his evidence that David acted as Chairman and that he did not challenge David's use of the title Chairman before this dispute.
45. The Company continued to pay Sam a director's fee after he reduced his involvement. The amount of the fee varied over the years (being as high as £19,450 in 2013) but in 2014 it was dramatically reduced to £100 per month. David explains this change on the grounds that the Company was incurring significant professional costs in relation to the Kirby litigation (see below) and that Sam was doing little for the Company other than his role as a director. In addition, David had negotiated an option agreement with a house-builder over land owned by Sam and David in their own names, which provided for regular payments to both David and Sam in the over the period from 2003 to 2017, and which was providing Sam with some regular income.

The Kirby litigation and the shoot

46. In 2017, the Company served a notice to quit on the Kirby family in relation to their tenancy of Grange Farm. The notice to quit was intended to fall within

one of the “Cases” in Schedule 3 to the Agricultural Holdings Act 1986 (“AHA”) which entitle a landlord to serve a notice where the consent of the First-tier Tribunal is not required to the operation of the notice. The service of the notice to quit and the subsequent arbitration proceedings and litigation between the Kirby family and the Company (the “Kirby litigation”) is an important part of the background to this Petition.

47. The Kirby litigation became more complex involving several additional notices to quit. However, the ground for the service of the initial notice to quit was that the use of the land was to change from farming land to use as a commercial shooting estate. It was considered necessary to support the Company’s case that the Company could demonstrate the commercial operation of a shoot that had the capacity to expand to land which included the land which was farmed by the Kirby family under the AHA tenancy.
48. The Company had granted shooting rights over its land to various tenants in the past. At the time that the notice to quit was served, the shooting rights were held by Mr Shane Ashby. The initial intention was that the Company would operate an expanded shoot in partnership with Mr Ashby. However, negotiations with Mr Ashby fell through and the arrangements with Mr Ashby were terminated abruptly in early 2018.
49. The Company decided to operate the expanded shooting operation itself. It engaged a volunteer gamekeeper, Mr Cox, in 2018 and proceeded to incur expenditure improving the facilities for the expanded shoot. In practice, this meant that the shoot was managed by David and Diana, with the assistance of Mr Cox. However, Sam also played a role assisting the Company with these arrangements.
50. David’s son Richard was involved both in preparing financial plans and a budget for the shooting operation. His participation in the shooting operations broadened in the period before the matters which are the subject of this Petition and included the arrangements for the building of a shooting lodge and the establishment of a partnership with a Michelin-starred chef for the provision of fine dining on shoot-days. Richard also provided practical assistance to the gamekeeper on shoot-days.
51. The increased participation of Richard in the shooting operations was of some irritation to Sam. He regarded it as a breach of an understanding between himself and David that none of their children should take over the farm as it was not large enough to provide a living for them all. This frustration came to a head in January 2020 when there was a significant disagreement between Sam and Richard over Richard’s participation assisting the gamekeeper on a shoot-day that Sam had arranged for his son Jamie.

52. There is an issue between the parties as to whether it was planned that Richard would take on the shoot at this stage and before the events which occurred in February 2020 which I describe below. Sam relies on this point in support his narrative that the events that I will come on to describe were part of a coordinated plan on the part of David and Mr Montlake to seize control of the Company for the benefit of David and his family (including Richard).
53. The evidence of David and Richard is that the first time that the prospect of Richard taking over the shoot on a formal basis was mentioned between them was in a discussion on 2 February 2020. This position contrasts with the evidence Mr Montlake – who was advising on the Kirby litigation – and who volunteered in cross-examination that it had been planned as early as 2018 that Richard would take over the shoot.
54. In my view, the surrounding evidence tends to support Mr Montlake’s admission. As I have explained, the operation of the shoot was a key part of the Company’s strategy in relation to the Kirby litigation. It is unlikely that thought was not given to how the shoot would operate after the breakdown of the negotiations with Mr Ashby. Richard’s involvement in the shooting operations had been increasing over time and it is unlikely that there had been no discussion of his playing a more formal role before February 2020. Furthermore, the concerns about David’s health had manifested themselves long before the discussion with Sam in February 2020. David was concerned to ensure that he could ensure the smooth running of the business of the Company – in particular, the Kirby litigation – and, even before the events of 2020, in my view, he would not have trusted Sam to operate the shoot given the past history. Richard’s other business venture – an interest in a start-up technology company – was yet to produce any material return and the level of Richard’s involvement in the shoot was such that it was unlikely that he would continue without some level of remuneration.
55. That leaves open the question as to whether the arrangements in relation to the shoot were part of a coordinated plan on the part of the respondents. I will return to that issue later in this judgment.

THE EVENTS THAT FORM THE SUBSTANCE OF THIS PETITION

56. I must now turn to the main events which form the substance of this Petition.
57. As I have mentioned, the Kirby litigation is an important part of the background to this Petition. By the time of the events in the period between February and July 2020, which I describe below, the first notice to quit had been the subject of arbitration proceedings in 2018 in which the Company had been largely successful. The Kirby family, however, appealed to the High Court on various

grounds. At the time of these events, the Company was in the process of preparing for the hearing of those appeals.

The meeting on 3 February 2020

58. The parties agree that these events begin with a meeting between David and Diana, and Sam and Claire at Michaelmas Cottage on 3 February 2020.
59. On the morning of 3 February 2020, David called Sam and asked to meet Sam and Claire later that day to discuss matters concerning his health. He did not go into any further detail at this stage. They arranged to meet that evening at David and Diana's home at Michaelmas Cottage.
60. The parties' descriptions of the nature of the meeting and its outcome diverge in some important respects.
61. Sam's evidence (supported by Claire) is that the meeting was a "family gathering", which was convened to discuss David's health, and which took place in the kitchen at Michaelmas Cottage. It was not a board meeting. David (supported by Diana) says that the meeting was a board meeting and it took place in the office, which is above the garage at Michaelmas Cottage.
62. It is agreed that, at the meeting, there was a discussion of David's heart condition. David explained that he was to undergo a direct current cardioversion procedure on 14 February 2020 in which his heart would be stopped and restarted in an attempt to correct an atrial flutter. David was concerned to reduce his workload and to provide for the governance of the Company if he should die or become incapacitated for any period of time. Sam became quite emotional during the meeting and, at one point, he got up from his chair and embraced his brother.
63. The discussion moved on to two specific topics: the operation of the shoot and the appointment of Diana as a director of the Company. The parties disagree about the order in which these two topics were discussed, but I do not regard it as material.
 - i) As regards the operation of the shoot, Sam and Claire say that they offered to take over responsibility of the shoot, but David was adamant that the only person qualified to take on the operation of the shoot was his son, Richard. Sam accepts that, after some discussion, he agreed that Richard should take on the shoot for the forthcoming season subject to his being involved in the negotiation of any agreement with Richard. David's case is that Sam agreed to Richard running the shoot subject to an arm's length agreement on terms similar to those agreed with Mr Ashby.

- ii) As regards the appointment of Diana as a director, Sam and Claire's evidence is that Sam's response to the proposal was that he would agree to the appointment of Diana as a director provided that Claire was appointed at the same time in order to maintain the balance of the family interests in the Company. However, David insisted that Claire had no role in the Company and should not be a director. No agreement was reached. David says that Sam agreed to Diana's appointment.
64. At the conclusion of the meeting, David said words to the effect of "Can I get on with it?" to which Sam responded, "I suppose so". It is David's case that these words extended to both of the issues that had been discussed, including whether or not Diana should become a director. Sam accepts that these or similar words were used, but his case is that it was clear from the context that he was referring solely to Richard's taking on the shoot.
65. I accept Sam and Claire's account that this meeting took place in the kitchen at Michaelmas Cottage. The location of the meeting is referred to on several occasions by Sam in the correspondence and discussions which followed the meeting. His description was not challenged by David at the time.
66. In my view, the dispute between the parties about the location of the meeting on 3 February is largely irrelevant as is the dispute about its nature. The two brothers had conducted the business of the Company on an informal basis for many years. There had been no formal board meetings, no written notices of meetings, no formal board resolutions and no minutes of board meetings. They were the only two directors and they took decisions whenever and however they happened to meet. No formalities were observed that would distinguish a directors' meeting from any other. It was not until the events in this period that any attempt was made to abide by any form of formal governance process. The more important questions are what was discussed and what was agreed at the meeting.
67. The parties agree that matters relating to the business of the Company were discussed at the meeting on 3 February 2020. As regards the decisions that were reached, I accept Sam's account of the position. I therefore find as a fact that he did not agree to the appointment of Diana as a director and that his agreement to the engagement of Richard to run the shoot was limited to the forthcoming season and with a condition that he would have some involvement in the negotiation of the terms of any agreement with Richard. There were no formal resolutions put to the meeting.
68. I reach that conclusion for the following reasons.
- i) Sam has been consistent in his account of the meeting from the outset (both in relation to Diana's appointment and in relation to the agreement

with Richard to operate the shoot). He reacted quickly to register his objections to the appointment of Diana (in his email of 20 February 2020) once he became aware that Diana had been registered as a director (on 19 February 2020).

- ii) His account of the Whatsapp messages and the meeting also fits the contemporaneous evidence. He mentions the meeting on 4 February 2020 in his email of 20 February 2020. There is no challenge in the correspondence at the time to that part of his account.
 - iii) It may well be that there was a misunderstanding between the brothers at the end of the meeting on 3 February 2020; David may well have thought that, from his response, Sam had agreed to Diana's appointment. However, even if that were the case, it must have been apparent to him from the subsequent events – in particular, the Whatsapp message and the meeting on 4 February 2020 – that there had been no meeting of minds. He would have been aware of the potential disagreement before he registered Diana's appointment at Companies House on 19 February 2020.
 - iv) I find some support for my conclusions in David's response to the objections raised by Sam in his email of 20 February 2020. His attempt to justify Diana's appointment on the grounds it was not possible for Sam to make his agreement to the appointment of one director (Diana) conditional on the appointment of another (Claire) relied upon a degree of formality in the Company's decision-making processes which simply did not exist at the time. It bore the hallmarks of a rationale manufactured after the event to justify his actions. Mr Montlake's attempts to support that argument in cross-examination were equally implausible.
69. After the meeting, Sam sent a WhatsApp message to David expressing his support for David, but stating that "we do need to talk further tomorrow to understand the full implications of what is being agreed". There are two further WhatsApp messages on 4 February 2020. The first suggests that Sam went to meet David at Michaelmas Cottage early in the afternoon, but David was not at home. The second WhatsApp message (timed at 14:23) simply states, "Don't go implementing new things until we see each other again".
70. It is Sam's case that a meeting took place that evening to discuss the arrangements surrounding the shoot, this time in the office at Michaelmas Cottage. One item that was discussed, according to Sam's evidence, was whether Richard should be granted a contract for the shooting rights for 10 years. Sam says that he objected to this proposal. David and Diana deny that any such meeting took place.

71. I have accepted Sam's account. His evidence is broadly supported by Claire. Furthermore, he refers to the 4 February meeting in subsequent correspondence when he objects to Diana's registration as a director. That reference is not challenged in David's response given at the time. In addition, when David, on behalf of the Company, negotiated and entered into an agreement with GSL with a 10-year term in April 2020, he concealed that agreement from Sam. I can only conclude that he did so in the knowledge that it was contrary to the agreement that he had reached with Sam in the meetings on 3 and 4 February 2020.
72. David registered Diana as a director of the Company at Companies House on 19 February 2020. The record at Companies House states that Diana was appointed on 6 February 2020. This date was chosen as the earliest date on which Companies House would allow him to record the appointment as he had failed to register the appointment within 14 days of 3 February 2020.

Further discussions concerning the composition of the board

73. Sam became aware of the appointment of Diana as a director when he and Claire attended a meeting with a contractor on 19 February 2020. He wrote to David by email on 20 February 2020 expressing his objections and recounting his version of the meetings on 3 and 4 February to which I have referred above. He wrote further to David on 25 February 2020 expressing his objections to the appointment of Diana, this time referring to the appearance of Diana's appointment on the record at Companies House. He copied this email to Mr Montlake.
74. David and Sam met on 26 February 2020. Sam recorded their discussion without the knowledge of David. The transcript reveals that there was a further discussion of the appointment of Diana as a director at the meeting on 3 February 2020. Sam reiterated his position that the appointment of Claire was necessary to maintain balance in their respective family interests in the Company and that he agreed to the appointment of Diana, if at all, subject to the appointment of Claire. David rejected Sam's account. He argued that it was not open to Sam to agree to Diana's appointment conditional upon the appointment of Claire, and that, even if Sam had not agreed, the appointment of Diana could have been passed on his casting vote as the effective Chairman of the Company. David dismissed Sam's concerns about the need for balance and maintained his objection to Claire being on the board on the grounds that she had no role within the Company. He also expressed a concern about the wisdom of appointing Claire as a director given the volatile state of Sam and Claire's marriage.
75. Sam's email of 25 February 2020 is the first time that Mr Montlake was copied on any correspondence relating to the appointment of Diana as a director or the

arrangements for the shoot. I will address the parties' motivations later in this judgment, and Mr Jory QC's assertion, on behalf of Sam, that the entire course of events was part of a coordinated plan by David and Mr Montlake to seize control of the Company. But I should record at this point, that there is no evidence that Mr Montlake had any involvement in David's proposals to appoint Diana as a director prior to the meeting on 3 February 2020. There is also no evidence that Mr Montlake was aware that the operation of the shoot would be discussed between David and Sam on 3 February 2020. That having been said, it is clear that, from this very early stage, Mr Montlake aligns himself with David's position and is acting in concert with David notwithstanding his position as the Company's solicitor and his protestations that he was remaining neutral between the two brothers.

76. Mr Montlake's immediate response to receiving a copy of Sam's email of 25 February 2020 was to send an email which, whilst professing the need for him to remain neutral given his position as the Company's solicitor, supports Diana's appointment to the board and questions Claire's qualifications and suitability as a director. Furthermore, immediately following the meeting on 26 February, David produces a summary of the meeting which he sends to Mr Montlake and to Mr Russell Short, the Company's accountant, which he does not share with Sam.
77. Sam instructed an independent solicitor, Patricia Barclay of Bonaccord Law in Edinburgh to look into Diana's appointment. On 9 March a copy of Ms Barclay's engagement letter addressed to the Company was received at the Company's registered office at Michaelmas Cottage, where it was opened and read by David. David did not immediately forward the letter to Sam. Instead, David sought the advice of Mr Montlake as to how to respond to Ms Barclay and to Sam.
78. On 10 March 2020, David then wrote to Sam, enclosing a copy of Ms Barclay's engagement letter (but not its enclosures), and questioning Sam's approach. He also wrote to Ms Barclay informing her that the Company had not instructed her. Ms Barclay responded on 11 March confirming that she was instructed by Sam and that the letter had been sent to the Company in error. In her response, Ms Barclay also questioned the validity of the appointment of Diana as a director of the Company. David again sought the advice of Mr Montlake as to how to respond to Ms Barclay.
79. Sam and David met again on 12 March 2020. Once again, Sam recorded the meeting without the knowledge or agreement of David. David maintained his objection to Claire being appointed to the board. However, the two brothers did go on to discuss the composition of the board, whether or not additional family members might be brought on to the board in order to maintain the balance

between their respective family interests, whether David should be recognized as Chairman in order to ensure that there was no deadlock on the board, and whether it might be appropriate to add a fifth board member (in addition to Diana and Claire). In this latter context, David and Sam considered the possibility of asking Mr Short or Mr Montlake to join the board. From the discussion at the meeting, it would appear that, at the time, the preferred candidate was Mr Short.

80. There followed further correspondence between 19 March 2020 and 31 March 2020 in which Sam continued to press for the immediate appointment of Claire to the board and to confirm the appointment of Diana, and for the subsequent appointment of a fifth independent director. Notwithstanding the previous discussion of the possibility of Mr Short or Mr Montlake becoming a director, Sam's suggestion in this correspondence was that Mr Roger Hayward, a local surveyor, should join the board. David responded on 2 April 2020 commenting on the appointment of Mr Hayward, but also noting that Mr Short was not prepared to act as a director given the possible conflict with his role as an adviser on financial reporting matters and reporting that Mr Montlake was prepared to act. He suggested deferring any action regarding the composition of the board whilst he was dealing with matters concerning the Kirby litigation which was particularly busy at that time.
81. On 6 April 2020, frustrated at the lack of progress, Sam sent an email to David threatening to instruct Ms Barclay to take action to remove Diana as a director unless steps were taken to appoint Claire to the board. At this point, Mr Montlake intervened to express his view that Sam had agreed to Diana becoming a director on 3 February 2020, that it was wrong for Sam to connect the appointments of Diana and Claire, and supporting David's argument that it was not possible for Sam to approve the appointment of Diana at the meeting on 3 February 2020 subject to the appointment of Claire. Mr Montlake also advised both Sam and David to consider what he called an "either way offer" under which one of them would propose the terms of an exchange in which one party would receive all of the shares in the Company that they both owned and the other would receive all of their combined personally owned land, subject to a balancing payment set out in the offer. The offer would be made on the basis that the person making the offer would accept either side of the bargain. The recipient of the offer would then be entitled to accept either side of the bargain. David responded to this suggestion positively – albeit on the basis that Sam would be the party making the offer. Sam rejected the proposal out of hand.
82. At this stage, Lady Angela became involved in the discussion at the instigation of Sam. She wrote to David and Sam imploring them both to put their differences to one side. She expressed her disapproval of the proposal to separate the assets between them and asked David to agree to put Claire on the

board of the Company and to add a single independent director as a means of resolving the dispute. Her initial email was sent on 7 April 2020 but it did not reach David as it was sent to an incorrect email address. She resent the message on 17 April. It was followed by an exchange of correspondence between David and Lady Angela between 17 April and 24 April. However, the correspondence simply resulted in David reiterating his position and his support for the “either way offer” proposed by Mr Montlake and so no progress was made. As part of this correspondence Lady Angela asked David to circulate the minutes of the 3 February 2020 meeting. No minutes had been prepared at that stage.

83. Around this time, on 21 April 2020, Sam sent an email to David (which he did not copy to Diana) in which he sought to convene a telephone board meeting on 24 April 2020 for the sole purpose of appointing Mr Hayward as a director, if he was willing to act. On 24 April 2020, shortly before the anticipated time of the meeting, David sent an email to Sam (copied to Mr Montlake, Mr Short, Mr Hayward and Diana) attaching an alternative agenda for the meeting. The alternative agenda included the appointment of both Mr Montlake and Mr Hayward as directors and attached, for approval at the meeting, draft minutes of three previous meetings expressed to have been held on 3 February 2020, 19 February 2020 and 13 March 2020.
84. Each set of draft minutes provided for David to sign the minutes (once approved) as Chairman of the Company. The draft minutes for the meeting of 3 February 2020 set out David’s account of the meeting and at the end of the minutes recorded that two resolutions had been passed: first “that Diana Metson be duly elected to the Board” and second “that David Metson be authorised to act for Baker & Metson Ltd. to draw up and agree a Shooting Agreement with Richard Metson”. The dates on the latter two sets of draft minutes were incorrect, but they were clearly intended to refer to the meetings on 26 February 2020 and 12 March 2020 to which I refer above. Once again, they set out David’s account of those meetings. They also referred to Diana as a director of the Company and recorded her absence from each meeting.
85. In the call that followed, in which Sam, David and Diana participated, Sam refused to accept the proposed agenda and refused to acknowledge Diana as a director. The call ended with no agreement on any matter including whether or not the draft minutes should be approved. Sam recorded his objections to the process and the draft minutes in a subsequent email.

The Shoot Agreement

86. Following the meeting on 3 February 2020, David pursued the arrangements for Richard to take on the shoot. Richard incorporated a new company, GSL, for this purpose.

87. Sam asked at various points to become involved in the negotiation of the arrangements with Richard and GSL. On 10 March 2020, he proposed a board meeting with an agenda which included an update on the drafting of the contract for the shoot. On 9 April 2020, Sam offered to put together heads of terms for discussion with Richard and suggested that he should take over the negotiations as David was obviously conflicted. These suggestions were ignored.
88. On 27 April 2020, the Company, acting through David, entered into an agreement with GSL, acting through Richard (the “Shoot Agreement”). Under the Shoot Agreement, the Company granted shooting rights to GSL over the Company’s land for the period from 2 February 2020 to 1 February 2030 for a rent of £1 and the provision of a number of shooting days each year as determined by a formula set out in a schedule to the agreement. The Shoot Agreement also provided that, in the event that the Company was successful in the Kirby litigation, GSL would pay additional rent to the Company for the use of the Grange Farm land for shooting in an amount equal to 150 per cent of the level of rent applicable to similar arable farm land subject to AHA tenancies in the south-east of England.
89. At the same time, the Company entered into a side letter with GSL, referred to as an addendum to the Shoot Agreement. Under the side letter, the Company was entitled to terminate the Shoot Agreement on 1 February 2021 if Sam or his immediate family gained control of the Company, either at shareholder level or at board level. A further side letter, also dated 27 April 2020, was agreed between the Company and GSL pursuant to which the Company or GSL had the right to terminate the Shoot Agreement on 1 February 2021, but, if the Company exercised this right in circumstances where GSL had suffered losses in the period to 1 February 2021 due to the Covid-19 pandemic, GSL had the right to extend the Shoot Agreement for a further one year to 1 February 2022.
90. David did not inform Sam of the existence of the Shoot Agreement or the side letters at the time they were executed or when Sam asked, on 22 May 2020, to be involved in the negotiation of the arrangements surrounding the shoot with Richard. In response to Sam’s request, David simply deferred and suggested that he would respond after 2 June 2020. Sam made subsequent requests for information regarding the Shoot Agreement but they were ignored. Sam was not aware of the existence of the Shoot Agreement until after the commencement of these proceedings.
91. In cross-examination, David’s explanation for not informing his fellow director of the existence of the Shoot Agreement was that the Shoot Agreement was intended to be temporary and so it was not appropriate to discuss it with the board at this time. This evidence is simply not credible. David regarded the form of the Shoot Agreement as important evidence in the Kirby litigation and

the outcome of the Kirby litigation as critical to the Company's prospects. On his evidence, the agreement had to be in a form which would enable the Company to demonstrate that it had a use for the Grange Farm land which would produce a greater return for the Company than the existing AHA tenancy with the Kirbys. It was for this reason that the agreement was expressed to be capable of remaining in existence for a period of 10 years when agreements with former tenants had been for much shorter periods. It is not consistent with the importance that David placed on the existence and the form of the agreement that he did not disclose it to his fellow director.

92. Richard in his evidence suggested that the 10-year period of the agreement was necessary given the capital outlay and risk that GSL would incur if the Company was successful in the Kirby litigation. I do not accept this evidence. Richard accepted in cross-examination that a two-year agreement would have been more than sufficient to mitigate GSL's risks.
93. In my view, the 10-year term of the Shoot Agreement was introduced purely for the purpose of the Kirby litigation. There was no intention on the part of David or Mr Montlake to disclose the side letters as part of the proceedings. The intention was to represent to the court or the arbitrator that a long-term arrangement was in place. Once the Kirby litigation was unsuccessful, the Shoot Agreement was terminated on 1 February 2021 by an agreement between the Company (acting through David) and with GSL (acting through Richard). GSL thereafter operated the shoot on the basis of an oral agreement similar to that which was previously in place with Mr Ashby.

Attempts to convene a general meeting

94. On 29 April 2020, Sam wrote to David and Diana in his capacity as a holder of more than five per cent. of the voting shares in the Company to request that the board put written resolutions to the shareholders appointing Mr Hayward and Lady Angela as directors of the Company. Although Sam included Diana as one of the addressees of his letter, he maintained in it that she had not been validly appointed as a director.
95. Once again, Mr Montlake intervened. He wrote to Sam on 1 May 2020 accusing him of acting contrary to the Company's interests at a particularly crucial stage in the Kirby litigation. He suggested that David and Diana would resign as directors if the resolutions were passed. His email was followed by an email on 3 May 2020 from David to Lady Angela, which was copied to Sam and Mr Hayward. In this email, David expressed a willingness on his and Diana's part to stand aside as directors in favour of Lady Angela and Mr Hayward. He attached copies of the draft minutes of the three meetings to which I have referred above, but this time with the dates of the later meetings corrected. He referred to the minutes as having been prepared from "our notes". His email

went on to describe the complexity of the Kirby litigation and promised to provide further documentation to Lady Angela and Mr Hayward. I have no doubt that David and Diana had no real intention of resigning at any point. The provision of copious amounts of information to Lady Angela and Mr Hayward was simply an attempt to deter them from acting as directors.

96. Mr Montlake sent further emails on 17 May and 19 May 2020 to Ms Barclay, in each case, in support of David and Diana and pointing out the deleterious effect that their resignations would have on the Company and its position in the Kirby litigation. He commented in disparaging terms on the abilities of Sam, Mr Hayward and Lady Angela to take on the running of the Company and conduct of the Kirby litigation if David and Diana were to resign.
97. Also on 19 May 2020, Sam sent to David a draft notice convening a general meeting of the Company for the purpose of considering resolutions to appoint Mr Hayward and Lady Angela as directors of the Company. Having received no comments, he circulated the notice to all shareholders on 20 May 2020. The notice sought to convene a general meeting to be held on 3 June 2020. The email attaching the form of the notice was copied to Mr Montlake and to Ms Barclay.
98. On 31 May 2020, Mr Montlake sent two emails to Ms Barclay. The first of these emails (timed at 07:06) reiterated Mr Montlake's position that the resignation of David and Diana was not in the interests of the Company and described Sam as "lovely" but "clueless" when it came to the matter of running the Company. In the second email (timed at 07:20), he pointed out to Ms Barclay that the notice convening a general meeting issued by Sam on 20 May 2020 did not give fourteen clear days' notice of the meeting and so was invalid. Ms Barclay suggested that a waiver of notice might be arranged. David, in an email to Sam on 1 June, refused to waive notice and suggested that a board meeting should be held to consider the appointment of Mr Hayward and Lady Angela.
99. Mr Montlake continued his assault on Sam. On 3 June 2020, he sent an email to Sam emphasising the amount of work currently being undertaken by David and Diana in relation to the Kirby litigation and suggesting that Sam would not be able to cope with the demands of handling the litigation and that, if he failed to do so, David and Diana would seek compensation from him following their resignation. He suggested to Sam that he would be "better off resigning".
100. Having circulated a draft for comment on 4 June and received no response, Sam issued a revised notice to shareholders on 5 June convening a general meeting of the Company to be held on 25 June 2020. Once again, the meeting was convened to consider resolutions to appoint Mr Hayward and Lady Angela to the board.

101. Later that day Mr Montlake wrote to Sam to suggest that there should be a board meeting to consider the issue of a notice to shareholders to convene a general meeting. This email was followed by an email from David to Sam insisting that a board meeting should be called for that purpose.
102. I have not set out large extracts from the email correspondence in this period. Mr Young described some of Mr Montlake's language in these emails as "forthright". However, in my view some of the language is quite simply extraordinary for a company solicitor addressing a director of the company. It is at times derogatory and, at others, simply insulting and offensive. On 9 June 2020, Sam wrote to Mr Montlake complaining of his conduct. He copied his email to Charles Latham, a partner at Tolhurst Fisher.
103. Sam acquiesced with the requests from Mr Montlake and David for a board meeting. A board meeting was arranged for 18 June 2020 to consider the convening of a general meeting of the Company. David circulated an agenda for the meeting. The matters for discussion were listed as follows.
 1. Approval of the minutes of the last 3 meetings.
 2. Matters arising.
 3. The Girl's Trust.
 4. Discussion of potential new director roles.
 5. Election of Andrew Montlake to the Board.
 6. Election of Lady Angela Chadwyck-Healey to the Board.
 7. Election of Roger Hayward to the Board.
 8. Confirmation of Diana Metson to the Board.
 9. Calling of a General Meeting with reference to the Board.
 10. Any other business.

The registration of the Trust shares

104. At this time, Birketts LLP ("Birketts"), the solicitors acting for Lady Angela, had been making enquiries regarding the position of the Trust and the Trust's shareholding in the Company. They requested documents relating to the Trust, its shareholding in the Company and its income. Having received no response to their enquiries, on 12 June 2020, Birketts sent a request purportedly under s.116 CA 2006 for a copy of the register of members of the Company to David, in his capacity as company secretary. The request was made by email on 12 June 2020 and redelivered by letter on 15 June 2020. The request extended to

“all historic entries in the register of members regarding the holding of 4,300 ordinary shares (currently held jointly by David George Douglas Metson and Samuel Alexander Metson) of Baker & Metson Limited... including all entries showing any previous holders of the shares making up this holding”.

105. Mr Montlake responded to the request from Birketts noting certain deficiencies in the request.
106. On 17 June 2020 David responded to the request for information from Birketts regarding the Trust. He also confirmed that the Company had not had sufficient reserves in the past to pay a dividend on the Trust shares. Later on 17 June 2020, David sent a further email to Birketts attaching the copy of the relevant page from the register of members of the Company showing the registration of the Trust’s holding of 4,300 ordinary shares. He also sent a copy of the register to Sam the following day (18 June 2020).
107. The copy of the register that was sent to Birketts (and Sam) shows the 4,300 ordinary shares as registered in the joint names of David and Sam, with David as the first-named trustee. Mr Jory QC asserts that David wrote up the register shortly before the board meeting on 18 June 2020 putting his own name as the first-named trustee as part of the plan to seize control of the Company. The entry in the register of members shows the registered members as “David George Douglas Metson jointly with Samuel Alexander Metson”. David’s address is shown initially as being at an address that was David’s address in 1985. This address is then crossed out and replaced with David’s current address of Michaelmas Cottage. Sam’s address in the register is also shown initially as an address that was Sam’s address in 1985. This address is again crossed out and replaced with Sam’s current address. The entry is in David’s handwriting. There is a single entry for the entire holding of 4,300 ordinary shares. The date of the entry on the register is shown as having been made on 26 September 1985, the date on which David and Sam were appointed as trustees.
108. In their Points of Defence, the respondents stated that the entry was completed in 1985 and updated with the revised addresses on 17 June 2020. This position changed in David’s witness statement, which was initially served on 18 February 2022. In that witness statement, David’s evidence was that the entry in the register was not made at the time of his and Sam’s appointment as trustees, but at a later time. David’s evidence is that, in the interim, he had kept a note of the relevant transfer with the register along with a note of other relevant transfers so that they could all be subsequently written up. His evidence was that the actual entry was made much later at some point between 2012 and 2017 and then updated with new addresses on 17 June 2020. David says that he used the addresses set out in the note to compile the register. The respondents sought

to amend their Points of Defence to reflect David's witness statement at the opening of the trial. The petitioner did not object to the change and I have accepted it.

109. I have accepted David's evidence on the timing of the entry to the register. There is no material evidence to show that David did not write up the entry at some point between 2012 and 2017.

i) Even though Sam was named first as a trustee in the deed of appointment, no doubt because he was the elder brother, it is entirely plausible that David would have entered himself as the first-named trustee when he wrote up the register. Sam had made it clear that he did not want to be involved in the administration of the Trust. It would be entirely natural for David to put his name first in the register as he was dealing with all the administration of the Trust and the Company at the time.

ii) Mr Jory QC made much of the fact that the entry states that it was made in 1985 (which it was not) and that the addresses used were the 1985 addresses not the addresses of David and Sam at the time at which David submits in his evidence that the entry was made between 2012 and 2017. Mr Jory QC says that the natural inference is that David used the 1985 addresses to conceal the time at which the entry was actually made. I accept Mr Jory QC's point that the date that should have been entered in the register was the date on which the entry was made and not the date on which the transaction which gave rise to the entry took place. However, that is a simple error to make and one which, I suspect, many untrained company secretaries may make. I do not draw the inference that Mr Jory QC invites me to draw.

iii) Mr Jory QC also noted that David was not the company secretary until 1992, the implication being that David's evidence as set out in his witness statement was designed to cover up an error in the pleaded case. I do not accept that submission. It is clear from the documentary evidence that David was involved in the administration of the Company long before he was formally appointed as company secretary. There is a letter from David to the family's solicitors shortly after the appointment of Sam and David as trustees in 1985 in which David undertakes to procure that the entries in the register are made.

iv) I also note, in passing, that Birketts' letter of 12 June 2020 referred to the entry in the register with David as the first-named trustee.

110. For all these reasons, I therefore accept David's evidence on this point. I find that the register was written up at some point between 2012 and 2017 with David

as the first-named trustee. It follows that the entry was not made as part of any plan for David and Mr Montlake to seize control of the Company in 2020. That leaves open the question as to whether it was appropriate for David, without the consent of his fellow trustee, to put his name first in the register and also whether David was entitled as the first-named trustee to vote the Trust shares in the way that he did at the general meeting on 22 July 2020. I will address these points later in this judgment.

The board meeting on 18 June 2020

111. On 18 June 2020, David sent an email to Sam suggesting that the Company should pay all the accrued but unpaid dividends on the preference shares, but that the dividends accrued and unpaid on the preference shares held by both David and Sam should remain unpaid. He asked for Sam's approval. Sam agreed in principle but asked for financial information to be provided to him before a formal decision was made.
112. A board meeting was held later on 18 June 2020. It was attended by David, Sam, Diana, Mr Montlake, Mr Hayward, Lady Angela, and Chloe Metson ("Chloe"). Chloe is Sam and Claire's daughter. She attended to take the minutes. At the meeting, the following matters were discussed.
 - i) The three sets of minutes to which I referred at [83] and [84] above were presented to the meeting, but with the dates having been corrected. Sam objected to the minutes. David purported to approve the minutes in his capacity as Chairman. Sam and David disagreed about whether or not David was entitled to approve the minutes as Chairman.
 - ii) Lady Angela objected to the position of the Trust being on the agenda as it was not a matter for the board. There was no further discussion of the Trust.
 - iii) David confirmed that he and Diana were no longer planning to resign even if Mr Hayward and Lady Angela were appointed to the board. (In my view, they had never intended to resign.)
 - iv) There was a discussion of the potential candidates for appointment as directors. It was agreed that the election of directors would be put to a general meeting of the Company.
 - v) It was agreed that Sam would prepare a notice to convene the general meeting.
113. Following the meeting, Sam sent a draft notice of general meeting on 22 June to David for comment. The draft notice set out the resolutions for the

appointment and/or confirmation of directors in the following order: Mr Hayward, Lady Angela, Diana and Mr Montlake. The notice provided for the meeting to be held at Sam's home address.

114. David responded on 23 June 2020 commenting on Sam's draft notice. He raised the following objections to Sam's draft including: that the draft did not refer to Diana as a director; that the meeting should be at the Company's registered office, Michaelmas Cottage; that the resolutions should be in the order set out in the agenda for the board meeting; and that the notice should be sent by David as Chairman and company secretary. He attached a revised form of draft notice to his email. He asserted that he should chair the general meeting and said that he would send a revised version to shareholders the following day.
115. Sam agreed that David could send the notice of general meeting on behalf of the board, but objected to all of the other changes. David did not send the notice of the meeting to shareholders on 24 June 2020.
116. On 30 June 2020, Sam sent a notice of general meeting to shareholders by email. Sam's notice was sent on the basis that the board had failed to call a general meeting within the time limit required to respond to his original requisition. On that basis, the notice included only resolutions to appoint Lady Angela and Mr Hayward as directors. He called the meeting for 22 July 2020 at 11am at his home address. Later that day, David also issued a notice convening a general meeting of the Company on 22 July 2020, this time at 10.15am at Michaelmas Cottage. The notice provided for resolutions for the appointment as directors of Mr Montlake, Lady Angela, and Mr Hayward and for the confirmation of the appointment of Diana in the order set out in the agenda for the 18 June 2020 board meeting.

Advice about the voting of the Trust shares

117. On 2 July 2020, Birketts wrote to Sam and David in their capacities as trustees of the Trust. The letter requested further information relating to the Trust, but also stressed the need for the trustees to act unanimously particularly in the exercise of the voting rights attaching to the Trust shares regardless of the order in which the names of the trustees appeared in the register of members. In their letter, Birketts also suggested that, given the potential for conflicts of interests between Sam and David's duties as trustees to act in the best interests of the beneficiaries, their duties as directors to act in the best interests of the Company and their personal interests, it would be appropriate for them both to retire in favour of new independent trustees.
118. Following their receipt of the letter from Birketts, David wrote to Sam on 8 July 2020 regarding the voting of the Trust shares at the forthcoming general meeting. He expressed his disagreement with Birketts' conclusion regarding

the need to act unanimously. He suggested that he would vote the Trust shares as the first-named trustee in the absence of agreement between them. He then expressed the view that the Trust shares should be voted in favour of the appointment of Mr Montlake and Mr Hayward, and to confirm the appointment of Diana. However, he suggested that the Trust shares should be voted against the appointment of Lady Angela largely on the grounds that her appointment would sow disharmony amongst the board, citing a comment from Lady Angela at the board meeting on 18 June 2020 that she “would not mind bullying him”.

119. In response to this email, Sam wrote to David on 10 July 2020 suggesting that they should both retire as trustees in favour of independent trustees as suggested in Birketts’ letter. He stressed the need for them to act unanimously and in that regard expressed his support for the appointment of Mr Hayward and Lady Angela as directors but against the appointment of Mr Montlake and confirmation of the appointment of Diana. On 16 July 2020, David responded to the effect that he intended to vote the Trust shares in favour of the appointment of Mr Hayward and Mr Montlake and to confirm the appointment of Diana, but against the appointment of Lady Angela.

The payment of the preference share dividends

120. As I have mentioned above, on 18 June 2020, David sent an email to Sam proposing that the dividends on the preference shares (other than those held by the two of them) should be paid and that following the payment of the preference share dividends the preference shareholders would no longer have the right to vote at a general meeting of the Company. Although Sam agreed in principle to the payment of the dividends on the preference shares, he asked for some financial information to be provided before a decision was taken.
121. Notwithstanding Sam’s reservations, David pressed ahead with the proposal. He asked Mr Short to calculate the amount of the accrued but unpaid dividends on the preference shares held by each preference shareholder. In an email to Sam on 20 June 2020, he reported that the dividends on the preference shares had been paid by “[payment] into loan accounts in the name of the individuals concerned” from which each shareholder could drawdown the funds by giving notice and providing necessary bank details.
122. In his response on 23 June 2020, Sam objected to the payment of the dividends asserting that the payment of the dividends was a matter for the board and that the decision to make the payments could only be made after consideration of the financial position of the Company and confirmation that the Company had sufficient distributable reserves.
123. David sought confirmation from Mr Short that there was no reason why the preference share dividends could not be paid and particularly that there were

sufficient distributable reserves available. Mr Short confirmed that the Company had sufficient reserves by reference to the accounts for the period ended 30 November 2018 and that the more recent management accounts for the period to 30 November 2019 and 30 April 2020 also showed that distributable reserves were available for the Company to consider the payment of a dividend.

124. On 14 July 2020, David sent an email to Sam informing him that Mr Short had confirmed that sufficient distributable reserves were available and that he would write to the preference shareholders to advise them that the accrued and unpaid dividends would be paid by crediting the relevant amounts to loan accounts and that following such payment the holders of the preference shares would have no right to vote at the general meeting on 22 July 2020. He asked Sam to provide any reasons why the dividends could not be paid by 5pm the following day so that he and Diana could take them into account in arriving at “a majority decision” of the directors on the payment of the dividends.
125. Sam replied reiterating that he did not regard Diana as a director and requesting to see the Company’s accounts and information on the Company’s potential liabilities before any decision was made on the payment of the dividends.
126. On 16 July 2020, David wrote to Sam dismissing his objections to the payment of the dividends and advising him that he and Diana had taken Sam’s reservations into account and that a majority of the directors were in favour of the payment of the dividends. His email concluded that “for the avoidance of doubt, the chairman was asked what his casting vote would have been in the event of no majority decision and he confirmed that his casting vote would have supported the payment”.
127. David says that he and Diana made the decision to pay the preference share dividends because he had been advised by Mr Montlake at the meeting on 18 June 2020 that the preference share dividends represented a debt due to the preference shareholders. That advice had been confirmed in subsequent correspondence. He was uncomfortable about the potential liabilities of directors if the dividends remained outstanding and so the decision was taken to discharge that liability as soon as possible. I do not accept that evidence. I will address the nature of the liability to pay the dividends on the preference shares and whether the steps taken by David were sufficient to discharge that liability later in this judgment, but it is clear that the primary motivation for the decision to pay the preference share dividends on 16 July 2020 was to ensure that the holders of the preference shares would not be entitled to vote at the forthcoming general meeting.
128. Having sent his email to Sam, David sent emails to each of the other preference shareholders informing them of the decision to pay the accrued but unpaid

dividends on their shares and that the amount of the dividends had been credited to loan accounts in the Company in the name of the relevant shareholders. He advised the preference shareholders that they could drawdown on the loan accounts as and when they wished by providing details of bank accounts to which they wanted the monies to be transferred. He also informed the preference shareholders that they would not be entitled to vote on their preference shares at the general meeting on 22 July 2020.

129. David's letter also confirmed that he intended to vote his personal holdings of shares in the Company and the Trust shares as first-named trustee in favour of Mr Hayward and Mr Montlake's appointments to the board and to confirm the appointment of Diana to the board, but against the appointment of Lady Angela on the grounds of the comments that she had made at the board meeting on 18 June and in particular her comments that she would "not mind bullying him".
130. David says that he accepted the credit to his loan account as the payment of the accrued dividend on his preference shares, but agreed that the amount of the dividend should remain outstanding as a debt due from the Company.
131. David arranged for the accrued dividend on Sam's holding of preference shares to be paid directly into his bank account. Sam wrote to David on 17 July 2020 challenging the validity of the decision and David's reference to himself as Chairman and asking for the Company's bank account details, so that he could return the money.
132. It was not until 2 August 2020 that Sam found the Company's bank account details and transferred the money back to the Company. On 11 August 2020, David sent an email to Sam stating that the funds would be repaid to Sam and that, if he repaid the sum to the Company again, it would be treated as a gift to the Company. The funds were transferred back to Sam's account that day. Sam subsequently arranged for the funds to be placed in a separate account.

Other events in advance of the general meeting on 22 July 2020

133. Following her receipt of David's letter to the preference shareholders, on 17 July 2020, Lady Angela wrote to David to inform him that she would withdraw her name from consideration to become a director of the Company. Her email expressed some confidence in the abilities of David, Diana and Mr Montlake to run the Company successfully and Sam and David to continue as trustees of the Trust.
134. On 21 July 2020, Lady Angela spoke to David on the telephone. She relayed the advice that she had received from Birketts that, if trustees were not unanimous, they should abstain from voting. She put a proposal to David to the effect that if he would withdraw his support for the appointment of Mr

Montlake, she would seek to persuade Sam to vote in favour of Diana. David was initially willing to consider that proposal, but he later sent an email saying that he would support Mr Montlake's appointment as he was essential to the running of the company.

The general meeting on 22 July 2020

135. The general meeting called by the notice sent by David was held on 22 July 2020 at 10.15am. The meeting was attended by David, Sam, Lady Angela and Mr Robert Yorke-Starkey. Lady Angela attended in her capacity as a holder of preference shares. She also held proxies for Jennifer and Colin Bingham-Wallis and a power of attorney for Jennifer. Mr Yorke-Starkey attended as the holder of a power of attorney for Colin Bingham-Wallis. Diana, Mr Montlake and Mr Hayward were also in attendance.
136. It was agreed that Diana would take the minutes. The meeting was also recorded with the agreement of the participants.
137. Mr Montlake began the meeting by announcing that he would coordinate the proceedings, acting "through the Chair", the "Chair" being David. This statement was not challenged at this point.
138. Sam then read a prepared statement referring to the disagreement regarding the voting of the Trust shares and suggesting that the views of the beneficiaries of the Trust should guide the voting of the Trust shares.
139. Mr Montlake reported to the meeting that there was a question as to whether David could vote the Trust shares and that there was a separate question as to whether Lady Angela and Mr Yorke-Starkey could exercise the votes attaching to the preference shares held by Jennifer and Colin Bingham-Wallis under the powers of attorney as he had received an opinion "from our legal advisers" that a power of attorney could not extend to the voting of shares. He also noted that the proxies held by Lady Angela in relation to the preference shares held by Jennifer and Colin Bingham-Wallis were invalid because they not been registered by the time specified in the notice.
140. Mr Montlake proposed that, irrespective of the issues regarding the ability of the various shareholders to vote, all votes of all shares would be recorded so that if there was an issue arising and anyone wanted to take action about it, they could "go to a judge".
141. Mr Montlake informed the meeting that the voting on the resolutions would be by a poll and he then asked each of the shareholders for their votes on each of the resolutions. Diana kept a record of the votes cast. The voting proceeded as set out below.

- i) On the resolution to appoint Mr Montlake as a director:
 - a) David voted his ordinary shares, the Trust shares, and the preference shares in favour of the resolution;
 - b) Sam voted his ordinary shares and his preference shares against the resolution;
 - c) Lady Angela voted her preference shares against the resolution;
 - d) Lady Angela voted the preference shares held by Jennifer (acting as proxy or under the power of attorney) against the resolution;
 - e) Lady Angela voted the preference shares held by Colin Bingham-Wallis (acting as proxy) against the resolution;
 - f) Mr Yorke-Starkey voted the preference shares held by Colin Bingham-Wallis (acting under the power of attorney) against the resolution.
 - ii) On the resolution to appoint Mr Hayward as a director, all the shareholders, including those voting through attorneys or proxies voted in favour of the resolution.
 - iii) On the resolution to confirm the appointment of Diana as a director:
 - a) David voted his ordinary shares, the Trust shares, and his preference shares in favour of the resolution;
 - b) Sam voted his preference shares against the resolution but abstained in relation to the votes on his ordinary shares;
 - c) Lady Angela and the remaining preference shareholders abstained.
142. Mr Montlake did not ask Sam, as the other trustee of the Trust, how he would have voted the Trust shares.
143. At the end of the voting, Mr Montlake reported that there may be an equality of votes on the resolution for his own appointment as David's votes, attached to his holdings of ordinary shares and preference shares, in favour of the resolution would be matched by Sam's votes, attached to his holdings of ordinary shares and preference shares, against the resolution assuming that the preference shares (other than those held by Sam and David) could not vote and the Trust shares could not vote. He asked David how he would exercise his casting vote as Chairman. David voted in favour of Mr Montlake's appointment. Sam and

Lady Angela challenged David's exercise of the casting vote as Chairman, but these objections were brushed aside.

144. Following the voting, Sam withdrew his requisition of the second general meeting on the grounds that the only remaining resolution was for the appointment of Mr Hayward and he had clearly been elected.
145. The minutes suggest that Mr Montlake then summarized the results of the meeting to the effect that Mr Montlake and Mr Hayward were appointed as directors and Diana was confirmed as a director. From the transcript, it is clear that Mr Montlake did not summarize the results of the voting. He did, however, proceed to conduct the meeting on the assumption that those were the results of the votes.
146. There followed a discussion as to whether it might also be appropriate to appoint Mr Yorke-Starkey as a director. He was willing to act and there was general agreement amongst those present that it would be desirable to appoint Mr Yorke-Starkey to the board. However, it was noted that the Articles of Association limited the number of directors to five and so it would be necessary to pass a special resolution to amend the Articles before Mr Yorke-Starkey could be appointed.
147. Although there was a suggestion that an appropriate resolution might be passed by those present at the meeting, Mr Montlake took the view that it would be preferable to have a separate resolution circulated to all shareholders. He undertook to prepare written resolutions to amend the Articles to allow for the expansion of the board and to appoint Mr Yorke-Starkey as a director.

The aftermath of the general meeting on 22 July 2020

148. The appointments of Mr Hayward and Mr Montlake were registered at Companies House on 24 July 2020.
149. In correspondence immediately following the general meeting, both Sam and Lady Angela expressed positive views of the outcome of the meeting. However, their position soon changed.
150. On 27 July 2020, Patricia Barclay, acting for Sam, wrote to Mr Graham Provan of Tolhurst Fisher, complaining about the election of Mr Montlake and the registration of his appointment at Companies House. She reported that the family members in attendance (i.e. Sam and Lady Angela) had felt "steamrollered" by Mr Montlake's conduct of the meeting. She asserted that that Mr Montlake's appointment was invalid because the resolution was defeated as, irrespective of any arguments about effectiveness of the powers of attorney and proxies, Lady Angela was physically present at the meeting and so

the votes of her preference shares against the resolution should have been counted in the same way as the votes of David and Sam in relation to their preference shares.

151. Also on 27 July 2020, Lady Angela wrote to Diana commenting on the draft minutes of the meeting. She again asserted that Mr Montlake's appointment was invalid because he had failed to count the votes attached to her preference shares whilst counting the votes of David and Sam on their holdings. Sam also wrote to Mr Montlake on 30 July 2020, stating that Mr Montlake's appointment was invalid for the reasons given in Patricia Barclay's and Lady Angela's emails, that the shareholders (other than David) had no confidence in him, and asking him to step down as a director.
152. Lady Angela explained her change of view in terms of a gradual realization in the days after the meeting that she had been "duped". She says that she found the manner in which the voting had been conducted at the meeting confusing and, in retrospect, she and others (Sam and Mr Yorke-Starkey) felt "foolish" for having accepted it. I accept her evidence. Sam also said he felt confused by the manner of the voting, but that he had been reassured by the proposal to invite Mr Yorke-Starkey to become a director to which all participants at the meeting had agreed.
153. Earlier on 30 July 2020, Mr Montlake had written to all shareholders to inform them that there would be some delay in circulating the resolutions to increase the maximum number of directors permitted by the Articles and appoint Mr Yorke-Starkey as a director because it was necessary to file a reprint of the Articles, but that, in any event, he understood that David would no longer vote in favour of the resolution to increase the number of directors and that without his votes or abstention the resolutions would not pass. He suggested that Mr Yorke-Starkey might be invited to attend board meetings as an observer until the dispute over the composition of the board had been resolved.
154. On 31 July, David wrote to all the other shareholders. He justified the election of Mr Montlake as a director on the basis that (i) the preference shareholders were not entitled to vote because the accrued dividends on all the preference shares had been paid, in most cases, other than in relation to Sam's holding of preference shares, by crediting the relevant amount to loan accounts with the Company; and (ii) that he had validly exercised the votes attaching to the Trust shares as the first-named trustee acting in the best interests of the Trust. He referred to Sam's email of 10 July 2020, in which Sam had suggested that it might be appropriate for both of them to resign as trustees, as evidence that Sam was of the view that Sam alone should resign. He concluded with a challenge to any preference shareholders who might disagree with his approach to pursue the issue through the courts.

SUBSEQUENT EVENTS

Tolhurst Fisher cease to act in the Kirby litigation

155. On 31 July 2020, Mr Montlake wrote to Sam to inform him that, with immediate effect, Tolhurst Fisher and Mr Montlake would cease to act for the Company in relation to the Kirby litigation following Sam's complaints about him to Tolhurst Fisher. He attached a copy of a notice in relation to the arbitration proceedings which formed part of the Kirby litigation stating that Tolhurst Fisher was no longer instructed and that all communication should be directed to Sam. He also informed Sam that he should ensure that the Company's new solicitors complete a notice of acting in relation to the High Court proceedings, which also formed part of the Kirby litigation, by the following Wednesday.
156. Sam responded to Mr Montlake suggesting that he would pass on the email to David who handled the litigation. David wrote to Sam to express his indignation at this turn of events. He called an emergency board meeting for Monday 3 August 2020 to discuss the Company's representation in its various litigation matters.
157. Mr Hayward initially objected to the calling of a meeting at short notice. He suggested that Tolhurst Fisher should not be entitled to terminate their engagement on short notice but should be required to continue acting for a reasonable period to ensure a smooth transition of matters. He did, however, attend the meeting on 3 August 2020. David, Diana, and Mr Montlake also attended. Sam did not attend. A telephone call was made to Tolhurst Fisher in the course of the meeting. Tolhurst Fisher agreed to continue to act to ensure smooth transition to new advisers. This position was reiterated by Mr Provan of Tolhurst Fisher in an email dated 14 August 2020.

Attempts to force Sam to resign as a trustee

158. On 9 August 2020, David wrote to Birketts, acting for Lady Angela, requesting that they ask Lady Angela what action she would like to take in respect of the resignation of Sam as a trustee of the Trust. He asked Birketts to provide him with Sam's resignation and details of other potential trustees for him to consider.
159. Birketts responded on 14 August 2020 noting that Sam's offer to retire was made on the basis that David would also do so and of it being in the best interests of the beneficiaries to have two new trustees in whom they could have faith and to try to reconcile family differences. Sam had never intended to retire unless David did so. Birketts' email noted that David could not compel Sam to retire or choose his successor.

160. On 4 September 2020, both Jennifer and Colin Bingham-Wallis wrote to both Sam and David asking them to stand down as trustees of the Trust.

The letter before action

161. On 14 October 2020, Goodman Derrick, acting for Sam, sent a letter before action to David asserting that David had acted in breach of his fiduciary duties to the Company and in breach of his duties as trustee of the Trust. The letter referred to matters which are the subject of this Petition, namely the appointment of Diana as a director, the approval of the payment of the dividends on the preference shares, the conduct of the meeting on 22 July 2020 and the appointment of Mr Montlake as a director.
162. Following the letter before action, there was an exchange of correspondence between Goodman Derrick and David over the period to 12 November 2020. I do not need to refer to any of the detail of that correspondence here. I should note however that, in this correspondence, David accuses Goodman Derrick of taking advantage of a vulnerable adult (Sam) and suggests to them that if the action against him is pursued that he will rely upon evidence of Sam's mental illness in court.

Written resolution to appoint Mr Hayward and Mr Yorke-Starkey

163. On the same day as Goodman Derrick's letter before action, Sam circulated written resolutions to all shareholders for the appointment of Mr Hayward and Mr Yorke-Starkey as directors. He also asked the beneficiaries of the Trust to indicate to the trustees the manner in which they would want the Trust shares to be voted. All the shareholders, with the exception of David, approved the resolutions and all of the beneficiaries indicated that they would wish the trustees to vote in favour of the resolutions. Sam also purported to exercise the votes attached to the Trust shares in favour of the resolutions.
164. On 23 October 2020, Sam declared the resolutions as having been passed and registered Mr Yorke-Starkey as a director at Companies House. He wrote to David, with a copy to Mr Yorke-Starkey and Mr Hayward, on 5 November 2020 calling a board meeting for 12 November 2020, inter alia, to record the appointments of Mr Hayward and Mr Yorke-Starkey as directors and to discuss updating the records at Companies House to remove Diana and Mr Montlake as directors. David responded on 9 November 2020 calling a board meeting for the same time but for a board comprising himself, Sam, Diana, Mr Montlake and Mr Hayward with Mr Yorke-Starkey invited to attend as an observer. His email was followed by a further email from Mr Montlake supporting David's position.

Reports to regulatory bodies and the police

165. At this point, events take a rather unsavoury turn. On 13 November 2020, Mr Montlake sent an email to Sam. It was copied, amongst others, to all the shareholders, all the beneficiaries of the Trust, Mr Hayward and Mr Yorke-Starkey, and Sam's solicitors, Goodman Derrick. In the email, Mr Montlake asserted that: Sam's signature on the written resolutions as trustee of the Trust was a forgery (on the grounds that Sam knew that he could not sign as trustee); and Sam and others copied on the email were involved in a conspiracy by participating in the passing of the written resolutions. He suggested that others involved in the conspiracy should admit their part in the conspiracy at the earliest opportunity.
166. This email was followed by an email on 17 November 2020 from David to the shareholders and the beneficiaries of the Trust accusing Sam of escalating an internal dispute through fraud and conspiracy, asking them if they wanted to see Sam prosecuted, and inviting them to vote in favour of a proposition that Sam should resign immediately as a director of the Company and as a trustee of the Trust. David sent Sam draft letters of resignation from his positions as a director and as a trustee on 18 November 2020.
167. Around this time, David and Mr Montlake also began a campaign against Sam, and those whom they regarded as supporting him, involving allegations of criminal offences, complaints to regulatory authorities and reports to the police.
- i) On 14 November 2020, Mr Montlake wrote to Goodman Derrick attaching a draft complaint to the Solicitors' Regulation Authority ("SRA") containing allegations of fraud and dishonesty.
 - ii) On 15 November 2020, David wrote to the Scottish Legal Complaints Commission making various complaints about the actions of Ms Barclay and her role as Sam's solicitor.
 - iii) On 18 November 2020, Mr Montlake wrote to Mr Hayward and Mr Yorke-Starkey alleging their involvement in fraud and conspiracy, threatening to report Mr Hayward to the Royal Institute of Chartered Surveyors, and encouraging them to procure that Sam resigned from his positions as a director and a trustee.
 - iv) On 29 November 2020, David submitted a crime report to the police alleging that Sam, and Mr Jonathan Cole, a solicitor at Goodman Derrick, were involved in a conspiracy, forgery and fraud surrounding the passing of the written resolutions to appoint Mr Hayward and Mr Yorke-Starkey as directors.
 - v) Also on 29 November 2020, David submitted his complaint to the SRA containing allegations of fraud and dishonesty against Sam and Mr Cole.

168. The allegations in the various complaints were baseless. None of the complaints to the various regulatory authorities or the police was pursued. They can only have been designed to intimidate Sam and those whom David and Mr Montlake regarded as supporting his position. In the various communications, David and Mr Montlake also made reference to claims brought by a public company, Amicrest Holdings Plc, against some of its former directors, including Mr Yorke-Starkey. I do not need to get into the detail of those claims for the purpose of this judgment. In my view, those references were designed to undermine Sam's and the shareholders and beneficiaries' faith in Mr Yorke-Starkey as a director. Together with the emails to the shareholders and beneficiaries of the Trust to which I have referred and several other communications to which I have not, the various complaints to the regulatory authorities and the police, and the doubts cast about Mr Yorke-Starkey's suitability as a director were part of a campaign aimed at securing the resignation of Sam as a director and a trustee and maintaining control of the board in the hands of David and his trusted associates, Diana and Mr Montlake.

Dispute over 2019 accounts

169. The disputes about the composition of the board and the exchanges of correspondence following Goodman Derrick's letter before claim had an inevitable effect on other matters. In particular, the disputes affected the process for the approval of the accounts of the Company for the period ended 31 December 2019, the result of which was a delay in the filing of the accounts.

The issue of the Petition

170. Goodman Derrick, acting on behalf of Sam, sent a letter before claim to David on 19 January 2021.

171. Sam issued the Petition on 11 February 2021.

172. Following the issue of the Petition, on 5 March 2021, Mr Yorke-Starkey resigned as a director.

Developments in relation to the Shoot Agreement

173. Before I turn to the issues raised in the Petition which remain at issue between the parties, I should return to the developments in relation to the Shoot Agreement.

174. As I have mentioned at [90] above, despite questions from Sam, David had not informed Sam that the Company had entered into the Shoot Agreement with GSL on 27 April 2020.

175. In the aftermath of the 22 July 2020 meeting, on 29 August 2020, David had written to Sam, Mr Montlake and Mr Hayward reporting that he was “in the final stages” of drafting a shoot agreement but the draft would need to be sent to counsel in the Kirby litigation for his comments. The letter also referred to the grant of shoot days to the Company and to the directors. Sam had responded on 2 September 2020 suggesting that it would be inappropriate to consider the shoot days without full information as to the costs which the Company had incurred in upgrading the shoot.
176. On 7 October 2020, Meade J handed down judgment in the appeal by the Kirby family against the results of the arbitration proceedings in relation to the first notice to quit. Meade J upheld the Kirby family’s claims. The Company sought permission to appeal against this decision, but failed to request permission to appeal within the required timeframe, with the result that the proceedings in relation to the first notice to quit were lost.
177. On 1 February 2021 – that is after the issue of the letter before claim by Goodman Derrick but before the issue of the Petition – David, on behalf of the Company, and Richard, on behalf of GSL, entered into a letter agreement to terminate the Shoot Agreement in accordance with the side letter dated 27 April 2020. GSL did not exercise its right to extend the agreement for a further year. Since that time GSL have operated the shoot on the basis of an oral agreement.
178. On 17 August 2021, David circulated to the board a copy of a report setting out his account of the development of the contractual arrangements with Richard and GSL. It was discussed at a meeting of the board on 26 August 2021.
179. The form of a proposed agreement between the Company and GSL granting shooting and other rights to GSL for a period of two years beginning in February 2022 has been discussed between the members of the board. The agreement has been negotiated between David, for the Company, and Richard, for GSL, with the knowledge of the board. The terms of that agreement have been reviewed and commented upon by Mr Andrew Thornton-Berry of Farmoor Services LLP, a firm of surveyors and land agents.

The motives of the parties

180. Mr Jory QC has made some serious allegations against David and Mr Montlake as part of his submissions. He accuses them of forming, with Diana, a “gang of three” which has acted with a common purpose as part of a coordinated plan to seize control of the Company.
181. In my view the position is more mundane. At the beginning of 2020, there was no coordinated plan in place. David and Diana were in control of the day to day

running of the Company as they had been for many years. They were deeply involved in the Kirby litigation, which was approaching a critical stage.

182. David's health issues had been developing for some time, but the prospect of the heart procedure in February 2020 was a worrying development, even if it was nowhere near as serious as David made it out to be. In my judgment, David wanted to maintain his control over the affairs of the Company. For the previous 20 years, with the possible exception of Sam's involvement in arrangements for the establishment of the shoot from about 2018 onwards, David and Diana had run the Company with little or no input or interest from Sam or other family members. David wanted to ensure that if he was at all incapacitated, the running of the business remained in trusted hands. For this reason, David wanted Diana to be in a position to run the business as a director and his son Richard to run the shoot, which he saw as an important aspect of the Kirby litigation. Given the past history, David did not trust Sam to do either.
183. Against that background, David arranged the meeting with Sam to obtain Sam's agreement to Diana's appointment as a director and to Richard's engagement to run the shoot. Sam strongly resisted both proposals driven by his insecurities around the exclusion of his family from the running of the business and the shoot. My view is that Sam's resistance to both proposals surprised and annoyed David. The interactions between them became more heated, their positions became more and more entrenched, and the trust between them eroded further.
184. Mr Montlake became heavily involved in the events almost immediately after the meeting on 3 February 2020, but, in my view, the evidence does not support the submission that Mr Montlake was a party to any such plan at the time of that meeting. Mr Montlake was unaware that the meeting on 3 February 2020 was to take place and he was unaware of the matters that were to be discussed.
185. Sam and David both turned to Mr Montlake for advice following the meeting. Mr Montlake almost immediately sided with David and against Sam notwithstanding his position as the Company's solicitor. His reason for doing so is reasonably clear. Mr Montlake had agreed with David that his remuneration from the Company would be largely dependent upon the conclusion of a transaction by the Company. There has been much discussion at the hearing of the form of Mr Montlake's remuneration, but in short he was to be entitled to a fixed percentage of the value of any transaction undertaken by the Company in which he was involved, with a higher percentage due in respect of real estate transactions compared with commercial transactions. He did not charge for advice in between transactions. If the Company had been successful in the Kirby litigation, it would have opened-up the prospect of a significant development on the Company's land. Mr Montlake might then have been able

to charge what David described in his emails as a “truly beneficial return”. Mr Montlake judged that that prospect was more likely with David in control of the Company and less likely if Sam became more involved.

186. It is difficult not to see the hand of Mr Montlake in many of the events that occurred after the meeting on 3 February 2020. At times, Mr Montlake appears act on his own motion. At others, David and Mr Montlake’s actions are coordinated. And at others, David acts on the advice of Mr Montlake. There was clearly a concerted effort to undermine Sam and Mr Montlake is at the heart of those actions. In the course of these events, Mr Montlake puts himself in hopeless positions of conflict of interests by purporting to act as company solicitor whilst at the same time advising David personally or advising in relation to his own appointment as a director.

THE ISSUES BETWEEN THE PARTIES

187. Sam asserts in his Petition that the affairs of the Company are being or have been conducted in a manner which is unfairly prejudicial to his interests as a shareholder and to the interests of shareholders generally within s.994 CA 2006. He relies on the following matters in support of his claim:

- i) the registration of Diana as a director when the board had not agreed to her appointment;
- ii) the entry into the Shoot Agreement on terms that were beneficial to GSL and Richard;
- iii) the events leading up to and the conduct of the general meeting on 22 July 2020 in a manner designed to secure the appointment of Mr Montlake and confirm the appointment of Diana as directors and to prevent the appointment of directors chosen by other shareholders (Mr Yorke Starkey) namely:
 - a) the steps taken to ensure that the holders of preference shares would not be entitled to vote at the general meeting on 22 July 2020 by seeking to ensure that the accrued but unpaid dividends on those shares were paid in advance of the meeting;
 - b) the registration of the Trust shares in the joint names of Sam and David, but with David as the first-named trustee;
 - c) the voting of the of the Trust shares by David at the general meeting without the agreement of his fellow trustee, Sam;
 - d) the failure to recognize the votes of the preference shareholders at the general meeting (particularly those held by Lady Angela);

- e) David's representation of himself as Chairman and his exercise of a casting vote at the general meeting;
 - f) the conduct of the general meeting as a whole including the manner in which votes were counted and the order in which resolutions were taken.
188. Sam says that these events are part of a coordinated plan to secure and maintain control of the Company, which David has used and continues to threaten to use for the benefit of his immediate family and from which Mr Montlake will derive personal benefit. Those events involved various breaches of the terms of the Articles of Association of the Company and various breaches of fiduciary duties owed by David to the Company.
189. David and Mr Montlake say that any perception of any coordinated plan to seize control of the Company is merely speculation on Sam's part and not supported the evidence. They have acted only to ensure that a competent board is in place to handle the Kirby litigation and to exploit the development opportunities that are available to the Company as and when they become available. If there is any wrongdoing in any of the matters of which Sam complains, it has resulted in decisions by the board for the benefit of the Company and not in any detriment to the Company or its shareholders.

RELEVANT LAW

190. Although the parties approached their submissions on the relevant legal principles rather differently – and there are clearly significant differences between them on the application of those principles to the facts of this case – I did not detect any material dispute on the general principles of law that govern the availability of relief for unfair prejudice pursuant to a petition under s.994 CA 2006.

Section 994 CA 2006

191. Section 994(1) Companies Act 2006 provides as follows:

A member of a company may apply to the court by petition for an order under this Part on the ground—

- (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
- (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

192. If a shareholder is to bring a claim under s.994 CA 2006, the shareholder must therefore demonstrate that the affairs of the company have been conducted in a manner which is “unfairly prejudicial” to the interests of the shareholder or shareholders generally. The conduct complained of must be “of the company’s affairs” and must be “both prejudicial (in the sense of causing prejudice or harm to the relevant interest) and also unfairly so; conduct may be unfair without being prejudicial or prejudicial without being unfair, and it is not sufficient if the conduct satisfies only one of these tests” (*Re Saul D Harrison & Sons plc* [1994] BCC 475 per Neill LJ at p499).

The conduct of “the company’s affairs”

193. Section 994 only applies to matters relating to the conduct of “the company’s affairs”. Although this phrase has to be “liberally determined” for the purposes of s.994 CA 2006 (*Re Neath Rugby Limited* [2009] EWCA Civ 291 (“*Re Neath Rugby*”) per Stanley Burnton LJ at [48]), and will extend to all matters decided by the board or which relate to the exercise by the company of its powers regarding the conduct of its business, it does not extend to matters which concern only the shareholders acting in their capacities as shareholders.
194. David Richards J (as he then was) described this distinction in his judgment in *Re Coroin Limited (No. 2)* [2012] EWHC 2343 (Ch) (“*Re Coroin (No 2)*”) at [626] in the following terms:

626. The purpose of the jurisdiction is to provide remedies in respect of the way in which the affairs of the company are conducted. It was perceived prior to the enactment of section 75 of the Companies Act 1980 that there was insufficient protection to shareholders in that respect. The section is not directed to the activities of shareholders amongst themselves, unless those activities translate into acts or omissions of the company or the conduct of its affairs. Relations between shareholders inter se are adequately governed by the law of contract and tort, including where appropriate the ability to enforce personal rights conferred by a company's articles of association. This important distinction has been emphasised in many of the authorities. *In re Legal Negotiators Limited* [1999] BCC 547 the Court of Appeal upheld the decision of Peter Goldsmith QC, sitting as a deputy Judge of the Chancery Division, to strike out a petition under section 459 of the Companies Act 1985 as unsustainable. Peter Gibson LJ at page 550 summarised the judgment below, with which he said he completely agreed. He said that the Judge

“reviewed the authorities from which he drew two points of significance for the case before him. The first was that the starting point was to consider what the parties had agreed between themselves as their commercial relationships, though

he recognised this need not always be contained in the articles of association. The second was that the essence of the powers under s.459 is to give a remedy where there is complaint about the way the company's affairs are being conducted through the use (or failure to use) powers in relation to the conduct of the company's affairs provided by its constitution. He regarded the section as concerned with the company's affairs rather than the affairs of individuals and to be concerned with acts done by the company or those authorised to act as its organs”.

At page 551, Peter Gibson LJ said:

“Thus, like the Judge I too would lay emphasis on the need to show that it is the affairs of the company which are being or have been conducted in an unfairly prejudicial manner or that it is an act or omission of the company that is or would be so prejudicial. The conduct of a member of his own affairs, for example by requesting a general meeting of the company or seeking answers to an excessive number of questions, is irrelevant”.

I would only add that the refusal by a company to convene a general meeting would be an act of the company, although whether it was either unfair or prejudicial would of course depend on the circumstances. Other authorities in which the same distinction had been drawn include *In re Unisoft Group Limited (No. 2)* [1994] BCC 766 , *In re Estate Acquisition and Development Limited* [1995] BCC 338 and *In re Leeds United Holdings Limited* [1997] BCC 131.

The concept of “unfairness” in s.994 CA 2006

195. On the question of unfairness, Mr Young referred me to the following passage from *Hollington on Shareholders' Rights (8th Edn)* at 7-01, which summarizes the law as it has generally been understood since the decision of the House of Lords in *O'Neill v. Phillips* [1999] 1 WLR 1092:

“Principle 14—The Unfair Prejudice Remedy

(3) As to ... the requirement of unfairness:

(i) the concept of unfairness, although objective in its focus, is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. This will usually take the form of the articles of association and any collateral agreements and understandings between shareholders which identify their rights and obligations as members of the company;

(ii) these are the terms upon which the parties agreed to do business together, which include applicable rights conferred by statute. The starting point therefore is to ask whether the exercise of the power or rights in question would involve a breach of these terms;

(iii) these terms include, by implication, an agreement that any party who is a director will perform his duties as a director;

(iv) these terms are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable;

(v) agreements and understandings do not have to be contractually binding in order to be enforceable in equity;

(vi) it follows that it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use Lord Hoffmann's words, 'consist in a breach of the rules or in using rules in a manner which equity would regard as contrary to good faith': see *O'Neill v Phillips* [1999] 1 W.L.R. 1092 HL at 1099A; the conduct need not therefore be unlawful, but it must be inequitable. Although it is impossible to provide an exhaustive definition of the circumstances in which the application of equitable principles would render it unjust for a party to insist on his strict legal rights, those principles are to be applied according to settled and established equitable rules and not by reference to some indefinite notion of fairness;

(vii) to be unfair, the conduct complained of need not be such as would have justified the making of a winding-up order on just and equitable grounds as formerly required under s.210 of the Companies Act 1948;

(viii) it is not enough merely to show that the relationship between the parties has irretrievably broken down. There is no right of unilateral withdrawal for a shareholder when trust and confidence between shareholders no longer exist. It is, however, different if that breakdown in relations then causes the majority to exclude the petitioner from the management of the company or otherwise to cause him prejudice in his capacity as a shareholder.”

196. The principles that I take from that passage for the purposes of this judgment are as follows.

- i) “Unfairness” in the context of s.994 has to be judged by reference to the terms of the arrangements between the parties which govern the manner in which the affairs of the company will be conducted.
- ii) These will include the articles of association of the company, any agreements between the shareholders, and any relevant statutory rights or obligations, and, by implication, an agreement that any parties who are directors will act in accordance with their duties as directors.
- iii) Conduct will be “unfair” if it involves a breach of those terms such as a breach of the articles of association, a breach of an agreement between the shareholders, a breach of any applicable statutory rights or a breach by directors of their fiduciary duties.
- iv) Conduct will also be “unfair”, even if does not involve a breach of those terms, where it would be inequitable for those conducting the affairs of the company to rely upon the strict legal terms of the arrangements.

197. Mr Jory QC put his submissions in a different manner, and referred me to a number of other authorities, but I did not understand him to disagree with these basic principles.

The concept of “prejudice” in s.994 CA 2006

198. As to the question of whether conduct is prejudicial, I was referred by both of the parties to the judgment of David Richards J in *Re Coroin (No. 2)* at [630]-[631] where he said:

630. Prejudice will certainly encompass damage to the financial position of a member. The prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is bound up with his position as a member. So, for example, removal from participation in the management of a company and the resulting loss of income or profits from the company in the form of remuneration will constitute prejudice in those cases where the members have rights recognised in equity if not at law, to participate in that way. Similarly, damage to the financial position of a member in relation to a debt due to him from the company can in the appropriate circumstances amount to prejudice. The prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to damage to the value of his shareholding. Moreover, prejudice need not be financial in character. A disregard of the rights of a member as such, without any financial consequences, may amount to prejudice falling within the section.

631. Where the acts complained of have no adverse financial consequence, it may be more difficult to establish relevant prejudice. This may particularly be the case where the acts or omissions are breaches of duty owed to the company rather than to shareholders individually. If it is said that the directors or some of them had been in breach of duty to the company but no loss to the company has resulted, the company would not have a claim against those directors. It may therefore be difficult for a shareholder to show that nonetheless as a member he has suffered prejudice. In *Rock (Nominees) Limited v RCO Holdings Plc* [2004] BCC 466 the respondent directors of the company procured the sale of an asset to a company of which they were also directors. It was alleged to be a sale at an undervalue and procured in breach of the respondent directors' fiduciary duties to the company. The evidence established that the price paid was not an undervalue but was the best price reasonably obtainable, and the Court of Appeal upheld the decision at first instance that no prejudice had been caused to the petitioner. At paragraph 79 of this judgment, with which the other members of the Court agreed, Jonathan Parker LJ said;

“As to the judge's finding of breach of fiduciary duty on the part of the respondent directors, it is plain that, as the judge found, the respondent directors were “in a position of hopeless conflict”. Further, they would undoubtedly have been well advised to obtain an independent valuation. However, no harm was in fact done and no damage or prejudice was caused. Nor is there any question of the respondent directors being personally accountable in any way. That being so, it seems to me to be inappropriate to reach a conclusion that they breached their fiduciary duties, as it were, in the abstract”.

199. I take from this passage that prejudice will encompass damage to the financial position of the shareholder in that shareholder's position as a shareholder, but it can also extend to commercial harm, which is not financial in nature, albeit that in such circumstances it may be more difficult to establish prejudice.
200. Once again, I did not understand the parties to disagree with these basic principles. The parties do however disagree materially about the application of these principles to the facts of this case. I will address their submissions on those issues in the context of the events on which Sam relies in support of his Petition.

WAS THE CONDUCT COMPLAINED OF “UNFAIR”?

201. Mr Jory QC says that the events that I have set out above involve breaches of the Company’s constitution and/or breaches by David of his duties as a director to the Company and so are demonstrably “unfair” within the meaning of s.994 CA 2006. It is not necessary to consider whether it would be inequitable to permit the respondents to rely upon the strict legal terms of the arrangements in this case.

Background: relevant provisions of the Articles

202. The particular provisions of the Articles of Association of the Company which Mr Jory QC says have been breached include the following regulations of Table A:

- i) regulation 55 (chairman of general meetings);
- ii) regulation 60 (chairman’s casting vote at general meetings);
- iii) regulation 62 (votes of members at general meetings);
- iv) regulation 63 (votes of joint holders of shares);
- v) regulation 95 (power of directors to fill a casual vacancy);
- vi) regulation 98 (regulation of business of directors, chairman’s casting vote);
- vii) regulation 101 (power of directors to elect a chairman);
- viii) regulation 107 (power of directors to appoint a managing director).

The terms of these provisions are set out in the Appendix to this judgment.

Background: duties of directors

203. Mr Jory QC says that David’s actions breached several of the general duties of directors as set out in chapter 2 of Part 10 CA 2006. The particular duties to which he refers are the directors’ duties to act within their powers (in s.171 CA 2006), to promote the success of the company (s.172 CA 2006), and to avoid conflicts of interest (s.175 CA 2006). It will assist my explanation if I set them out at this stage.

Duty to act within powers: s.171 CA 2006

204. Section 171 is in the following terms:

171 Duty to act within powers

A director of a company must–

- (a) act in accordance with the company's constitution, and
- (b) only exercise powers for the purposes for which they are conferred.

205. Section 171 includes two separate duties. The first, in s.171(1)(a), is a duty to act in accordance with the company's constitution. For this purpose, the company's constitution comprises: the company's articles of association; resolutions and agreements affecting the company's constitution; decisions taken in accordance with the articles; and other decisions taken by the members (or a class of them) if they are to be treated by virtue of any enactment or rule of law as equivalent to decisions of the company (s.17 CA 2006, s.257 CA 2006). The duty is focussed on whether the action in question was within the scope of the director's powers.
206. The second, in s.171(1)(b), is a duty only to exercise powers for the purposes for which they are conferred. This duty is focussed not on whether the action in question was within the scope of the director's powers, but on whether the power was exercised for the purpose for which it was granted. As it is concerned with the motives of those who exercise the particular power, the test is necessarily a subjective one.
207. As Lord Sumption said in *Eclairs Group Ltd v JKN Oil & Gas plc* [2015] UKSC 71 ("*Eclairs Group*") at [15], when describing the origins of this rule (which he referred to as the "proper purpose rule"):

The important point for present purposes is that the proper purpose rule is not concerned with excess of power by doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing acts which are within its scope, but done for an improper reason. It follows that the test is necessarily subjective. "Where the question is one of abuse of powers," said Viscount Finlay in *Hindle v John Cotton Ltd* (1919) 56 Sc LR 625, 630, "the state of mind of those who acted, and the motive on which they acted, are all important".

208. The Privy Council in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 ("*Howard Smith*"), described the process that the court should adopt to determine whether the power in question was used for proper or improper purposes (at p835) as follows :

... it is necessary to start with a consideration of the power whose exercise is in question,... on a fair view, the nature of this power,

and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not.

209. For these purposes, although the purpose of a power may to an extent be derived from the document that confers the power, such as a provision of the articles of association, the process of ascertaining the purpose of a power is not simply a matter of construction of that document. As Lord Sumption described in *Eclairs Group* (at [30]):

...[the proper purpose rule] does not necessarily depend on any limitation on the scope of the power as a matter of construction. The proper purpose rule is a principle by which equity controls the exercise of a fiduciary's powers in respects which are not, or not necessarily, determined by the instrument. Ascertaining the purpose of a power where the instrument is silent depends on an inference from the mischief of the provision conferring it, which is itself deduced from its express terms, from an analysis of their effect, and from the court's understanding of the business context.

210. The cases to which I have been referred relating to the duty to exercise powers for proper purposes (principally, *Eclairs Group* and *Howard Smith*) concern directors exercising powers against the background of potential changes in ownership of the company. However, one general principle that I take from them is the importance, when assessing whether a power has been exercised for an improper purpose, of having to regard to what Lord Sumption describes in *Eclairs Group* as the "respective domains" of shareholders and directors within the governance structures of the company (*Eclairs Group* [37]) and the need for directors in exercising their powers to respect the areas of decision-making which are the preserve of the shareholders. For this reason, it will usually be a breach of this duty for the directors to exercise their powers to control or influence the outcome of a general meeting. As Lord Sumption says (*Eclairs Group* [16]):

16. A company director differs from an express trustee in having no title to the company's assets. But he is unquestionably a fiduciary and has always been treated as a trustee for the company of his powers. Their exercise is limited to the purpose for which they were conferred. One of the commonest applications of the principle in company law is to prevent the use of the directors' powers for the purpose of influencing the outcome of a general meeting. This is not only an abuse of a power for a collateral purpose. It also offends the constitutional distribution of powers between the different organs of the

company, because it involves the use of the board's powers to control or influence a decision which the company's constitution assigns to the general body of shareholders. Thus in *Fraser v Whalley* (1864) 2 H & M 10, the directors of a statutory railway company were restrained from exercising a power to issue shares for the purpose of defeating a shareholders' resolution for their removal. In *Cannon v Trask* (1875) LR 20 Eq 669, which concerned the directors' powers to fix a time for the general meeting, Sir James Bacon VC held that it was improper to fix a general meeting at a time when hostile shareholders were known to be unable to attend. In *Anglo-Universal Bank v Baragnon* (1881) 45 LT 362, Sir George Jessel MR held that if it had been proved that the power to make calls was being exercised for the purpose of disqualifying hostile shareholders at a general meeting, that would be an improper exercise of the directors' powers. In *Hogg v Cramphorn Ltd* [1967] 1 Ch 254, Buckley J held that the directors' powers to issue shares could not properly be exercised for the purpose of defeating an unwelcome takeover bid, even if the board was genuinely convinced, as the current management of a company commonly is, that the continuance of its own stewardship was in the company's interest. The company's interest was an additional and not an alternative test for the propriety of a board resolution.

211. Tom Leech QC (sitting as a deputy High Court judge) made a similar point in *Barrowfen Properties Limited v Patel* [2021] EWHC 2055 (Ch) ("*Barrowfen*") at [272]:

272. It is for the shareholders to appoint the directors in general meeting and it is the duty of the directors to decide what is in the best interests of the company and exercise their powers and judgment accordingly. One director cannot, therefore, exercise his powers for the purpose of preventing the shareholders from exercising their rights to appoint other directors or for the purpose of preventing those directors from exercising their powers. Moreover, it is no justification for that director to prevent shareholders and directors from exercising their rights because he or she disagrees with them about what is in the best interests of the company.

212. The other issue that emerges from these cases is the difficulty that may arise in cases where directors have acted for mixed or multiple purposes, some of which may be proper purposes and others improper. In the passage that I have quoted above, Lord Wilberforce in *Howard Smith* referred to the process of identifying the "substantial purpose" for which the power was exercised. At other points in his judgment, he refers with approval to the test which was adopted by the trial judge as being whether a particular purpose was "the substantial or primary purpose" (see p832). There is an open question as to whether the test imports a

“but for” causation test i.e. there will be a breach of the duty if but for the improper purpose the power would not have been exercised. In *Eclairs Group*, the point was not before the Supreme Court. Lord Sumption (with whom Lord Hodge agreed) expressed support for the causation test (at [24]), but Lord Mance (with whom Lord Neuberger agreed) reserved his position (at [50] to [55]). On the facts of this case, I do not need to determine that issue.

Duty to promote the success of the company: s172 CA 2006

213. Section 172 imposes a duty on a director to promote the success of the company and sets out a non-exhaustive list of six factors to which a director must have regard in doing so. It is in the following terms:

172 Duty to promote the success of the company

(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

- (a) the likely consequences of any decision in the long term,
- (b) the interests of the company's employees,
- (c) the need to foster the company's business relationships with suppliers, customers and others,
- (d) the impact of the company's operations on the community and the environment,
- (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
- (f) the need to act fairly as between members of the company.

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

214. As regards, the general approach to the scope of this duty, I was directed by Mr Jory QC to the judgment of Tom Leech QC, as he then was, in *Barrowfen*. In that case, the deputy judge noted (at *Barrowfen* [274]) that the test in s.172 is a

subjective one and referred to a passage from the decision of Jonathan Parker J in *Regentcrest plc v Cohen* [2000] 2 BCLC 80 at [120] where, in the context of the pre-existing equitable duty to act in good faith in the interests of the company, Jonathan Parker J said this:

The duty imposed on directors to act bona fide in the interests of the company is a subjective one (see *Palmer's Company Law* (Sweet & Maxwell), para. 8.508). The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test.

215. The position did not change as a result of the codification of directors' duties in CA 2006: the opening words of s.172(1) expressly require a director to act in the way "he considers" would be most likely to promote the success of the company.
216. The opening words of the section also make it clear that the duty to promote the success of the company requires a director to act for the benefit of the members as a whole rather than a section of the members. I was also referred by Mr Jory QC to s.172(1)(f) which requires a director to have specific regard for the purposes of the duty in s.172 to the need to act fairly as between individual members. In this context, in *Barrowfen*, Tom Leech QC accepted a submission from counsel that this must include ensuring that the members of a company may exercise their statutory rights to call an extraordinary general meeting under s.303 to s.305 CA 2006 and, if they chose to do so, to vote to replace the directors of the company under s.168 CA 2006 (*Barrowfen* [275]). He also held (at *Barrowfen* [276]) that:

276. ...one director who deliberately ignores or frustrates a valid request under section 303 in order to prevent shareholders legitimately exercising their powers to appoint or remove other directors commits a breach of the duty to promote the success of the company. Again, it is not an answer to a claim for breach of section 172 that the director believed himself to be acting in the commercial interests of the company, if he knew or believed that he was not acting fairly as between the individual members.

Duty to avoid conflicts of interest: s.175 CA 2006

217. The final duty on which Mr Jory QC relies in support of the matters referred to in Sam's Petition is the duty to avoid conflicts of interest in s.175 CA 2006. Section 175 provides as follows:

175 Duty to avoid conflicts of interest

- (1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.
- (2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).
- (3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.
- (4) This duty is not infringed—
 - (a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or
 - (b) if the matter has been authorised by the directors.
- (5) Authorisation may be given by the directors—
 - (a) where the company is a private company and nothing in the company's constitution invalidates such authorisation, by the matter being proposed to and authorised by the directors; or
 - (b) where the company is a public company and its constitution includes provision enabling the directors to authorise the matter, by the matter being proposed to and authorised by them in accordance with the constitution.
- (6) The authorisation is effective only if—
 - (a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and
 - (b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted.
- (7) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.

218. Section 175 therefore contains a broad duty on directors to avoid situations in which a conflict of interest might arise. It is subject to three main exceptions.

- i) The first exception is in s.175(3) which provides that s.175 has no application in relation to “a conflict of interest arising in relation to a transaction or arrangement with the company”.

Although Mr Young, in his skeleton argument relies on s.175(3) in relation to certain aspects of this case, I did not hear any material submissions on this scope of this exception. I was, however, referred to the decision of Adam Johnson QC, as he then was, sitting as a Deputy High Court Judge, in *Re Dinglis Properties Limited* [2019] EWHC 1664 (Ch) (“*Re Dinglis*”) in relation to other aspects of this case. I note in his judgment in that case the deputy judge concluded (at [307]-[308]) that the exclusion is not limited to cases in which the relevant director is personally a party to the transaction or arrangement and so can extend to circumstances where the company enters into a transaction or arrangement with another person with whom the director is associated or in which the director is interested. He said this at [308]:

308. In my view, Mr Hubbard is right to say that the broader formulation of section 175(3) is the correct one: i.e. it excludes from the scope of section 175 all cases where the conflict arises in connection with a transaction or arrangement with the company, regardless of who is entering into the transaction. I say that for two reasons:

i) That is what section 175(3) says: it is not in terms confined to cases in which the transaction is one with the director personally.

ii) It makes sense to read section 175 together with section 177, as David Richards J. did in *Re Coroin (No. 2)* [2012] EWHC 2343 (Ch) , in holding (at [583]) that the effect of section 175(3) is to make sections 175 and 177 mutually exclusive. The duty under section 177 arises in any case in which the director is interested, directly or indirectly , in a proposed transaction or arrangement with the company. An indirect interest obviously arises even in a case where the person or entity proposed to enter into the transaction is a third party, and not the director himself. If in such a case the duty under section 177 is engaged, it makes sense to say that the duty under section 175 is not.

I agree with his approach and will follow it in this case.

- ii) The second is in s.175(4)(a) which provides that the duty is not infringed “if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest”.

iii) The third exception is in s.175(4)(b) and applies to cases where the matter has been authorized by the directors.

219. In *Barrowfen*, Tom Leech QC directed himself that that the test for compliance with s.175 was no different from the test for compliance with s.172 (*Barrowfen* [286]). He took the view therefore that the relevant question is “whether the director knew that a situation within s.175(1) had arisen, but took no steps to avoid it or whether he or she honestly believed that no such situation had arisen” but that “if the director relies on [s.175(4)(a)] and argues that the situation could not reasonably be regarded as likely to give rise to a conflict of interest, then ... the test is an objective one for the court”.
220. In *Barrowfen*, Tom Leech QC had not had the benefit of submissions on that point. In this case, Mr Jory QC referred to the relevant passage from the deputy judge’s judgment in his closing submissions without further comment. I have heard no further submissions on this point, but for my own part, I would have inclined to the view the test for compliance with s.175 should be objective. However, for the reasons that I give below, I do not need to decide this point in this case, and do not do so.

Application to the events of February to July 2020

221. I shall now turn to the events of February to July 2020.

The appointment of Diana as a director

222. The first is the appointment of Diana as a director of the Company. In his Petition, Sam asserts that Diana’s appointment was invalid as there was no notice of any meeting of the directors to consider Diana’s appointment, no meeting of the directors to consider the appointment, no resolution put to the directors, and no resolution passed by them. Sam did not agree to the appointment.
223. As I have described, the Articles of Association of the Company adopt many of the regulations of Table A. Regulation 95 of Table A permits the directors to appoint any person to be a director, either to fill a casual vacancy or as an addition to the existing directors, provided that the number of directors does not exceed the maximum number fixed by the Articles. In this case, the maximum number of directors was fixed at five by article 4 of the Articles of Association. The directors clearly had power to appoint Diana as a director.
224. The regulations of Table A contemplate that the directors will exercise their powers through their meetings. Regulation 98 of Table A permits the directors to regulate the conduct of their meetings as they see fit. As I have found, up to and at the time of the meeting on 3 February 2020, the directors, David and

Sam, conducted their business on an informal basis. They had dispensed with many of the formalities that typically surround the governance of a company: no formal notice was given in advance of meetings, no resolutions were formally put to directors, and no minutes were kept.

225. The only notice of the 3 February 2020 meeting was given by David over the telephone on the morning of 3 February 2020. He gave little or no indication that the meeting would discuss matters relating to the Company. However, notwithstanding the informality of the setting, David and Sam did discuss matters concerning the Company at that meeting and, in that sense, the meeting on 3 February 2020 was as much a meeting of the directors as many other previous meetings. The important point is, as I have found, that there was no agreement at that meeting that Diana should be appointed as a director. (I will address the question of whether David was entitled to act as Chairman later in this judgment. However, in relation to the meeting on 3 February 2020, the question of whether or not David was entitled to exercise a casting vote is not relevant. He did not purport to exercise one.)
226. It follows that Diana was not validly appointed by the directors at that meeting in accordance with regulation 95 of Table A and that David was not entitled to register Diana as a director on 19 February 2020. David was aware that he was not entitled to do so. In doing so, he was in breach of his duty to act within his powers and in particular with his duty to act in accordance with the Company's constitution (in s.171(1)(a) CA2006).
227. Mr Jory QC has suggested that the appointment of Diana might also involve a breach by David of his duty to avoid conflicts of interest under s.175 CA 2006. Having found that David was in breach of his duty under s.171(1)(a) CA 2006, I do not need to consider s.175 further at this stage.

Acting as Chairman

228. In his Petition, Sam claims that David was not "elected" as Chairman of the Company and accordingly was not entitled to refer to himself as such or to exercise a second or casting vote at a general meeting of the Company pursuant to regulation 60 of Table A or at meetings of the directors pursuant to regulation 98 of Table A. (The Petition refers to regulation 104 of Table A but this must be an error as that particular regulation refers only to meetings of committees of the board and not meetings of the directors themselves.) On that basis, the exercise of a casting vote by David was a breach of the Articles of Association, and, by holding himself out as Chairman and by exercising a casting vote, David acted in breach of his duty to act in accordance with the Company's constitution pursuant to s.171(1)(a) CA 2006.

229. In their Points of Defence, the respondents do not assert that David was “elected” as Chairman. Their pleaded case is that he held that office with the approval of Sam after 17 November 1998 following the death of their mother. In response to Part 18 Requests relating to the relevant paragraph of the Points of Defence, the respondents state that, since Sam ceased to be an active director in autumn 1999, David has been left as the “only active director and de facto chairman and that this has been the position for in excess of 20 years”. The parties in their agreed list of issues for resolution by this court also refer to the question of whether David is “de facto” chairman of the board and if so whether he is entitled to a casting vote in the event of an equality of votes on the basis that he is “de facto” chairman.
230. There has been some dispute about the respondents’ pleaded case on this issue. In advance of the hearing, on 25 March 2022, and in response to statements made in Mr Young’s skeleton argument, Mr Jory QC sought confirmation from Mr Young that the respondents were not seeking to amend their pleadings to argue that David was the “elected” Chairman under regulation 101 of Table A. Mr Young initially confirmed that no such application was being made. However, he subsequently confirmed that the respondents intended to make an application for permission to amend their pleadings to argue that Sam had accepted the election of David as Chairman for every meeting of the board and every general meeting following the general meeting on 30 September 2008 to which I refer at [44] above. On 27 March 2022, a day before the trial, an application was made. I heard that application at the commencement of the trial. I refused the application for the reasons that I gave at that time. I have therefore proceeded on the basis of the pleaded case.
231. The only times during the sequence of events at which this point has had any real significance are when David has assumed the chairmanship of the meetings – most importantly at the board meeting on 18 June 2020 and the general meeting on 22 July 2020 – and when he has purported to exercise a casting vote – at the board meeting on 18 June 2020, in relation to the approval of the minutes of previous meetings, in support of his decision to pay the dividends on the preference shares, and, perhaps most importantly, at the general meeting on 22 July 2020, in relation to the resolution regarding Mr Montlake’s appointment.
232. On the basis of the pleaded case, I agree with Mr Jory QC that, if David was not “elected” as Chairman of the board under regulation 101 of Table A. There is no evidence of any process by which David was elected as Chairman by the directors. He was not, in the capacity of an elected Chairman, entitled to cast a second or casting vote at the meeting of directors on 18 June 2020 in approving minutes of previous meetings (including the meeting on 3 February 2020) or to approve the payment of dividends on the preference shares.

233. Regulation 101 of Table A also permits of the possibility that the board may choose one of their number to act as Chairman in relation to specific meetings. A Chairman so appointed may also exercise a casting vote at that meeting under regulation 98. As regards the meetings before the meeting on 18 June 2020, Sam asserted in his evidence that the position of Chairman passed between David and himself on an ad hoc basis. There is no evidence to support this assertion and I reject it. In cross-examination, Sam accepted that, in practice, David assumed the position of Chairman and that he, Sam, had acquiesced in David doing so. However, even if it could be said that David had therefore been “chosen” as Chairman for those meetings for the purposes of regulation 101, it is of little or no consequence as David did not purport to exercise a casting vote at any of them.
234. As regards the meeting on 18 June 2020, no Chairman was chosen by the directors. David sought to assert his position as Chairman, but this was contested by Sam. Sam also contested David’s right to approve the minutes of the previous meetings by the exercise of a casting vote. In seeking to exercise a casting vote, which under the terms of the Company’s constitution, he did not have the right to exercise, David acted in breach of his duty to act in accordance with the Company’s constitution pursuant to s.171(1)(a) CA 2006.
235. I will deal separately below with the steps taken by David to pay the dividends on the preference shares, but, for the reasons that I give there, in my view, the purported exercise by David of a casting vote is not relevant to the validity or otherwise of those steps.
236. The appointment of a Chairman to act at general meetings of the Company is governed by regulations 55 and 56 of Table A. The default position is that the Chairman of the board of directors shall preside as Chairman of any general meeting (regulation 55). I take this to be a reference to a Chairman who is duly elected under regulation 101 of Table A. Where there is no elected Chairman of the board, or the elected Chairman is not present, Table A provides for the directors to elect a Chairman of the meeting from amongst the directors (regulation 55), failing which the members are to choose a Chairman from amongst the members. The Chairman so appointed has a casting vote on any resolution at the meeting (regulation 60)
237. Once again, this point was not in issue before the general meeting on 22 July 2020. General meetings were rarely called. When they had been called, the preference shareholders had not been given notice even though they were entitled to attend and vote. David had assumed the position as Chairman of the meetings and been recorded as Chairman in some minutes, but he had never sought to exercise a casting vote.

238. At the meeting on 22 July 2020, David simply assumed the position of Chairman and Mr Montlake assumed authority to conduct the meeting acting “through the Chair”. David then purported to exercise a casting vote which would take effect if there was an equality of votes on the resolution for the appointment of Mr Montlake as a director. There was no elected Chairman of the board and there was no process for the election of the Chairman amongst the directors. The only basis on which David could exercise the casting vote was that he had been “chosen” by the members to chair the meeting under regulation 56 of Table A. In my view, David was not chosen by the members to chair the meeting and his exercise of the casting vote was in breach of the Articles of Association and in breach of his duty to act in accordance with the Company’s constitution pursuant to s.171(1)(a) CA 2006. However, for the reasons that I give later in this judgment, in my view, the exercise of the casting vote is not material to the outcome of the resolution to appoint Mr Montlake at that meeting.

Acting as Managing Director

239. In his Petition, Sam also claims that David has started to refer to himself as Managing Director of the Company when he has not been appointed under regulation 107 of Table A and that in holding himself out as such David is in breach of his duty to act in accordance with the Company’s constitution under s.171(1)(a) CA 2006.

240. David does not claim to have been appointed as Managing Director under regulation 107 of Table A. He claims in his Defence that he “has used that designation to indicate his actual role in the Company on the basis of an informal appointment from time to time since he wrote to Highways England on 3 June 2014”.

241. I agree with Mr Young that there is nothing in this point. David has styled himself as “managing director” but that simply reflects the fact that he has done almost all the day-to-day executive-level work for almost 20 years. Sam has not objected to his doing so other than in the context of these proceedings. David does not claim to have been appointed as Managing Director under regulation 107 and has not sought to rely upon having been appointed under regulation 107 to avoid retirement by rotation.

The payment of the dividends on the preference shares.

242. The next issue to which I will turn is the payment of the dividend on the preference shares.

The Petition

243. In his Petition, Sam claims that:

- i) no dividends were, in fact, paid on the preference shares in accordance with the Articles and accordingly:
 - a) the preference shareholders remained entitled to exercise the votes on their shares pursuant to paragraph 6(c) of the Memorandum of Association and regulation 62 of Table A; and
 - b) the steps taken at the general meeting on 22 July 2020 which resulted in the votes of the holders of the preference shares being ignored led to the affairs of the Company being conducted in a manner which did not satisfy the requirements of its constitution (in particular, regulation 98 of Table A) and involved a breach by David of his duty to act in accordance with the Company's constitution (pursuant to s.171(1)(a) CA 2006);
- ii) any dividends paid on the preference shares were not lawfully approved by the directors in that there was no meeting of the directors to approve the payment, no material provided to directors to enable them to determine whether it was appropriate to pay the dividends and no resolution passed by the directors to approve the payment of the dividends and accordingly:
 - a) by refusing to recover monies paid to Sam and/or to abandon his own claim for payment of dividends, David acted in breach of his duty to promote the success of the Company for the benefit of its members as a whole (pursuant to s.172 CA 2006) and to exercise his powers for a proper purpose (pursuant to s.171(1)(b) CA 2006);
 - b) by not counting the votes of the preference shareholders at the general meeting, David acted in breach of his duty to promote the success of the Company for the benefit of the members as a whole (pursuant to s.172 CA 2006);
- iii) any dividends paid on the preference shares were approved for an improper purpose of disallowing the votes of the preference shareholders at a general meeting and accordingly by paying the dividends and refusing to count the votes of the preference shareholders, David had acted in breach of his duty to promote the success of the Company for the benefit of its members as a whole (pursuant to s.172 CA 2006) and in breach of his duty to exercise his powers for a proper purpose (pursuant to s.171(1)(b) CA 2006).

Were the dividends paid?

244. The first question that I need to determine on this issue is whether or not steps undertaken by David resulted in the dividends being “paid” for the purposes of the constitution of the Company so that the holders of the preference shares were not entitled to vote at the general meeting on 22 July 2020.
245. As I have described above, under paragraph 6(a) of the Memorandum of Association of the Company, the holders of the preference shares were entitled to a fixed cumulative dividend of 5% per annum on the capital paid up on those shares. Under paragraph 6(c) of the Memorandum of Association of the Company, the holders of the preference shares were entitled to one vote per share, but only if the dividend was in arrear for more than 12 months.
246. Under paragraph 6(a), the preference share dividend was “deemed due and payable” on 31 March in each year.
- i) The effect of the dividend being treated as “due” on 31 March in each year was that the preference dividend became due on that date in each year irrespective of whether not profits were available to the Company to pay the dividend. As a result, if the preference share dividends remained unpaid in any year, the dividends would be treated as being in arrear for the purposes of the Memorandum (including for the purposes of paragraph 6(c) of the Memorandum).
 - ii) The dividend was also treated as “payable” on 31 March in each year. As a result, the amount of the dividend became an enforceable debt capable of being claimed by a shareholder without the need for the dividend to be separately declared by the Company in accordance with the provisions of regulation 114 of Table A.

The ability of a shareholder to enforce that debt is subject to the other provisions of the Articles – in particular regulation 116 of Table A, which requires that no dividend may be paid otherwise than out of profits - and to the provisions of company law applicable to distributions – in particular s.830 CA 2006 pursuant to which a distribution, including a dividend, can only be made out of profits available for this purpose.

Subject to those conditions, there is no discretion in the directors to determine whether or not to pay the dividends. The role of the directors is limited to ensuring that the amount of the dividend that is paid is correct and that there are sufficient profits to meet the requirements of the Articles and the relevant provisions of company law applicable to distributions. Once those requirements are met, the Company is obliged to pay a dividend which has become payable.

247. Against that background, were the steps taken by David sufficient to “pay” the dividends so that the preference shareholders were not entitled to vote their shares under paragraph 6(c) of the Memorandum of Association at the general meeting on 22 July 2020?
248. As I have set out above, David claims to have paid the accrued dividends on the preference shares in various ways:
- i) by creating loan accounts in favour of the holders of preference shares other than himself and Sam in amounts equal to the accrued dividends on their shares;
 - ii) by accepting that an amount equal to the accrued dividends on his own holding of preference shares was left outstanding as a debt due to him from the Company; and
 - iii) by the payment of an amount equal to the accrued dividends on Sam’s holding of preference shares by bank transfer to Sam’s account (albeit that Sam subsequently sought to repay those amounts to the Company).
249. I will begin with the arrangements in relation to shareholders other than David and Sam.
250. Mr Jory QC submitted that the steps which David took in relation to these shareholders were insufficient to “pay” the accrued dividends for the purpose of the Memorandum and Articles of Association. He says that the default position under Table A is that dividends must be paid in cash. In support of this submission, he referred to regulation 121 of Table A, which provides that a dividend may be paid by cash or by warrant. He says that the effect of regulation 121 is that the only acceptable means of payment of a dividend other than cash are by cheque or by dividend warrant. The preference shareholders were therefore entitled to insist on payment in cash or by cheque or warrant. Any other form of “payment” could not, without their agreement, discharge the Company’s obligation to pay dividends to the preference shareholders for the purpose of the Company’s constitution.
251. Mr Young submitted that the creation of loan accounts was a valid means of payment of the dividends. He said that regulation 121 of Table A is permissive and not mandatory and it did not preclude other means of payment.
252. I agree with Mr Jory QC on this issue. In my view, the underlying assumption in the drafting of the relevant provisions of Table A is that a dividend must be paid in cash unless the terms of the Articles of Association or the terms on which the shares are issued provide otherwise.

253. The regulations of Table A do not contain a provision which expressly states that dividend must be paid in cash unless otherwise provided. Regulation 121 refers to dividends “payable in cash”. Although that phrase could be given a narrow reading and be treated as referring only to those dividends that are expressed to be paid in cash (for example, under the terms of the Articles of Association or the terms on which the shares are issued), in my view, it should be read more widely to include all dividends paid by the company unless otherwise provision is made. That approach is consistent with other regulations of Table A which allow the company to “pay” dividends in other ways but only with the agreement of the shareholders. For example, regulation 120 of Table A permits a company to direct payment of a dividend to be made by the distribution of assets but only with the approval of the shareholders in general meeting.
254. I was not referred to any case law authority relevant to this particular issue. However, if I need support for the general assumption in the regulations of Table A that dividends should be paid in cash, I would refer to the decision of Stirling J in *Wood v Odessa Waterworks Company* (1889) 42 Ch. D. 636.
255. Regulation 121 provides an exception to that general principle. However, it is a very limited exception (applying only to cheques and dividend warrants). The implication is that the general principle should be interpreted strictly and, for these purposes, a payment in “cash” would be limited to a physical delivery of cash or another method of transfer as good as cash, which gives the payee an unconditional right to the immediate use of the funds, such as a direct bank transfer. The creation of a loan account is not payment in cash in those terms. It does not put the payee in funds.
256. It follows that without the agreement of the preference shareholders, the creation of the loan accounts could not be treated as payment of the dividends accrued on the preference shares for the purposes of the Articles of Association. Accordingly, the dividends on the preference shares held by shareholders other than David and Sam remained in arrears and the holders were entitled to vote at the general meeting held on 22 July 2022 on the resolutions to appoint or confirm the appointment of directors. David’s attempts to prevent the preference shareholders from voting at that meeting were a breach of his duty as a director to act in accordance with the Company’s constitution (s.171(1)(a) CA 2006).
257. As regards the payment of the dividend on the preference shares held by David, David confirmed that he had accepted the creation of a loan account as payment of the dividend on his holding of those shares. Subject to any issues regarding the authorization of the payment of the dividends (see below) that was a transaction which was open to him as a shareholder to agree. In doing so, he

replaced his claim for payment of the dividend with a debt claim against the Company. However, the effect was that the payment of the dividend on his shares was not in arrears and so he was not entitled to vote those shares at the general meeting on 22 July 2020.

258. The dividend on Sam's preference shares was paid in cash. This was in a manner authorized by the Company's constitution. The effect was that the payment of the dividend on his shares was not in arrears and so he was not entitled to vote those shares at the general meeting on 22 July 2020.

Were the payments of the dividends properly authorized by the board?

259. If and to the extent that the dividends on the preference shares were paid for the purpose of paragraph 6(a) of the Memorandum of Association, Sam claims that the payment of the dividends was not authorized by the directors and so the payment was made in breach of the provisions of the Articles. There was no notice of a meeting to consider the payment of the preference share dividends. No actual meeting was held, no resolution was put to the directors and no vote was held. Furthermore, David was aware that Sam objected to the payment of the dividends being made at the time without taking due account of the financial position of the Company. There was therefore no valid decision of the directors to pay the dividends (in accordance, in particular, with regulation 98 of Table A).
260. Mr Young, for David, says that the payments were appropriately authorized by the board through the exchange of emails between 14 July 2020 and 16 July 2020. In any event, the payments were simply discharging an obligation of the Company that had already fallen due. It was not necessary to obtain further authorization of the board.
261. As I have mentioned above, the effect of the provisions of the Memorandum and Articles of the Company is that the accrued dividends on the preference shares were "due and payable" at the time which David took the steps to have them paid subject only to the requirements of the Articles and company law regarding the availability of the sufficient suitable profits. It was not necessary for the dividends to be declared by a resolution of the Company in the general meeting.
262. The directors' role in relation to the payment of the dividends on the preference shares was limited to ensuring that the correct amounts that were paid and that the Company had sufficient available profits to pay them to meet the requirements of the Articles and company law regarding the payment of dividends. Subject to those requirements, the Company was obliged to pay the dividends and the shareholders could enforce their payment against the Company.

263. There is little dispute between the parties that sufficient profits were available at the time. Although there may have been times during the history of the Company where there were insufficient profits to pay the dividends on the preference shares, David's evidence, based on the advice of Mr Short, was that there were sufficient profits at the time. Although Sam has questioned whether or not appropriate governance procedures were followed regarding the payment of the dividends, I did not detect any serious challenge to that evidence and I accept it. I will proceed on the basis that the requirements were met.
264. Mr Jory QC says that, in effect, it was still necessary for the directors acting collectively to approve the payment of the dividends. There was no agreement between David and Sam (the only validly appointed directors) and David's purported exercise of a casting vote in his email of 16 July 2020 was not valid for the reasons that I have discussed above. For these reasons he says the payment of the dividends was in breach of the Company's constitution.
265. I disagree. In the circumstances of this case, although it may have been good practice to hold a board meeting in order to consider the payment of the accrued dividends on the preference shares, it was not necessary for directors to meet and to authorize the payment of the dividends. The dividends were due and payable and an enforceable debt. It was not necessary for the dividends to be declared by the shareholders pursuant to regulation 114 of Table A or for the directors to resolve to pay them pursuant to regulation 115 of Table A. The steps taken to discharge that obligation were not a breach of the constitution of the Company (and David was not in breach of his duty to act within the constitution of the Company in s.171(1)(a) CA 2006).

Was the payment of the dividends in breach of David's duties as a director?

266. If and to the extent that the dividends on the preference shares were paid for the purpose of paragraph 6(a) of the Memorandum of Association, Mr Jory QC also submits that the steps taken by David to pay the dividends were taken for an improper purpose – namely to secure the disenfranchisement of the preference shareholders at the subsequent general meeting – and therefore a breach of his duty to exercise his powers for a proper purpose pursuant to s.171(1)(b) CA 2006.
267. As I have mentioned, the case law (principally *Howard Smith*) requires that I should: identify the power that is being exercised, and the purpose for which it is given; then examine the substantial purpose for which it was exercised; and reach a conclusion on whether that purpose was proper or improper.
268. The power in this case is the obligation to pay the preference dividends. Its purpose is to provide a preferred return to the preference shareholders as they have no other right to participate in the profits of the Company.

269. David's evidence was that his primary concern in taking the steps to pay the dividends was to discharge the liabilities of the Company to pay the dividends on the preference shares which had been outstanding for some material time. He notes that it was Sam who initially raised concerns about the unpaid dividends on the preference shares. He simply took the steps to discharge them.
270. I do not accept that evidence. Although David may have been partly motivated by a desire to discharge the accrued dividends, I have no doubt that David's primary purpose in seeking to pay the preference share dividends at the time at which he did and in the manner in which he did was to ensure that the preference shares would not be entitled to vote at the general meeting on 22 July 2020.
- i) His wife, Diana, although generally careful not to contradict David's evidence accepted that one of the reasons for the payments was to ensure that the preference shareholders could not vote.
 - ii) No dividend had been paid on the preference shares for nearly 60 years. There was no good reason for the payment of the dividends at the time at which they were paid other than the prospect that the preference shareholders would otherwise be entitled to vote at the forthcoming general meeting.
 - iii) David's refusal to consider the issues being raised by Sam, however minor they may in fact have been, and which may have taken only a few days or weeks to resolve, demonstrates that the most important issue for David was the payments should be made before the general meeting.
 - iv) The view is supported by the rushed implementation of the proposal. Instead of taking time to obtain bank details of shareholders or simply post cheques to them, David relied upon making book entries as a means of payment.
271. That purpose was an improper one. David's primary purpose was to disenfranchise the preference shareholders so that they could not vote at the forthcoming meeting on the resolutions to appoint or re-appoint directors. This was part of his principal aim to retain control of the board within his trusted group. In doing so, he sought to use his powers as a director to affect a decision which within the governance processes of the Company fell within preserve of the shareholders. As I have described, it is a breach of the duty in s.171(1)(b) CA 2006 for directors to exercise their powers to control or influence the outcome of a general meeting (*Eclairs Group* [17], *Barrowfen* [271]-[272]).
272. It might be said that the preference share dividends could have been paid at any time – in which case they would not have been entitled to vote at a general meeting – and that it might be said that allowing the preference shareholders to

vote in these circumstances might give them a disproportionate influence on the decisions taken at that meeting given their economic stake in the Company. However, for the reasons that I have given, David's primary motivation in seeking to pay the dividends at the time at which he did was an improper one and aimed at depriving the preference shareholders of their limited influence over the governance of the Company.

273. As I have described, David had two purposes in seeking to discharge the accrued dividends on the preference shares: a legitimate purpose in meeting the liabilities of the Company; and an improper purpose in seeking to ensure that the preference shareholders could not vote at the general meeting. In such circumstances, for the purpose of determining whether a director is in breach of his duty to exercise his powers for the purpose for which they are conferred (within s.171(1)(b) CA 2006), the correct approach on the current state of the case law is to identify the "substantial purpose" for which the power was exercised (*Howard Smith* p835G). I am satisfied, on the facts, that the substantial purpose for David's exercise of his powers as a director was an improper one, namely to seek to ensure that the preference shareholders would not be entitled to vote at the general meeting, and accordingly not be entitled to take part in the decisions regarding the appointment and re-appointment of directors. His actions constituted a breach of his duty under s.171(1)(b) CA 2006.

Differential treatment of preference shareholders

274. If and to the extent that the dividends were paid, there remains a question as to whether the differential treatment of the different preference shareholders in terms of the form of the "payments" which David sought to make was a breach of the Company's constitution and a breach of David's directors' duties (in particular, the duty to act in accordance with the Company's constitution and the duty to promote the success of the Company for the benefit of the members as a whole). This issue was not raised in argument before me. I do not need to decide it for the purpose of this judgment and do not do so.

Registration of the Trust shares

275. In his Petition, Sam claims that David's creation of the entry in the register with his own name as the first-named trustee was a breach of his duty to exercise his powers for a proper purpose (s.171(1)(b) CA 2006) and a breach of his duty to avoid a conflict of interests (s.175 CA 2006).
276. I have already addressed the factual issues relating to the registration of the Trust shares at [104] to [110] above. I have found that David entered the names of the trustees in the register at some time in the period between 2012 and 2017 and so could not have done so as part of a plan implemented in 2020 to retain

control of the Company. I have accepted his evidence as to the time at which the entry was made. It may have been prudent for David to seek the consent of Sam to the order in which he wrote up the entry in the register, but there is no evidence that he made the entry at the time with any improper motive.

277. There was also a real possibility of a conflict of interest in David's exercising his powers to put himself as the first-named holder of the Trust shares in the register of members. However, for the reasons that I give below, even if David was in breach of duty under s.175 CA 2006 in this respect that breach was not material for the purpose of this case.

The conduct of the meeting on 22 July 2020

278. Sam's central complaint in his Petition relates to the conduct of the general meeting on 22 July 2020 which led to the appointment of Mr Montlake as a director and to the confirmation of the appointment of Diana. He alleges that the conduct of that meeting was manipulated to enable David to retain control of the Company which he had acquired by the invalid appointment of Diana at the meeting on 3 February 2020.

The Petition

279. In his Petition, Sam refers to certain matters which were involved in the preparation for the meeting on 22 July which, in his view, laid the ground for the events at that meeting. I have dealt already with several of these matters namely:
- i) the payment of the dividends on the preference shares in order to disenfranchise the preference shareholders;
 - ii) the assumption of the role of Chairman of the Company so that David could, if necessary, exercise a casting vote;
 - iii) the writing up of the register of members in relation to the holding of the Trust shares in a manner which would allow David to assert that he was entitled to vote the Trust shares as the first-named trustee without regard to the instructions of Sam, his co-trustee.
280. In addition to those matters, Sam also refers to various other matters relating to the convening of the meeting and the conduct of the meeting itself. It will assist my explanation if I simply list the main issues to which Sam refers.
- i) David convened a meeting immediately before the meeting which had been called by Sam to ensure that the resolution to appoint Mr Montlake and to confirm the appointment of Diana would be put to the shareholders.

- ii) David and Mr Montlake assumed control of the meeting by David's assuming the role of Chairman even though he had not been properly elected as Chairman and by Mr Montlake acting "through the Chair" even though he had no authority to do so.
 - iii) David and Mr Montlake used their control of the meeting to put the resolution for Mr Montlake's appointment as a director first so that his appointment could not be affected by the limit in the Articles on the number of directors.
 - iv) David and Mr Montlake used the device of acknowledging the issues surrounding the voting of shares to allow all shareholders to express their views, but ultimately in order to provide themselves with the opportunity to count the votes in the manner most likely to achieve the appointment of Mr Montlake.
 - v) Although they acknowledged that there was "an issue" as to whether David could vote the Trust shares, David and Mr Montlake caused the Company to recognize David's voting of the Trust shares even though David was in breach of trust in doing so.
 - vi) David and Mr Montlake caused the Company not to recognize the votes on the preference shares held by shareholders other than David and Sam even though the dividends on the preference shares had not been paid.
 - vii) David purported to exercise the casting vote of the Chairman even though he had not been properly elected as Chairman to provide an alternative means by which the resolution to appoint Mr Montlake might be regarded as passed (even though it was not ultimately necessary to rely upon the casting vote).
 - viii) Following the meeting, David registered Mr Montlake's appointment as a director relying upon the unlawful exercise of the votes on the Trust shares and the invalid disenfranchisement of the preference shareholders.
 - ix) David and Mr Montlake used the appointment of Mr Montlake and the limit on the number of directors in the Articles to avoid the appointment of Mr Yorke-Starkey and then reneged on the understanding reached between all the shareholders that the limit on the number of directors would be raised and that Mr Yorke-Starkey would be elected as an additional director.
281. The overall effect was that Mr Montlake was appointed as a director (and registered as a director at Companies House) against the wishes of all the

shareholders (other than David) and that Mr Yorke-Starkey was not elected as a director notwithstanding that he had the approval of all the shareholders (other than David) to his appointment.

The parties' submissions

282. Mr Jory QC says that these steps involved various breaches of the Articles of Association of the Company – principally, regulations 62 and 63 of Table A – and various breaches of David's duties as a director – his duty to act in accordance with the Company's constitution (s.171(1)(a) CA 2006), his duty to promote the success of the Company (s.172 CA 2006) and his duty to avoid conflicts of interests (s.175 CA 2006). However, his central claim is that in taking these steps David sought to subvert the shareholders' right to appoint and remove directors. That, he says is a breach of David's duty to promote the success of the Company within s.172 CA 2006.
283. Mr Young says that there has been no breach of the Articles and no breach of David's duties as a director in respect of any of these matters. David, at all times, acted in the honest belief that he was acting in the best interests of the Company. In practice, the meeting on 22 July 2020 was a well-run and civilized meeting.
284. Sam no longer disputes the appointment of Diana as a director. The real issue between the parties relates to the appointment of Mr Montlake. As I have mentioned, his appointment relied on the recognition by the Company of the votes on the Trust shares and the failure to recognize the votes on the preference shares. I will deal with these issues before I turn to the conduct of the meeting more generally, focussing on the appointment of Mr Montlake as a director.

The recognition of the votes on the Trust shares

285. In his Petition, Sam claims:
- i) David acted unlawfully in breach of his duty as a trustee only to act unanimously when he voted the shares at the general meeting on 22 July 2020 in favour of the appointment of Mr Montlake and against the wishes of co-trustee, Sam. At all material times there has been an understanding between Sam, David and the Company that they would act lawfully in relation to the casting of votes on the Trust shares.
 - ii) David was aware that he was acting unlawfully as a trustee and his knowledge should be imputed to the Company so that by counting the votes attaching to the Trust shares in favour of resolution to appoint Mr Montlake, David should be regarded as acting in breach of his duty to act in accordance with the Company's constitution (s.171(1)(a) CA

2006), in breach of his duty to promote the success of the Company (s.172 CA 2006), and in breach of his duty to avoid conflicts of interest (s.175 CA 2006).

Did David's voting of the Trust shares involve a breach of trust?

286. On the first question – whether David acted unlawfully when he exercised the votes on the Trust shares contrary to the wishes of his co-trustee, Sam – Mr Jory QC says that the position in trust law is clear. He says that it is a fundamental principle of trust law and the administration trusts that in a trust which is neither a charitable trust nor a pension trust scheme, the trustees must act unanimously. He refers to the judgment of Sir Robert Megarry V-C in *Cowan v. Scargill* [1988] 1 Ch 270 (at p297E) and the judgment of Stirling J in *Astbury v. Astbury* [1898] 2 Ch 111 in support of that submission.
287. Mr Young has sought to persuade me that David was entitled to vote the Trust shares in this case notwithstanding the general principle that trustees must act unanimously. He points out that: it was understood that David would administer the trust; Sam had expressed his willingness to retire as a trustee given the potential conflicts of interest that were likely to arise; and that David was working towards a significant increase in the value of the assets of the Trust by securing permission to develop the Company's assets. Having taken into account Sam's views, David acted properly in exercising his judgment to vote the Trust shares in circumstances where Sam was wishing to advance his own interests. David could not have acted otherwise than he did without being in breach of his own duties as a trustee.
288. I cannot accept that submission. The law is very clear that, except in certain limited circumstances, trustees of a trust, which is not a charitable trust, must act unanimously. The point is stated plainly by Sir Robert Megarry VC in *Cowan v. Scargill* at p297E:

“in an ordinary trust, the trustees can do nothing unless they are unanimous: the majority cannot prevail over a minority...”

289. The principle is also summarized in the leading text of *Underhill and Hayton: Law of Trusts and Trustees*, Chapter 13, Article 52 as follows:

In the case of a non-charitable trust, which is not a pension trust scheme, where there are more trustees than one, all must join in the execution of the trust, save only:

- (a) where the settlement or a competent court otherwise directs;
- (b) as to the receipt of income;

(c) as to such matters as can be lawfully delegated under Article 51.

290. Mr Young referred me to the decision of the Court of Appeal in *Armitage v. Nurse* [1988] Ch 241 (“*Armitage*”). That case concerned the scope of a provision in a settlement deed which excluded the liability of trustees except for loss or damage caused “by his own actual fraud”. In his judgment in that case, Millett LJ (as he then was) acknowledged that it is quite possible that a trustee may be in breach of trust but not act dishonestly, for example where he honestly believes he is acting in the best interests of the trust (see p251A-F).
291. I shall turn to David’s motivations for the action that he took shortly, but, in my view, *Armitage* does not assist Mr Young. Indeed, *Armitage* demonstrates that even if David honestly believed that he was acting in the best interests of the Trust and the beneficiaries, his actions could still constitute a breach of trust. It was clearly a breach of trust for David to exercise the votes on the Trust shares in favour of Mr Montlake’s appointment in the knowledge that he was acting contrary to the wishes of his co-trustee, Sam.

Was the exercise of the voting rights a matter of the conduct of the Company’s affairs?

292. That breach of trust, however, is not of itself an issue on which the Petition in this case can be founded. It is not a matter relating to the conduct of “the company’s affairs”: the exercise of the voting rights by David is an activity of a shareholder acting in that capacity and is not of itself part of the conduct of the affairs of the Company. In his pleaded case, Sam asserts that the voting of the Trust shares was a breach of an understanding between himself, David and the Company that they (David and Sam) would act lawfully in the exercise of the voting rights on the Trust shares. There is no direct evidence of any such understanding and, even if one were to be implied, any such understanding would only operate between Sam and David in their capacities as trustees so that a breach of that understanding would not relate to conduct of the Company’s affairs.
293. If so, the breach of trust can only become a matter relating to the conduct of the Company’s affairs if the process of voting the Trust shares is brought within the purview of the actions of the Company or the conduct of its affairs or, to adopt the words of David Richards J in *Re Coroin (No.2)*, if “those activities translate into acts or omissions of the company or the conduct of its affairs”.
294. In this case, Mr Jory QC says that it did. He says that the process of recognizing the votes of the Trust shares at the meeting on 22 July 2020 is a matter relating to the conduct of the affairs of the Company and so falls within the provisions of s.994 CA 2006. I agree with him on that issue and I did not understand Mr

Young to disagree fundamentally on that narrow point. The question is, however, whether the process of recognizing the votes of the Trust shares was “unfair” within the scope of that concept as it is understood for the purposes of s.994 and as I have described above. Mr Young does take issue with Mr Jory QC on that question.

Was the recognition of the votes on the Trust shares a breach of the Company’s constitution?

295. I must therefore turn to the question of whether or not the recognition of the votes attaching to the Trust shares involved a breach of the constitution of the Company.

296. I was referred by the parties to s.286 CA 2006. It provides as follows:

286 Votes of joint holders of shares

(1) In the case of joint holders of shares of a company, only the vote of the senior holder who votes (and any proxies duly authorised by him) may be counted by the company.

(2) For the purposes of this section, the senior holder of a share is determined by the order in which the names of the joint holders appear in the register of members (or, if an election under section 128B is in force in respect of the company, in the register kept by the registrar under section 1080).

(3) Subsections (1) and (2) have effect subject to any provision of the company's articles.

297. The provisions of s.286 are subject to the provisions of the articles of the company (s.286(3)). The relevant provisions of the Company’s Articles are regulation 7 and regulation 63 of Table A. I have set out the terms of these regulations in the Appendix to this judgment. In summary, regulation 63 of Table A provides, that, where shares are registered in joint names, on any vote of the jointly-owned shares, the Company is required to take into account only the votes of the senior holder, that is the person first-named on the register; and regulation 7 provides that, except as required by law, the Company is not required to recognize any equitable interest in a share.

298. Mr Young says that is the end of the matter. The law is clear. The Company is not entitled to go behind the vote of the first-named of the joint holders of the shares. Any disagreement between the trustees as to the voting of the Trust shares is a matter of trust law and should be resolved on the basis of trust law between the trustees or between the trustees and the beneficiaries. It cannot be resolved in the context of a petition relating to the conduct of the Company’s affairs.

299. Mr Jory QC says that there is nothing in regulations 62 or 63 of Table A to override trust law and to entitle David to exercise the votes on the Trust shares. The effect of the breach of trust law was that the vote was a “nothing” (to adopt the terminology of Sir Robert Megarry VC in *Cowan v Scargill*); an invalid act could not become a valid act because David and Mr Montlake decided to treat it as such in recognizing the votes attaching to the Trust shares.
300. On this point, the effect of regulation 63 Table A (which takes priority over s.286 CA 2006) is that the Company was required to accept the vote of the senior holder of jointly-owned shares. Seniority is decided by the order in which the names of the joint owners appear on the register. I agree with Mr Young that, in the ordinary case, the Company cannot be required to look behind the registration of the shares and establish the position as between the trustees or as between the trustees and the beneficiaries before deciding how to count the votes of holders of jointly-owned shares. Any issue as between the trustees, or between the trustees and the beneficiaries – even if it involves a potential breach of trust – is a matter of trust law and to be resolved between them on that basis.
301. This, however, is not an ordinary case. David and Mr Montlake knew that Sam was opposed to voting the Trust shares in favour of Mr Montlake’s appointment. The Company can also be taken to have known, through David and Sam, that Sam was opposed to the voting of the Trust shares in favour of Mr Montlake’s appointment. Furthermore, in my view, Mr Montlake must have known that the principle of unanimity applied and that any exercise of the votes attaching to the Trust shares contrary to Sam’s expressed wishes, was likely to be unlawful. He is an experienced solicitor. The principle is not an obscure one and he had ample notice of the issue. The point had been made by Birketts in their letter of 2 July 2020.
302. We do not know whether or how Mr Montlake advised David on this issue. When the issue was raised by Birketts, the likelihood is that he would have sought the advice of Mr Montlake and Mr Montlake would have advised him accordingly. At the very least, David was aware that there was a material issue regarding the voting of the Trust shares. It is reflected in his communications with the other family members; Mr Montlake acknowledged as much at the start of the meeting on 22 July 2020.
303. I acknowledge all of these points. However, the underlying principle of regulation 7 and regulation 63 of Table A is clear. The Company is not required to recognize any rights in a share other than the rights of the registered holder. In my view, there was no breach of the Company’s constitution as a result of the Company recognizing the vote of the Trust shares.

Was there a breach of David’s director’s duties?

304. Mr Jory QC says that, even if there was no breach of the Company's constitution, David must be taken as acting in breach of his duty to promote the success of the Company (s.172 CA 2006) and his duty to avoid conflicts of interest (s.175 CA 2006) by causing the Company to give effect to resolutions which could only be carried by counting the votes on the Trust shares which he had cast unlawfully.
305. Mr Young submits that there was no breach of any of these duties on the facts. Even if there was a breach of the principle of unanimity in this case, David was still acting in good faith and in the honest belief that he was acting in the best interests of the Trust and of the Company.
306. I agree with Mr Jory QC.
307. The test for the purposes of the duty in s.172 is a subjective one: that is, whether David honestly considered that his actions were most likely to promote the success of the Company for the benefit of its members as a whole (s.172 CA 2006) having regard, amongst other matters, to the need to act fairly as between members of the Company. In my view, he did not. David caused the Company to recognize the votes on the Trust shares either knowing that the exercise of the voting rights on the shares was unlawful or being reckless as to the point. David's primary motivation in taking these steps was to secure the appointment of Mr Montlake as a director and the reappointment of Diana so that he and his trusted group of associates could continue to exercise control over the board. His aim was to control the outcome of the general meeting on 22 July 2020 and subvert the legitimate exercise by the shareholders of their rights to appoint and remove directors. The effect was to secure the appointment of Mr Montlake as a director at the expense of the appointment of Mr Yorke-Starkey. In doing so, he failed to act for the benefit of the members of the Company as a whole and he did not have regard to need to act fairly between the members as a whole.
308. I do not accept David's evidence that he honestly believed that he was acting in the best interests of the Company as a whole. If he had been mindful of his duty to act fairly between the members as a whole, he would have taken independent advice on behalf of the Company. Mr Montlake was in no position to provide independent advice in relation to his own appointment. I accept that David may have been of the view that it was in the commercial interests of the Company for Mr Montlake to be appointed given his knowledge of the Kirby litigation. But that is no answer to a claim for breach of s.172 (*Barrowfen* [276]).
309. I also accept that, for similar reasons, David may also have been in breach of his duty to avoid conflicts of interest, within s.175 CA 2006, by pursuing his personal interest in securing control of the board.

310. I have not considered whether, even if it could be said that David did not act in breach of his duties as a director in causing the Company to recognize the votes on the Trust shares, it would be inequitable in the circumstances to permit the recognition of the votes. That was not part of Sam's pleaded case.

The failure to recognize the votes on the preference shares

311. I have found that the holders of the preference shares (other than David and Sam) were entitled to vote at the general meeting on 22 July 2020 because the arrears of dividends on their shares had not been paid in accordance with the Articles.
312. Mr Montlake in his brief calculation of the votes on the resolution for his appointment counted the votes of the preference shares held by David and Sam, but failed to take into account the votes of any of the other preference shareholders. The email which David circulated to shareholders following the meeting setting out the results of the resolutions at the meeting was based on an assumption that the preference shareholders were not entitled to vote.
313. Leaving to one side the issues surrounding the validity of proxy votes and votes made under powers of attorney, the failure to recognize the votes of those shareholders was a breach of paragraph 6(c) of the Memorandum and regulation 62 of Table A. Even if the issues concerning the validity of proxy votes and the votes made under powers of attorney had some substance, Lady Angela was present at the meeting in person and her votes should have been counted. The failure of David to recognize the votes on the preference shares was also a breach of his duty to act in accordance with the Company's constitution (s.171(1)(a) CA 2006).
314. David's primary motivation in taking these steps was to secure the appointment of Mr Montlake as a director and the reappointment of Diana so that he and his trusted group of associates could continue to exercise control over the board. His aim was to influence or control the outcome of the general meeting and subvert the legitimate exercise by the shareholders of their rights to appoint and remove directors. For the reasons that I have given at [304] to [310] above (in the context of the exercise and recognition of the votes on the Trust shares), David's actions in failing to recognize the votes on the preference shares were in breach of his duty to promote the success of the Company for the benefit of the members as a whole having regard (amongst other matters) to the need to act fairly between members (s.172 CA 2006).

Other aspects of the meeting on 22 July 2020

315. The recognition of the votes on the Trust shares and the failure to recognize the votes on the preference shares were the two main aspects of the conduct of the

meeting on 22 July 2020 by which David and Mr Montlake manipulated the results of the voting on the resolutions to secure Mr Montlake's appointment. Without those elements, the resolution to appoint Mr Montlake would have been lost.

316. These were not, however, the only aspects of the meeting of which Sam complained in his Petition. I have listed the other main factors at [280] above: namely, the convening of the meeting immediately before the meeting which had been called by Sam; the assumption of control of the meeting by David's assuming the role of Chair even though he had not been properly elected; the use of that control of the meeting to put the resolution for Mr Montlake's appointment first; the manipulation of the voting process; David's purporting to exercise the casting vote of the Chairman; and the use of Mr Montlake's appointment to exclude Mr Yorke-Starkey's appointment.
317. I do not propose to go through each of these other elements in detail. It is sufficient for me to say that I regard all these steps as part of the process of securing Mr Montlake's appointment and Diana's reappointment so that David could ensure he retained control of the board within his trusted group of associates. They were part of a process to influence or control the outcome of the general meeting. For the reasons that I have given above, I do not accept that David honestly believed that he was acting in the best interests of the members as a whole when he took these steps. He was acting in breach of his duty to act to promote the success of the Company within s.172 CA 2006.

The entry into the Shoot Agreement with GSL

318. In his Petition, Sam claims that:
- i) without the authorization of the Company, David sought to confer the benefit of the shooting rights over the Company's land on GSL, a company owned and controlled by his son, Richard;
 - ii) in the circumstances, David acted in breach of his duty to avoid a conflict of interests under s.175 CA 2006 in relation to those arrangements, which were designed to benefit his son.
319. I agree with Mr Jory QC that David was not authorized by the board to enter into a 10-year agreement with GSL. Sam had agreed to the grant of the shooting rights, but only for one season, and subject to his having some input into the terms that were negotiated.
320. As regards the potential application of s.175 CA 2006. Mr Jory QC accepted in his submissions that the test for compliance with s.175 was a subjective test (based on the judgment of Tom Leech QC in *Barrowfen* (at [286])). As I have

mentioned above, my own view would be that the better view is that an objective test applies. I do not, however, need to decide the point in this case.

321. Although Mr Young submitted otherwise, it is clear beyond doubt that David's negotiation of the Shoot Agreement with GSL and, in particular, his decision to enter into a 10-year agreement, involved a conflict of his personal interests with the interests of the Company. David was aware that this was the case. For this reason, he concealed details of the negotiations and the resulting contracts from Sam in the full knowledge that he was acting in breach of his agreement with Sam.
322. In his skeleton argument, Mr Young raised the exception in s. 175(3) CA 2006. He says that s.175 cannot apply in these circumstances because the arrangements fall within s.175(3). Mr Jory QC did not address this point directly in his submissions. However, as I mentioned above, I agree with the approach of Adam Johnson QC (sitting as a deputy judge of the High Court) in *Re Dinglis* on this point. In that case, the deputy judge took the view that s.175(3) is not confined to circumstances in which a director is personally a party to the relevant transaction (*Re Dinglis* [308]). Rather s.175(3) can extend to any transaction in which a director is interested whether directly or indirectly. That will encompass circumstances where the company proposes to enter into a transaction or arrangement with another person with whom the director is associated or in which the director is interested.
323. In the present case, the Shoot Agreement is a transaction or arrangement with the Company. Any question of a conflict of interest cannot fall within the ambit of s.175.
324. Mr Young also submitted that there could be no breach of the duty within s.175 on the grounds that s.175(4)(a) or (b) would apply. Given my conclusion on the scope of s.175(3), I do not strictly need to deal with this point. However, if I am wrong on the scope of s.175(3), in my view, s.175(4) does not assist the respondents. There was a clear conflict of interest in David's negotiating and agreeing the terms of the Shoot Agreement with GSL. It could not be said that the situation "could not reasonably be regarded as likely to give rise to a conflict of interest" (within s.175(4)(a)). Furthermore, although Sam agreed to the grant of the shooting rights to GSL, his agreement was limited to the grant of rights for one season (not 10 years). David was not authorized to negotiate an agreement with a term of 10 years. The exception in s.175(4)(b) could not therefore apply.

Summary

325. In summary, my conclusions on whether the various matters raised in the Petition were "unfair" for the purpose of s.994 CA 2006 are as follows:

- i) There was no resolution of the board to appoint Diana at the meeting on 3 February 2020. She was not validly appointed under the Articles of Association of the Company. David's registration of Diana as a director was a breach of his duty to act in accordance with the Company's constitution in s.171(1)(a) CA 2006.
- ii) David was not elected as Chairman of the Company under regulation 101 of Table A. He was, from time to time, chosen to act as Chairman of relevant board meetings (under regulation 101 of Table A). He was not chosen to chair the board meeting on 18 June 2020. He was not elected or chosen to chair the general meeting on 22 July 2020 (under regulation 55 or 56 of Table A).
- iii) The accrued dividends on the preference shares held by shareholders other than David and Sam were not paid in advance of the general meeting on 22 July 2020. Under the terms of the Memorandum and Articles of Association of the Company, those preference shareholders were entitled to vote on the resolutions that were put to that meeting. The accrued dividends on the preference shares held by David and Sam were paid in advance of the general meeting on 22 July 2020.
- iv) The steps taken by David to pay the dividends on the preference shares at the time were taken in breach of his duty as a director to exercise his powers for the purpose for which they were conferred under s.171(1)(b) CA 2006.
- v) There was no breach by David of his duty as a director to exercise his powers for the purpose for which they were conferred under s.171(1)(b) CA 2006 in writing up the entry for the Trust shares in the register of members with his own name as the first-named of the trustees, although his actions may involve a breach of his duty to avoid conflicts of interest.
- vi) As regards the conduct of the meeting on 22 July 2020:
 - a) the recognition of the votes on the Trust shares was a breach of David's duty as a director to promote the success of the Company for the benefit of the members as a whole under s.172 CA 2006 and his duty to avoid conflicts of interest under s.175 CA 2006;
 - b) the failure to recognize the votes on the preference shares held by shareholders other than David and Sam was a breach of the terms of the Memorandum and Articles of Association of the Company and a breach of David's duties as a director to act in accordance with the Company's constitution under s.171(1)(a)

CA 2006 and to promote the success of the Company for the benefit of the members as a whole under s.172 CA 2006;

- c) the various other steps taken in preparation for or at the meeting to manipulate the voting process at that meeting to secure the appointment of Mr Montlake involved breaches of David's duty as a director to promote the success of the Company for the benefit of the members as a whole under s.172 CA 2006.
- vii) There was no breach of David's duty as a director to avoid conflicts of interest under s.175 CA 2006 in the negotiation and entry into the Shoot Agreement with GSL.

WAS THE CONDUCT COMPLAINED OF "PREJUDICIAL"?

326. As I have described above, if a shareholder is to bring a claim for unfair prejudice under s.994 CA 2006, it is not sufficient for the shareholder to demonstrate that the conduct of the company's affairs was "unfair" in the sense required by s.994. The shareholder must also show that the conduct is "prejudicial" in the sense of causing prejudice or harm to the shareholder's interest.

The parties' submissions

327. Mr Young, for the respondents, says that there was no "prejudice" in that sense from the conduct of which Sam complains. Any breaches were "technical breaches". There was no real loss to the Company or the members, whether financial or otherwise. In any event, Sam and the other members acquiesced in any breaches.

328. Mr Jory QC, for Sam, says that it is not necessary to demonstrate any financial prejudice in the sense of a loss to the Company or a reduction in the value of a member's interest arising from the conduct of which Sam complains. This is a clear case of non-financial prejudice. The breaches of the Company's constitution and the breaches of duty to which Sam refers in his Petition reflect circumstances in which the rights of the members as members to appoint the board have been disregarded (*Re Coroin (No. 2)* [630]).

329. I have been referred by both Mr Jory QC and Mr Young to the passage in the judgment of David Richards J in *Re Coroin (No. 2)* at [630]-[631]. It is clear from that passage that prejudice of which a petitioner complains must be prejudice in his capacity as a member. However, although it may be more straightforward to establish prejudice in a case of financial loss, prejudice need not be financial in nature. As David Richards J confirms (at [630]): "A disregard

of the rights of a member as such, without any financial consequences, may amount to prejudice falling within the section”.

The appointment of Diana as a director

330. In my view, the appointment of Diana at the meeting on 3 February 2020 was not valid. The registration of her appointment was not in accordance with the Company’s constitution and David’s actions to register her appointment were a breach of his duty to act in accordance with the Company’s constitution (s.171(1)(a) CA 2006). That having been said, in my judgment, there was no material prejudice to Sam in his capacity as a member arising from the invalid appointment of Diana.

331. My reasons are as follows:

- i) There was no financial loss to the Company from Diana’s appointment as a director and none has been pleaded.
- ii) The purported appointment of Diana as a director was made at a directors’ meeting and pursuant to the directors’ rights to fill a casual vacancy under regulation 95 of Table A. There was no infringement of the members’ rights to appoint or remove a director.
- iii) The shareholders had the opportunity to refuse to confirm Diana’s appointment at the general meeting on 22 July 2020. Notwithstanding the other concerns regarding the conduct of the business of that meeting, Diana’s appointment was confirmed by the shareholders at that meeting and would have been confirmed even if the votes on Trust shares were ignored and the votes on the preference shares counted – the two matters of which Sam most vehemently complains.
- iv) Even if Sam might say that the balance of the board was “tipped” in the period between 3 February and 22 July 2020 as a result of Diana’s appointment, in my view that was not a matter of material prejudice to the shareholders. Diana’s involvement in the other matters of which Sam complains was limited. Notwithstanding the invalidity of Diana’s appointment, the shareholders had rights under the Articles and as a matter of company law to remove her as a director. They did not exercise them.
- v) Sam no longer seeks relief in relation to Diana’s appointment.

Acting as chairman

332. As I have mentioned, David assumed the position of Chairman in relation to many board meetings and Sam allowed him to do so. However, David was not

“elected” as Chairman of the board pursuant to regulation 101 of Table A. He may have been “chosen” to act as chair of many board meetings, but he was not “chosen” to act as Chairman of the meeting on 18 June 2020, nor was he “chosen” to act as Chairman in relation to the decision to pay dividends on the preference shares in advance of the meeting on 22 July 2020. David was not elected to chair the general meeting on 22 July 2020 under regulation 55 of Table A nor was he chosen to chair that meeting under regulation 56 of Table A.

333. As regards most of these issues, David’s acting as the Chairman and purporting to exercise of a casting vote at these meetings did not give rise to any material prejudice to shareholders. They were matters concerning the conduct of the business of the Company at the level of the board and not matters which affected the rights of the shareholders. The exception is the conduct of the general meeting on 22 July 2020 and the purported exercise of a casting vote in favour of Mr Montlake’s appointment. I shall address those issues in the context of the steps taken at that meeting.

Steps to pay the dividends on the preference shares

334. I have reached the conclusion that the dividends on the preference shares (other than those held by David and Sam) were not paid and the holders of those shares remained entitled to vote at the meeting on 22 July 2020. To the extent that the dividends were paid, although David did not act in breach of the constitution in seeking to pay them, by taking the steps to pay the dividends when he did, David acted in breach of his duty as a director to exercise his powers for the purpose for which they were conferred (s.171(1)(b) CA 2006).
335. In my view, there was no material prejudice to Sam and the other shareholders arising from the steps that David took in an attempt to pay the dividends in so far as their rights as preference shareholders to receive dividends are concerned. As a consequence of those steps, the dividends were either paid or not. If they were not, the shareholders remained entitled to the dividends. Any potential prejudice arose from the effect of the payment (or otherwise) on the entitlement of the preference shareholders to vote at the general meeting on 22 July 2020. I shall address that issue in the context of the steps taken at that meeting.

Registration of the Trust shares

336. There was a potential breach of David’s duty as a director to avoid a conflict of interest in relation to his registration of the Trust shares in joint-names but with himself as the first-named trustee. However, in my view, the registration of the Trust shares in this manner did not itself give rise to material prejudice to Sam or the other shareholders. Any prejudice, if any, arose on the exercise by David of the votes on the Trust shares in breach of trust and the recognition of those

votes at the general meeting on 22 July 2020. I shall also address that issue in the context of the steps taken at that meeting.

Conduct of the general meeting on 22 July 2020.

337. As I have discussed above, there are various actions which, in my view, constitute a breach of the Articles or give rise to breaches of David's duties as a director arising from the conduct of the meeting on 22 July 2020. They include: the usurpation of the general meeting on 22 July 2020 called by Sam to ensure that the resolutions put to the shareholders would include the resolutions to appoint Mr Montlake and reappoint Diana and reinstate the order in which they were put to the general meeting; the recognition of the votes on the Trust shares; the recognition of the votes on the preference shares held by David and Sam; the failure to recognize the votes on the other preference shares, in particular the preference shares held by Lady Angela; the purported exercise of the Chairman's casting vote; and the use of Mr Montlake's appointment to exclude the possibility of the appointment of Mr Yorke-Starkey.
338. I agree with Mr Jory QC that all of these steps were designed to secure the appointment of a board that remained within the control of David and his trusted group of associates. The overall effect was that Mr Montlake was appointed against the wishes of the majority of shareholders and that Mr Yorke-Starkey was not appointed despite the support of the majority of shareholders entitled to attend and vote at the meeting. In my view, that was a clear "disregard of the members' rights as members" to adopt the words of David Richards J in *Re Coroin (No. 2)* (at [630]) and it was of such sufficient importance to constitute "prejudicial" conduct for the purpose of s.994.
339. The rights of shareholders to appoint and remove directors are amongst the most fundamental rights that shareholders enjoy. The shareholders are clearly prejudiced if that right is undermined. The fundamental importance of the right is underscored by section 168(1) of CA 2006, which provides that a company can remove a director before the expiration of his or her period of office notwithstanding anything in any agreement between them. The right of shareholders to appoint and remove directors may, of course, be subject to limits under the terms of the articles of association. There may be a restriction on the number of directors (as in this case). The articles may provide for weighted voting rights in relation to board appointments (as in *Bushell v Faith* [1970] AC 1099). But those are matters which are the subject of agreement between the shareholders through the articles.
340. In the present case, the general meeting was managed and controlled by David and Mr Montlake to ensure that the shareholders' desire not to appoint Mr Montlake was ignored. I accept that, if the dividends had been properly paid on the preference shares, as they could have been, the preference shareholders

themselves would not have been entitled to vote. However, they had not been paid, and they were entitled to vote. Even if the dividends had been paid, the Company would have been deadlocked and David would not have been in a position, acting lawfully, to impose his choice of directors on the other shareholders. That is the position that the Company's constitution was intended to enshrine and the position which David (with the assistance of Mr Montlake) sought to undermine.

341. For these reasons, I agree with Mr Jory QC that the Petition is well-founded in relation to these matters.

The Shoot Agreement

342. I should deal briefly with the Shoot Agreement. I have found that there was no breach of duty under s.175 CA 2006 in respect of the negotiation and execution of the Shoot Agreement with GSL in April 2020. Even if I was wrong on that point, I would have found that there was no material prejudice to members arising from the entry into and execution of that agreement.

343. My reasons are as follows:

- i) The Petition and Sam's claims relate primarily to the entry into the 10-year agreement on 27 April 2020 and focus on its 10-year term. That agreement was terminated on 1 February 2021, before the issue of the Petition. Any prejudice arising from the negotiation of that agreement did not exist at the time of the issue of the Petition.
- ii) A revised agreement has been negotiated between David, acting for the Company, and Richard, acting for GSL. It has been reviewed by the board and been subject to a review by an independent consultant. There is no evidence that the terms of that agreement have been manipulated in a way that could constitute prejudice to the shareholders.

THE FORM OF RELIEF

The requested relief

344. In the prayer attached to his Petition, Sam requests various forms of relief. I have summarized them below.

- i) The primary form of relief that Sam requests is a bespoke remedy in the form of an order from this court that a meeting of the shareholders be convened at which separate resolutions should be put to remove each person currently registered as a director and, for those persons who wish to be re-elected separate resolutions to re-appoint them. The meeting could also consider resolutions to appoint additional directors if they are

willing to act. Sam requests that the court make directions that, at that meeting, there should be no Chairman of the Company and/or no casting vote, the holders of the preference shares should be entitled to vote, and the holders of the Trust shares should only be entitled to vote if the trustees agree as to how the Trust shares are to be voted on each resolution.

ii) Sam then asks for specific relief concerning the appointment of Mr Montlake:

- a) a declaration that, pending the proposed general meeting, the directors of the Company are David, Diana, Sam, and Mr Hayward;
- b) an order that the Company shall not recognize the appointment of Mr Montlake or hold him out as a director;
- c) an order that Mr Montlake shall not hold himself out as a director or permit himself to be held out as a director.

iii) Sam also seeks:

- a) an order for rectification of the register of members of the Company to show that the Trust shares are registered in the name of the trustees but with Sam as the first-named holder;
- b) an indemnity from David in respect of all or any liabilities suffered by the Company in relation to the appointment of Mr Montlake and an order for an account of those liabilities;
- c) a declaration that David is not the Chairman or Managing Director of the Company;
- d) an order that no payment of dividends be made to the holders of the preference shares until following the proposed general meeting;
- e) an order that the Company accept the repayment by Sam of the dividend on his preference shares;
- f) an order that the Company does not owe any amount to David in respect of the dividend on his preference shares.

345. Sam no longer challenges the appointment of Diana and Mr Hayward. At the hearing, Mr Jory QC suggested that, at the meeting convened by court order for the purpose of the bespoke remedy requested by Sam, resolutions should not be

put for the removal and re-appointment of Diana and Mr Hayward. However, he argued that the process should continue to apply to both Sam and David, as well as Mr Montlake, as neither Sam nor David has been subject to retirement by rotation as required by regulations 89 to 92 of Table A and David had expressed a wish not to serve on a future board with Sam.

The relevant law

346. The court has wide powers to grant relief from unfair prejudice. They are set out in s.996 CA 2006. Section 996(1) provides that where the court is satisfied that a petition is well-founded, the court may make such order as it thinks fit by way of a remedy. Section 996(2) sets out certain specific forms of relief that the court may grant.

347. Section 996 is in the following form:

996 Powers of the court under this Part

(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.

(2) Without prejudice to the generality of subsection (1), the court's order may—

(a) regulate the conduct of the company's affairs in the future;

(b) require the company—

(i) to refrain from doing or continuing an act complained of, or

(ii) to do an act that the petitioner has complained it has omitted to do;

(c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;

(d) require the company not to make any, or any specified, alterations in its articles without the leave of the court;

(e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.

348. The section therefore confers a wide discretion on the court. I have not been referred by the parties to much authority on the exercise of this discretion other than the decision of the Court of Appeal in *Re Neath Rugby*. I take from that

decision that the court is not restricted in the exercise of its discretion to the grant of relief that the petitioner has requested or that the petitioner has agreed to (*Re Neath Rugby* [88], [91])

The appropriate remedy in this case

349. I have found that the Petition is in part well-founded. The matters in respect of which the Petition is well-founded relate to the conduct of the general meeting on 22 July 2020 and the steps taken at that meeting to undermine the right of the shareholders to appoint the board. In that respect, the only matters which remain at issue between the parties are (i) the appointment of Mr Montlake and (ii) the fact that the appointment of Mr Montlake was used to prevent the appointment of Mr Yorke-Starkey.
350. The court has a wide discretion to grant appropriate relief under s.996(1) CA 2006. However, that discretion must be exercised for the purpose described in s.996(1) and so any remedy granted should be appropriate “for giving relief in respect of the matters complained of”. Any remedy that I do grant should therefore seek to address those matters. In deciding upon the appropriate remedy in this case, I am not restricted to the form of relief that is requested by the petitioner. In any event, in this case, the Petition includes the usual request for “such other order as the court thinks fit” as an alternative to the specific remedies that are requested.
351. It is not uncommon in relation to successful petitions under s.994 for the court to provide for the purchase of the shares of some members of the company by other members or by the company itself (within s.996(2)(e)). Such an order would not be appropriate in this case. This is a family company, in which all family members were intended to participate. Notwithstanding Mr Montlake’s proposals at one stage in the chain of events for either of David or Sam to purchase the shares of the other, neither of them has shown any desire to relinquish his stake in the Company. I have also considered whether to order a break-up of the assets of the Company into separate companies each owned by one of them (with appropriate participation for the preference shareholders and the Trust), but I have no basis on which to divide the assets between the shareholders in such a way. In any event, such orders would not directly address the prejudice that has occurred in this case.
352. The prejudice that has taken place in this case relates to the appointment of Mr Montlake and the consequent exclusion of Mr Yorke-Starkey. I therefore need to address the appointment of Mr Montlake. For that reason, I propose to make the declaration similar to that which Sam has requested in his Petition that Mr Montlake is not a director of the Company and that the directors of the Company are David, Diana, Sam and Mr Hayward. I will also make the orders requested in the Petition that the Company shall not recognize the appointment of Mr

Montlake or hold him out as a director and that Mr Montlake shall not hold himself out as a director or permit himself to be held out as a director, unless and until he is subsequently validly appointed under the constitution of the Company.

353. Mr Jory QC has made the case for a bespoke remedy under which David, Sam, and Mr Montlake would all, in effect, be put through a specific form of re-election process. He submits that it is appropriate to require David and Sam both to resign and be subject to re-election in part because David has indicated that he is no longer prepared to sit on a board with Sam. I do not accept that submission. David and Sam have continued to sit on the same board throughout this process and the evidence does not show that the board is dysfunctional following the appointment of Mr Hayward. The only matter of which Sam now complains is the appointment of Mr Montlake and the consequent exclusion of Mr Yorke-Starkey. It would not be appropriate to require Sam and David both to resign to address that issue. David can retire as a director if he wishes to do so.
354. Mr Jory QC also submitted that it was appropriate to require both David and Sam to be subject to re-election because neither of them has, in the past, been subject to retirement by rotation as required by the Company's constitution. I acknowledge his point. However, the failure of the Company to operate the retirement by rotation procedure in the past is not a matter in respect of which any unfairly prejudicial conduct is alleged in the Petition. In my view, it is not appropriate to address that issue by way of relief granted in relation to this Petition.
355. I have considered whether it is appropriate to go further and to order a meeting at which Mr Montlake's appointment can be put to shareholders together with the appointment of others who may wish to act. The shareholdings in the Company have not changed. Such an order would allow the court to provide for all the shareholders, who should have been entitled to vote at the general meeting held on 22 July 2020, to vote on the resolutions and secure the appointment of a board that is in accordance with the wishes of the members as a whole. That would include allowing the preference shareholders to vote at that meeting. If I do not order such a meeting, the accrued dividends could be paid at any time – indeed the constitution of the Company requires that they should be paid provided that reserves are available – and the preference shareholders would not have an opportunity to vote on the composition of the board in the future. On the other hand, I take into account that such an order arguably puts too much power into the hands of the preference shareholders, who would ordinarily only be entitled to vote if the preference share dividend was in arrears, and would otherwise have no say in the composition of the board.

356. Having taken those issues into account, I have decided that I will make such an order if there are candidates for appointment who have the support of shareholders and who are prepared to act. Those candidates could include Mr Montlake and/or Mr Yorke-Starkey. Such an order would address the prejudice that has taken place, which deprived the shareholders at the time of the right to determine the composition of the board.
357. I will hear submissions on whether there are such candidates together with submissions on the form of any such order to deal with such matters as notice, the shareholders who are entitled to vote and proposals for the chairing of any such a meeting. If there are no such candidates, the board should remain comprised of the four remaining directors. As this judgment will be handed down by email, I will hear those submissions at a further hearing, which I will ask the listing office to convene.
358. In the Petition, I am asked to make an order for the rectification of the register of members so that the Trust shares are registered in joint-names of the trustees, but with Sam as first-named holder of the shares. I have not found any material prejudice in the manner of the registration of the Trust shares itself. Any unfairly prejudicial conduct arose from the exercise of the votes on those shares in breach of trust by David at the general meeting on 22 July 2020. I am persuaded, however, that I should take steps to prevent a repetition of that event, and for that reason, I will order that the Trust's existing holding of ordinary shares should be divided into two and a number of ordinary shares representing one-half the Trust's holding (i.e. 2,150 ordinary shares) should be transferred into the joint names of Sam and David as trustees of the Trust, but with Sam as the first-named trustee in the register.
359. As regards the other forms of relief requested in the Petition:
- i) I will not make an order for an indemnity from David in respect of matters arising from the appointment of Mr Montlake or an order for an account of any such liabilities. It has not been part of Sam's case that the Company has suffered any financial loss.
 - ii) I will not make the orders regarding the payment of the dividends that are requested. In my view the accrued dividends should be paid if sufficient funds and appropriate reserves are available. The constitution assumes that they will be paid and that the preference shareholders will only be entitled to vote if the accrued dividend is in arrears.
 - iii) I will make a declaration that David has not been elected as Chairman pursuant to regulation 101 of Table A or regulation 55 of Table A.

360. As I have mentioned, I will hear submissions on the form of the order at a further hearing. I will ask counsel to liaise with the listing office to agree a date for that hearing, at which the court may also deal with any consequential matters. I direct that the hearing of this Petition is adjourned until that date. For the avoidance of doubt, I also direct that, for the purpose of CPR 52.12(2)(a), the period for filing any appeal notice will be 21 days from the date of that hearing. If no date for a further hearing can be agreed within 14 days of this judgment, the court will make further directions.

Appendix

Relevant regulations from Table A

7. Except as required by law, no person shall be recognised by the company as holding any share upon trust, and the company shall not be bound by or be compelled in any way to recognise (even when having notice thereof) any equitable, contingent, future or partial interest in any share or any interest in any fractional part of a share or (except only by these regulations or by law otherwise provided) any other rights in respect of any share except an absolute right to the entirety thereof in the registered holder.

55. The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company, or if there is no such chairman, or if he shall not be present within fifteen minutes after the time appointed for the holding of the meeting or is unwilling to act the directors present shall elect one of their number to be chairman of the meeting.

56. If at any meeting no director is willing to act as chairman or if no director is present within fifteen minutes after the time appointed for holding the meeting, the members present shall choose one of their number to be chairman of the meeting.

60. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded, shall be entitled to a second or casting vote.

62. Subject to any rights or restrictions for the time being attached to any class or classes of shares, on a show of hands every member present in person shall have one vote, and on a poll every member shall have one vote for each share of which he is the holder.

63. In the case of joint holders the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of members.

89. At the first annual general meeting of the company all the directors shall retire from office, and at the annual general meeting in every subsequent year one-third of the directors for the time being, or, if their number is not three or a multiple of three, then the number nearest one-third, shall retire from office.

90. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.

91. A retiring director shall be eligible for re-election.

92. The company at the meeting at which a director retires in manner aforesaid may fill the vacated office by electing a person thereto, and in default the retiring director shall if offering himself for re-election be deemed to have been re-elected, unless at such meeting it is expressly resolved not to fill such vacated office or unless a resolution for the re-election of such director shall have been put to the meeting and lost.

95. The directors shall have power at any time, and from time, to appoint any person to be a director, either to fill a casual vacancy or as an addition to the existing directors, but so that the total number of directors shall not at any time exceed the number fixed in accordance with these regulations. Any director so appointed shall hold office only until the next following annual general meeting, and shall then be eligible for re-election but shall not be taken into account in determining the directors who are to retire by rotation at such meeting.

98. The directors may meet together for the despatch of business, adjourn, and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes, the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time summon a meeting of the directors. It shall not be necessary to give notice of a meeting of directors to any director for the time being absent from the United Kingdom.

101. The directors may elect a chairman of their meetings and determine the period for which he is to hold office; but if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the directors present may choose one of their number to be chairman of the meeting.

107. The directors may from time to time appoint one or more of their body to the office of managing director for such period and on such terms as they think fit, and, subject to the terms of any agreement entered into in any particular case, may revoke such appointment. A director so appointed shall not, whilst holding that office, be subject to retirement by rotation or be taken into account in determining the rotation of retirement of directors, but his appointment shall be automatically determined if he cease from any cause to be a director.

114. The company in general meeting may declare dividends, but no dividend shall exceed the amount recommended by the directors.

115. The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

116. No dividend shall be paid otherwise than out of profits.

120. Any general meeting declaring a dividend or bonus may direct payment of such dividend or bonus wholly or partly by the distribution of specific assets and in particular of paid up shares, debentures or debenture stock of any other company or in any one or more of such ways, and the directors shall give effect to such resolution, and where any difficulty arises in regard to such distribution, the directors may settle the same as they think expedient, and in particular may issue fractional certificates and fix the value for distribution of such specific assets or any part thereof and may determine that cash payments shall be made to any members upon the footing of the value so fixed in order to adjust the rights of all parties, and may vest any such specific assets in trustees as may seem expedient to the directors.

121. Any dividend, interest or other moneys payable in cash in respect of shares may be paid by cheque or warrant sent through the post directed to the registered address of the holder or, in the case of joint holders, to the registered address of that one of the joint holders who is first named on the register of members or to such person and to such address as the holder or joint holders may in writing direct. Every such cheque or warrant shall be made payable to the order of the person to whom it is sent. Any one of two or more joint holders may give effectual receipts for any dividends, bonuses or other moneys payable in respect of the shares held by them as joint holders.