Neutral Citation Number: [2023] EWHC 289 (Ch)

Case Nos: CR-2019-005930 and
CR-2019-008057

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

Royal Courts of Justice,
Rolls Building,
Fetter Lane, London EC4A 1NL

Date: 24/02/2023

Before :

ICC JUDGE MULLEN

- -

IN THE MATTER OF SIMMONDS TRANSPORT LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

BETWEEN :

ANDREW SIMMONDS	**Petitioner**
- and -	
(1) JEREMY PAUL WILSON	
(2) RICHARD MARK JONES	
(3) MARK SIMMONDS	
(4) NEIL SIMMONDS	
(5) PAUL SIMMONDS	
(by his litigation friend, Ms Donna Holmes)	
(6) SIMMONDS TRANSPORT LIMITED	**Respondents**

AND IN THE MATTER OF STA VEHICLE CENTRES LTD

AND IN THE MATTER OF THE COMPANIES ACT 2006

BETWEEN :

ANDREW SIMMONDS	**Petitioner**
- and -	
(1) MARK SIMMONDS	
(2) STA VEHICLE CENTRES LTD	**Respondents**

- -

- -

Ms Sarah Clarke (instructed by **Bater Law Ltd**) for **the Petitioner**

Mr Shakil Najib (instructed by **MFG Solicitors LLP**) for **the First to Fourth Respondents in** the Simmonds Transport Limited petition and **the First Respondent** in the STA Vehicle Centres Ltd petition

Ms Donna Holmes (solicitor, **Anthony Collins Solicitors LLP)** provided written submissions as litigation friend of **the Fifth Respondent** in the Simmonds Transport Limited petition

Hearing dates: 24th, 25th, 26th, 27th and 28th January 2022,
4th March 2022, 22nd April 2022 and 1st July 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 24th February 2003 by circulation to the parties or their representatives by e-mail.

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ICC JUDGE MULLEN

ICC JUDGE MULLEN :

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Introduction

1. This is my judgment following the trial of two petitions presented by Mr Andrew Simmonds under section 994 of Companies Act 2006 ("CA 2006"). The first was

presented on 5th September 2019 in respect of Simmonds Transport Limited ("STL" and "the STL Petition") and the second was presented on 29th November 2019 in respect of STA Vehicle Centres Ltd ("STA" and "the STA Petition").

2. The respondents to the STL Petition are Mr Jeremy Paul Wilson, Mr Richard Mark Jones, Mr Mark Simmonds, Mr Neil Simmonds, Mr Paul Simmonds and STL itself. The individual parties to the STA Petition are Andrew and Mark, and the company is the second respondent. The individual parties to these petitions were predominantly referred to by their given names at the hearings and I mean no discourtesy by adopting the same approach in relation to the parties with the surname "Simmonds" and to Jeremy Wilson for the sake of clarity. I shall refer to Mr Jones as "Mark Jones", again adopting the approach taken at the trial, to distinguish him from Mark Simmonds.

3. Andrew, Mark and Neil are brothers and the principal figures in both petitions. Paul is the fourth brother but, for the reasons that I shall explain, has taken no part in the proceedings. When referring collectively to "the respondents" to the relevant petition, I do not include the company or Paul.

The STL Petition

4. STL carries on a freight transport logistics and warehousing business based in Shropshire. The business now carried on by STL was founded by Geoffrey Simmonds in about 1972. He is the father of Andrew, Mark, Neil and Paul. STL was incorporated in May 2001 under the name Tronicweb Limited and was acquired in June of that year for the purposes of carrying on the business. It changed its name to G. J. Simmonds & Sons Ltd on 7th August 2001 and adopted its current name on 24th March 2004.

5. Andrew alleges that STL was founded on the basis of a personal relationship of trust and confidence between shareholders and an agreement or understanding that each shareholder would be entitled to be represented on the board of directors and to be involved in major or strategic decisions. In other words, it was a "quasi-partnership" company. He also alleges that the shareholders were to be remunerated by monthly interim dividends and salary, with supplementary dividends when the performance of the company allowed ("the Shareholders' Understanding"). The STL respondents deny this, saying that the relationship of the shareholders was regulated by a shareholders' agreement dated 20th June 2016 ("the Shareholders' Agreement") and that supplementary dividends had only been paid on two occasions when the trading of the company had been exceptional.

6. The unfair prejudice to Andrew pleaded in the STL Petition can be summarised as follows:

<u>Attempts to remove Andrew and exclusion from management</u>

i) Andrew alleges that in about 2017, Mark, Jeremy and Mark Jones attempted to take control of the board by removing Neil and Andrew as directors. In September 2017, Mark is said to have asked Andrew to resign as a director to "soften the blow" of removing Neil from the board. The pleaded case is that this conversation took place in September "2018" but it is clear from the

context, and the Reply, that September 2017 is meant. In any event, any such conversation is denied, as is a further such conversation in January 2018.

ii) In about November 2017, a solicitor called Mr Christopher Goode, who also worked as a management consultant, was asked to carry out a management review. Andrew says the true objective was to remove Neil and him as directors but the review was abandoned when it was made apparent that Andrew was unwilling to resign, in particular in an email dated 19th January 2018. The respondents deny this and say that the review came to an end when Mr Goode sadly received a diagnosis of a terminal illness in 2018 and later died.

iii) From June 2018 Andrew says that he became too unwell to attend the business regularly in person as a result of the respondents' conduct. During his absence he was not provided with information about the company including:

a) being refused access to the company's online accounts;

b) not being provided with board reports and minutes of meetings held on 28th June 2018 until 7th January 2019; and

c) not being provided with any notice of or documents relating to board meetings since the board meeting held on 8th January 2019.

iv) The respondents maintain that Andrew took a leave of absence and did not return, simply abandoning both STL and STA. He asked not to be contacted and it was not until 5th November 2018 that he submitted sick notes confirming that he had been signed off work by his GP with work-related stress. As presented at trial, their position was that, until that point, they were unaware that the reason for being off work was stress and that his absence was connected to chest and asthma problems.

v) The respondents maintain that Andrew retained access to those company online systems that he had had access to prior to his absence. They accept that the minutes of the meeting held on 28th June 2018 were provided late but say that this was a result of the fact that Mr Goode was responsible for preparing these and his illness delayed their preparation. No further board meetings were called between 8th January 2019 and the presentation of the STL Petition.

vi) The Reply makes further allegations that on 2nd September 2019, Andrew discovered that Mark had caused passwords to be changed, with the result that he could not access emails or draft audited accounts for 2018-2019. On 6th September 2019 notice of general meetings of STL and STA was given for the purpose of removing Andrew as a director. The resolution in respect of his directorship of STL was passed on 9th October 2019 but no valid resolution to remove him as a director of STA could be passed by reason of the meeting being inquorate.

Purchase of trucks

vii) Andrew alleges that three Iveco trucks were purchased in March 2019 at a cost of £20,000 to £30,000, which purchase had not been approved at a meeting of the board, in breach of the Shareholders' Agreement. The STL respondents' position is that the restrictions in the Shareholders' Agreement as to authorising expenditure over £3,000 were not routinely observed and the vehicles were purchased at the end of their hire agreements in accordance with STL policy.

Purchase and financing of the business of Codex Print Solutions Limited

viii) In Spring 2017 Andrew says that Mark told him that he and Jeremy intended to acquire a printing business. A company called Codex Print Solutions Limited ("Codex") was incorporated on 19th June 2017 for this purpose. Andrew alleges that this was a venture between Mark and Jeremy as equal shareholders. The STL respondents say that the shares were held on trust for the shareholders of STL in the same proportions in which they held their shares in the latter company. Andrew complains that he understood this to be a separate business belonging to Mark and Jeremy but, without STL board approval:

a) £24,000 was paid by STL to acquire the printing business;

b) substantial loans were made to Codex by STL to finance the purchase of machinery, including a guillotine at a cost of £13,000 plus VAT, and to pay wage bills;

c) a six year lease of a property called Pemberton House was entered into, the annual rent and rates for which were £36,120; and

d) a truck was leased at a cost of £239.88 per month and modified at a cost of £15,999 plus VAT.

The venture was unsuccessful and the loans made by STL were not repaid in full. The STL respondents say that Andrew was fully aware of the venture, which was entered into with the authority of the board of STL, and used the truck himself. While the printing business was unsuccessful, it caused only minimal loss to STL.

Non-payment of dividends

ix) An expected additional dividend was not paid in November 2018 and, on 1st December 2018, STL put Andrew on notice that it would reclaim dividends paid to him and cease paying future monthly dividends. Andrew objected on 4th December 2018 and this proposal did not proceed. Nonetheless, on 8th January 2019, STL proposed to put all dividends for all shareholders on hold, despite the fact that the company's balance sheet, as at 30th November 2018, recorded profits of £134,765.01 and reserves of £1,073,339.82. On 14th February 2019 an emergency board meeting was held at which the company resolved to suspend dividends. Andrew asserts that this was because of the

losses attributable to Codex. The Points of Defence deny that such a threat was made or that dividends were in fact suspended.

7. Andrew seeks a buyout of his shares on a willing buyer and seller basis, without a minority discount and taking account of the unfair prejudice alleged. The STL respondents contend that the relationship of trust and confidence broke down by reason of Andrew's non-attendance at the company and the allegations that he then raised as to exclusion and unfair prejudice.

The STA Petition

8. STA was incorporated on 22nd February 2002. Andrew and Mark hold 50% of the issued share capital each and have been directors since incorporation. It provided fleet maintenance and compliance services and its principal client was STL. Despite the similarity of the initials, the "ST" in the name does not stand for "Simmonds Transport"; rather "STA" stands for "Speed Limiters, Tachographs and Auto-electrics", in reference to the business that was acquired by STA and originally carried on by it. Andrew was responsible for its day-to-day running, receiving a modest salary, his remuneration principally being paid by STL and a proportion of it being recharged to STA. While Mark was also a director, he had "no operational role in STA but controlled the accounts with assistance from Mark Jones". Andrew again alleges that STA is a quasi-partnership between him and Mark in which both shareholders would be entitled to be involved in the management of the company and receive a salary from it.

9. Mark's position, as set out in the Points of Defence to the STA Petition, is that, while STA's shares were held by him and Andrew, they were held on trust for themselves and the other registered shareholders of STL in the proportions in which they held shares in STL. They were registered as shareholders when the business formerly carried on by STA was acquired from a Mr Mike Price. That position is also adopted by the STL respondents in the STL Petition.

Non-payment of dividend

10. Andrew claims that he and Mark agreed to gift half of their dividends to Neil and Jeremy in about 2018. Despite this agreement, he contends that he was not paid his own share of the dividend. Mark denies that there was any such "gift" but that Neil and Jeremy simply received their share of the dividends by virtue of their beneficial entitlement to a quarter each of the share capital of STA. He contends that Andrew received his share of the dividend on 16th July 2018.

Exclusion from management

11. Andrew alleges that, following his illness and absence from June 2018 onwards, he was excluded from management of the company. He complains of a letter of 30th August 2019, in which an intention to suspend dividend payments with effect from 19th September 2019 was expressed, together with an intention to refer Andrew to an occupational health advisor.

12. He further alleges that, on or before 2nd September 2019, Mark instructed STA's IT service provider to change Andrew's passwords to prevent him having access to

STA's server, including his company email account, Sage accounts and a system called "Stirling". Mark contends that STA's passwords were changed as a result of security breaches, and Andrew was not provided with a new password because he was off work and not expected to perform any duties. Andrew also contends that Mark failed to provided him with a copy of the company's accounts for the year ending 2018 and the draft accounts for the year ending 2019 when requested on 23rd and 24th September 2019. Mark's position is that he either had the material or it was available to him from Companies House.

13. As I have noted above, the STA Petition was presented later than the STL Petition and it contains further allegations of unfair prejudice in relation to STL. Andrew refers to his removal as a director of STL on 9th October 2019. Following notice being given of the meeting to consider the resolutions to remove him, he was referred to occupational health and attended an appointment on 23rd September 2019. The report concluded that the primary issue affecting Andrew's return to the companies was the dispute and that his ability to return to work was likely to depend on the resolution of that dispute. He was invited to attend a meeting on 10th or 17th October 2019 to discuss the report, by which time the resolution removing him as a director of STL had been passed. Finally, he complains of a decision on 7th November 2019 to suspend dividends in STL and to increase the remuneration of the remaining directors to £50,000 per annum.

14. The STA Petition was amended in September 2021 to include further allegations. It alleges that Mark caused additional charges and expenses, including management charges, vehicle hire costs and legal costs to be loaded onto STA. As a result, STA traded at a loss and its reserves were extinguished. This is said to have been a breach of Mark's duties:

    i) under section 171 CA 2006 to use his powers as a director for a proper purpose;

    ii) under section 172 CA 2006 to promote the success of the company for the benefit of the members as a whole;

    iii) under section 174 CA 2006 to use reasonable care skill and diligence; and

    iv) under section 175 to avoid conflicts of interest.

    Mark further attempted to place STA into company voluntary liquidation ("CVL") without a valid board resolution to do so, and the notices sent to creditors as a consequence led to the cessation of the business of the company.

15. Mark's position is that the charges were justified in that the legal fees related to employment advice provided to STA in relation to Andrew and an employee of STA, Mr Colin Griffiths. Where appropriate, legal fees were apportioned between STL and STA. The vehicle costs were said to be necessary for the purposes of providing a low emission vehicle. The additional costs reflected management charges to reflect the time spent by the STL team in running STA in Andrew's absence. In his attempt to place the company into liquidation he followed the advice of insolvency practitioners on the basis that the company was insolvent.

16. Andrew seeks a buyout of his interest on the same basis as in the STL Petition. Mark accepts that there has been a breakdown in trust and confidence but denies that such breakdown was occasioned by any conduct on his part.

Relevant procedural history and Paul's capacity

17. In the usual way, standard directions were automatically given on issue of each petition. MFG Solicitors accepted service on behalf of the respondents to both petitions, including Paul, in Paul's case indicating that he did not intend to take part in the proceedings. On 18th February 2020, Deputy ICC Judge Schaffer ordered that the two petitions should be heard together and gave directions for extended disclosure and costs management. Further directions to trial were given on 2nd June 2020 by Deputy ICC Judge Frith. He gave permission for expert evidence as to the value of the companies and their shares.

18. Andrew made an application for further extended disclosure, and on 18th January 2021 the respondents to each petition were ordered to carry out searches for documents falling into the categories of management accounts, nominal ledgers and bank statements and some of the case management directions were varied. On 10th September 2021, ICC Judge Prentis permitted Andrew to amend the STA Petition, giving consequential directions, the terms of which amendment I have described. He gave the parties permission to rely on a jointly instructed valuation expert as to the value of STA's premises at Halesfield 22, Telford, Shropshire TF7 4QX.

19. The trial took place over five days from 24th January 2022. During cross-examination, further reference was made to Paul's cognitive limitations. He was described as having learning difficulties in some of the documentation. Jeremy Wilson said that Paul's shareholding was given to him by his father and mother as a way of "protecting a vulnerable individual". Paul is named as a respondent to the STL Petition and it became clear over the course of evidence and discussions with counsel that there was a serious question as to Paul's capacity to conduct litigation or, troublingly, to have given instructions to MFG Solicitors as to the stance he wished to adopt in relation to the proceedings in the acknowledgment of service.

20. While everyone is presumed to have capacity, it appeared to me that there was a clear likelihood that Paul did not have capacity to conduct litigation. The effect of that is set out in Part 21 of the Civil Procedure Rules. That Part provides that a "protected party", which means a party who lacks capacity within the meaning of the Mental Capacity Act 2005 to conduct proceedings, must have a litigation friend to conduct proceedings on his behalf. CPR 21.3(2) limits the steps that can be taken in proceedings where a party requires, but does not have, a litigation friend as follows:

> "A person may not, without the permission of the court –
>
> (a) make an application against a child or protected party before proceedings have started; or
>
> (b) take any step in proceedings except –
>
> (i) issuing and serving a claim form; or

> (ii) applying for the appointment of a litigation friend under rule 21.6,
>
> until the child or protected party has a litigation friend."

CPR 21.3(4) then provides:

> "Any step taken before a child or protected party has a litigation friend has no effect unless the court orders otherwise."

Paul had never had a litigation friend in these proceedings and no order permitting the parties to proceed with the litigation had been sought or made.

21. I raised the question with counsel of whether it could be said with absolute confidence that no order that I might make would affect Paul's interests. Only in that unlikely event did it appear to me to be right to validate the steps taken in the proceeding and conclude them without Paul being represented. I invited the parties to consider the issue and it was agreed that a capacity assessment should be undertaken following close of evidence and that final submissions should be adjourned until the question of Paul's capacity had been resolved and any necessary directions to protect his position made.

22. A capacity assessment was undertaken on 24th February 2022 and a report prepared, dated 1st March 2022. The assessor concluded that Paul lacked the ability to understand information about the decisions to be made in the proceedings or retain that information, and nor could he communicate his decision effectively. The report concluded that Paul lacked capacity to conduct the proceedings at the date of the acknowledgement of service and that he continued to lack capacity.

23. A further hearing was listed on 4th March 2022. With her consent, I appointed Ms Donna Holmes, an experienced solicitor at a firm of solicitors independent of the parties, as Paul's litigation friend and directed that the trial bundle and transcripts of the evidence at trial be provided to her so that she could consider Paul's position and make any submissions as to whether further evidence or cross-examination would be required or make any submissions on behalf of Paul on the basis of the evidence as it stood. I listed a further hearing to take place on 22st April 2022.

24. Ms Holmes filed a position statement on behalf of Paul in advance of that hearing. She set out her account of her meeting with Paul, his wishes and feelings and the matters that were of significance to him. She had taken advice from Mr David Stockill of counsel and had received assurances from the parties that no relief was sought against Paul. While she acknowledged that the question of the ownership of STA would have an effect on the value of Paul's shares in STL, she did not think it was appropriate for Paul to take an active role in the proceedings, beyond placing her position statement before the court, and she did not seek to re-open the evidence.

25. The position statement set out Paul's views, which were primarily a desire to maintain stability, and his awareness of the emotional impact that these proceedings had had on his family. He was conscious that the current position, under which dividends had been suspended, meant that he had less income than before. Ms Holmes was content

that the court make an order validating the steps previously taken in the proceedings and to maintain a watching brief. With the consent of the parties I made such an order and directed that the petitions proceed to final submissions in July 2022. That necessarily delayed the drawing up of this judgment but, in addition to my own contemporaneous notes and the transcripts of evidence, I received detailed written closing submissions and a further day of oral submissions from counsel. I am grateful to them for the care and thoroughness with which they set out their clients' cases.

26. This judgment will of course need to be provided to Ms Holmes so that she may consider whether any consequential orders should be sought on behalf of Paul.

Legal principles

27. Section 994(1) of 2006 Act provides:

> "(1) A member of a company may apply to the court by petition for an order under this Part on the ground —
>
> (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), 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."

Section 996(1) confers a broad power on the court, if satisfied that a petition is well-founded, to make such order as it thinks fit for giving relief in respect of the matters of which complaint is made. In particular, it may grant the relief set out in sub-section (2) so as to:

> "(a) regulate the conduct of the company's affairs in the future;
>
> …
>
> (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."

The conduct complained of must relate to the company's affairs. That is interpreted "liberally" and embraces matters that are capable of coming before the board (see *In re Neath Rugby Ltd (No.2)* [2009] 2 BCLC 427 at para 48-50, per Stanley Burnton LJ).

28. The limits of this were discussed by Sales J (as he then was) in *Oak Investment Partners XII v Boughtwood* [2009] 1 BCLC 453 at paragraph 15:

> "Conduct of anyone involved in a company may be so far removed from actually carrying on the affairs of the company that it does not amount to the conduct of the company's affairs

> for the purposes of section 994. But in my view, section 994 is concerned with the practical reality which obtains on the ground in relation to the conduct of a company's affairs, and there is no sound reason to exclude the possibility that what someone does in exercising or purporting to exercise managerial powers as a director or senior employee should not in principle qualify as conduct of the affairs of a company for the purposes of that provision."

29. That conduct must prejudice the interests of the member or a section of the members as such. In *O'Neill v Phillips* [1999] 1 WLR 1092, Lord Hoffmann explained that this is "not to be too narrowly or technically construed". The prejudice suffered must be "unfair". At 1098, he said that the predecessor to section 994 was enacted:

> "to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. As Warner J. said in *In re J. E. Cade & Son Ltd* [1992] B.C.L.C. 213, 227: 'The court . . . has a very wide discretion, but it does not sit under a palm tree'.
>
> Although fairness is a notion which can be applied to all kinds of activities its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others ('it's not cricket') it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important."

30. The unfair prejudice complained of by a member may be "some breach of the terms on which he agreed that the affairs of the company should be conducted". In *Re Tobian Properties Ltd* [2013] Bus. L.R. 753, Arden LJ (as she then was) said at paragraph 22:

> "One of the most important matters to which the courts will have regard is thus the terms on which the parties agreed to do business together. These are commonly found in the company's articles. They also include any applicable rights conferred by statute. In addition, the terms on which the parties agreed to do business together include by implication an agreement that any party who is a director will perform his duties as a director. Primary among these duties are the seven duties now codified in ss 171 to 177 of the Companies Act 2006. Under these duties, a director must act in the way which 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. There is

> also the well-known duty to avoid conflicts of interest and duty: a director must avoid a situation in which he has an interest which conflicts with that of the company. Six out of seven of these duties are fiduciary duties, that is, duties imposed by law on persons who exercise powers for the benefit of others. Non-compliance by the Respondent shareholders with their duties will generally indicate that unfair prejudice has occurred."

31. Lord Hoffmann observed that the unfair prejudice may also consist "in using the rules in a manner which equity would regard as contrary to good faith." This is considered objectively (*RA Noble & Sons (Clothing) Ltd* [1983] BCLC 273 *per* Nourse J at 290). It is not necessary to prove that a respondent acted in bad faith or with the intention of causing prejudice to the petitioner. The ways in which a member's interests may be prejudiced have been described as "almost unlimited" but the "classic indicium" of unfair prejudice is a breakdown of trust and confidence.

32. The nature of the company is relevant to the question of whether there has been unfair prejudice to the complainant member and what the appropriate remedy should be. The rights and obligations of members defined by a company's constitution and statute have to be considered in the context of the relationship of the parties which may subject the legal rights of the members to equitable considerations.

33. In *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 379 Lord Wilberforce identified the following factors that might give rise to such considerations in the case of a petition for just and equitable winding up,:

> "Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction on the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.
>
> It is these, and analogous, factors which may bring into play the just and equitable clause"

He continued at 380:

> "The just and equitable provision nevertheless comes to his assistance if he can point to, and prove, some special

> underlying obligation of his fellow member(s) in good faith, or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that, if broken, the conclusion must be that the association must be dissolved."

Companies in which there exists such a personal relationship of mutual confidence are often referred to as "quasi-partnerships".

34. In *Re Edwardian Group Ltd* [2019] 1 BCLC 171 Fancourt J noted that:

> "Where equitable considerations of the kind identified by Lord Wilberforce apply, a court is likely to find that, although the conduct of the company was lawful according to its constitution, nevertheless the contravention of the special underlying obligation was a wrong done to some or all of the members that justifies the grant of relief. Nevertheless, it is salutary to remind oneself that the initial question on such a petition must be whether the conduct of which complaint is made was in accordance with the articles of association. If it was, then the allegation of some inconsistent obligation or right needs to be carefully scrutinised: *In re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 17-18, per Hoffmann LJ. It is also pertinent to add that there must be something in the nature of the 'special underlying obligation' or the circumstances in which it arises that makes it enforceable in equity at the suit of the petitioner. An unenforceable agreement or understanding will not suffice: there must be something that makes it unconscionable for those controlling the company to disregard the agreement or understanding, and that will generally be found where there is mutuality between the shareholders as to the benefit and burden of the obligation, or some detrimental reliance or change of position that makes it inequitable to deny the obligation."

35. Equitable constraints on the exercise of strict legal rights may arise during the course of the parties' relationship after the formation of the company, although it is necessary for the petitioner to show that he or she relied on the new arrangements. In *Re Guidezone Ltd* [2000] 2 BCLC 321 Jonathan Parker J, as he was then, said at paragraph 175:

> "Applying traditional equitable principles, equity will not hold the majority to an agreement, promise or understanding which is not enforceable at law unless and until the minority has acted in reliance on it. In the case of an agreement, promise or understanding made or reached when the company was formed, that requirement will almost always be fulfilled, in that the minority will have acted on the agreement, promise or understanding in entering into association with the majority and taking the minority stake. But the same cannot be said of agreements, promises or understandings made or reached

> subsequently, which are not themselves enforceable at law. In such a case, the majority will not as a general rule be regarded in equity as having acted contrary to good faith unless and until it has allowed the minority to act in reliance on such an agreement, promise or understanding. Absent some special circumstances, it will only be at that point, and not before, that equity will intervene by providing a remedy to the minority which is not available at law."

36. The appropriateness of the remedy is to be assessed at the date of the hearing. In *Grace v Biagioli* [2005] EWCA Civ, at para. 73, Patten J, as he then was, said in relation to the predecessor section:

> "Once unfair prejudice is established, the court is given a wide discretion as to the relief which should be granted. Although s.461(1) speaks in terms of relief being granted 'in respect of the matters complained of', the court has to look at all the relevant circumstances in deciding what kind of order it is fair to make. It is not limited merely to reversing or putting right the immediate conduct which has justified the making of the order. In *Re Bird Precision Bellows* [1986] Ch. 658, Oliver LJ described the appropriate remedy as one which would 'put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders of the company.' The prospective nature of the jurisdiction is reflected in the fact that the court must assess the appropriateness of any particular remedy as at the date of the hearing and not at the date of presentation of the petition; and may even take into account conduct which has occurred between those two dates. The court is entitled to look at the reality and practicalities of the overall situation, past, present and future."

37. In relation to the valuation exercise, Robert Walker LJ, as he was then, set out the approach to selecting a valuation date in *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031 at paragraph 60 as follows:

> "[60] … The starting point should in our view be the general proposition stated by Nourse J in *Re London School of Electronics Ltd* [1985] BCLC 273 at 281, [1986] Ch 211 at 224:
>
> 'Prima facie an interest in a going concern ought to be valued at the date on which it is ordered to be purchased.'
>
> That is, as Nourse J said, subject to the overriding requirement that a valuation should be fair on the facts of the particular case.
>
> [61] The general trend of authority over the last 15 years appears to us to support that as the starting point, while

> recognising that there are many cases in which fairness (to one side or the other) requires the court to take another date. It would be wrong to try to enumerate all those cases but some of them can be illustrated by the authorities already referred to:
>
> (i) Where a company has been deprived of its business, an early valuation date (and compensating adjustments) may be required in fairness to the claimant (*Meyer*).
>
> (ii) Where a company has been reconstructed or its business has changed significantly, so that it has a new economic identity, an early valuation date may be required in fairness to one or both parties (*OC Transport*, and to a lesser degree *London School of Electronics*). But an improper alteration in the issued share capital, unaccompanied by any change in the business, will not necessarily have that outcome (*DR Chemicals*).
>
> (iii) Where a minority shareholder has a petition on foot and there is a general fall in the market, the court may in fairness to the claimant have the shares valued at an early date, especially if it strongly disapproves of the majority shareholder's prejudicial conduct (*Cumana*).
>
> (iv) But a claimant is not entitled to what the deputy judge called a one-way bet, and the court will not direct an early valuation date simply to give the claimant the most advantageous exit from the company, especially where severe prejudice has not been made out (*Elgindata*).
>
> (v) All these points may be heavily influenced by the parties' conduct in making and accepting or rejecting offers either before or during the course of the proceedings (*O'Neill v Phillips*)."

38. Where the company is a quasi-partnership, it is not usually appropriate to apply a minority discount. In *Sunrise Radio Limited* [2009] EWHC 2893 (Ch) His Honour Judge Purle QC, sitting as a judge of the High Court, said:

> "290. It is well established that an undiscounted valuation is usually appropriate when the successful petitioning shareholder is a quasi-partner as that expression is used in this branch of the law. Moreover, in *Strahan v Wilcock* [2006] 2 BCLC 555, Arden LJ, with whom Richards and Mummery LJJ agreed, commented at 562 that it was difficult to conceive of circumstances in which a non-discounted basis of valuation would be appropriate where a quasi-partnership relationship did not exist. This point was expressly left open, however.
>
> 291. In *Irvine v Irvine* (No 2) [2007] 1 BCLC 445, Blackburne J observed as follows:

> 'A minority shareholding, even one where the extent of the minority is as slight as in this case, is to be valued for what it is, a minority shareholding, unless there is some good reason to attribute to it a pro rata share of the overall value of the company. Short of a quasi-partnership or some other exceptional circumstance, there is no reason to accord to it a quality which it lacks.'
>
> 292. The recognition in that case of "some other exceptional circumstance" is a less narrow formulation that that posited by the Court of Appeal in *Strahan*, and points to the fact that there is no inflexible rule."

39. Even the existence of a quasi-partnership does not automatically entitle a petitioner to a "no fault divorce", there must be something more. In particular, a quasi-partner who decides to leave for personal reasons is not entitled to be bought out at an undiscounted value (see *Phoenix Office Supplies Limited v Larvin* [2002] EWCA Civ 1740, *per* Auld LJ, at paragraphs 32 to 34, with whom Clarke and Jonathan Parker LJJ agreed).

Witnesses of fact

40. I heard from five witnesses of fact. The first was Andrew. He was, in general, a straightforward witness, accepting the limitations of his memory, but it is impossible not to detect a sense of persecution that has developed over the course of his absence from the companies. Much of his evidence in relation to the period just before his departure and immediately thereafter was inconsistent with the available contemporary documentation. In particular, his protestation that he had suffered a "huge betrayal" does not sit easily with the tone of his exchanges with his brothers and Jeremy in the weeks and months following his absence from the companies. I do not doubt the sincerity of his belief in the evidence he now gives but, in my judgment, it has to be approached with caution. It is distorted by a sense of grievance which appears to have developed since his departure from STL and STA.

41. A similar degree of caution has to be applied to the evidence of the other Simmonds brothers, both of whom have become entrenched in their positions and hostility to Andrew. Mark, as Ms Clarke submitted, did not accept matters that he could not plausibly deny. For example, I find it difficult that he could genuinely have believed that he could unilaterally put STA into CVL, or at least begin the process for doing so, without the involvement of Andrew, or submit its accounts without Andrew's approval, not least because, in the case of the latter, he had been warned by Andrew's solicitors that he could not do so. He accepted, and indeed had little choice but to accept, that he had signed a false statement of truth on a statement of affairs as to the date of on which that statement was prepared, though it may be that he did not appreciate the significance of this. The evidence does suggest an increasing tendency to disregard Andrew's position and to bulldoze his way through objections to his intended course of action.

42. Neil was a defensive and somewhat abrasive witness, though there were moments of spontaneity, in particular when responding to Ms Clark's questioning on the closeness of his relationship with Mark and the extent to which he would rely on Mark's

account of events. His written account of the extent to which he was aware of Andrew's emotional or psychological illnesses prior to the provision of the sick notes gives only a partial picture of what he must have been aware of, though the cause of Andrew's psychological issues certainly appears to have been clouded by the physical illnesses from which Andrew was suffering.

43. There was, sadly, palpable resentment between the Simmonds brothers and I agree with Ms Clarke that the evidence bears a similarity to that discussed by Mr Andrew Lenon KC, sitting as a deputy High Court Judge, in *Pickering v Hughes* [2021] EWHC 1672 (Ch):

> "6. The evidence of the family witnesses mainly addressed the informal agreements and understandings which it was alleged had been made concerning the disputed properties and chattels. Taking into account the inevitable fallibility of the witnesses in recalling past events, particularly events which took place many years ago, the motives of the witnesses in giving evidence concerning matters in which they had a direct financial interest, their ingrained sense of what they and other family members are entitled to and their strong personal feelings towards the other family members, I came to the conclusion that I should treat the evidence of the family witnesses with considerable caution. As noted by Robert Goff LJ in *Armagas Ltd v Mundogas SA* [1985] 1 Lloyd's Rep 1, 57:
>
> 'It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, references to the witness' motives and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.'"

Here, each of the Simmonds brother's evidence was, in my view, passed through a prism of resentment all too common in a family falling out, even in a commercial context. I bear the above observations in mind in considering their evidence.

44. The remaining witnesses of fact were, in my judgment, seeking to assist the court. Jeremy Wilson was straightforward, though some of his answers to questions in cross-examination were a little unfocused. It is evident from his commentary on Andrew's grievance document, submitted on 14th December 2018, ("the Grievance Document") that he regarded Andrew's complaints to be unjustified and was very much of the same mind as his fellow respondents. Indeed, he accepted in cross-examination that he did not think much of Andrew's abilities as a director. I reject, however, the submission that Jeremy had simply thrown his lot in with his fellow directors. His recollection of the time of acquisition of the business of STA was self-evidently wrong but I do not think that was anything other than a mistake of memory as a result of the passage of time. I am satisfied that he was seeking to give his evidence to the best of his recollection.

45. Mark Jones is not a shareholder in either company but a professional director, contracted to provide his services through a company called Premium Group Limited.

His comments on the Grievance Document similarly show that he regarded the grievance to be unjustified and, despite his greater distance from the companies and the personal relationships of the witnesses, he is not a wholly disinterested party. Nonetheless I found him to be a straightforward witness, who gave his evidence in an understated and fair-minded manner. I am similarly satisfied that he was seeking to assist the court.

Preliminary matters

46. At the outset of the trial, Ms Clarke raised two issues. The first was a question of the adequacy of disclosure. It is not in issue that Andrew's access to emails was terminated, he has been unable to search for relevant documents held on the companies servers and has been reliant on the respondents to provide disclosure. Andrew was not provided with access to the companies' Sage system on the basis it seems that "read only" access could not be provided. He was however provided with access to Stirling, which apparently provides the raw data to Sage. Some additional documents in relation to STA were supplied to him very shortly before trial, which, it was submitted, ought to have been identified if the disclosure exercise had been undertaken in accordance with the search terms set out in the disclosure review document in relation to STL, although Ms Clarke very fairly recognised that the DRD in respect of STA was less detailed than that in respect of STL. Ms Clarke's submission was that Andrew could not be satisfied that he had the entirety of the relevant documents. There was no application to exclude those documents or seek further extended disclosure, though the issues with the provision of access to Sage arose in January 2021, and nor was the existence of particular undisclosed documents that must exist positively asserted. I bear in mind that there might be gaps in the disclosure but, on the basis of the position adopted by Andrew, I have to proceed on the basis that I have the documents that are available and relevant.

47. Ms Clarke also took issue with Mr Najib's position as to Andrew's absence from work from June 2018 and the reasons for that. It is said in Mr Najib's skeleton that Andrew "walked out" or "abandoned" the companies and that his sick leave was connected to his pre-existing asthma and chest problems, which might have been "exacerbated by stress at work" but were unrelated to prejudicial conduct. His true motivation for leaving was, in part, because he had married and his wife lived in Swansea. He simply wanted to move on from the business. Ms Clarke made the point that Andrew's motivation for wishing to leave the companies had not been pleaded or foreshadowed in evidence. In relation to Andrew's medical condition, his pleaded case is that his absence was as a consequence of work related stress and anxiety. The Points of Defence simply state that the respondents were unaware that Andrew had suffered from stress and anxiety, whether work related or not, when he took time off in June 2018. They understood him to be doing so as a result of a "tight chest" and asthma" and it was not until he provided them with sick notes that they were aware of the medically diagnosed reason for his absence, which they refer to as "work related stress". They do not challenge that diagnosis or suggest that his illness was not genuine. Ms Clarke is right about that, though, as I shall explain, it is undeniable that Andrew did complain of physical conditions that were affecting him at the same time.

STL Petition

Was STL a quasi-partnership?

48. The business now carried on by STL was founded by Geoffrey Simmonds in 1972. He is the father of Andrew, Mark, Neil and Paul. STL was incorporated on May 2001 and was acquired in June of that year for the purposes of carrying on that business.

49. As at the date of the petition, Andrew, Mark and Neil held 25% of the company's issued share capital of 100 ordinary shares of £1 each. Jeremy held 20% and Paul held the remaining 5%. The shareholdings in STL have however fluctuated over the years –

    i) As at 8th May 2002, the annual return filed at Companies House showed that Neil held 32 ordinary shares, Jeremy held five ordinary shares and Andrew, Mark and Paul held one ordinary share each. The remaining 60 shares were held by Mr Geoffrey Simmonds and his wife, Mrs Patricia Simmonds, equally.

    ii) As at 8th May 2005, the annual return showed that Andrew, Paul and Jeremy held 10 ordinary shares each, while Mark held six and Neil held 18. They each also held 20 "A" or "B" preference shares. Neil's wife held 12 ordinary shares and Mark's wife four such shares. Geoffrey and Patricia Simmonds held 15 ordinary shares and 20 "A" preference shares each.

    iii) By 8th May 2007, Andrew, Mark and Neil held 25 ordinary shares each, Jeremy held 20 ordinary shares and Paul held five such shares. They also held 20 preference shares each. Geoffrey Simmonds and Patricia Simmonds had relinquished their ordinary shares and held 20 preference shares each.

    The preference shares were cancelled in June 2018 and the current shareholding position has obtained since then. Mark Jones has never held any shares.

50. The directors of STL have been as follows

    i) Andrew was appointed as a director on 5th June 2001 and resigned on 24th June 2003. He was reappointed on 10th November 2005. He was employed as a fleet director and it is not in issue that he has had very limited involvement in the company since June 2018. He did not return to the company was removed as a director by resolution on 9th October 2019.

    ii) Mark was also appointed as a director on 5th June 2001 and has been the company secretary since 24th June 2003. He was appointed as managing director in February 2006.

    iii) Neil too was appointed as a director on 5th June 2001. He has been employed as the sales director of the company since then.

    iv) Paul was also appointed as a director on 5th June 2001 and resigned on 24th June 2003.

    v) Jeremy has been a director since 1st February 2002, with a gap between 21st January 2002 and 10th November 2005. He has been employed as the operations director of the company since then.

vi) Mark Jones has been a director since 10th November 2005. He has been the finance director of the company since then but is not employed.

Mr Geoffrey Simmonds was a director from incorporation until his resignation on 1st June 2016. Mrs Patricia Simmonds was the company secretary on incorporation.

51. It appears tolerably clear that the company was a quasi-partnership at its establishment. It was, as Mark put it a "family-owned" business of long-standing, founding by Geoffrey Simmonds and then carried on by his sons, as its previous name implied, in which he was concerned that his fourth son, Paul, should have, if not a right to participate in management, an interest and a role. Its affairs were relatively informally run, with infrequent and somewhat informally minuted board meetings for a company with a turnover in excess of £12 million per annum.

52. On 20th June 2016 Mark, Neil, Andrew, Paul and Jeremy signed the Shareholders' Agreement. It is accepted that this was professionally drafted. It is executed as a deed and each of the parties' signatures is witnessed by Mr Goode. Andrew accepted that it was entered into to regulate the affairs of STL. It may be of significance that it was entered into shortly after Geoffrey Simmonds' resignation as a director. It is likely that, on the retirement of the founder of the company and father of the majority of the shareholders, some formalisation of the relationship between the shareholders would have been thought to be prudent.

53. The Shareholders' Agreement recites the shareholdings as at that date that I have described above. Clause 2 provides for the management of STL as follows:

> "2.0 The affairs of the Company will be managed by a board of a size and number as agreed from time to time. The present directors of the Company are Mark Simmonds Jeremy Paul Wilson Neil Simmonds Andrew Simmonds and Richard Mark Jones
>
> Three (3) directors shall constitute a quorum for the transaction of any business at any meeting of the board of directors. At all meetings of the board of directors, every motion to be carried must receive a majority of the votes cast, subject to the provisions of subparagraphs 2.4 and 2.5. Unless otherwise agreed, board meetings will be held at the head office of the Company.
>
> 2.1 In the event that a Director to the Board shall fail to act as a director to carry out the provisions of this agreement, then the shareholders agree to exercise their right as shareholders of the Company and in accordance with the Articles of the Company to remove such Director from the Board and to elect in the place or stead thereof such individual who will use his/her best efforts to carry out the provisions of this agreement.
>
> 2.2 The election, appointment and determination of officers and the auditors and advisors of the Company, the defining of their

duties and functions and the salaries and remuneration to be paid to them will be a function of the board of directors.

All direct out-of-pocket expenses will be reimbursed provided these fall within Company Policy on expenses set out from time to time. Until otherwise agreed, each officer of the Company will commit to spending his/her full time on the affairs of the Company.

The board of directors will decide from time to time who the Auditors and Legal Advisors of the Company shall be.

….

2.4 All parties who are employees of or consultants to the Company shall use their best efforts to promote and maintain the interests of the Company.

2.5 Subject to paragraph 2.6, all decisions relating to the management and control of the business of the Company shall be determined by the board of directors of the Company, provided always that the following matters shall be determined by a Special Directors' Resolution: (majority in Favour)

(a) any capital expenditures greater than £3,000

(b) any lease commitments greater than £3,000

(c) the acquisition of any business interests by the Company;

(d) the elections of officers of the Company;

(e) the payment of any cash dividends or stock dividends to Shareholders of the Company;

(f) the issuance of any debt obligations of the Company;

(g) the disposal of the whole or any part of the business, undertaking, or assets of the Company outside the normal course of business of the Company;

(h) the transfer of any shares of the Company;

(i) changes or variations in the objects or powers of the Company;

(j) the liquidation or winding up of the Company;

(k) the approval of any contracts or transactions outside the normal course of business;

> (i) the execution of any contract involving a consideration greater than £3,000 within the normal course of business;
>
> (m) the lending of money by the Company;
>
> (n) the guarantee by the Company of the debts or obligations of any other person, firm or body corporate;
>
> (o) any non-budgeted expenditures greater than £3,000
>
> (p) business plan and/or budgets."

54. A "Special Directors' Resolution" is defined to mean a resolution passed at a properly constituted meeting of the board of directors at which meeting a majority of directors in attendance are in favour of such resolution or a resolution signed by all the directors. The Shareholders' Agreement continues:

> "2.6 The following decisions shall be determined by a Unanimous Directors' Resolution:
>
> (a) alterations, variations or changes to the authorised or issued capital of the Company;
>
> (b) the salaries and bonuses of officers and directors of the Company;
>
> (c) the issue, redemption, purchase or Company buy back of any Shares; and
>
> (d) changes in the number of directors of the Company
>
> 2.7 The Shareholders may not pledge any of their Shares as security for any borrowings by them.
>
> 2.8 The board of directors shall meet at least four times during each fiscal year of the Company. Any director can call a meeting provided 10 days' notice is given. Notice may be waived. During the first year from the date of this agreement, the board of directors shall meet on a monthly basis. Directors may elect to attend a board meeting by telephone conference call.
>
> 2.9 Each Shareholder shall, for so long as/he is the owner of shares of the Company devote such of his/her business, time and energy as may be reasonably required to carry on the business of the Company and the Shareholder shall use his/her best efforts, skill and abilities to promote the interests of the Company. Each Shareholder agrees that he/she will not engage, without the consent of the other Shareholders, in a business which is directly competitive to that of the Company.

> 2.10 The Company agrees to provide to the Shareholders 4 (4) Quarterly income statements within a reasonable time, but no greater than 30 days, after the end of each 4 (4) month period commencing from the date hereof.
>
> 2.11 The Parties agree that a Company Business Plan will be prepared and maintained on an ongoing basis with at least annual reviews and updates. This Business Plan will define the operational details of the Company and will include, but not be limited to, items such as: budgets, forecasts, capital expenditures, salaries and wages, hours of operation, market information (products, services, pricing, discounts, etc). The Plan will serve the purpose of giving management direction as to the day-to-day operation of the Company."

55. Clause 3 provides a right of first refusal on the sale of shares:

> "3.0 If any of the Shareholders wishes to sell, transfer or otherwise dispose of any or all of his/her Shares (such party being called the 'Seller'), the other Shareholders ('the Offerees') shall have a prior right to buy such Shares (the 'Offered Shares') and the following shall apply (note that in the event that a Shareholder wishes to buy shares from other Shareholders, that Shareholder may solicit offers from potential Sellers in accordance herewith)"

A mechanism for acceptance or rejection of the offer was then provided for, which mechanism did not provide for any method for determining the value of the shares if the seller's proposals were not accepted. There are similar rights of pre-emption on the allotment of shares.

56. Dividends were dealt with in clause 8.4 as follows:

> "Except when precluded or otherwise prohibited by the terms of any debt financing and to the extent permitted by law, the net profit of the Company available for distribution, after making such provisions and transfers to reserves as shall be required in the opinion of the Board to meet expenses or anticipated expenses, shall be distributed annually (unless otherwise agreed), firstly by way of repayment of Loans on a pro-rata basis, and secondly by way of dividend."

57. I do not accept that that the Shareholders' Agreement was not intended to have effect, or was merely a pro-forma document to which little thought was given, as was suggested on behalf of Andrew. It is true to say that it is not a conventionally drafted shareholders' agreement and it certainly appears that the expenditure of more than £3,000 was never in fact authorised by Special Directors' Resolution and no issue was raised as to this by anyone at the time, but this does not satisfy me that the Shareholders' Agreement was not intended to have effect. The regulation of the affairs of companies associated with STL by similar agreements were also raised at meetings of the board of STL and Andrew asked for a copy of the signed

Shareholders' Agreement in an email to Mark on 19th January 2018 and thereafter, at the very least indicating that he regarded it as a document of significance.

58. The shareholder-directors did, in my judgment, have the right to be involved in the management of the company. The Shareholders' Agreement is not inconsistent with this. Clause 2.6(d) required any change in the number of directors to be made by unanimous decision of the board. As is clear from clause 2(1), a director could be removed for failure to carry out his duties and replaced with another individual, so that any of the existing directors could be replaced under that provision, but that was limited to cases where the director was not performing his duties. Save for the resolutions specifically provided for, it was agreed that a majority of directors at a quorate meeting could bind the minority but I do not see this as inimical to a quasi-partnership relationship. Any director was entitled to call a board meeting on 10 days' notice. Paul was not a director, though his involvement in the company was plainly not an arm's length commercial matter: it was accepted that the intention was for him to be involved and included.

59. Andrew also signed a director's service agreement on the same day. Clause 4.1 provided:

> "4.1 The Director shall duly and faithfully exercise and perform such powers and duties commensurate with his employment as Director as the Board may from time to time direct and shall observe such restrictions as the Board may from time to time impose and shall at all times use his best endeavours to promote the interests of the Company. In particular his duties shall be to:
>
> ● perform such duties and exercise such powers in relation to the business of the Company as may from time to time be assigned to or vested in him by the Board and as and when required provide such written reports and any other confirmations of any type reasonably required by the Board from time to time
>
> ● conform to and comply with any reasonable directions and regulations made by the Board
>
> ● accept such offices and responsibility in the Company as the Board may require
>
> ● well and faithfully serve the Company to the utmost of his ability, and
>
> ● devote the whole of his time (subject to 3.2 above), attention and abilities to those duties of his appointment during the normal working hours of the Company (for no further remuneration) during such additional hours as shall be reasonably necessary for the proper performance of those duties."

60. Clause 10 dealt with absence as follows:

> "10.1 If the Director shall at any time be incapacitated by illness or accident from performing his duties hereunder then he shall at the earliest possible opportunity on the first day of absence inform the Managing Director of such illness or accident and of the expected date of his return to work. The Director must inform the Managing Director as soon as possible of any change in the date of his anticipated return to work.
>
> 10.2 In the case of absence of up to and including seven consecutive days a self-certification form must be completed and sent to the Managing Director without delay. For periods of absence exceeding seven days, one or more doctor's certificates must be forwarded to the Managing Director as soon as possible following the seventh day of absence and at intervals of no more than seven days during the period of sickness absence.
>
> 10.3 The Director may be required at any time to undergo a medical examination by a medical practitioner nominated by the Company whether or not he is suffering or has suffered any period of sickness or incapacity for work. The cost of any the examination will be met by the Company and the Director shall co-operate in the disclosure of all results and reports to the Company."

Clause 11.1 provided that a director prevented by illness or other incapacity from attending to his duties would be provided with statutory sick pay.

61. In my judgment STL was a quasi-partnership company in which Mark, Andrew, Neil and Jeremy as the principal shareholders of the ordinary shares expected to be able to participate. It was a family business, albeit one in which Jeremy also had a long-standing interest. It was also one in which the shareholders had agreed to regulate and formalise certain aspects of their relationship in the Shareholders' Agreement and their service contracts. The Shareholders' Agreement is consistent with something more than an arm's length commercial arrangement between the parties, not least because it provides for the shareholders, in their capacity as shareholders and not as officers or employees of the company, to devote their time to the company and promote its interests, and it limited the freedom to dispose of their shares. Nonetheless it prescribes how the decision-making process of the company was to be regulated and does not provide a wholly unrestricted right to participate in the management of the company in that it contemplates limited circumstances in which a director could be removed and replaced.

62. The basis of the relationship also, it appears from the evidence before me, was that the remuneration of the directors would predominately come from dividends. Their monthly salaries were minimal. This long-standing practice, too, appears to be consistent with a quasi-partnership and was not altered by the Shareholders' Agreement. It refers to the payment of annual dividends but does not preclude the

payment of monthly dividends in the interim. I am satisfied that, the relationship between the shareholders was a quasi-partnership, founded on a relationship of trust and confidence, as modified to a relatively limited extent by the Shareholders' Agreement.

Reasons for Andrew's absence and the knowledge of STL Respondents

63. Andrew's case is that stress induced by the management situation at work led to his absence because of ill-health. Although he suggests that he was subject to stress and a lack of support at work, he traces the breakdown of the trust and confidence between the STL respondents to an alleged attempt by Mark, Jeremy and Mark Jones to "take control of the board by removing Andrew and Neil as directors".

64. Andrew traces a desire to alter the constitution of the board to the minutes of a meeting on 26th September 2017 where, under the heading "Sales", the following is recorded:

> "MS raised question on what work NS now did in the Warehouse and Sales role. Emphasised the need for Sales Pipeline to be passed onto JW when NS is concentrating on Sales.
>
> MS wanted NS to confirm when he was fully back on Sales."

It was put to Mark that this was an implied criticism of Neil, who had been subject to earlier disciplinary proceedings, which Mark in his written evidence had said had been in 2017 but in his oral evidence said had been in 2015. Mark said that these disciplinary proceedings had not concerned a performance-related issue.

65. Andrew's evidence is, however, that in November 2017, Mark had told him that he wanted to remove Neil as a director. Mark asked him to resign as well to "soften the blow" to Neil. Andrew regarded the management review by Mr Goode, which began at around this time, as cover for this attempt to remove them both. Mark denied that he had ever had a conversation with Andrew about removing Neil from the board, or suggested to him that, if Andrew also resigned, it would soften the blow.

66. The respondents were all taken to the Grievance Document. I shall refer to the circumstances in which this came to be produced later in this judgment but for present purposes I need only explain that in evidence was a version in which Mark, Neil, Jeremy and Mark Jones had provided comments on Andrew's allegations. The comments are identifiable by the colour of the type in which they are written.

67. The first reference to Neil being removed, in this document, is alleged to have been in a telephone conversation earlier in 2017. Andrew said:

> "To add more stress to me, Mark employed a full time so-called marketing consultant paid £23k per year by STA.[1] I agreed initially but it didn't take long before I realised the marketing consultant was inept and voiced this to Mark. I felt we didn't need a full time marketing consultant, and due to his ineptitude

[1] This appears to be an error and STL is intended.

> I even had to remove his access to STA's Facebook page as he was doing more harm than good."
>
> …
>
> The pressure really began to take its toll later that year when Mark called me on the phone and said he and Jeremy wanted to remove Neil as a director of Simmonds Transport, and asked if I would also relinquish my directorship to 'soften the blow' for Neil. Chris Goode, the company solicitor had regular meetings with Neil to improve sales, although at the time the business seemed to be performing well and was profitable."

68. Mark's comment on this was:

> "In fact Chris Goode was put with Neil for a while to help him with his sales to focus and improve what he was doing for the company. This was agreed by all us in Board Meeting."

None of the directors' responses comment on Andrew's allegation in this section that it had been suggested that they wanted to remove Neil and asked Andrew to soften the blow. Neil's comment is that:

> "I and Chris did have meetings and regular chats to discuss sales, how I went about finding sales and what his view was from his experience from working with other company's [*sic*]"

Jeremy comments:

> "During a board meeting it was discussed that the sales process lacked strategy and direction. Chris Goode agreed to sit with Neil within his remit of Non Exec and Business Advisor. I was of the opinion that we paid for Chris so might as well use him and his time to assist in an area where we were deemed to need tightening up on process and targets. This was discussed fully within a board meeting and agreed by all and especially Neil."

69. A little later the Grievance Document raises Andrew's concern about relinquishing his directorship, ousting Neil and allowing Jeremy Wilson and Mark to have "full control at board meetings". The first annotation under this observation is by Jeremy:

> "I have to state that within board meetings AS did not raise any points regarding this and also did not raise any concerns in any way. AS did not contribute fully within board meetings and did what I would call the bare minimum before darting out of the room citing being too busy. In my opinion he was out of his depth and not able to contribute with logical and considered thought. If the board were to be reduced it would have been on the advice of our non-exec and lawyer following structured management meetings to determine from each director what their role was within the business and their thoughts for a five

> year plan and the future. To state he even has a relationship with Neil is laughable. Also, I would love to know when I have ever made a decision where the best interest of the company and the fellow directors was not put first!!!"

The second comment states that no issues were raised in board meetings.

70. Andrew then referred to his meeting with Mr Goode in 2018 and repeated the allegation that Mark asked him to resign as a director:

> "Regarding the review he said if I had nothing to say, I should just leave it blank and not to worry about it.
>
> Mark approached me shortly after this and again talked about removing me as a director. I asked him if he could give me a guarantee that if I agreed, I would be reinstated as a director within 3 months, to which he shrugged and, in a very non-committed manner, said not to worry, and he would have to see about that. His manner really concerned me."

71. Mark's comment under this is:

> "A discussion did take place but it was to see what his feelings would be if the company needed to make changes to the board out of our review. This is a process many companies go through at some point in their progression. It did not constitute him assuming he would be removed and he is still a director and involved in everything within the businesses."

Andrew's account here does not refer to the removal of Neil or "softening the blow" to him. Mark said in oral evidence that he did not recollect what they had spoken about but that it was probably the management review meetings. That is consistent with a comment on the Grievance Document. Neil's comment is:

> "He does not handle change or the thought of change, when you met with him did you say what do you want to do?? Do you want to continue to work at STA/ST? Have you had enough??
>
> Tell me what you are thinking and would like to do?"

This tends to suggest that Neil considered that Andrew's ongoing involvement with STL and STA was in question.

72. Mark did not accept that Andrew had cause for concern and the management review was to see how the company could perform better and that there was never any intention to remove a director. The comments on the Grievance Document do admit that possibility, at least if it was recommended by Mr Goode, and demonstrate a perception that Andrew was not contributing to the business in his capacity as a director. This is consistent with Neil's witness statement, in which he said:

> "I do believe however that Andrew was possibly more threatened by the management review than I was. I believe that Mark has always protected Andrew specifically in his role as a director of the company. Andrew is and always was a very good mechanic but his particular aggressive management style was not in my opinion suited to his role as a director or to the management of other people."

Neil said that what he meant by this was that Mark provided Andrew with a lot of support. Ms Clarke put it to him that his relationship with the other directors was such that, if Mark had approached Andrew and made him feel like his position as a director was under threat he would not have had anyone to turn to. If, for example, he had approached Neil to discuss the alleged conversation about standing down, Neil would have believed Mark, not Andrew. Neil's response was vehement and spontaneous and that he would not have done so. He said that he was not closer to Mark. He simply worked with him. I accept Neil's account of this.

73. Andrew did not raise any concerns at the board meetings on 2nd November 2017 or 22nd May 2018, which he ascribed to his health deteriorating since March 2017. This is also the reason he gave for not raising the issue in the text messages he exchanged with his brothers over the period, to which I shall turn in a moment. He said that he was suffering from his workload, insomnia, and heart problems.

74. It is apparent that he did not decline to take part in Mr Goode's review, whether as a result of ill-health or because he regarded it as an attempt to oust him. There is no indication of reticence on Andrew's part, though he said that he was forced to have the meeting and did not have the strength or the trust to raise his concern about a plot to remove him. That is not the flavour one gains from Mr Goode's notes, which indicate that Andrew gave considered and helpful proposals for the ongoing management of the businesses at a meeting on 16th February 2018. In any event, matters were not progressed after Mr Goode's interviews with the directors in early 2018 as he was receiving treatment for the illness that sadly led to his death later that year.

75. The first contemporaneous mention of Andrew's concerns in evidence is an email sent to Mark alone on 19th January 2018 in which he said:

> "It pains me to say but I feel deeply hurt and angry about the way you and Jez with Chris' involvement are trying to remove me from the board of directors using Neil's removal as an excuse. It's clear you have your own agendas in wanting to reduce the number on the board which will ultimately give you more decision making power. The way you are going about it is underhand using this company re-organisation exercise as a smokescreen to get rid of me. It is particularly upsetting for me not only as a fellow director but more importantly as my closest brother whom I trusted would always have my best interests at heart.
>
> As this is not the case I am offering you a solution. I will not relinquish my directorship as this will put my shareholding

> liabilities at significant risk going forward. I no longer have trust in you to run the company ethically and honestly, and having had access to the accounts recently, some very troubling facts have come to light which I believe put me and the business at risk. I am requesting unofficially at this stage that you or the company consider buying my 25% shareholding at the market rate, according to the latest valuation. This way, you will have less board members and more personal control. I will have no risk and will not be obliged to make my concerns to the board, which will have consequences for you, Jez and Chris.
>
> I asked Chris to see my original signed shareholders agreement before Christmas which has not been forthcoming. Also I am awaiting on accounts information from Mark Jones who also seems to be obstructive. You don't need me to tell you mark that as a director it is my right and my duty to have access to all financial records at any time."

It was put to Mark that he did not reply to say that it was not true. Indeed, it does not appear that he replied at all. Mark said that he had cried when he read it and just could not believe it. He spoke to Andrew about it and in the coming months tried to get things "back on track" with him. I do not find that a surprising approach in the context of a family relationship. I also note that the "troubling facts" and "concerns" to be brought to the attention of the board are entirely unspecified and as such could not be addressed in a reply.

76. In relation to Andrew's suggestion that Mark Jones was "obstructive" in providing information there are a series of emails between them in December 2017 in which he requested financial information. Andrew was provided with the Sage records for 2017. He asked for the information for 2015 and 2016 but Mark Jones told him that this ran to 7,180 pages so couldn't be sent by email and he was reluctant to print it out. Andrew did not respond to ask for all of that to be provided and said in evidence that Mark Jones could have offered it. In fact, Mark Jones had asked Andrew to let him know what he was specifically looking for and he would see if he could help point it out. I do not detect any reluctance to provide Andrew with information on the part of Mark Jones.

77. Tellingly, Andrew's evidence was that he did not know what he was looking for, which suggests that he may have been hoping to identify some irregularities, or "dirt" as Mr Najib put it, that would bolster a claim to sell his shares. He had not, he accepted, previously asked for financial information and said that he had never had to do so. In fact, he said that he had not had access to STA's Sage accounting system for some time because he had forgotten his password and so he relied on Mark to provide information, and that neither he nor Neil had access to STL's Sage program. He accepted that he never asked for access to STL's Sage records prior to this point.

78. Andrew did not raise the question of his health in his email of 19th January 2018 but by June 2018 he said it had deteriorated to the point where he was not sleeping more than a couple of hours a night. He attributes this in his written evidence to his increasing workload at STA and "added pressures of what I felt was a huge betrayal

by my brother and other directors". He was signed off work with stress and anxiety and prescribed a course of steroids to help with his asthma. He did not return to work thereafter.

79. His current characterisation of his health and departure from the company is rather different from that in the email that he sent to Neil and Jeremy on 5th July 2018. It is in a friendly and apologetic tone. He said:

> "Morning Boys,
>
> Hope you're both ok.
>
> Sorry I've not been in touch as I have had a real bad couple of weeks thinking I'm going mad and worried about having a heart attack as my heart has been continually racing and lack of sleep which is still the case.
>
> I'm currently on 12 tablets a day for my chest as this has been very bad, this morning is the best my chest has felt in 4 months so hopefully the tablets are starting to work. Having to admit to myself that I am completely suffering from bad stress also was very difficult for me and broke me in front of my wife but was possibly the point I needed to reach. I physically look ok but underneath I am broken at the moment and unsure how long it will take. I feel like I have let everyone down and this is the biggest thing that bothers me. Once my chest is sorted the doctors are going to send me for psychological therapy.
>
> Even writing this has made me anxious.
>
> I will keep in touch and let you know my progress.
>
> Cheers."

80. Neil's reply on the same day was sympathetic:

> "Andy,
>
> I have called a couple of times but couldn't get through.
>
> Your health is the most important thing at the moment and all other things are irrelevant. You have not let anyone one down so try not to think about that if you can.
>
> Reading this has brought tears to my eyes as I feel I have let you down. As you say we would not have seen this.
>
> It's good to talk and get things of you chest, I my self have learnt a lot over the years
>
> look after yourself"

81. Ms Clarke put to Neil that he was not setting out the full extent of his knowledge of Andrew's ill health in his witness statement. In this, he says as follows:

> "In around June 2018 I know that Mark had arranged for us all to play golf at the Belfry. This was going to be a day away from work to allow us all to let off a bit of steam. This was when I first found out via Andrew's communications with Mark that he was not feeling too well and that he had issues with blood pressure and possible asthma. I note that he indicated that he did not want to be contacted. We were obviously concerned about his ill health and I thought nothing more of it on the basis that he would take some time off work and come back. I had no real communications with Andrew."

Neil said that he knew that Andrew was off in June 2018 but that he understood him to have asthma. He thought that, and possibly blood pressure issues, were the reasons for his absence until he saw the 2018 sick notes. Again, Ms Clarke said this was inconsistent with the respondents' Points of Defence which state:

> "The Respondents will state that it was not until 5 November 2018 that Andrew submitted sick notes confirming he had been signed off as medically unfit due to work related stress. Up until this point the Respondents were unaware of the medically diagnosed reasons for Andrew's absence. It is wholly denied that any steps have been taken by the Respondents to restrict Andrew's involvement as alleged or at all."

This does of course refer to "medically diagnosed" reasons.

82. Andrew's stress was similarly referred to in another of Neil's responses to the Grievance Document:

> "We all know that ST has supported the other businesses in one way or another.
>
> If he had concentrated on his job at STA and not worried about all the other businesses he was part of he would not be stressed."

The Grievance Document and the comments upon it were produced after the sick notes were provided.

83. Jeremy's reply to Andrew's email, also sent on the same day, was in the same tone:

> "Thanks for the email Drew. It sounds as though you are in a pretty dark place pal. Please don't say things like you have let us down because you have not in any way. Its an illness mate and needs to be treated that way.
>
> Breaking down in front of Gayle was a good thing. Might not feel like it but she needed to see what was going on and its easy

> to cover things up and pretend nothing is wrong and all is ok but its clearly not.
>
> Please go and see someone and talk about things. They are a great help and you will feel the difference immediately.
>
> Take things easy Andy and if you need anything you just have to call……..”

84. It is clear that Neil’s account of what he knew about Andrew’s illness is incomplete, first, in that it makes no mention of stress at all, and, secondly, in that it suggests that there was no real communication from Andrew following the golf day in June. Nonetheless, it seems to me that the criticisms of the respondents’ evidence in this regard is unfair and tainted by hindsight. The focus of Andrew’s email is on his physical complaints – he has concerns about his heart, his chest has been “very bad” and that he had broken down and was suffering from stress. There is nothing to link the stress to the situation at work, at least insofar as it was caused by the respondents, other than to say that he felt that he had let Neil and Jeremy down, which in context must be understood as a reference to taking time off work. It is understandable that this email should not be read as signifying only work-related stress, or stress occasioned by anything other than health or personal problems. Neil’s reply reads as genuine and concerned, rather than defensive, and in the phrase “I feel I have let you down… we would not have seen this” reflects a guilt at not being aware of any stress-related issues beforehand.

85. There were also about 100 pages of texts between Andrew and Mark between June and September 2018. They are in a similarly friendly tone. Andrew mentions stress and anxiety and said in a message on 19th June 2018:

> “Doctor has put me on sick for two weeks to start with no contact about work. Blood pressure above normal and scared me with possible heart attack if I’m not careful with my anxiety etc”

but nowhere is there a suggestion of a plot to oust him or work being the cause of his stress and anxiety – there are exchanges about golf and general friendly banter. Again, on 3rd July 2018 he had texted Mark in response to a question as to how he had got on at his doctor’s appointment. Andrew said that he was on steroid tablets to try an sort out issues with his chest and that his blood pressure was a bit high. He said:

> “He’s put me off for a month now. Then talk about counselling”

86. Andrew accepted that Mark was texting every few days to see how he was, though he ascribed this to guilt. Andrew also texted Mark to wish him a happy birthday. They also saw each other – on 4th July 2018 Andrew texted Mark to say:

> “Cheers for coming over. Good to see you bro!”

They went on a caravan holiday together at the end of July 2018 and also went to a restaurant. By 20th July 2018 Andrew reported that he was still anxious the day when

he tended to "overthink simple stuff". He described it in his text as "such a weird problem". Andrew said in evidence that he was trying keep his life as normal as possible but it is impossible to reconcile these light and friendly texts with the notion that Andrew's stress and anxiety were caused by a plot to oust him that he had considered to be a "huge betrayal" by his brothers.

87. It is suggested that the relationship broke down irretrievably in September 2018. On 4th September 2018, there was a text exchange between Mark and Andrew in which Mark said:

> "Good to see you today. I'm sure in time we'll get back to being normal. Decide what you want to do, and we can sort it out either way. I miss you not being around."

Andrew replied to say that he had been thinking about what Mark said and would let him know.

88. Despite the friendly tone of the emails and texts between Andrew, Mark, Neil and Jeremy, on 7th September 2018 Andrew sent an email to Mark asking again for his share to be bought out. The email is headed "Without Prejudice save as to costs" but privilege is not claimed in respect of it. It says:

> "Further to our meeting on 04.09.18, I feel my position within the Company is becoming untenable due to the actions of my fellow directors and shareholders. I reserve my full rights to raise a grievance and to pursue appropriate action in respect of my position as shareholder and director of the Company at this time.
>
> However, with a view to resolving matters in an amicable manner, I would be prepared to exit the Company for the sum of £800,000 plus repayment of my director's loan of £25,000.
>
> Please come back to me on the above within the next 7 days."

89. On 13th September 2018 Mark sent the following text:

> "I've left a voicemail, can you call me?"

and then:

> "Give me five minutes to recover from what you've said, and I'll call you back."

That appears to have been the end of the "conversational" text exchanges between Mark and Andrew.

90. On 21st September 2018 Andrew sent a further email to make it clear that he wanted his shares to be bought out in both STL and STA:

> "Thank you for your email.

> I am also keen to resolve matters as amicably and in as timely a manner as possible, particularly given the impact this has had on my personal health.
>
> On that basis, I would be prepared to exit both companies on the following terms:-
>
> The sum of £800,000 from Simmonds Transport Limited and £200,000 from STA Vehicle Centres Limited, in one payment plus repayment of my director's loan of £25,000.
>
> I am unable to attend the board meeting on 27 September for health reasons.
>
> Please send me a copy of the agenda and the subsequent minutes. Please also send me the minutes of the last meeting."

There is little to explain the sudden change in tone.

91. It was put to Mark that he did not immediately reply to either of Andrew's offers of 7th September 2018 or 21st September 2018 but that he had had a conversation with Andrew in which he had proposed to buy him out for £200,000. Mark's spontaneous reaction was that this was "total lies".

92. Andrew chased the provision of the board minutes on 18th October 2018. Mark's reply dated 19th October 2018 was conciliatory in tone:

> "Andrew,
>
> Please accept my apologies for not replying sooner to your last email.
>
> Unfortunately due to workload and the time of year my time has been taken up with both STA and Simmonds Transport but this in no way excuses the tardy response.
>
> With regard to the most recent Board Meeting. You are indeed correct and this was postponed as communicated to all including you on September 23rd 2018. It was deemed prudent to postpone the meeting and I will advise you of the new date when we have set this which will be a decision taken next week.
>
> I will have full information for you within 10 days of today, 19th October 2018, and will issue you with information and full board minutes from the last meeting. I will also confirm the date of the next board meeting.
>
> I hope this is all satisfactory for you
>
> Best regards

Mark"

93. It was put to Mark that, contrary to his promise in his email of 19th October 2018, he did not provide the requested information with 10 days concerning the most recent board meeting. Andrew did not get the minutes of the meeting of 28th June 2018 until 7th January 2019, by which time he had had no information for nine months. Mark said that he was under a lot of pressure trying to keep the companies running. This is indeed consistent with the apology he offers in this email of 19th October 2018. The principal significance of the 28th June 2018 minutes is that they refer to the division of the STA dividend between the four STL directors. This division is however also referred to in an email to the directors, including Andrew, sent by Mark Jones on 12th July 2018. The reason for the delay in providing the minutes given in the STA Points of Defence – that Chris Goode was slow in preparing them, was not offered at the time, and it does not appear that he was involved in their preparation.

94. Mark's letter was followed by a further letter of 29th October 2018, again written by Mark but expressed to be written with the authority of the other directors and shareholders. He referred to Andrew's email of 21st September 2018 and said:

> "Dear Andrew,
>
> I apologies [*sic*] for the delay in responding to your email of 21st September 2018.
>
> As indicated, your email has come as somewhat of a shock to both myself and your fellow Directors/Shareholders.
>
> As you are aware, we had previously agreed that you would take some leave, on a purely goodwill basis, to allow you a period of rest and recuperation from work. At no stage during that period have you indicated that you were ill or have produced any medical evidence to support your ongoing absence from the business. As such, I am somewhat surprised to hear you suggest that you have a grievance against the company. Obviously this is very concerning and clearly does not reflect our historical relationship or management style within the company.
>
> In these circumstances, I believe I have no alternative but to act in relationship to your notification of the grievance. To that end, the company will write to you separately to invite you an investigatory meeting, to enable you to provide some details of the alleged grievance so that it can be fully investigated and processed. I would consider that it would be useful if, at the meeting, your current situation in relation to your ongoing absence could be discussed, together with your return to work.
>
> In relation to your suggested sale price, in respect of your shares in both Simmonds Transport and STA, neither I nor the other Directors/Shareholders are in a position to agree to the purchase of your shares at those levels. Do you have any

> supporting evidence in relation to the valuation? If so, are you prepared to share it? If not, I will have no option to but obtain an Accountants valuation of the Company. However, I would point out that I believe the current value that you have placed upon your shares, significantly overvalue both companies, and do not represent a fair value for your shares.
>
> In any event, I would like to assure you that, if at all possible, and after the receipt of professional advice we, the Directors and Shareholders of both companies, will endeavour to work with you to negotiate a fair value for the purchase of your shares, if indeed, that is what you want to achieve."

Formal notice of a meeting to investigate the grievance was given on 1st November 2018, with a meeting to take place on 13th November 2018.

95. Ms Clarke suggested that, instead of seeking to resolve matters, Mark sought to escalate them in this letter by engaging the grievance procedure. I reject that criticism. Andrew had raised the question of a grievance in his email of 7th September 2018, which he proposed to "settle amicably" by the sale of his shares. Mark's letter does address the offer to purchase. It asks whether there is a supporting valuation and suggests that the proposed offer is excessive and that an accountant's valuation would need to be obtained. It again expressly refers to dealing with the matter informally and concludes by offering a discussion.

96. Curiously, it states that "at no stage… during this period" had Andrew indicated that he was ill, although it appears to be accepted that he had not by October produced any sick notes from his doctor. The extent of Andrew's illness seemed to be queried by Mark in evidence. He accepted that Andrew wasn't feeling well and that it was agreed he would take some weeks off. He knew that Andrew was asthmatic, as Mark is himself, and he said that Andrew had always been stressed. He said that Andrew had intimated that he was signed off work but had never told him that he had been given sick notes and he had not asked for them. It is clear however that he had been referring to having been "signed off" in the texts between them, though it may be that could be interpreted as having been advised to take time off, rather than issued with a formal sick note. The reference to not having indicated he was "ill" is likely, in my judgment, to indicate that Mark did not believe him to be so ill as to require an extended period away from work, rather than a short period of "rest and recouperation", during which he was able to engage in social activities. This is certainly the impression that given in the comments on the Grievance Document, in which Neil remarks:

> "For God's sake, he's been out living it up, going on various holidays, including skiing, which can't be good for a very bad chest. Also, having bad chest pains, skiing will not help stress".

Similarly it reflects the position set out in Mark's letter dated 1st December 2018, to which I refer below, in which he says that it had been envisaged that Andrew would have a short-term period of rest. I accept that it is not open to the respondents to

challenge that Andrew was suffering from stress at work, but it is evident that their impression of the extent of his illness at this point was different to Andrew's.

97. The sick notes were provided on 5th November 2018, with a request from Andrew for further time to formulate his grievance. The last of the sick notes showed that Andrew was signed off work until 4th February 2019. They each gave "stress at work" as the relevant condition. Andrew asked not to be contacted until he was in a position to provide full details of his grievance and raised no objection to the grievance procedure, other than to propose that the grievance was considered by an independent human resources consultant, rather than an employment solicitor as had been proposed. He said that he was unsure whether he would be well enough to attend a formal meeting.

98. Mark wrote on behalf of STL on 1st December 2018, saying that the company had not received details of Andrew's grievance. He referred to the sick notes and said:

> "In June it had been understood by the company that you wished to take a period of voluntary absence from the company to allow you a period of rest. On a goodwill basis this was agreed to by the company and at the time it was envisaged this would be a short-term absence only.
>
> Whilst I appreciate when first taking up the period of leave you kept in touch by text messages, specifically sent to me, these text messages became less frequent and recently contact with you has proven to be difficult. The FFWN's show that you first visited your GP on 19 June 2018 and the company wishes to understand why 5 months has passed without it being notified of the FFWN's. We invite you to respond on this.
>
> For the avoidance of any doubt I wish to emphasise that it is the wish of the company to support you in any way that it can, but it can only do so if you keep the director's fully informed of the reasons for your absence and to provide to us with details of the grievance."

99. He referred to paragraph 10 of the directors' service agreement, which provided for doctor's certificates to be lodged for periods of absence exceeding seven days and that a director might be required to undergo a medical examination by an occupational health professional. Mark stated that the company did require such an examination. He went on to consider the question of sick pay and said:

> "To date you have received full pay during your absence as the company was operating on the understanding that you were taking time out for the purpose of rest and recuperation. It was envisaged that this break from work would be for a short period of time only. Having heard nothing from you regarding a date for your return we were surprised to hear that you wished to raise a grievance. We have attempted to understand and resolve your grievance by invoking the company grievance procedure and arranging a grievance investigation meeting for 13

> November 2018. You did not attend that meeting for the reasons stated in your email to me of 5 November."

100. He stated that it was proposed that statutory sick pay would be paid from 1st December 2018 and raised the prospect of the company seeking to recoup "the overpayment" of dividends made in previous months. He asked for the return of the company vehicle used by Andrew. In relation to dividends he said that the company had been working on the premise that Andrew was "taking a break" and it was not envisaged at the time that he would be absent until February 2019. He said that no more dividends would be paid after December 2018:

> "until we better understand the reason for your ongoing absence, be that by way of a medical report and/or details of your grievance"

Ms Clarke suggested that this email was to put pressure on Andrew. Mark denied that this was a further escalation but it is apparent that the company's attitude to Andrew did become markedly more formal and hostile following Andrew's request to be bought out in September 2018. It is difficult to see the threat to suspend dividends and seek to recover "overpayments" as anything other than an attempt to apply pressure to Andrew. As I shall explain below, a meeting was called in early 2019 with a view to suspending dividends, but this did not proceed at this time.

101. On 4th December 2018 Andrew stated that he was in the process of finalising his grievance and asked for certain information, including his service agreement, the Shareholders' Agreement and requests for sick notes. He said he was "particularly unwell". That email was responded to in a letter from Mark dated 14th December 2018. He addressed to each of Andrew's requests in turn and provided what he described as "further copies" of the agreements, which he said had been provided when they met on 3rd September 2018, and a copy of the staff handbook. He concluded:

> "Please be assured we are here to help and to understand what you need to assist you with your health issues, and to fully investigate and conclude your grievance. We cannot do this without your help. Similarly we cannot allow the situation where we have a valued director and member of the senior management team on long-term absence, without any explanation and importantly a resolution for remedying this, having been put in place."

102. It was put to Mark and the other respondents that the annotations to the Grievance Document displayed hostility. That is true but I do not consider it surprising, given that Andrew was making a number of allegations which, from the annotations of the other directors, were evidently regarded as unfounded. I do not regard it as evidence of hostility towards Andrew prior to June 2018. By a letter of the same date, Mark responded on behalf of the company to say that the Grievance Document would be treated as a formal complaint and the directors considered that it was appropriate to appoint a third party who was not involved in the company to conduce a full investigation. Andrew was invited to attend a meeting or to make further written representations if he preferred.

103. An investigation was carried out by Mr Robert Downing, a human resources consultant at Downing HR. The transcript of Mr Downing's interview with Andrew is in the bundle. Andrew told Mr Downing that, once signed off work, he "fell to pieces" and could not function properly. Andrew was asked if he could see himself returning to the Company. He is recorded as replying that he could not whilst the other directors were there. No objection was taken to Mr Downing's report and conclusions being put in evidence, though of course I am in no way bound by them and they are evidence of nothing more than the process engaged in by the company and Mr Downing's opinion.

104. Mr Downing did not find sufficient evidence to substantiate Andrew's grievances, whether in relation to his allegation that he had been subjected to undue work pressure, that he was provided with insufficient support, or that there was a plot to remove him. His view, expressed in his report dated 18th May 2019, was that there was:

> "insufficient evidence to substantiate Andrew's grievance, most of which appears to be founded on suspicion plus a perceived lack of information and transparency in how the Company has operated. This does not support a claim of misappropriation, undermining or detrimental treatment. However, it does indicate a lack of transparency and governance with regard to some business-related decisions which affect the interest of all directors. Where business interests are taken outside of the immediate scope of the Company's current trading interests, it is recommended that such meetings are fully documented, and a clear audit trail is established for the avoidance of doubt.
>
> There is no evidence to support Andrew's claim that the Company has sought to exacerbate his ill-health and that its actions, once Andrew had requested a settlement and the pursued a formal grievance, were inappropriate, disproportionate or seeking to impose detrimental treatment upon him as a result of his ill-health. There is no evidence that the Company's actions have been prejudicial to Andrew's interests as a shareholder either as there has been no cessation of pay, dividends and associated benefits. The return of the pick-up is deemed as a reasonable request as this was not Andrew's own company car. The request for clarity over the status of his continued absence from the business is also seen as reasonable and although Andrew felt the Company was well aware of the reasons for his absence and that no one had asked him for sick notes, he still had a duty to accurately certify his absence."

He recommended that Andrew be:

> "referred to occupational health for an independent review of his long-term sickness and ability participate in any future, direct dealing with the Company and its directors, which may include his departure from the business".

105. Andrew appealed Mr Downing's decision and this was considered by a separate human resources consultant altogether, June Mills of June Mills HR Solutions. She upheld Mr Downing's findings and recommendations in a letter dated 23rd June 2019. Again, those expressions of opinion are not binding on me but no objection was taken to their inclusion in the trial bundle. The significance of both reports is the extent to which the company sought to address Andrew's grievance in an independent manner, not least acceding to Andrew's request for the investigation to be carried out by a human resources consultant rather than a solicitor.

106. The draft STL Petition was sent on 2nd August 2019, which it is claimed triggered the next hostile action by Mark and the other STL respondents. On 9th August 2019, Mark sent an email to the company's IT provider and said as follows:

> "Could you authorise everyone's RDS password apart from mine at STA to be changed please at 11am Monday morning. I would like a message to go out to all users to say there has been a security breach and new passwords will be sent.
>
> I have a security issue and want to lock it down.
>
> If all the new passwords can be emailed to Gareth Phillips and myself that would be great. Gareth Phillips is the only one who will be authorised to talk to you to keep the system running in my absence.
>
> One thing to be aware of is if you get a call from Andrew Simmonds or Colin Griffiths you must not allow passwords to be given to either of them.
>
> …
>
> Also the scanner RDS I would like google chrome and explorer locked so they cannot be used or any external websites just allow for scanning. Can you also lock down the pc that the scanner runs from the same with google and explorer. You may need Gareth's help to do that."

Mark maintained this was coincidence. Staff members had experienced a system shut down, which is indicative of someone trying to gain access externally. He had changed his own password and had been told that the cause of the issue was phishing. He did not know if either Mr Griffiths or Andrew were responsible but Andrew was off sick. He said that it was open to Andrew to ask for the new log-in details.

107. Andrew asked for a password and was met with three letters on 5th September 2019 and 6th September 2019. The first is from Mark which gives his account of the reason for the change of password and states:

> "Notwithstanding this you are of course absent from work suffering from work related stress.
>
> Due to your absence and more particularly the nature of your health condition, you are not currently carrying out any work

> for the Company, neither does the Company expect you to do so. Indeed you must continue to take the time during your absence to rest and recuperate.
>
> As such and in order to protect your own health, the Company shall not provide you with the access that you have requested. This is both reasonable and necessary given the nature of your health condition. As you are not obliged to carry out any work you have no need to have any access to the STA server during this time.
>
> On a final note with respect to any information you may be entitled to as a Director, if any such information is due to be provided, you will of course receive such information by way of correspondence."

The second and third letters were notices of a proposed resolution to remove Andrew as a director of STA and of STL at a meeting on 9th October 2019.

108. Ms Clarke characterised the letter of 5th September 2019 as disingenuous, saying the correspondence to which I have referred was a "master class" in a sibling creating a form of words designed to goad his brother but claim the best of intentions to a third party. I would not accept that in its entirety but I cannot see the decision not to give Andrew a password, whatever may have prompted the need to change passwords, as anything other than a decision to prevent access to information. The suggestion that it was, in essence, for his own good is, in my view, disingenuous. To have provided Andrew with a password would not have required him to work or attend to the company's affairs, but it would have allowed him access to the information to which he was entitled as a director.

109. A proposal to refer Andrew to occupational health was sent by letter dated 12th September 2019. Mark wrote:

> "I write further to my letter to you dated 30th August 2019 and note that I have not received a response. You will recall that I confirmed the Company's decision to refer you for an Occupational Health assessment and requested that you sign the consent form for the referral. You were reminded in the correspondence of your contractual obligation to submit yourself to a medical examination by someone appointed by the Company and we have advised you who we intend to instruct in that respect.
>
> As we have not received a response from you today we will require you to provide your consent by no later than 5.00 pm on 17th September 2019.
>
> Given your contractual obligation to submit to the examination and given the length of your absence, if you refuse to give your consent, fail to respond to our correspondence or fail to take reasonable steps to assist the Company in relation to its

> enquiries concerning your health condition then the Company may have no alternative than to make decisions about your employment and the Company's options in relation to your ongoing absence without the benefit of medical opinion and without further input from you.
>
> As such we would strongly urge that you comply with your contractual duties and assist the Company with its enquiries."

110. Again, the proposal to refer Andrew to occupational health was characterised by Ms Clarke as mere box-ticking, the reality was that he was being excluded from management. His passwords had been changed and there was a proposal to remove him as a director. It was simply incredible to suggest that the company was trying to restore him to work at the same time as removing him. There was no necessity to remove him from the board. It could continue to function. The only reason to remove him was to exclude him from management.

111. Mark's evidence was that the referral to occupational health was "what you do" and denied that he was trying to exclude Andrew as a response to his sickness. He described him as a "non-functioning director". It is not surprising that a commercial organisation should observe formalities while simultaneously offering support but Mark accepted Ms Clarke's proposition that it possibly would have made no difference to the company if he had remained as a member of the board.

112. It was put to him that there was a sudden pivot from being supportive to being very cold and business-like and that this was unfair. Mark said that it was also unfair that Andrew had telephoned him and, in their last conversation, accused him of "robbing" him, or words to that effect. That, Ms Clarke suggested, was the significant point. It was a retaliation. Mark said again that he was simply following company procedure.

113. The occupational health assessment was carried out on 23rd September 2019 by Dr David Adnitt of Telford Occupational Health Service. The report, dated 23rd September 2019, stated that Dr Adnitt had been informed by Andrew that is absence was "related to his mental health", which had been "affected by conflict with individuals in his company". He went on:

> "I did talk to the employee about how his current mental health is. I did undertake a screening questionnaire for anxiety and depression. This employee's screening questionnaire did not show evidence of him having anxiety and depression. This employee is not on medication for his mental health. This employee is not currently having talking therapies for his mental health.
>
> The only situation in which this employee informs me he is currently having mental health symptoms is in relation to what he describes as conflict with individuals in his company. This employee informs me that he is well in terms of his mental health at other times.

> The other medical problem that I understand that this employee has is asthma for which he is on 2 different sorts of inhalers. I understand this employee's asthma is currently well controlled."

He considered that Andrew's fitness to return to work on expiry of his sick note after 1st December 2019 was likely to depend on whether the issue that Andrew identified in relation to his employment could be addressed. He considered that there was no objection to a meeting being held to discuss his return to work but that he should be accompanied by someone he trusted. Of course, after this, Andrew was removed as a director and his monthly dividends were suspended.

114. Having set that out, my conclusion is that I am not satisfied that Andrew was excluded from the management of STL so as to constitute unfair prejudice in June 2018 when his period of absence began. There is nothing approaching sufficient evidence to show that Andrew was excluded then. The evidence is entirely consistent with Andrew having had physical and mental conditions which led him to take a period away from work but inconsistent with those conditions being caused or exacerbated by the respondents, or indeed Andrew believing them to be so. On the contrary, he maintained friendly communication with his fellow directors which is wholly at odds with the contention that his absence had been caused in part, by a huge betrayal and an attempt to remove him. I am not satisfied there were such attempts and consider that Andrew simply over-reacted to the management review. That review may well have been accompanied by discussions as to the management structure but I am not satisfied that there was any plot to remove Andrew or any of the directors against their will.

115. There is a "disconnect" between the exchanges as to the nature and his extent of his illness and the respondents' claims that the had not stated that he was "ill". I consider that this is explicable by the respondents' belief, which I accept was genuine, that Andrew was having a short period of rest and recouperation and their experience of him going about normal social activities with them and corresponding in an ordinary manner, albeit referring to receiving treatment for long-standing medical conditions and counselling, rather than a prolonged period of being too unwell to work as a result of stress exacerbated by the respondents and having been formally issued with sick notes. The proposition that he was anticipated to be absent for a short period is repeatedly referred to in Mark's letters and not contradicted by Andrew.

116. By the time of the removal of Andrew as a director he had been absent for some 16 months. He had himself raised the question of grievances against the company and had said to the independent consultant charged with investigating those grievances that he could not see himself returning to the company. He had not undertaken his duties as a director for more than a year and was apparently unable to do so. The Shareholders' Agreement expressly contemplates the removal of a director who fails to act as such and, by October 2019, Andrew's wish to leave the company was quite plain and he had no desire to be restored to his position as a director of it. I accept Mr Najib's submission that, in fact, Andrew had formed a wish to leave the company by January 2018, when he wrote to Mark seeking to be brought out, having sought, for the first time, financial information from Mark Jones. It appears to me to be likely that he felt threatened by the management review and, as suggested by Mr Najib, was potentially seeking some "dirt" to justify leaving or at least seeking to understand his

financial position better. He did not, however, follow up on his wish to leave in the early part of 2018.

117. Nonetheless, after he left work in June 2018 he continued to be copied into emails concerning financial matters, in particular the payment out of the STA dividends to each of the directors of STL. It is right to say that there was a delay in providing a set of STL minutes to him, for which apologies and an explanation was offered. It is not suggested that these were withheld from him while provided to other directors. I do not see this as a sinister attempt to exclude him from information. I am however satisfied that the decision not to allow him access to the servers in September was a deliberate attempt to prevent him having access to information, probably as a prelude to the resolution to removing him as a director.

118. Andrew had not in fact been fulfilling his role as a director for many months. The Shareholders' Agreement contemplates the removal of a director who is not performing his functions. Taken in isolation, his removal as a director in these circumstances in October 2019 would be difficult to characterise as unfairly prejudicial. It is apparent however that the STL respondents' response to Andrew's grievance, while in many regards reasonable, plainly did include attempts to bring undue pressure to bear upon him. While monthly dividends were not in fact suspended in December 2018 or January 2019, the threat to suspend them and recoup "overpayments" appears to me to have been intended to intimidate. There is a tangible shift in tone, on both sides but predominantly on the side of the other directors, to "playing hardball", culminating in the suspension of dividends. I shall turn to this in due course but, before doing so, it is necessary to consider other transactions of which Andrew complains that have potentially affected the financial position of the company.

Expenditure on Codex Print Solutions Limited

119. Andrew contends that in the spring of 2017, Mark told Andrew that he and Jeremy intended to acquire a printing business, of which Mark and Jeremy were to be the directors and equal shareholders. Andrew says that this was to be separate business from STL but he nonetheless advised Mark that he did not think it was a good investment. The proposed acquisition was not raised at board meetings on 28th February or 25th May 2017 and no decision was made by the board of STL to have any involvement in Codex. Nonetheless:

    i) On 22nd June 2017, STL paid £24,000 to a company called Eniprint Ltd to acquire its printing business;

    ii) On 30th June 2017 STL entered into a six year lease of Pemberton House, the trading premises of Codex, paying rent and rates of £36,120 per annum

    iii) Again in about June, STL entered into a lease agreement for a Mitsubishi truck for Codex to make deliveries at a monthly costs of £239.88, together with a cost of £1,599 plus VAT for the installation of a hard top roof.

    iv) STL discharged monthly wages of £3,166.67 and National Insurance of £343.34 from July 2017 and November 2017.

v) Other expenses were also paid by STL such as the purchase of a guillotine for use by Codex at a cost of about £13,000 plus VAT and £2,600, plus VAT, for steel window bars.

Codex was unsuccessful and ceased trading in November 2017 and was unable repay STL for these expenses in full. Total repayments were amounted to £30,000 but the lease of Pemberton House and the Mitsubishi truck continued.

120. This is alleged to be a breach of the Shareholders' Agreement and the Shareholders' Understanding. Andrew says that the Codex Transactions were not discussed or approved at STL board meetings or, in particular, approved by a Special Director's Resolution as required by clause 2.5 of the Shareholders' Agreement. Further, they are alleged to have been in breach of the STL directors' duties in that they were entered into for the benefit of Codex. Mark and Jeremy exposed STL to liabilities without any corresponding benefit to the company, no security was provided and Mark and Jeremy's conflict of interest was not disclosed to STL's board under section 177 CA 2006.

121. Again, the STL respondents, in their Points of Defence, say that the Codex shares, like those of STA, were to be held on trust of the STL shareholders in proportion to their shareholdings in the STL and STA. The acquisition was not recorded in the STL minutes for the meeting on 25th May 2017 but the acquisition was discussed with all the directors present, save for Mark Jones.

122. In respect of Pemberton House, the premises acquired at the time of the Codex transaction, the STL respondents accept that this was used for Codex, but not exclusively so. It was also used for the purposes of STL – for meetings of directors, private meetings, training rooms and storage. Codex paid a charge for its use of the buildings. Similarly, a charge was paid by Codex for the use of the Mitsubishi truck and Andrew also used this vehicle after its demise. Wages and National Insurance were recharged to Codex and paid. The guillotine was acquired by part exchange leaving a balance of £1,614 which was paid by an intercompany loan of £1,614 and the steel bars were purchased by STL. The bulk of loans to Codex were repaid leaving a net loss to STL of £3,000. In short, Codex was an investment opportunity that was simply not successful and was approved by the STL directors, including Andrew at the board meeting on 28th May 2017.

123. Mark accepted that the minutes of the STL board on 25th May 2017 did not refer to Codex. His written evidence says that it was discussed after the meeting, after Mark Jones had left. He said that it was just "a chat" between the Simmonds directors but the issue had also been discussed with Mark Jones as finance director. He said that the minutes would not necessarily record the transaction, even though it was significant, involving a loan to Codex and the acquisition of premises. He accepted that the Andrew had not seen the lease but said that he was aware of the transaction. When the business failed, Pemberton House was used for training and the truck was used by Andrew to make the best of a bad job.

124. Neil's written account is to the same effect. He said:

> "I do not believe that Andrew was excluded from the business. I note he refers specifically to the Codex transactions. I was

> aware of the idea as it had been floated prior to a board meeting. After the principal business of the board meeting had concluded we had a further chat. Mark Jones had left the meeting but he was called back to confirm how we could fund the purchase. Andrew was there throughout and didn't say anything and didn't object. Despite the fact that Andrew suggests that he was unaware of the transaction it must be pointed out that Codex was set up in Pemberton House and some security shutters had to be provided, It was Andrew who ordered all of those for that building. He clearly had opportunity after opportunity to raise questions in relation to Codex and the suggestion that he was somehow mislead is simply not correct."

Ms Clarke put it to him that if there was a discussion of Codex at this meeting it would have been documented. Neil said the discussion took place after the board meeting itself. Andrew accepted that he had provided the steel for shutters for Pemberton House, but said that this was because STL was a customer of STA.

125. Jeremy's written evidence as to the acquisition of Codex's business is as follows:

> "This was a potential opportunity presented to myself following a chance encounter with Mark Taylor-Wozencroft. Effectively, we, the four shareholders, would take over Codex, retain Mark Taylor-Wozencroft who would undertake the daily work allowing us to reap the rewards by way of profit. Codex was a print business and whilst it did have some ongoing print work I was confident that we could provide it with sufficient print business to make it profitable. Other than our initial outlay Codex would require minimal management input from us. The plan was the four of us would receive a yearly dividend going forward. Unfortunately after incurring initial costs on set up Mark Taylor-Wozencroft became seriously ill."

126. Ms Clarke put the absence of documentation in relation to Codex to Jeremy. He said the proposal was "floated" as an idea after the board meeting on 25th May 2017. He, Mark, Neil and Andrew were present and they discussed the acquisition and the use of inter-company loan. This took place after the formal STL board meeting. Chris Goode was also present. It was Jeremy who floated the idea. He disagreed that it was unusual that it was not recorded in a minute.

127. It was put to Jeremy that the investment was risky, given that it was a business that was dependent on Mr Wozencroft. Mr Wozencroft was, apparently, in his mid to late 40s and there was no reason in the evidence that I have seen to think that he would not be able to carry on working.

128. Mark Jones, despite not being a director or shareholder in Codex, or a shareholder in STL, appears to have been involved in some of the financial aspects of Codex, albeit in a fairly minimal way, by administering the payment of certain invoices. His recollection of the initial discussion as to the proposal to acquire Codex's business. His written evidence is that:

> "In relation to the board meetings which I did attend Andrew's contribution was generally fairly limited. After he provided his STA fleet report he made very little contribution. I note he has referred to various issues as evidence of his supposed exclusion from the business. One of those relates to the Codex transactions. I recall that discussions and agreement took place at the end of a board meeting although I did not sit in on the discussion. The formal business of the board meeting had concluded and I left the meeting. I recall at some point being asked to discuss how the potential deal could be funded. I recall advising that we could do it by way of an intercompany loan. Personally, I did not think it was a particularly good idea, and stated so, but I made it clear that it was up to the other directors and shareholders as, in all reality, it was ultimately their money. As I recall there was a general agreement that it should proceed with Mark and Jeremy being scheduled as the shareholders."

129. Ms Clarke took Mark to his managing director's report for the 26th September 2017, after the acquisition of Codex, the purchase of the Mitsubishi vehicle and the lease of Pemberton House. She put to Mark the absence of any reference to these matters. The only reference is in passing is follows:

> "The below is delayed due to my time on other parts of the business's [*sic*] and setting up Codex on a short timescale. In red below are the new start dates for this."

The minutes of the meeting of that day makes a reference to Codex that is similarly brief:

> "Update on Woody trading. Very busy at the moment with increased business. Accounts to be tied up shortly.
>
> STA tie up with Renault. New night shift and new Trainee fitters.
> General points made on the shortage of skilled employees for Transport and STA.
> More details on STA when AS getting back off holiday.
> MS reported that he and CG to progress new lease and Rent review with Andrew Dixon next week.
>
> Print Operation set up going OK after some initial problems with the move; but more direction into the operation will be given shortly, by MS and JW."

130. Ms Clarke suggested that there was nothing there to suggest the purchase of Codex. Mark stated that Andrew knew all about Codex. The minutes do read as if a degree of knowledge of Codex was assumed. The use of the term "Print Operation" suggests it was treated as an operation of what one might informally call the Simmonds group of businesses. Certainly Andrew does not seem to have raised any question as to why it was referred to in both the managing director's report or at the meeting itself. A

printing operation was entirely outside the scope of the business of STL or STA and it is remarkable, even in an relatively informally run businesses, that this should not be queried at all by Andrew.

131. The next reference is in the minutes of the meeting of 2nd November 2017. The print business is said to be "not working the way we wanted". It seems that this followed Mr Wozencroft's illness and retirement. The use of the "the way we wanted" does suggest, again, that Codex was treated as part of the business of the group. Andrew maintained that Codex was only mentioned because Mark and Jeremy were spending time away from STL. That is not how I read these minutes. The discussions are very much framed as being relevant to the whole board and on the basis that a degree of knowledge was assumed. Again, it appears that Mr Jones, though neither a director nor employee of Codex, was involved in its financial administration. There are emails in which he refers to paying an invoice.

132. It was put to Mark that the company had by this point been sold and that this was again an example of matters being concealed from the board. That reading is over critical. The cheque for payment for the business was in fact drawn that very day, which is consistent with Mark being said to update on Codex "after recent events are settled". Moreover, the sale was expressly drawn to Andrew's attention. He was sent a text a text by Mark on 2nd November 2017. At paragraph 48 of his witness statement he says this:

> "That same afternoon, after the meeting and after Mark S had stated Codex had stopped trading, I was surprised to receive a text from him, with a photograph of a cheque for £36,000. It was made out to Codex by a firm of funeral directors. No explanation was given and I wondered why on earth he had sent it. I didn't respond, as I didn't really know what to say."

In fact, he did respond by text with the word "lunatics". It was put to him that, if he had had nothing to do with Codex, he would have replied "why are you sending me this?" and that his response was because he thought that the buyers were "lunatics" for purchasing the business without Mr Wozencroft. At the very least this shows some assessment of the value of the business.

133. That was not the only communication regarding the affairs of Codex post the sale of its business, however. On 16th November 2017 Mark wrote to Jeremy, Neil and Andrew to report that the sale of the business completed on 3rd November 2017 and the machinery had been moved out. He reported that customer payments were being collected and all suppliers were being closed. He reported that Codex maintained a subscription with Shutterstock, a stock image supplier, until the end of the month and he had asked for as many pictures to be downloaded as possible "for all the business's [*sic*]" before then. He went on:

> "The only outstanding thing i have to do is to pay the guy who made all the bars and fitted them to the windows and doors. This came to $2,600 I will sort with MJ next week and then we are all good with the office block as it is now secure.

> I have plans for the new offices to go through and agree before Christmas.
>
> If we do need any stationary [*sic*] printing Simon Williams has said for us to speak to him when we want something doing.
>
> Any questions call me."

Andrew said that he didn't know why he had been copied in to this email. He did not appear to have responded to Mark's request to call him with any questions. Again, the plans for the "new offices", which can only have been a reference to Pemberton House, do not seem to have raised caused him any surprise.

134. The profit and loss account for Codex's brief period of trading in 2017/18 shows that all but £3,100.28 of the monies paid to it by STL were repaid. Andrew denied seeing this in 2017. He accepted that the Mitsubishi car that had been purchased for the use of Codex was later used by him as his personal vehicle, even after he left the company.

135. The financial report for a board meeting on 27th March 2018 refers to the additional costs of Pemberton House. These state "The following known cost increases will be included:... Pemberton House Costs £36k per annum which were not in last years [*sic*] budget". Again, a board meeting on 22nd May 2018, at which Andrew is shown as being present, records "Discussed Pemberton House and renting it out". Andrew did not raise any objection to this.

136. STL is said to have continued to use Pemberton House for training purposes. Andrew again denied being aware of that. The minutes of an emergency financial meeting dated 14th February 2019 state:

> "JW confirmed the room at Pemberton house had been cleared and all training facilities removed. The premises had been used for external training and CPC courses however with the impending notice to be given to the landlord, JW confirmed the room had been cleared and the new room at High Ercall was complete and the CPC training had started there. MS confirmed he will now start the process with the landlord and estate agent."

Andrew said he was not present at this meeting and, indeed, there is no suggestion in the minutes themselves that he was.

137. On one view it might be said that there would be nothing surprising in brothers keeping each other updated about their respective interlocking business interests but the STL minutes, the text with the photograph of the cheque and the email of 16th November 2017, are all consistent with the progress of the business being reported to the principal shareholders in STL on the basis that they had an interest in it by virtue of their interest in the company. I find it impossible to accept that Andrew could either have been unaware of it or thought that it was irrelevant to him or to STL. I accept the evidence of Mark, Neil and Jeremy that the plans for the acquisition of this business by a vehicle beneficially owned by the shareholders of STL, the taking of the

lease and the use of intercompany loans were discussed with Andrew and that, at the least, he was content to acquiesce in this.

138. On the face of it was a reasonable commercial venture – a small printing business primarily printing hymn sheets for religious services and its success was frustrated by the unforeseen illness of Mr Wozencroft. It is true that there is little in the way of formal recording of the transactions, but STL's documentation is informal generally and the period of Codex's trading was limited to a matter of months. The available documentation is sufficient however for me to be satisfied that Andrew would have been aware the discussions and at the very least accepted the acquisition on behalf of STL, the financing by the company and the entry into the lease of Pemberton House. These transactions were not in any event ones that could have been prevented by Andrew under the terms of the Shareholders' Agreement entered into by Andrew. The acquisition of any business interests, leases and the lending of money were transactions requiring a Special Directors' Resolution, i.e. a bare majority at a directors' meeting with a quorum of three. I reject Andrew's complaint in respect of the Codex-related transactions.

Expenditure on vehicles

139. In respect of Andrew's complaint about the purchase of three vehicles he accepted that such vehicles were usually acquired on a lease. At the end of the lease period they could be purchased or returned but there would be costs associated with the return such as the removal of the company livery or satellite navigation. Andrew denied that these costs could be saved by purchasing the vehicles at the end of the lease period as he said there were costs associated with purchase too, though he offered no costs comparison. His complaint was that the decision to purchase three vehicles was taken during his absence from work. He accepted that, when vehicles were purchased, the finance costs would generally be lower than lease costs but maintenance costs could be higher. In the case of the three vehicles it was put to Andrew that, while he complained that there had been no board meetings, it was a commercial decision that the directors could have passed by a majority resolution in any event, which he also accepted.

140. Andrew was taken to a list of capital expenditure in excess of £3,000, all but seven of which had been incurred when Andrew was still working at the companies. While there were no resolutions in evidence showing that there had been any formal approval of this expenditure in accordance with the Shareholders' Agreement, Andrew said they would nonetheless have been discussed. What appears to be the case is that the formal procedure set out in the Shareholders' Agreement was not in fact followed. The directors who continued to be active while Andrew was ill followed the same approach. This appears to me to be reasonable. Andrew's objection is that he knew most about vehicles and should have been involved but the business cannot have been expected to be put into suspended animation as a result of Andrew's absence. Andrew was, it is accepted, not carrying out his duties as director and his evidence does not persuade me that the decision to purchase these vehicles was unreasonable or would not have been approved had a directors' meeting been convened. I can see no basis on which it could be said that these transactions were unfairly prejudicial.

Cessation of dividends

141. The annual dividend was not paid in November 2018. As I have noted above, this was foreshadowed in late 2018. On 1st December 2018 Mark wrote to Andrew and, among other things, said that dividends would not be paid to him after that month. Andrew replied to say that this could not be done. At the next board meeting on 8th January 2019 there was a discussion of sales figures and expenses and Mark Jones is reported as saying:

> "MJ what we don't want to see is them figures being down on budget and having a loss which we have not had for many years. If we don't hit those targets one thing we may have to consider is hold our dividends so we don't get in a position like we did a few years ago. So to retain the cash within the business as we have 3 big negative months, we have fuel price problems and we are not sure what Brexit will bring either. MJ said we just need to bear this financial position in mind as we may need to halt dividends."

142. Ms Clarke suggested that this was simply laying the groundwork for suspending dividends. Mark maintained it was justified on the basis of the figures. On 12th February 2019 an "emergency financial meeting" was called by Mark to take place on 14th February 2019. The email giving notice of the meeting was copied to Andrew and it prompted a letter from his solicitor dated and sent by email on 13th February 2019 stating that the meeting was "clearly not being called for commercial reasons" but had been prompted by the submission of a further sick note by Andrew. They stated:

> "You are clearly trying to manufacture a position to avoid making payments to our client of his salary (which is paid by way of basic salary and dividend)."

They stated that the management accounts showed profit above budget of £28,760.

143. The principal points of discussion at the meeting on 14th February 2019 were set out as follows:

> "Decembers figures are were not good and down on what we had budgeted, this needs to be discussed.
>
> January figures are still not complete but looks like they will be worse as we have already budgeted for a £87,497 loss anyway.
>
> As per our discussion in the last Board Meeting we may need to be prudent and take action if our performance does not improve in the form of nonpayment for directors for the period to the end of the financial year.
>
> Customers are now being affected by the lack of Brexit planning due to the government not reaching a deal at this point."

144. The minutes state under the heading "AOB":

> "As responsible Directors, we want to rectify things sooner rather than later, and all options including Directors remuneration needs to be looked at. The directors need to set an example to the rest of the business and although it's a harsh decision to make, it's prudent to do this as it sets a precedent to the rest of the business and shows confidence to all staff that we are committed in full to turning the performance around and quickly rectifying the problems.
>
> JW confirmed the room at Pemberton house had been cleared and all training facilities removed. The premises had been used for external training and CPC courses however with the impending notice to be given to the landlord, JW confirmed the room had been cleared and the new room at High Ercall was complete and the CPC training had started there. MS confirmed he will now start the process with the landlord and estate agent."

The minutes go on to refer to some vehicles and trailers having been returned to the hire company due to a slowdown in January and February, which was described as "usual". Two agency workers had ceased to be used. The minutes concluded:

> "MJ raised the point of payment for February for Directors. Although management figures were poor for the last 3 months we are still strong on a balance sheet and we still have a facility for drawdowns so in his opinion we would be ok to pay dividends in February. This would need to be managed on a month by month basis however so he would like to address this at the board meeting on 26.02.19."

145. Mark said that the directors were trying to manage the business with losses that kept coming in "month after month". December, January and February were the company's worst months and the losses "kept going on and on and on". The filed accounts, however, as Ms Clarke pointed out, showed an increase in turnover over £1 million, though it should be noted that they also show an increase in costs of sales of over £900,000. Profit before tax was £485,889, an improvement on the previous year by £52,719, and the company was comfortably balance sheet solvent.

146. The Strategic Report forming part of the financial statements for the years ended 31st March 2019, approved by the board on 17th December 2019, similarly contrast with the negative position set out in the minutes of the emergency board meeting. This states:

> "The directors are happy with the results of the company in the year and are positive about the future outlook. Dividends of £219,478 (2018: £215,945) have been paid from profits made.
>
> The directors appreciate that any plans for future development of the business may be subject to unforeseen events outside our control. However, the directors consider the performance of the

> business continues to be positive and its cash position remains strong."

147. Ms Clarke put to Mark that there was no basis to suspend dividends. Mark stated that the company only had £39,000 or so in cash at the bank. The balance sheet shows that as at 31st March 2019 the company had £38,987, some £37,047 less than at the previous year's end. Ms Clark similarly suggested that the position conveyed by the emergency financial meeting was inconsistent with the purchase of vehicles in March 2019 at the end of their hire purchase contracts. Mark's position was that no cash was spent on these at the time. The vehicles were bought on finance and without the vehicles the business could not deliver its services.

148. Ms Clark suggested another reason why a less than healthy financial position might be presented. Mark received a valuation of STL on 21st February 2019 from AVR Consultants. That was based on the company's 2018 figures and valued the total consideration for all the shares at £2,567,240. The valuation noted that a change in performance in the year ending 2019 would need to be taken into account. It is not in dispute that this valuation was paid for by the company but, troublingly, it doesn't seem to have been provided to Andrew. In response to an enquiry in a letter from Andrew's solicitors dated 26th February 2019, the respondents' solicitors replied as follows:

> "We note your comments that the company has incurred the cost of a valuation. However, as far as our clients are aware it has not actioned nor had any valuation prepared. Can you please provide confirmation of your supporting evidence of a valuation and the costs being incurred by our client."

Mark had no explanation for how this statement came to be made nearly a week after the date of the report. He simply noted that it took ages to get the report. He denied that the intention had been to find out the value of the business and present a less positive outlook for the purposes of buying out Andrew.

149. Dividends were finally suspended pursuant to a resolution on 7th November 2019. The minutes record:

> "• After much discussion the Directors note with some concern the downward projections in relation to business through to the yearend specifically in light of the continuing uncertainty in relation to Brexit.
>
> • The Directors note that the company is currently subject to a Petition, threatening Winding Up, based on allegations of unfair prejudice brought by Mr Andrew Simmonds, former Director of this company. The potential impact of defending this litigation coupled with the uncertain economic future in respect of the business has caused the Directors to consider the current Dividend Policy.
>
> • The Directors consider it wholly prudent that the current practice of paying a monthly dividend to the shareholders be

> suspended pending finalisation of year end accounts for 2019/2020, and probably for the subsequent year.
>
> • In light of the suspension of ongoing dividend payments the Directors also agree that current salaries in respect of Mark Simmonds, Jeremy Wilson and Neil Simmonds be amended. Mark Jones is authorised to make the appropriate PAYE amendments to confirm payment from November 2019.
>
> • To confirm dividends will not be paid for at least the next two years as a result of:
>
> • Brexit uncertainty
>
> • Downturn in current trading, and anticipated continuance of this
>
> • Continued litigation and employment legal costs
>
> • To protect the company from future shareholder disputes"

The salaries were to be paid at a maximum of £4,116 per month, annualised at £50,000. The minutes suggested that this was a lower sum than the market rate for the roles. The salaries of Paul and Geoffrey and Patricia Simonds were to be put on hold for until the conclusion of the financial period.

150. Ms Clarke suggested that the proposal to stop dividends for "at least two years" was intended to be a further warning shot. I cannot see any justification for that decision other than to seek to cut off Andrew financially. It is quite correct, as Mr Najib noted, that his director's service agreement entitled him to statutory sick pay after a period of absence, but I cannot see how that disentitled him to dividends if otherwise properly payable in accordance with the long-standing practice of this quasi-partnership company.

151. The threat to suspend dividends in February 2019 was not justified by the financial position of the company but was an attempt to disadvantage Andrew financially, or at least to threaten to apply pressure to him. The actual suspension of dividends in November 2019 was similarly unjustified by the company's anticipated financial position. Again, its financial position as disclosed by its filed accounts for the year ending 31st March 2020 show a healthy profit and shareholders funds, though reduced on the previous year. This reduction appears to attributable principally to increased administrative expenses and interest payable, and the notes to the accounts show a substantial increase in director's remuneration, from £44,238 in the year ending 2019 to £105,858 in the current year. The Strategic Report again refers to the "stable trade during the year" the directors' happiness with the company's performance and that the "directors consider that the performance of the business continues to be positive and the cash position remains strong". I can see no justification for the negative outlook in either February 2019 or November 2019 or any other way of characterising the suspension of dividends than as an attempt to exclude and disadvantage Andrew. This is rendered all the clearer by the decision to move from a model whereby the directors were principally remunerated by the dividends payable to them as shareholders to a

salary model. Had the reason to suspend dividends genuinely been attributable to the financial position of the company I cannot see any justification for an increase in salaries that to compensate for this.

STA Petition

The ownership of STA

152. Before considering this aspect of the case it is necessary to mention two other entities connected with the Simmonds family and STL. I have already referred to Codex in the context of the STL Petition above, but there were two other companies that are mentioned the papers. First, Stovey Ltd ("Stovey"), a company of which Mark was director and shareholder and, secondly, Woody Wood Products Ltd ("Woody Wood"), a company of which Mark and Mark Jones were directors and Mark was the shareholder. I have already explained above that Codex's directors and registered shareholders were Mark Simmonds and Jeremy Wilson.

153. The Points of Defence allege that the business of STA was purchased from a Mr Mike Price in 2002. While Mark and Andrew were recorded as the holders of the share capital in STA from that date, it was "always understood" that the shares in STA would be held by them:

> "as nominees for and on behalf of the registered shareholders in Simmonds Transport Limited, on the same pro rata basis as per the shareholding in Simmonds Transport Limited."

The consideration for this arrangement was the transfer all STL's vehicle maintenance workshop work into STA.

154. It is common ground that the initials "ST" in STA do not stand for "Simmonds Transport". The letters "STA" represent "speed limiters, tachographs and auto electrics", the fitting of which was STA's business in the early part of its trading life. Mark accepted in oral evidence that this business was not in fact purchased from Mr Price in 2002, who joined STA as a director in 2003 and acquired shares in 2004. He explained that a partnership business operated by him, Andrew and Paul called Simmonds Car Van and Commercials was brought into STL and its business was then transferred into STA.

155. Mark's witness statement offers a different account of the acquisition of the shares. He says that in 2005 it was agreed between himself, Andrew, Jeremy and Neil that they would buy out Mr Price's shares and the shares in STA would be held for all of them by Andrew and Mark as a result of corporation tax advice received. Apparently this advice was that, if STA were a wholly owned subsidiary of STL, or its the shareholdings were identical to those of STL, it would lead potentially to an increased tax liability.

156. Mark's statement goes on to say that the consideration for Mr Price's shares was that STL would taken on STA's company debt and guarantee the repayment of Mr Price's outstanding directors' loans. Neil's statement too states that "the ownership model was effectively the four of us". Jeremy also said in his evidence that STA was taken over by STL in 2005. Mr Price offered Mark the opportunity to buy him out, repaying

his director's loan, with STL taking on STA's existing company debt. Those accounts are not consistent with the Points of Defence, which give the impression that the business was purchased outright from Mr Price in 2002 and was to be held for the then shareholders in STL. Mark Jones's evidence was that, in his mind, there was no question that STA was and is owned by "all four shareholders".

157. The recorded shareholdings of STL in March 2002 are that Andrew, Mark and Paul held one ordinary share, while Mr Wilson held five shares and Neil held 32 ordinary shares. The remaining shares were held by Mr Geoffrey Simmonds and his wife, Mrs Patricia Simmonds. By May 2005, the annual return showed that Andrew, Paul and Mr Wilson held 10 ordinary shares, while Mark held six and Neil held 18. They each held 20 A or B preference shares. Neil's wife held 12 ordinary shares and Mark's wife four. Geoffrey and Patricia Simmonds held 15 ordinary shares and 20 preference A shares each. Aside from the parties to these proceedings, none of the other shareholders in 2002 or 2005 have contended that they have a beneficial interest in the shares of STA.

158. STA's annual returns show that Mr Price did not in fact cease to be a shareholder until 2009. It was put to Mark that his statement as to the acquisition of Mr Price's shares was wrong, though, as he noted, his witness statement says that the agreement in 2005 was between himself and three of his brothers, not with Mr Price. By 2009 the holders of the ordinary shares in STL were as they are now, with Andrew, Mark and Neil holding 25 such shares each, Jeremy 20 shares and Paul 5 shares. Geoffrey and Patricia Simmonds held 20 preference shares each, as did each of the other ordinary shareholders.

159. It does appear that negotiations for the purchase of Mr Price's shares began in about December 2004 and that these negotiations included the repayment of director's loan and the transfer of the shares to STL. In a letter dated 6th December 2004, Mark wrote to Mr Price and said:

> "At our last meeting the option presented was for Simmonds Transport to take over the business in its entirety, for all Directors to stand down and the shareholding transferred to Simmonds Transport. As Simmonds Transport has provided business loans and regular management charges to STA (Shropshire) Ltd this was considered to be an appropriate course of action, to which you expressed your agreement.
>
> …The Directors of the Board are prepared to take on the loan and repay your capital investment of £14,902.74, payable monthly over a period of 3 years on the strict understanding that the company remains in profit. If the company can afford to pay this off any earlier then it will do so."

This offer was not accepted.

160. There was a proposal for the transfer of Mark and Andrew's shares to STL recorded in the minutes of a STA board meeting of 7th July 2007. That was for the Mark and Andrew to "sign over" their shares to that these would be held by STL. Mark said that

the shares had always been held on trust for STL shareholders. I shall refer to these minutes in more detail below.

161. On 14th December 2009 a different offer was made to Mr Price as follows:

> "Both Andrew and myself confirm that we can agree as discussed with you the following;
>
> 1. Repayment of your Directors Loan
>
> 2. Compromise Agreement.
>
> 3. Release or indemnity for the Guarantees given by you for STA
>
> 4. Resignation as a Director/ Secretary
>
> 5. You are to sign a Stock Transfer form to transfer your shares back to either the Company or one or other or both of myself and Andrew"

The guarantees were to be removed or transferred to Mark and Andrew and, in the alternative, they agreed to indemnify Mr Price.

162. Mark disagreed that the transfer to him and Andrew contemplated by that proposal is what took place. Indeed, what the letter contemplates is a transfer to either "the Company" or to "one or other or both of myself and Andrew". The Company to which the share were to be transferred is not identified but might be understood to be STL, although the offer is written on STA letter paper. In any event, this suggests that there was no particular concern as to which of Mark and Andrew the shares were transferred to which and is suggestive of a private arrangement as to how the beneficial interest should be held, irrespective of the person in whom legal title was vested.

163. It appears relatively clear therefore that, while there was discussion of the purchase of Mr Price's shares from relatively shortly after his acquisition of them, the purchase did not take place, and Mr Price did not resign his directorship, until 2009. Nonetheless, the board of STL considered the affairs of STA from shortly after its incorporation. STL's board minutes dated 26th November 2003 record:

> "3. Cash in the bank is £25,000 in the No 1 Account and £40,000 in the current account. Everything is up to date and being paid and a separate account has been set up to pay corporation tax.
>
> …
>
> 14. It was agreed the Simmonds Transport would finance STA to the tune of £25,000 and Directors agree to provide guarantees if necessary."

Andrew stated that he was not aware that Neil and Jeremy Wilson had provided guarantees or that STL financed STA. He accepted that STA did not have regular board meetings and that, from its early days to June 2018, its affairs were discussed at STL board meetings as STA was "very much linked" to STL.

164. He was taken to STL's board meeting agenda from 12th January 2006 in which "STA Budgets & Plans" was listed as an item for discussion. The minutes for the meeting on 15th November 2006, at which Andrew was present, refer to the sales figures for both STL and STA. STA has its own section and the minutes, under the heading, "View from the Top", stated that:

> "Shares in Simmonds Transport to be altered as agreed with a cost of approx. £3,000 to be done immediately. Also shares in STA to be reviewed now."

What the reference to the review of STA's shares might mean is perhaps explained by the minutes of the STL board meeting dated 5th July 2007, which were emailed to Andrew on 10th July 2007. The section headed "New Financial Year 06/07" states:

> "Mark & Andrew Simmonds will now sign over there [*sic*] shares of 40% each to Simmonds Transport Ltd who will own a total of 80%.
>
> Budgets for the new year we went through and confirmed a few alterations for then to be agreed as a working document. A further meeting
> Will be arranged to then confirm this document.
>
> The board agreed to alter Mike Price's wages to a salary of 35k per anum [*sic*]."

Andrew said that he had never agreed to give any of his shares away. The wording of the minute suggests that the board regarded the transfer of title to the shares as something that STL was entitled to as of right. They were to be "signed over" not purchased and the STL board plainly regarded itself as able to resolve to alter Mr Price's salary.

165. Again, the agenda for the "Simmonds Transport Board Meeting – 25th April 2007" includes the following items:

> "2. Reports by Senior Directors in each business:
>
> …
>
> Andrew Simmonds - STA
>
> 4. Plans for the Future
>
> …
>
> (c) Plans for STA

(d) Development of Business Plan"

Andrew said he did not remember this meeting.

166. Mark's "Managing Director Report Year End 2007" concluded

> "Andrew has kept our vehicles in good order this year and has had to increase their staff levels to enable this. With the increase in vehicles & also the 18 new trailers we have just purchased this should keep them busy again for the next year. We will again be able to improve what STA can achieve in the New Year after we relocate. Andrew has done well in keeping this side of the business in order and helping sometimes with the parking. (The cause). Mike has kept the accounts and paper work side of the office in order and perhaps increasing the grey hairs in the process."

It was put to Andrew that STA was regarded as part of the overall business of the group. Mark, as managing director of STL, devoted a significant chunk of his one and a half page report for this meeting to STA, the growth of its business and the maintenance of the accounts. Andrew said that STL was a service provider to STL and had a very close connection to it. One wouldn't work without the other.

167. The subject of the structure of STA was further discussed in November 2011. Mark's report to the board of STL for that month concluded:

> "9. Other Business's [*sic*]
>
> In January I will issue written updates on STA & 1ST4 Biofuel Ltd (Woody) this will include the position of each business and the current and future structure."

It is signed off, electronically, by Mark as managing director and dated 15th November 2011.

168. It seems from a manuscript note dated 6th November 2011, prepared by Mark, that he was contemplating an agreement to transfer the shares so that they were held equally between Mark, Andrew, Neil and Jeremy Wilson. It says next to the marginal note "Shares" "Current 6-11-11 50/50" and then to an "agreement to transfer" the shares between four people in equal shares, listing them as Mark, Andrew, Neil and Jeremy. That does not tell me anything about the beneficial interest in those shares.

169. STA was still on STL's agenda in the managing director's report for February 2014, when it was noted that the insurance renewal covered all of "the group's" businesses. One can see that the policy document itself shows that the insured entities are STL, STA and "1st 4 Biofuel Ltd", which was Woody Wood's previous name. Andrew's evidence was that he had never paid any attention to the use of the word "group" in STL's management documents. As far as he was concerned there was no such group.

170. Mark's managing director's report for May 2014 included the following section:

> "8. STA

> Performance and communication is good between the businesses. Spend on our vehicles is the priority now to keep below budget.
>
> Mot pass rates are good still keeping our ratings high.
>
> Also now we are happy with the tyres from China we can proceed to use those tyres on certain vehicles within the fleet thus saving on tyres ."

The report included separate notes for Woody Wood.

171. Also in evidence are board minutes from 23rd September 2014, which were to be approved at a meeting on 18th November 2014. Under "Other Business" they stated:

> "[Jeremy] referred and updated on his recent discussions with Palletline over STA staying in the existing premises. Arrangements were to be agreed. Would involve a small increase in the rent."

Jeremy had no official role in STA. Andrew's explanation for this was Jeremy was the point of communication with Palletline as he did not know the management at that company.

172. The minutes of the board meeting on 23rd April 2015 refer to the progress of a shareholders' agreement for STA and Woody Wood. Neil, who was not a registered shareholder of Woody Wood or STA, asked as to the progress of these. Mark reported that he "wanted to get [STL] resolved first and then go on to the others". When asked why he did not object to this discussion and remind the other board members that they were not shareholders, Andrew's evidence was that he did not remember the meeting. It is difficult to accept that answer. I do not see how it can be that STA was so consistently referred to as if its affairs were the responsibility and under the control of STL, or at least the principal shareholders therein, without any objection from Andrew, unless it had been considered by all of them to be a company in which STL, or its shareholders, were interested. In my judgment he did not object because that was the reality.

173. Mark Jones was also involved in STA's affairs in relation to banking. The financial report for 13th October 2015, prepared by Mark Jones, who again was neither a director nor employee of STA, stated:

> "Banking Facilities
>
> I have recently been in talks with Barclays Bank, who seem very keen to win us over as a client. Firstly they have agreed a loan for STA Shropshire to fund the large spend that has occurred in their redevelopment at Halesfield. However as STA cashflow seems to be coping currently, we will be leaving this alone for now. This would have involved a second charge on the property, and probably moving our banking over to Barclays as a whole - which wouldn't be a real problem."

Andrew accepted that Mark Jones dealt with banking for STA.

174. The financial report for the board meeting for 26th September 2017, again prepared by Mark Jones, referred to the existences of self-employed individuals at both Simmonds Transport and STA. He said:

> "It is becoming more of a hot topic, but I will leave it to you to decide if you wish to run the risk."

It was put to Andrew that "leave it to you" was plainly a reference to the board of STL as a whole.

175. The meeting on 2nd November 2017 record that Mark reported on the financial results shown STA's accounts and the proposals for dividends to be retained but reported further work was required to finish the accounts for Woody Wood. Again, Andrew's position was that Woody Wood and STA were always raised as they were beneficial to STL but it is evident that the STL board took more than an general interest in their success but oversaw their financial administration.

176. In the financial report for the board meeting on 27th March 2018. Mark Jones reported:

> "Year End Accounts for Simmonds Transport Ltd, STA Vehicle Centres Ltd and Woody Wood Products Ltd have all been finalised and sent to Companies House for the 2017/18 year end. All corporation tax due has been paid."

Andrew said that he had never seen Woody Wood accounts.

177. It was put to Andrew that the fact that only his time was re-charged to STA at £72,000 per annum, and Mark Jones's time for dealing with financial matters and Jeremy's dealings with Palletline were not, was indicative of a belief that the STA was part of a jointly-owned business. Andrew said that this was simply because Jeremy was the contact point with Palletline and he did not think that Mark Jones was taking that much time with STA. He accepted that if STA was not a jointly-owned business, there would be no reason for STL to charge a less than commercial rate for these services.

178. Perhaps most telling is the payment of dividends. These were declared only twice, in 2015/16 and 2016/17 and were divided equally between the four directors of STL. The dividends declared and paid to Andrew, Mark, Neil and Jeremy for 2015/2016 were dividends from both STL and STA, paid proportionately according to their shareholding in STL in the case of the STL dividend and in equal shares in relation to STA. Paul received a dividend in respect of his 5% shareholding in STL only. No objection was raised to this by Andrew and nor is there any suggestion that this was a gift.

179. At a board meeting, attended by Andrew, on 2nd November 2017 the minutes record that the following was discussed in relation to the 2016/17 dividends –

> "MS confirmed that last year STA finished up with £60K profit. Dividend to be set for STA but not paid yet so as to retain cash in the business for the short term."

There was a further discussion at the STL meeting for 28th June 2018. By this point Andrew was on sick leave and did not attend the meeting. The minutes records:

> "JW asked about STA dividend 2016/17 we agreed 10k which has to be drawn through MS & AS. We also have 2k that we can all draw when need to, but will have to run past MS when needed."

The use of the words "drawn through" appears to recognise that the entitlement to dividends was based on Andrew and Mark's shareholding. This is not expressed in terms that suggest that the drawing was dependent on Andrew and Mark making a gift but was part of an entitlement. The dividends were in fact paid by Mr Jones on 12th July 2018 and he reported this by an email copied to all four directors. It does not appear that any request was made for Andrew's consent but he did not object. There is nothing to suggest a gift being made by Andrew and Mark to the other directors. It is however right to say that the payments made were not in proportion to the holdings in STL. Jeremy received 25%, rather than 20%, and Paul received nothing.

180. The burden is on the respondents to show that the beneficial interest in STA's shares differed from the legal title to the shares. In my judgment STA was plainly an entity in which the beneficial interest in the shares did so differ. That the legal title to shares would not necessarily reflect the beneficial ownership appears to be clear from the apparent indifference as to whether Mr Price would transfer his shares to "the Company" or one or other, or both, of Mark and Andrew. The proposal that Mark and Andrew would simply "sign over" their shares in STA to STL is consistent with a transfer of legal title to the beneficial owners. It is similarly clear that dividends were paid to the four shareholder directors of STL as if as of right and there is no evidence that these were regarded as a gift. The extent of the oversight of STA by the board of STL is consistent with the directors of STL, including Andrew, regarding STA as a subsidiary of STL or as a company in which STL's shareholder-directors were interested. That is also consistent with the proposal that STL would finance STA and the directors would give personal guarantees, whether that proposal was carried into effect or not. Ms Clarke is right to say that the minutes at which the affairs of STA were discussed do not include formal resolutions as to its affairs, but the minutes are, in general, quite informal documents and are of course meetings of the board members of STL. Whatever the position was in relation to the shareholdings in STA, Andrew, Mark and Mr Price were undoubtedly the directors of the company and it would be unsurprising if the day-to-day management decisions of STA would have been undertaken fairly informally by them as its directors, subject to the oversight of the directors of STL. There is however little evidence of Mark, Andrew and Mr Price making any independent management decisions for STA.

181. While the recollections of the respondents as to the time at which STA was established, the time at which shares of Mr Price were acquired and the time and terms of any express trust are unclear, this is hardly unexpected in the context of the passage of time, the close family relationship and the relative informality of the way in which the affairs of the companies were conducted. The evidence does however satisfy me on balance that there was an agreement that Mark and Andrew would hold the shares on trust at least by 2009. That was acted upon by the provision of free assistance provided to the company by Jeremy and Mark Jones and the covering of expenses, such as insurance.

182. Ms Holmes' submissions on behalf of Paul recognise that the respondents' pleaded case is that the STA's shares were held on behalf of the shareholders in STL in proportion to the shares in which they held shares in STL. This is also the way in which the shareholdings are described in a letter from MFG Solicitors to those acting on behalf of Andrew on 8th March 2019. I see no reason to permit the respondents to depart from their pleaded case in this regard in both the STL and the STA Points of Defence. It seems to me that the proper way to regard the holding of the beneficial interest in STA is as being held on behalf of STL's shareholders from time to time. That would be entirely understandable in the context of companies regarded as part of one overarching family business. I attribute the references to the shares being held on behalf of the "principal shareholders" of STL in the evidence in these proceedings to, as Ms Clarke put it in the context of Codex, Paul's shareholding simply being overlooked. A striking example of this can be seen in Mark's witness statement in which he lists the five shareholders in STL and proceeds immediately thereafter to say "the business was to be owned and operated by the four of us". The dividends from STA seem similarly to have been paid on that basis.

183. The reality is that the respondents are not lawyers and it seems to me that it must have been intended that those businesses supported and held on trust by the principal shareholders of the main "family business", STL, would be held for the shareholders in that family business from time to time. Accepting as I do that STA's shareholding was held on trust it seems to me the only proper basis on which it could have been so held, in circumstances where STL's personnel were applied for the benefit of STA, would be if the latter were held for the benefit of STL's members as a whole and not for the benefit of a subset of its shareholder-directors. This particularly so given that it is accepted that part of STA's business had its origins in a partnership business that included Paul. I conclude on the balance of probabilities that STA's shareholding is held for the benefit of STL's current shareholders, in proportion to their shareholdings in STL.

Was STA a quasi-partnership?

184. It appears to me that STA must be regarded as a quasi-partnership for the reasons that I have discussed in relation to STL. It was an extension of the family business. While the minutes of the meetings of the STL board make reference to the drawing up of a shareholders' agreement in relation to STA no such agreement was finalised and it was not argued that the STL Shareholders' Agreement modified the relationship between the beneficial owners of the shares in STA. Insofar as there was a relationship of trust and confidence entitling Andrew to participate in the management of the company I reject the submission that he was excluded from management or deprived of information in June 2018 for the reasons I have given in respect of STL. He remained a director of STA after his removal from STL in October 2019 but, as I shall explain below, it seems that at around this time he was simply treated as no longer being involved in the management of STA either. Before I consider that aspect, I shall consider Andrew's allegation that expenses were loaded onto STA to diminish its value.

Additional vehicle charged to STA

185. The first of these complaints relates to a vehicle with the registration number "DX67 UKA", which Andrew says did not exist. In fact that was a typographical error and

this was a leased vehicle with the registration "DK67 UXA". Andrew said that he only knew that now but it is a fairly obvious error. He maintained that there was no need for STA to lease the vehicle from STL in February 2020. It was put to him that it was as it would serve as a replacement vehicle to be provided to STL when an STL vehicle was being serviced. It was, however, being leased from STL itself. Mr Najib suggested that if it was not leased from STL it would have had to have been leased from somewhere. Andrew maintained that it was simply unnecessary. Mark accepted STA would not in previous years have supplied a courtesy vehicle to STL. It began to lend the vehicle to STL as a courtesy vehicle when repairing STL vehicles, having leased that vehicle from STL in the first place. Mark said that a number of repair companies provided such courtesy vehicles.

186. I struggle to see why STL leased a vehicle to STA for the purposes of that same vehicle been supplied to it as a courtesy vehicle free of charge as needed. It might be different if the vehicle had been supplied so that it could be provided as a courtesy car to other customers of STA too, but that was not argued. It appears to me that his was simply an unnecessary cost that was loaded on to STA in Andrew's absence.

Management charges levied

187. Andrew accepted that there has always been a management charge levied by STL for management assistance, and that it had only been for his time, rather than, for example, Jeremy Wilson or Mark Jones. He accepted that the less the charge to STA, the lower the profit of STL, but if Neil and Jeremy were equal shareholders in STA, then ultimately the level of the charge would not matter as the same people, Andrew, Mark, Neil and Jeremy, would be benefiting one way or another. By the same token, if Neil and Jeremy were not beneficially interested in the shares of STA the level of management charges would matter as it would be in Neil and Jeremy's interests to maximise STL's profit.

188. The historic management charges are as follows:

Financial Year (ending 30 April)	Total Management Charge
2014/2015	£65,125
2015/2016	£72,000
2016/2017	£72,000
2017/2018	£72,000
2018/2019	£174,000
2019/2020	£132,000
2020/2021	£72,000 (portion of the year)

189. The management charges increased significantly after Andrew stopped working at the company in 2018. Mark accepted this, but said in his witness evidence that this was because he was working in the business and the directors of STL required stricter inter-company accounting. He said that because of Andrew's allegation about

ownership of STA the board of STL had decided not to provide services to STA otherwise than at a commercial rate.

190. Andrew accepted that Mark stepped into his shoes but maintained that the management charge levied was excessive and quite a few people had been brought in to cover roles. It is accepted, however, that he had complained that his job was too big for one person and that the people brought in had other full time jobs in STL. Mark said that he had spent 20% to 30% of his time on STA. He did not work full time there when Andrew was off work but 65% of his wages were recharged to it.

191. The management charge had always been a fixed sum in the form of a percentage of Andrew's remuneration from STL. Mark's time spent, prior to Andrew's illness, was not recharged to STA. Mark said that this was because they all regarded themselves as 25% shareholders, as in Codex and Woody Wood. Stovey was slightly different in that it was a 50/50 arrangement in which the other shareholder, Mr Reeves, who was unconnected with STL, ran the business and Mark had limited input, but spent a little more time in this business as it was in the same office from which he worked.

192. Ms Clarke noted that Mark was recharging four fifths of his remuneration from STL to STA. Geoff Simmonds and Neil also charged for time spent. Mark said these were charges for work that needed to be done, such as taking vehicles for MOT tests which were not previously charged for. Ms Clarke put it to him that it was just an exercise in costs shifting to which Andrew had not consented, while he remained a director. The invoices for some of these charges were raised some months after the year end at around the time that the accounts fell to be prepared, which accounts were not provided to Andrew. Ms Clarke said this was a crude attempt to pluck a figure out of the air to inflate expenses after the event. Mark's position was that STL would not have provided those its services if STA had not agreed to pay.

193. Ms Clarke argued that it was a breach of Mark's duties as a director of STA to accept these charges, which had not been agreed with STL in advance, though Mark said that the charges would have been a "damn sight more expensive" if they had had to obtain the services elsewhere. There is no evidence of what charges would have been levied by third parties, or that there was any proper consideration of the level of the charges at all. Mark Jones accepted that the calculation of the recharges for 2018/2019 took place within a few months of the year end and those for 2019/2020 after the year end.

194. In my judgment the level of these charges is arbitrary and unjustified. No consideration appears to have been given as to the commercial value of the services provided and Ms Clarke is correct, in my view, to say that it would have been a breach of Mark's duties as a director of STA to accept the management charges without any proper consideration of them. They were not negotiated in advance and there was no consultation with Andrew, who remained a director. Several of them, such as the employment of Mr Geoff Simmonds on a casual basis do not seem to be directly connected to Andrew Simmonds' departure. The reason this occurred is clear. Mark said that as a result of Andrew's allegation that STL was owned beneficially by him and Mark, the view of the directors of STL was, as Mark accepted, "Well, we now need to make sure we charge proper and factual services to STA, in light of that". On any footing this was retaliatory measure in response to this allegation with a view to diminishing the value of STA.

Expenditure on respondents' legal costs

195. In relation to legal costs there is a degree of confusion as to what costs are attributable to the proper legal costs of the companies and what are attributable to the these proceedings, which should be borne by the individual parties.

196. Andrew accepted that Mr Griffiths, in respect of whom certain advice was taken, was an STA employee and it would thus be for STA to pay legal costs associated with him. Similarly he accepted that, as he was an employee of STL and STA, those companies were entitled to take legal advice on employment issues relating to him. There are a number of invoices in the bundle referable to this, with the fee-earner reference "SLM". By contrast there are invoices with a different reference, "TAE", referable to this dispute. Mark Jones had prepared a summary of what costs were referrable to which case.

197. Ms Clarke submitted that the invoices were vague and unparticularised. By way of example there is a fee note dated 30th September 2019, which has the heading "shareholder dispute". The narrative gives the fee earner references "SLM" and "TAE". It is annotated in manuscript :

> "TAE Personal 1650.00
>
> TAE Company 852.00
>
> STL 50/50 STA Colin 100% 5495.50
>
> STA Andy 50% 2742.75
>
> Andy 50% 2742.57"

The second reference to "Andy" should have STL next to it indicating an apportionment to that company. Ms Clarke asked Mark Jones he could tell what related to what. Mark said he probably could have done so at the time and would have been able to tell from the accompanying narrative what the letters referred to. He accepted that there was a lack of discipline in recording the time and that the possibly the titles of the invoices were not reliable. It seems to me that it is clear that this is indeed the case. For example, the narrative to a fee note dated 28th October 2019, which is headed "Employment Advice – Andrew Simmonds" includes conversations with Mr Esler, who is the fee earner whose initials are "TAE", and discussions were held on 9th October 2019, the date of the meeting to consider the resolution to remove Andrew as a director of STL and STA. There are various unparticularised items such as "consideration of issues" and "various telephone conversations". Strikingly, "drafting" is recorded on 16th October 2019, the day before the Points of Defence to the STL Petition is dated. It is difficult to accept that there has been proper separation of the fees that were chargeable to the company and those which relate to this dispute. In context, these charges are relatively modest and could no doubt be resolved by assessment. It does seem however that there is a lack of precision in apportioning the costs between the companies and their cases such that I cannot be satisfied that they are properly attributable to STA.

Filing of STA Accounts

198. Andrew's case is that he was treated as if he didn't exist. The 2019 accounts were filed without Andrew seeing them or approving them. Andrew was not provided with the draft accounts when they were requested by him in an email on 24th September 2019. He also requested them, as director, from STA's accountants on 15th January 2020, but the accountants directed him to Mark. Mark accepted that they were not provided at the time. They were purportedly approved at a meeting on 30th January 2020 attended by Mark, Jeremy, Neil and Mark Jones, though the last three are noted to be "supporting in Andrew Simmonds' (Director) long term sickness absence as fellow Directors of associated company". Mark said that Andrew's involvement would have been more of "a mither for him" and he was doing what he had done for the previous 16 or 17 years in dealing with the financial affairs accounts. The impropriety of filing the accounts as "approved by the Board of Directors" on the basis of this meeting was pointed out in a letter from Andrew's solicitors to the respondents' solicitors dated 4th February 2020. Andrew's solicitors also wrote to the company's accountants on 4th December 2020 to state that they were instructed not to file the 2019 accounts without the approval of Andrew. The accountant's response was to say that the approval of the accounts was a matter for the company.

199. Nonetheless the same happened on the following year. On 13th January 2021 Andrew's solicitors wrote to the respondents' solicitors to state that an offence had been committed in filing accounts that had not been approved in accordance with section 414 of the Companies Act 2016. They stated that Andrew had not been provided with a copy of the draft accounts for the year ending 2020 either. Again, the accounts were filed containing a statement that the financial statements had been approved by the board on 22nd April 2021. That was untrue.

200. These are two quite clear instances of Mark riding roughshod over Andrew's management rights, and indeed the requirements of the Companies Act 2006. Andrew remained a director and the accounts needed to be approved by board, as had been pointed out to Mark by his solicitors. While Andrew had absented himself from the company he remained entitled to participate in the management of the company to the extent he was able to.

The attempt to liquidate STA

201. The notes to the last filed accounts state that the directors continued to believe the "going concern" basis of accounting to be appropriate in preparing the financial statements. Despite that statement, on 3rd June 2021 a general meeting was convened to consider insolvency advice. Andrew's solicitors sought an explanation of this inconsistency. The explanation given was that, in the subsequent six weeks since signing the statement, Mark had "increasingly serious concerns" about a reduction in work as a result of the falling off of customers.

202. Andrew's solicitors said that he would not attend the meeting without financial clarity. A board meeting was called on 12th July 2021 on two days' notice at which meeting it was resolved to put STA into liquidation. That meeting happened to be the day before hearings of applications issued in these proceedings on 13th and 14th July 2021. Ms Clarke characterised this timing as the epitome of bouncing someone into a meeting without adequate opportunity to consider the position.

203. It is accepted that, without the attendance of Andrew at the meeting, there was no valid resolution of directors. Mark said that he had not been advised of this. Notices were however sent to creditors of STA of the intention to hold a meeting to place the company into voluntary liquidation and the staff were made redundant. Mark denied that this was a deliberate attempt to destroy the business of STA however Andrew might vote. I simply cannot accept that any minimally competent insolvency practitioner or solicitor would not have identified the need for a quorate meeting. I regard this as another instance of Andrew's rights as a shareholder director of a quasi-partnership company being disregarded.

Discussion and conclusion on unfair prejudice

204. I am not satisfied that Andrew was driven from the business by the actions of his fellow directors or a plot to remove him in June 2018. I am satisfied that he was aware of the Codex transactions and at the very least acquiesced in them. It was simply a reasonable business venture which failed as a result of the illness of the principal employee. Similarly, the decision to purchase vehicles at the end of the lease period was a matter for commercial judgment, and one that Andrew could not have prevented in any event. While it is clear that Andrew was suffering from stress and anxiety, in addition to his physical problems, and the respondents were aware of this, there was nothing to attribute this to conduct on their part. He remained on friendly terms with his brothers and Jeremy during the first part of his absence, but he plainly had had a wish to leave the business in January 2018.

205. A change in attitude took place in September 2018 when Andrew indicated that he had a grievance against the company. While the procedures followed by STL in dealing with that grievance seem to me to have been properly conducted there was plainly ill-feeling between the parties from that point onwards, though in my judgment Andrew participated in the grievance process and HR investigation in good faith. Regrettably, at this point, the respondents also chose to deploy tactics which were unfairly prejudicial to the Andrew's rights as a shareholder. First, there were unwarranted threats to suspend his dividends and seek to recover "over payments" at the end of 2018 and beginning of 2019. Then his dividends from STL were unjustifiably suspended from November 2019, while the remaining shareholder-directors saw a commensurate increase in salary. While I do would not otherwise see his removal as a director in October 2019, by itself, as unfairly prejudicial, in the circumstances it is coloured by the subsequent decision to introduce a remuneration package that brought to an end the monthly dividend that he had historically been given without any justification. That undoubtedly was unfairly prejudicial to Andrew and, in my view, marks the final severance of his involvement in the company. At around the same time, a process of costs shifting was undertaken so as to supress the profits of STA. Finally, an attempt to place STA into CVL was made which, while ineffective, nonetheless destroyed STA's remaining business. Against that background one can see the decision to remove him as a director of STL as part of a creeping process to exclude him from the company, which was complete by 7th November 2019. Against that background I consider that the removal of Andrew as a director was not in fact a proper use of the power in the Shareholders' Agreement to remove an inactive director but part and parcel of the interference with Andrew's rights as a shareholder. The exclusion from the business, by removal as a director,

suspension of dividends, withholding of information and the destruction of STA's business were plainly unfairly prejudicial to Andrew.

206. I approach the decision as to remedy at the date of the hearing. It seems to me, however, that I should not order that his shares be purchased as at today's date given his initial desire to be bought out in 2018. I must have regard to the fact that Andrew was seeking to negotiate a buy out by the date of the HR review, and could not see himself returning to the business with the current management structure in place. Given the nature of the business, that structure was unlikely to change. It would be a windfall were Andrew to obtain the fruits of any upturn in the business that he has been absent from since June 2018 and from which he sought to remove himself some four years ago. There is some force in concluding that the appropriate date would be 7th November 2019, for the reasons I have given above. That is not a date proposed by the parties and I consider that the practical approach is to set the date of valuation and purchase price at 5th September 2019, when proceedings were commenced. Looking at the two petitions in the round, September 2019 also marks the point at which Andrew was refused sight of the STA accounts. It is not suggested that he laid the ground work for some profitable business that has only come to fruition after then. It seems to me that I need make no allowance for the decision not to declare an annual dividend at the end of 2018 as any distributable profits will have remained in the company at the date on which Andrew is to be bought out.

207. There will be no deduction for the fact that Andrew holds a minority shareholding. This was a quasi-partnership business and, while a shareholder in such a business is not necessarily entitled to be bought out without discount, it seems to me that justice requires the court to recognise that, while Andrew had a wish to leave the business at an earlier date, he had by November 2019 been excluded by the respondents, having participated in the grievance procedure and occupational health exercise in good faith. I reject the submission that it was Andrew's actions in making allegations in the Grievance Document or the petition that destroyed the relationship of trust and confidence between him and his brothers. He was plainly unwell and I accept that his concerns about a "plot" were unjustified; nonetheless he was entitled to raise his concerns and he participated in the company processes to determine his allegations. He was concerned in September 2018 that his position was "becoming untenable" but it seems to me that matters deteriorated from early 2019 as a result of the respondents' threats to stop dividends and became irretrievable at the point that the dividends in STL were in fact stopped.

208. In the case of the 25% beneficial interest in STA, Andrew was excluded from the management of that company by virtue of being denied sight of the draft accounts in September 2019 and the loading of unjustified costs onto the company. This coincides, broadly, with the denial of his rights as a shareholder in STL. It seems to me that that the most satisfactory way of addressing his exclusion from the business and the prejudicial loading of costs onto STL to diminish its value from the financial year beginning on 30tht April 2018 is again to direct that his interest again be purchased at its value as at 5th September 2019. That date again reflects his wish to negotiate a buy out at an earlier date. It reduces the need to make adjustments for the prejudicial conduct – the legal costs were incurred and the costs of purchasing of the vehicle took place after this point. Given the termination of STA's business it appears to me to be too speculative to seek to establish what the value of the business would

have been as at today's date had its finances not been affected by the management charges and the notice of the CVL proposal. It does not extinguish the need to make adjustments to compensate for the unfair prejudice altogether though. It seems to me that, given that I have found that STA was beneficially owned by the shareholders of STL, and the justification for the increased management charges given by Mark was that Andrew had contended that it was not, the appropriate remedy is to cap the management recharges at the level they were in the year ending 30th April 2018. It seems to me that the experts, when finalising the purchase price, should take the costs incurred in each month of that year, and apply them to the corresponding months between 1st May 2019 and 5th September 2019. Again, the purchase price will be without a minority discount to reflect the exclusion of Andrew from the business.

209. The purchase must be effected so as not to prejudice the value of Paul's shareholding in STL. I will hear counsel as to how this is to be effected and whether the purchase prices should bear interest.

Approach to valuation

210. I shall briefly address the questions of valuation that were raised during the trial. Unusually in this case, a split trial had not been directed so that questions of expert evidence could be left until liability had been determined. I appreciate that not all of the differences between the experts will be relevant given the date that I consider appropriate for Andrew's share to be valued and bought out but, should those matters need to be considered for any reason, I will determine them now.

Expert witnesses

211. Ms Tanya Wilson, a chartered certified accountant and head of the forensic accounting team at Haines Watts Wales LLP gave expert evidence as to the value of the business on behalf of Andrew. Mr Christopher Hine, a chartered accountant and partner in Crowe UK LLP, gave expert evidence on behalf of the Respondents. The experts gave evidence together, an approach to receiving evidence known as "hot tubbing". There is also a report as to the value of Halesfield 22 by Mr Richard Bache, a chartered surveyor instructed jointly by the parties. He was not called to give oral evidence and his evidence is not challenged.

212. Ms Clarke raised the question of Mr Hine's independence. Crowe UK LLP acts as auditor for STL and accountants for STA. He explained in his report that in the course of drafting it he had had no contact with that team within the LLP and personally had no prior relationship with the companies or the parties. He said that he had discussed the issue with the ethics partner and was satisfied there were no on-going issues and that, when an assignment was taken on, an ethical wall would be set up. Mr Hine operated on a different IT system and worked at a different office from those dealing with the accounts of the companies. He had not seen the correspondence between Andrew's solicitors and his firm in relation to the provision of documents. I accept his evidence in this regard. He was an impressive and considered witness and I am satisfied that he was giving his independent opinion, free of influence, conscious or unconscious. In general, he justified and explained his opinion carefully in those areas were it differed from that of Ms Wilson. I am similarly satisfied that Ms Wilson was giving her true professional opinion though, when challenged, she tended to justify

her answer by reference to her experience and expertise in the field, rather than to explain her working.

STL valuation

213. Both experts were agreed that EBITDA ("Earnings Before Interest, Taxes, Depreciation and Amortisation") was the appropriate approach to the valuation of STL and that this calculation required adjustments to, for example, remove the effect of one off transactions and the approach to which shareholder-directors may have taken to their remuneration, to obtain the price that a hypothetical buyer would pay.

Management charges by Mark Jones

214. Mr Hine took the approach that Mark Jones's salary reflected the market rate. He was not a shareholder-director but a director retained from Premium Group for two days a week at a fee paid to Premium Group Limited, for which he invoiced. There is no need to normalise his fee because it represented what the company would have to pay for such services. Ms Clarke put it to Mr Hine that Mark Jones, having worked in the businesses for some 17 years was more in the nature of "a faithful retainer" than a commercial services provider. Mr Hine remained of the view that the position remained that he was an arm's length third party, retained at the market rate for the services that he provided. I agree with Mr Hine's approach. Mark Jones provided his services for a fee, and provided services to other companies too. He is one of several directors of Premium Group Limited and another individual is listed as a person with significant control on the register maintained by the Registrar of Companies. It is unlikely that he would take an uncommercial approach to his charges. It seems to me that his remuneration represents the best guide to remuneration payable for the services he provided.

Remuneration of other directors

215. Both Ms Wilson and Mr Hine had added back in the remuneration that the directors were actually receiving and then make an allowance for the "going rate" for a director of a company of the type under consideration. Ms Wilson allows for five directors, on the basis that Mark Jones should not be considered differently from the other directors. I disagree with that approach. Mark Jones provided a limited range of services to the company on a part-time basis. It is likely that, were the company sold as a going concern, Mr Jones, or someone like him, would be required to perform those same services on a similarly part-time basis and the operation would require four other directors.

216. As the remuneration of the other directors, both Ms Wilson and Mr Hine were agreed that a managing director in a non-family owned company might expect to command a premium. Ms Wilson acknowledged that she had leaned towards the lower end of the range suggested by the standard compendium for a company with a turnover of between £10 and £20 million, placing the remuneration of the directors in the lower decile of ranges provided. This gave a figure of £80,000 per annum for a managing director and £62,500 for the four remaining directors, assuming they were required to devote 100% of their working day to the company. Mr Hine thought the lower quartile was more appropriate, and that, though his assessment of director remuneration was higher than that of Ms Wilson, it was possibly over-conservative.

He considered that £100,000 was appropriate for a managing director and £65,000 would be appropriate for the other directors, again on a full-time basis.

217. I acknowledge that this is a difficult area of professional judgment but I prefer the opinion of Mr Hine. Both Mr Hine and Ms Wilson acknowledged that the published guides were rather blunt instruments but Mr Hine's assessment is consistent with the information provided for companies in the lower quartile of the £10 to £20 million range turnover range in the sector and location of STL with its level of employees. Ms Wilson's assessment was too low. I similarly agree that a managing director is likely to attract a premium and it seems to me that it is likely to approach the median figure of the range provided, that is to say to be in the region of £100,000 on a full-time basis. As both experts said, there is a large element of professional judgment which has to be applied to the figures given the guides, but ultimately I am satisfied that Mr Hine's assessment is the most accurate.

Solicitors' fees incurred generally by the business

218. Here the difference is that Ms Wilson has added the costs attributable to MFG Solicitors back in from 2019 on the basis that they are non-recurring. Mr Hine has made more modest adjustments, broadly consistent with legal costs in previous years. Again, I consider that Mr Hine was more persuasive on this question. When one looks, for example, at solicitors' fees for 2016, 2017 and 2018, these were £43,000, £39,000 and £37,000 respectively and thus consistent with the costs for 2019 and 2020 of £30,000 and £38,000. It seems to me to be simplistic simply to remove the MFG Solicitors' costs. As was discussed during the evidence, there is a question of "bandwidth" or the ability of the directors of a modestly sized company to address multiple legal issues at once, so that other legal issues may well not have addressed during the currency of these proceedings. There is nothing to suggest that the years prior to 2019 were out of the norm for STL and are thus more likely to reflect the reality of its ongoing legal expenses. I agree that a potential purchaser would consider those years as a reliable guide to the annual outlay on legal costs.

Financial statements in relation to 2021 valuation

219. Again, I found Mr Hine's approach to be more detailed and considered on this question. He used the financial statements for 31st March 2018, 2019 and 2020. Ms Wilson used the years 2019, 2020 and 2021, for the last of which only management accounts were available. She was however unable to 'normalise' the year ending 2021. That period covered the majority of the Covid pandemic and is an unreliable guide to the performance of the company – furlough payments were available, fuel prices were comparatively low. I agree with Mr Hine that it was fundamentally unsafe to have regard to it. He similarly disregarded 2022 forecasts on the basis, as he put it, that the economy was in uncharted territory. I was not satisfied that Ms Clark's criticisms of Mr Hine was justified. She did not particularise the additional checks of information provided to him that she contended should have been carried out.

Rent and rates

220. Mr Hine's approach is again to be preferred. The lease term expires in 2033 and contains two rent free periods. I cannot see any reason why a further rent free period might be granted. Similarly, Mr Hine's approach of spreading the rent holiday over

the term of the lease is to avoid skewing the figures for the year in which it was granted. That seems to me to be the correct approach to take, as Ms Wilson herself appeared to accept was applicable in the general run of cases. Similarly the credit in relation to rates was received in 2021 and there does not appear to be any basis on which it could be said that it was a likelihood in 2019, with the result that a hypothetical purchaser would not have known of it at the time.

2018 and 2019 multiples

221. Ms Wilson's experience was that a multiple of between three and five and half or six was applicable to owner-managed businesses. Data as to sales of private companies was difficult to obtain but freight distribution was a relatively stable sector and therefore she applied a multiple of four for STL, though she thought the multiple for STL could be higher. Mr Hine agreed that the data was relatively difficult to obtain but he had considered a sale in February 2017 of a business that, like STL, was as part of the Palletline network, and of comparable size. He also consulted standard publications and made adjustments to reflect STL's size. He applied a multiple of three and a half. Ms Wilson agreed that there was nothing fundamentally wrong with the approach taken by Mr Hine and I am similarly satisfied that he took into account the comparables that were put to him during cross-examination.

222. Again, Mr Hine's approach is more closely reasoned by reference to the standard publications, cross-checked against the EBITDA of comparable businesses, of which he chose three examples which he considered to be most relevant. The comparable on which he placed greater weight had a multiple of 2.36, which he adjusted upwards in relation to STL to reflect that the directors' remuneration in the comparable transaction was low. He gave a careful explanation of why he placed greater reliance on that comparable than another, with a substantially higher multiple. He explained that its profit was larger and the price was probably based on financial information for a slightly earlier period. Ms Wilson did not explain her approach in detail but accepted the appropriateness of the approach adopted by Mr Hine. Both experts accepted that this was a difficult area in which a large degree of professional judgment is required. Mr Hine's approach appears to me the one in which I can have more confidence. I accept it.

Casual labour attributed to Geoff Simmonds, Patricia Simmonds and Paul

223. There is little evidence in relation to this but such as there was suggested that Geoffrey Simmonds and Paul Simonds did carry out some *ad hoc* for both STL and STA. The evidence is not sufficient for me to be able to conclude that any work that was carried out added value to the company or that *ad hoc* work would be necessary were the company to be purchased by a third party. In this regard I am persuaded by Ms Wilson's approach.

STA valuation

Director's remuneration

224. Mr Hine considered £100,000 per annum to be appropriate, while Ms Wilson, having assessed the level of time that Andrew Simmonds spent in STL and STA at 10% to 90% respectively proposed a figure of £63,000. Again, it seems to me that Mr Hine's

assessment is appropriate. Andrew plainly considered that running STA was not a one man task and I accept that Mark and Mark Jones provided assistance to him in running STA on a day-to-day basis. I accept that it is likely that a hypothetical purchaser of STA would likely require at least some assistance from another director or manager, such as a finance director, or would be rewarded on the basis that he or she carried out all roles within the company.

Legal fees

225. This does not arise in the event. Mr Hine said that he had approached this on the basis that the STA Petition alleges that £30,000 of fees charged by MFG Solicitors was attributable to these proceedings. In fact, that figure is caveated by the word "approximately". On the basis that I am satisfied that the MFG Solicitors' fee notes conflated fees chargeable in these proceedings with those properly chargeable to the company, and there is no way in which I can disentangle them, these costs should be added back in full. There is nothing to suggest that STA incurred legal fees prior to 2020 from which a likely level of on-going costs can be inferred.

Valuation at 22nd April 2021

226. The company had ceased trading by this point and was worth at least the value of its net assets on a going concern basis, being £76,000. Mr Hine valued it on a "break up" basis at £73,000. I very much doubt that the company would be purchased on a going concern basis, having ceased trading, and the value of its assets on a break up basis is likely to reflect the value of the company.

Relief

227. On the basis of the forgoing I will direct that Andrew Simmonds 25% share in both companies be bought out, without a minority discount, as at 5th September 2019. No adjustment needs to be made in respect of the Codex transactions or the purchase of STL's vehicles. I accept that STA shares are held on trust for the ordinary shareholders of STL. The attempt to load costs onto STA began earlier in the year and so these will need to be added back and replaced with a sum equal to that would have been charged for those months in the previous year.

228. I will invite counsel to agree an order providing for the experts to finalise a purchase price as at the dates that I have given, based on my judgment in relation to their respective approaches above.

229. I should end, as I did at the hearing, by expressing sadness that this dispute has led to such ill-feeling between brothers who, as is plain from early texts, got on well with each other and cared about each other. I hope that, even now, the personal relationships between them are not irreparable and that they will try and restore some level of trust.