

Neutral Citation Number: [2024] EWHC 2616 (Ch)

Case Nos: BL-2023-CDF-000005 and CR-2023-CDF-000005

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

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 21 October 2024

Before:

HIS HONOUR JUDGE KEYSER KC
sitting as a Judge of the High Court

Between:

(1) MARK LANE	
(2) AGM BRICKWORK & STONWORK LTD	<u>Claimants</u>
- and -	
PAMELA LANE	
(on her own behalf and as executrix and personal representative of Alan James Lane deceased)	<u>Defendant</u>

And between:

PAMELA LANE	<u>Petitioner</u>
-and-	
(1) MARK LANE	
(2) SUZANNE LANE	
(3) AGM BRICKWORK & STONWORK LTD	<u>Respondents</u>

Rebecca Page (instructed by **Bennetts Solicitors Attorneys and Notaries**) for the **First
Claimant** and **First and Second Respondents**

Niraj Modha (instructed by **Red Kite Solicitors**) for the **Defendant** and **Petitioner**

Hearing dates: 10, 11, 12, 13, and 14 June 2024
Written submissions: 18 and 20 June, 1 and 5 July 2024

Approved Judgment

This judgment was handed down remotely at 10 a.m. on 21 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE KEYSER KC

Judge Keyser KC :

Introduction

1. This is my judgment after the trial of two cases that were heard together. One is a claim in the Business List (“the Claim”). The other is an unfair prejudice petition in the Insolvency and Companies List (“the Petition”). Both concern the affairs of a company called AGM Brickwork & Stonework Limited (“AGM”, or “the Company”). AGM is a nominal claimant in the Claim and respondent to the Petition. However, the real protagonists are members of the Lane family, to whom for convenience, but intending no discourtesy, I shall refer by their forenames. References to “the claimant” or “the respondents” will not include AGM.
2. The claimant and first respondent, Mark Lane (“Mark”), is the son of the defendant and petitioner, Pamela Lane (“Pamela”), and her late husband, Alan Lane (“Alan”). The second respondent, Suzanne Lane (“Suzanne”), is Mark’s wife. Mark and Suzanne are the directors of AGM.
3. AGM was incorporated on 19 September 2003 as a vehicle by which Alan and Mark would carry on a construction business. In accordance with an agreement among the parties, the 100 issued shares in AGM were held as follows: 40 to Alan; 40 to Mark; 10 to Pamela; and 10 to Suzanne.
4. Alan died on 3 November 2009. Thereafter his 40 shares (“the Disputed Shares”) were recorded at Companies House as having been transferred to Mark. Mark says that he was entitled to the Disputed Shares pursuant to an agreement made by him, Alan, Pamela and Suzanne, on the occasion when they agreed the initial shareholdings, that upon the death of Alan or Mark the shareholding of the deceased would pass to the survivor of Alan and Mark. He advances his claim on the alternative bases of contract, proprietary estoppel and constructive trust. However, Pamela denies that there was any such agreement and asserts that in accordance with AGM’s articles of association she is the only person entitled to be registered as the holder of the Disputed Shares. Therefore the Claim is a dispute between Mark and Pamela as to which of them is entitled to the Disputed Shares.
5. Pamela’s complaint in the Petition is, in essence, that Mark and, subsequently, Mark and Suzanne have arranged the finances of AGM in a manner that has deprived her of the dividends to which she was properly entitled and have thereby caused her unfair prejudice.
6. The rest of this judgment will begin with a basic factual narrative. Although I have had regard to all of the evidence that was presented at trial, I shall not recite it in detail but shall refer to matters that seem to me to be particularly important. One feature of the case is that on central issues, including in particular the alleged agreement concerning the Disputed Shares, there is a dearth of contemporaneous documentation; the oral evidence of witnesses has therefore assumed an importance that it would not otherwise have had. I have not formed any useful conclusions on the basis of the demeanour or presentation of the witnesses of fact. Some of them were calmer and more measured than others, but I do not regard that as significant: one cannot ignore variations of personal temperament or the passions that a bitter family

dispute has clearly engendered. In the end, I have had to form my own view of where the probabilities lie, having regard to all the available evidence.

7. I am grateful to Miss Page, counsel for Mark and Suzanne, and Mr Modha, counsel for Pamela, for their detailed and well-argued submissions.

The Facts

8. Pamela and Alan had three children: Alan (“Alan Junior”), Mark and Kevin. Alan Junior, who is now aged 57 years, gave evidence at trial on behalf of Pamela, though his lack of involvement in the events with which the dispute is concerned meant that his evidence did not really advance matters. Kevin was born with a disability and has since lost his sight; he is cared for by Pamela.
9. Alan was a bricklayer by trade and Mark followed in his footsteps. They both worked as self-employed sole traders, doing work together for building contractors in and around Cardiff. They were highly skilled and by the beginning of the century had built up a good reputation.
10. In 2003 a contact in the building industry suggested to Mark and Alan that they set up in business together rather than continuing to work for others. I take this to mean that, instead of simply being available for hire as skilled labour by building contractors, they would themselves be tendering for contracts and, when successful in that regard, would engage others to work for them. Mark and Alan thought that this sounded like a good idea, though neither of them had any business experience. At trial there was some unprofitable exploration of such questions as whose was the contact who made the suggestion (Mark’s, or Alan’s, or both of theirs?) and whose business it was to be. The simple position was that father and son, who had a very close working and personal relationship, decided to go into business on an equal footing; neither was the boss or had precedence of the other, though Alan made it clear that he wanted to concentrate on work on site and had no interest in becoming involved in paperwork or administration. I mention now, in order not to do so again, that Mark and Alan invited another bricklayer, Gary James, to work with them in the business and he agreed to do so. Gary James became one of the first directors of AGM and contributed an initial to its name, but he was never, and was never intended to be, a shareholder and he left the company after a few months. He plays no further part in the story.
11. Mark and Alan had no idea how to go about setting up in business formally, but another contact put them in touch with an accountant called Craig Freeman for the purpose of taking advice. Mr Freeman, who carried on business as Freemans, and his office manager, Rebecca Liscombe, gave evidence at trial on behalf of Mark. Mr Freeman had grown up on the same street on which the Lane family lived and the families had known each other, but I accept his evidence and that of Mark that he and Mark had no significant ongoing or recent relationship when Mark and Alan approached him in September 2003. Mr Freeman and Mark have since developed a cordial relationship, as between accountant and client, but I accept their evidence that their social engagement is limited to business and marketing events.

12. Mr Freeman suggested to Mark and Alan that they operate their intended business through a limited company rather than as a partnership. This was a distinction that had previously meant nothing to them, but they accepted the advice. On 19 September 2003 Mr Freeman procured the incorporation of AGM as a private company with a share capital of £100 divided into 100 shares of £1 each and with a Memorandum of Association and Articles of Association in largely standard form. For the purposes of these proceedings, the relevant provisions in the Articles are articles 29, 30 and 31 (emphasis added):

“29 If a member dies the survivor or survivors where he was a joint holder, and **his personal representatives where he was a sole holder** or the only survivor of joint holders, **shall be the only persons recognised by the company as having any title to his interest**; but nothing herein contained shall release the estate of a deceased member from any liability in respect of any share which had been jointly held by him.

30 A person becoming entitled to a share in consequence of the death or bankruptcy of a member may, upon such evidence being produced as the directors may properly require, elect either to become the holder of the share or to have some person nominated by him registered as the transferee. If he elects to become the holder he shall give notice to the company to that effect. If he elects to have another person registered he shall execute an instrument of transfer of the share to that person. All the articles relating to the transfer of shares shall apply to the notice or instrument of transfer as if it were an instrument of transfer executed by the member and the death or bankruptcy of the member had not occurred.

31 A person becoming entitled to a share in consequence of the death or bankruptcy of a member shall have the rights to which he would be entitled if he were the holder of the share, except that he shall not, before being registered as the holder of the share, be entitled in respect of it to attend or vote at any meeting of the company or at any separate meeting of the holders of any class of shares in the company.”

13. It was arranged that Mr Freeman would meet with Mark, Alan, Pamela and Suzanne to discuss shareholdings and other administrative matters and to give general advice. The meeting (“the September 2003 meeting”) took place in late September 2003 at Mark and Suzanne’s home. It was an informal occasion, with the five participants sitting casually on sofas or armchairs. It is common ground that, although in substance the business was to be a 50:50 arrangement between Alan and Mark, Mr Freeman advised that there would be tax advantages in giving 10% shareholdings to Pamela and Suzanne. That advice was accepted, and the 100 issued shares in AGM were duly allotted as to 40 to Alan, 40 to Mark, 10 to Pamela and 10 to Suzanne. It was agreed that Mark, Alan and Gary James would be the directors and Suzanne the secretary, that the registered office would be Mark and Suzanne’s home, and that Mr Freeman would act as AGM’s accountant.

14. One factual dispute concerning the September 2003 meeting is central to the Claim. Mark's case is that, in response to a query from Mr Freeman, all present agreed with Alan's proposal that if Alan died his shares would go to Mark and if Mark died his shares would go to Alan. (I shall call this the "Share Agreement".) Pamela's evidence was that there was no such agreement and that the question of what should happen in the event of the death of either Alan or Mark was not raised. I shall address the issue regarding the Share Agreement in the course of discussion of the issues on the Claim.
15. There is a second, less important factual dispute concerning the September 2003 meeting. Mr Freeman's oral evidence was that he suggested that Alan, Mark, Pamela and Suzanne enter into a shareholders' agreement but that they declined because they could leave matters on the basis of mutual trust. (In his witness statement he said that he may or may not have made that suggestion, though he also said that Alan had remarked on the trust existing within the family.) Pamela's evidence was that there had been no such discussion at the September 2003 meeting; rather, the question of a shareholders' agreement had been raised subsequently by AGM's bank manager, who said that where money was concerned families were the worst, and that Mark had promptly interjected to say that they were a close family and trusted each other. Mark's witness statement said that Mr Freeman "might have suggested" that a document be executed to record the Share Agreement and that Alan had said that they did not need a written contract because they were a close family. Mark's oral evidence was similar to that of Pamela: he said that the bank manager had suggested that they execute a document (Mark spoke uncertainly of a stock transfer or share transfer, but I think he probably meant shareholders' agreement) and that he had replied that they had no need of such a document as they were a close family and trusted each other. I think it likely that the matter was raised on both occasions. However, as there is no suggestion that the question of what should happen to Mark's or Alan's shares in the event of the death of either of them was discussed with the bank manager, it is clear that advice regarding a shareholders' agreement has no necessary connection with the dispute over that question. Therefore this issue of fact does not significantly advance my consideration of the Claim.
16. In the following years, AGM traded successfully. Alan and Mark continued to work on construction sites, though Mark took responsibility for much of the administration and was assisted in that role by Suzanne, who worked from an office at home.
17. In early 2008 all four shareholders in AGM met with Mr Freeman to discuss his suggestion that they consider setting up what became "the Remuneration Trust" in accordance with a strategy devised by Baxendale Walker LLP and explained in a brochure titled "Wealth is just the beginning" and marked as "Prepared for Clients of Freeman & Co". In outline, it involved paying some or all of the company's profits as contributions into an offshore trust, from which discretionary loans could be made to individuals. The contributions were to be set against taxable profits, thereby minimising or extinguishing any liability to corporation tax, and as loans the payments to individuals would not be taxed. Page 9 of the brochure had the following text:

"The Scenario

A UK resident company, or partnership, or sole trader making trading or investment profits wishes to provides incentives to any of its suppliers, customers or prospective employees.

The Remuneration Trust

Using legal strategies successfully implemented over a decade, the company can fund an incentives plan, under statutory protection, through a tax free trust-based environment.

Then:

- Contributions are deductible against corporation tax
- Post-tax profits can also be used
- Incentives can be accessed tax free
- Fund grows grow tax free
- Fund available tax free to post-death beneficiaries.

Features

These benefits are provided through the implementation of a highly technical Product by the Solicitors of Baxendale-Walker's renowned Wealth Strategy Department. Comprehensive written professional advice, together with specialist consultation and client support

- both during and after the transactions
- are included in the BW fixed fee.

The Remuneration Trust:

- Uses statutory reliefs
- No 'tax avoidance'
- Full disclosure to Revenue
- Set up in conjunction with your existing professional advisors
- Independent professional trustees recommended."

The Questions & Answers section of the brochure contained the following:

"Is this legal?"

YES - Paul Baxendale-Walker has published 5 leading textbooks about

commercial trusts and taxation.

Have other clients done it?

YES - many. And all have enjoyed the benefits advised. BW can provide a list of referees.

Can I get a Counsel's Opinion?

YES - if you are prepared to pay for it. Counsel will defer to the expertise of the author of 5 leading textbooks on tax and commercial trusts.

...

What if the Revenue challenges the arrangements?

It will be the first time in over a decade. BW's ongoing advisory service charge covers this also. Only if it went to Court would you have to pay Counsel, but such costs are guaranteed by BW's P.I. Insurance.

What if the relevant legislation changes?

EU law precludes retrospective legislation. The benefits up to that date remain protected. UK legislation cannot affect offshore trusts.

Are you guaranteeing the Plan?

YES. BW is bound to provide best advice. If BW considers that the Plan cannot work in your circumstances, BW will say so. Otherwise, BW will be giving you legal advice that the Plan has the legal and tax effects set out in their detailed written advice. You are entitled to sue if BW is negligent and to recover all Plan fees and Legal fees.

Why doesn't everyone do this?

Everyone who receives BW's advice does do it. New clients come through personal recommendation, not general advertising, so that necessarily limits the number of people receiving the information.

My current advisor doesn't like it.

That is not unusual. BW always asks a dissident advisor to engage in open discussion with BW in front of the client.

It sounds too good to be true.

BW has heard that from new clients for over a decade. Their experience teaches them that it is just as good as it sounds.”

The Disclaimer at the end of the brochure said that it did not itself constitute advice to prospective clients.

18. I accept the following evidence in Mr Freeman’s witness statement:

“25. I explained to the four shareholders the basics of the Remuneration Trust Scheme. In particular I advised that instead of paying salaries or dividends which would be taxed, the Company would make contributions to a Trust and that (at that point in time) Mark and Alan could apply to the Trustees for payment of a loan which is treated as free of tax. I explained that there was a fee of 10%. So that, for example, if the Company contributed (say) £20,000 to the Trust, the loans coming back to Mark and Alan would be £18,000 free of tax. Therefore, in simple terms Mark and Alan would receive £18,000 ‘tax free’ rather than pay tax on £20,000, which would be much more.

26. All four shareholders were immediately receptive. There was a discussion (which was quite usual) as to potential pitfalls and downsides—e.g. ‘what’s the catch’. I explained that it was possible that HMRC might in future challenge the payments but that Baxendale Walker were confident that the scheme worked. ... I was clear to all four shareholders, including Pam that there was a risk of a Revenue challenge later on. They all understood this.

27. [I refer to] a document which Baxendale Walker prepared for clients of mine considering using the Trust titled ‘WEALTH is just the beginning’ which I handed to the shareholders and they discussed the matter between themselves. At the end of the meeting, which lasted around 1 hour, there was a unanimous agreement between Mark, Alan, Suzanne and Pamela that they would participate in the Remuneration Trust Scheme and I was instructed to contact Baxendale Walker to get things moving.”

19. Pamela accepted in evidence that she had been at the meeting when the Remuneration Trust was discussed. She denied that Mr Freeman had given those present copies of the brochure or, indeed, that she had ever seen it before, but I think she is mistaken about that. She confirmed that she had understood that AGM would pay contributions to the Trust but said that she had understood that the money coming back to the individuals would be dividends. I return to that point below.

20. In his evidence Mr Freeman insisted that he “did not advise the shareholders whether they should or should not participate [in the Remuneration Trust] because they needed

to make their own minds up about that”. It is unnecessary for the purposes of this judgment to decide whether what Mr Freeman said is strictly to be categorised as “advice”. He was clearly presenting an opportunity to AGM and, with whatever caveats and warnings he may have hedged what he said, he was clearly to some extent recommending the use of a Remuneration Trust. He also received some benefit from introducing his clients to the scheme, in that his own remuneration trust was exempted from the payment of fees. I accept Pamela’s evidence that, in response to her question whether the scheme were legal, he replied to the effect that it was used by a number of his clients, including some dentists. The brochure that he gave to the shareholders had been provided to him for the purpose of being given to his clients. There is no evidence that Mr Freeman advised the shareholders to seek advice from Baxendale Walker or from counsel, and they did not formally do so, although Mark and Alan probably did have a telephone conversation with someone at Baxendale Walker.

21. I accept Mark’s evidence concerning the reason why he and Alan decided to adopt the Remuneration Trust:

“45. I am not going to pretend that being paid ‘tax free’ was not a major consideration for all of us; Alan and Pamela included. Alan was very keen indeed to participate in the scheme and Pamela was right behind him. If either of them could avoid paying tax they would. But Alan and I also thought it was a good business decision based on the advice we received from Craig who told us the best tax lawyers in the Country were behind the scheme. If the Company paid less/no corporation tax, it meant that we would have more cash available for the needs of the business and in those early years, it would allow us to get on a stable footing.”

22. AGM’s Remuneration Trust was set up with the use of documents that Mr Freeman obtained from Baxendale Walker. The Trust Deed dated 18 March 2008 was made between AGM as “the Founder” and Bay Trust International Limited (“Bay Trust”), a company registered in Belize, as “the Original Trustees”. Another company, HWC Management Limited (“HWC”), was registered in Belize, with Alan and Mark as the sole shareholders and directors, to act as the nominee of Bay Trust. The Beneficiaries of the trust included spouses, widows and widowers, children and remoter issue of the Providers, and a Provider was any person who provides, has provided or may in future provide service or services or custom or products to AGM. There was a significant category of Excluded Persons, who were not capable of being Beneficiaries. The Trustees were given absolute discretion to apply the income and capital of the trust fund to or for the benefit of any of the Beneficiaries, and the extensive powers conferred on the Trustees included the power to make loans to any persons (including Excluded Persons). (By a Deed of Amendment dated 19 March 2009 and signed by Alan and Mark, the text of the Remuneration Trust was amended by the entire substitution of a new text. It is not apparent to me that the amendment was in any material respect relevant to these proceedings.)
23. In the years that followed, AGM made substantial payments to the Remuneration Trust, and the Remuneration Trust, acting by HWC as nominee of the Trustees, made substantial loans to individuals in the company. With the exception of 2018, there has

been no year since 2009 when AGM has declared dividends. Until Alan's death, payments from the Remuneration Trust were made only to Alan and Mark. In the two years immediately following Alan's death, Pamela received payments equal to those that Alan would have received—a total of £121,500. Mark's evidence, which I accept, was that the payments were retained at that level during that period because AGM's income was still derived largely from work done by Alan. Thereafter the payments received by Pamela decreased, and after 2012 she received money from the Remuneration Trust indirectly and via Mark and Suzanne.

24. The question of the legal efficacy of the Remuneration Trust in reducing or preventing tax liabilities is not an issue on the pleadings in this case and remains undetermined. To preserve its position for limitation purposes, HMRC has commenced proceedings for the recovery of National Insurance Contributions, both against AGM and against other companies that have used the Remuneration Trust device. Those proceedings are stayed or adjourned pending determination of the issue in a tax appeal. Mark's evidence is that the consistent advice he has received is that the device is both lawful and effective.
25. Alan, who had been diagnosed with terminal cancer in 2007, died on 3 November 2009. He left a will dated 19 December 2001. Clause 1 of the will appointed Pamela as the sole executrix. Clause 3 left Alan's estate on trust for Pamela absolutely, provided (as was the case) she survived him for 28 days. If Pamela had not survived Alan for 28 days, the effect of the will was that Alan's house would have been left to Kevin and the remainder of the estate would have been divided equally among Alan Junior, Mark and Kevin. In the event, Pamela did not take a grant of probate until 12 May 2023, during the course of these proceedings.
26. On 13 January 2010 Mr Freeman filed at Companies House a Form TM01 recording the termination by death of Alan's appointment as a director of AGM.
27. On 29 October 2010 Mr Freeman filed at Companies House AGM's Annual Return. This showed that Alan's 40 shares had been transferred to Mark on the date of his death and that the shares in AGM were now held as to 80 by Mark, 10 by Pamela and 10 by Suzanne. Mr Freeman's evidence was that shortly after Alan's funeral, and remembering the Share Agreement that had been made in 2003, he said to Mark "something along the lines of, 'I know you don't want to think about it but we need to sort the shares out'", meaning by this that they needed "to file documents at Companies House to record the agreement that Alan's shares would pass to Mark." However, as the next Annual Return was not due until October 2010, there was no immediate rush. Mark's evidence was to substantially similar effect: that Mr Freeman said that he would deal with the necessary paperwork to show that Alan's shares had been transferred to Mark. Mr Freeman stated that he prepared the Annual Return without further reference to Mark or Suzanne. In cross-examination he said that he had not known that a share transfer form had to be executed but had believed that the entry on the Annual Return would suffice. It was put to him that he had deliberately acted with a view to procuring Alan's shares for Mark without alerting Pamela to what was happening, but he denied that. It is common ground that nothing was said to, or indeed by, Pamela concerning Alan's shares.

28. Alan had not been able to work during his illness, and after his death AGM operated substantially as it had done previously. In January 2017 Suzanne was appointed as a director, but this did not reflect any alteration to her day-to-day activities.
29. Until that point, relations within the Lane family had remained very close and happy. However, they broke down later in 2017. Words between Pamela and Suzanne developed into a major falling-out involving also Mark and other members of the family. Mark and Suzanne on the one side and Pamela on the other have not spoken to each other since. The two women, in particular, showed considerable antagonism towards each other in the course of the trial.
30. On 7 January 2021 solicitors acting for Pamela wrote to AGM's directors (that is, Mark and Suzanne). The basis of the complaint in the letter appears from the following paragraphs:

“Our client is the holder of 10 ordinary shares in AGM Brickwork & Stonework Limited (the ‘Company’).

We are instructed to undertake investigations into the Company's activities, given that our client has not received a dividend for several years.

The company accounts for the period up to 31 March 2016 (enclosed) show a loan from the Company to one of its directors, Mr Mark Lane. Our client had no knowledge of this loan, despite the requirement set out in section 197 of the Companies Act 2006 (‘CA 2006’) that any loan to a director must be approved by the members of the company.”

31. Mr Freeman replied to that letter on behalf of the directors on 15 January 2021, pointing out that the loan in question was from Mark to the company, not from the company to Mark.
32. By their reply dated 25 March 2021, Pamela's solicitors raised the question of the Disputed Shares, as appears from the opening substantive paragraphs:

“Since our first letter our investigations into the Company have revealed an extremely serious matter which requires immediate clarification from your client. We have enclosed with this letter a copy of the last will and testament of Mr Alan Lane dated 19 December 2001 (the ‘Will’).

As you will see from the Will:

- i. Our client was named and did so act as the sole executrix of Mr Alan Lane's estate (the ‘Estate’);
- ii. Our client is entitled to the Residuary Estate (as therein defined) absolutely.

Companies House filings for the Company show that a transfer of 40 Ordinary shares of £1.00 each (the ‘Shares’) in the

Company occurred on 3 November 2009, whereby Alan Lane transferred the Shares to Mark Lane (the ‘Transfer’) – see the enclosed Annual Return dated 19 September 2010 which records the Transfer. We understand that 3 September 2009 was the day of Mr Alan Lane’s passing and our client is confident that no such transfer occurred on this date. It is not clear why the Transfer did not follow the terms of the Will, under which the Shares would fall under the Residuary Estate.

Our client has very serious concerns about the validity of the Transfer and the legality of the circumstances surrounding it, which on the face of it appear fraudulent. These concerns must be addressed urgently.”

33. Mark commenced the Claim in London on 1 November 2021, naming Pamela as defendant both in her personal capacity and as Alan’s personal representative.
34. Pamela filed the Petition in this court on 22 December 2022. (An earlier draft of a proposed petition had accompanied her defence in the Claim.)
35. By order dated 20 February 2023 the Claim was transferred by consent from London to this court, with a direction that the Claim and the Petition be managed together.
36. By order dated 20 April 2023 His Honour Judge Jarman KC, sitting as a Judge of the High Court, directed that the Claim and Petition be tried together.

The Claim

The pleadings

37. The particulars of claim plead the Share Agreement at paragraph 14(c):

“[At the September 2003 meeting] Mr Freeman further asked what would happen in the event of the death of either Mark or Alan. Alan, Pamela, Mark and Suzanne discussed the matter and unanimously agreed that upon the death of either Alan or Mark, the deceased’s shareholding would be transferred to and be owned by the survivor of either Alan or Mark. This was because only Mark or Alan had the required bricklaying skills to carry on the business in the event of the death of the other (‘Agreement’).”
38. In the particulars of claim, the Share Agreement (or “Agreement”) is relied on as the basis of several alternative causes of action. First, it is the basis of a claim based in AGM’s constitution:

“27. The Agreement took effect as a resolution of the Company (by reason that it was an agreement or approval by the unanimous consent of all shareholders) and/or took effect as an amendment to the Articles of Association of the Company

and/or as a shareholders agreement, binding between the shareholders and the Company (alternatively between the shareholders), whereby the Shares would be compulsorily and/or deemed to be transferred to Mark in the event that he survived Alan. Further or alternatively, it was an implied term of the Agreement that registration of the Shares in the name of anyone other than Mark in circumstances where he survived Alan would be declined and/or that Mark had the right to be registered as the holder of the Shares or to be offered the same.”

In her submissions at trial, Miss Page did not pursue this first basis, at least insofar as it differed from the contractual basis.

39. Second, a contractual claim is advanced:

“28. Further or alternatively, and without prejudice to the aforesaid, Pamela is bound by the Agreement as a matter of contract (whether in her personal capacity (including as a beneficiary under the Will) or in her capacity as Alan's executrix). Mark is entitled to an order for specific performance that Pamela do all such things as are necessary to transfer the Shares to Mark and for him to become the registered shareholder of the same (in so far as that is not already the case).”

40. Third, a claim is advanced on the basis of proprietary estoppel:

“29. Further or alternatively and without prejudice to the aforesaid, Mark has an equitable right to the Shares by reason of a proprietary estoppel. Mark seeks orders that Pamela [on her own behalf and/or as personal representative of Alan] do all such things required to procure the Shares are transferred to him and that he is the registered holder of the Shares and/or such other relief for proprietary estoppel (including financial relief or monetary award) as the Court sees fit.”

(The particulars of acquiescence, reliance and detriment are set out in paragraphs 21 to 26 of the particulars of claim.)

41. Fourth, the particulars of claim rely on a trust:

“31. Alternatively, if (which is denied) the Shares have been transmitted to Pamela or she is otherwise found to hold the same, Mark seeks a declaration that the Shares are held on trust (whether express, implied, constructive or otherwise) by Pamela (whether as the First and/or Second Defendant) for Mark and (in so far as necessary) orders for the delivery up or transfer of the Shares to Mark.”

42. The long and detailed defence comprehensively denies Mark's case. I refer here only to the averments relating to the Share Agreement itself:

“9.7. Paragraph 13 (c) is denied. It is denied that in or around late September 2003 to early October 2003 (or at any other date) there was any agreement (unanimous or otherwise) that upon the death of either Mr Mark Lane or Mr Alan Lane the deceased's shareholding would be transferred to and be owned by the survivor of either Mr Mark Lane or Mr Alan Lane. In particular:

- (i) It was always agreed and intended that Mr Alan Lane's shareholding would transfer to Mrs Pamela Lane in the event that Mr Alan Lane predeceased Mrs Pamela Lane. The income from Mr Alan Lane's shares was anticipated by Mr Alan Lane and Mrs Pamela Lane to provide for Mrs Pamela Lane in the event of Mr Alan Lane's death.
- (ii) Mr Mark Lane is one of three children born to Mr Alan Lane and Mrs Pamela Lane and (as provided for in the terms of the will of Mr Alan Lane) it was the intention of Mr Alan Lane and Mrs Pamela Lane that the three children would be provided for equally by an equal distribution of the estate of Mr Alan Lane (upon the death of Mrs Pamela Lane).
- (iii) All parties at or around the time of the alleged Agreement had subscribed for shares in a Company which provided for the shares of a member to pass in accordance with Article[s] 29 - 31 of Table A which is entirely inconsistent with the alleged Agreement. The members of the Company took no decision (being aware of the relevant facts or otherwise) to alter the Company's Articles of Association whether in or around September 2003 or thereafter.”

The Share Agreement

43. Evidence concerning the September 2003 meeting and the alleged Share Agreement was given by Mark, Suzanne, Mr Freeman and Pamela.
44. Mark's written evidence regarding the Share Agreement was as follows:

“25. Craig then broached the subject about what would happen to my shares and Alan's shares in the event of one of us dying. I recall him saying something like: ‘Now I have to mention it, what do you want to happen to your shares if one of you die.’ We had a bit of a discussion between the four of us. I cannot recall the precise words we used but Alan suggested that because it was only me or him that could (in the event of the

death of the other) do the work and run the business, my shares should pass to Alan if I died and Alan's shares should pass to me if he died. We agreed that this made absolute sense to all of us because neither Pamela or Suzanne could run the business nor work as bricklayers (there was never any intention for Pamela to do any work for the business at all) and indeed the only reason they were made shareholders in the first place was for tax reasons under advice of Craig. Pamela was never going to be involved in the management of the Company or work for the Company. We discussed that it would not be fair or indeed make any sense for there to be any other agreement. Alan said something like 'If I die, my shares go to him [pointing at me] and if he dies, his shares go to me'. I would not have proceeded with the Company / new business if 50% of the shares were to go to Pamela on Alan's death.

26. And so we reached an agreement about that and we agreed that in any event, Pamela and Suzanne would each keep their 10%. I think Craig might have suggested that we consider some document to record the Agreement but Alan stressed that we did not need written contracts because we were a close family and trusted each other and I agreed with that sentiment. We all did. There is absolutely no doubt whatsoever that the Agreement was reached on that day and the four of us were unanimous in that Agreement as Craig himself confirms."

45. When cross-examined, Mark insisted that he had a clear recollection of the September 2003 meeting. He said that, after the discussion concerning the 10% shareholdings for Suzanne and Pamela, Mr Freeman said that he had to ask a "difficult question", which was about what would happen to Alan's or Mark's shares in the event of their deaths. "That's when my father said, 'If I die, mine go to him; if he dies, his go to me.' Those are his exact words. We all agreed to it."¹ Mark said that Suzanne and Pamela had said nothing in response to Mr Freeman's question. When asked about the mention of a discussion in paragraph 25 of his witness statement, Mark said, "There wasn't really much of a discussion; we probably had some conversation, but no one objected and we all agreed to it as it made sense. Any discussion was just along the lines that we all agreed with what Alan had said." Regarding the position if he had predeceased his father, Mark said, "I didn't think about what would happen if I died before my father. I was in my 30s! I accept that something could have happened to me. If it did, Suzanne would have 10%, because that's what we agreed." It was put to Mark that the question of the death of the shareholders had arisen only in the later discussion with the bank manager, but Mark denied this and said that, after the November 2003 meeting, the matter was never again discussed until after Alan had died.
46. Suzanne's witness statement contained the following evidence (paragraphs 11 and 12):

¹ References to the oral evidence are from my notes rather than a transcript. Although they represent the substance of the evidence and are believed to be substantially accurate, they are not necessarily precisely verbatim and I have not preserved the question-and-answer form.

“It was agreed [at the September 2003 meeting] that: ... (e) On the death of Alan or Mark, the deceased’s shares would go to the survivor of them. This was agreed after Craig said something like, ‘Now, I have to ask you, but what happens to the shares when you die?’ Alan was very quick to point at Mark and say, ‘Mine goes to him and his goes to me.’ The agreement regarding the shares was agreed by all four of us after Craig raised the question.”

Her oral evidence was to the following effect:

“Craig said, ‘I’ve got a difficult question to ask. What would happen if Mark or Alan would pass?’ Alan tapped his chest and said, ‘If I die, my shares will go to Mark; and if he dies his shares will go to me.’ The four of us had a slight discussion amongst ourselves; it was not a long conversation; we were just sitting around. I agreed—why wouldn’t I? Then Alan told Craig we were all in agreement. I found this a difficult thing to think about, because you don’t like thinking about losing your husband. I didn’t think about the possibility that I would be left with only 10%. I am young—I was younger than all of them.”

47. Mr Freeman’s evidence was substantially to the same effect as that of Mark and Suzanne. His witness statement said this:

“16. After the allocation of shares was agreed, I recall raising the difficult issue (as I normally would) as to what they all intended in the event of Mark or Alan passing away. I recall that it was quickly and unanimously agreed that if Alan should die the shares would pass to Mark and vice versa. There was no real debate about this. I may or may not have mentioned whether they should sign a shareholders’ agreement to this effect but I do recall Alan making it clear that they all trusted each other and were a close family. I cannot recall the exact words Alan used but it was clear that if either Mark or Alan were to die, his shares would pass to the other and that I would file the necessary forms when the time came. Pam was certainly in agreement with this. They all were.”

48. When he was cross-examined, Mr Freeman said that it was his normal practice, when he assisted in setting up companies, to ask about his clients’ intentions regarding shareholdings in the event of the death of a member, though this was not really an issue if the company was simply for a business run by a husband and wife. In a more complicated case, he would recommend that the clients instruct solicitors to prepare a shareholders’ agreement. “At this meeting the matter was only touched on briefly. I did not think that there was anything odd about the arrangement, because it was Mark and Alan’s business. I took it that the surviving wife would keep her 10% shareholding, but that was not discussed. There was no particular reason not to have a shareholders’ agreement, but they decided not to do so. It was a matter of family trust; they were a very close family. In hindsight they should have formalised the agreement.” Mr Freeman said that it was Alan who did the talking on this point;

Mark said little if anything, and no one objected to what Alan had said. There was no mention of what would happen on the death of Mark, only of what would happen upon Alan's death. Mr Freeman denied that he had concocted the account of the Share Agreement in an attempt to justify his entry on the annual return that was filed in October 2010.

49. Mr Freeman also gave evidence that he took some notes at the September 2003 meeting, as was his normal practice. He was challenged on that evidence, to no great purpose, on the principal ground that he had not mentioned notetaking in his written evidence. As Mr Freeman did not produce or purport to rely on his notes—he explained that he did not keep documents for more than six years—I am not surprised that he did not mention them, and as there is a significant issue about only one aspect of the meeting nothing turns on the taking of notes.
50. Pamela's evidence was directly contrary to that of Mark and his witnesses. Her witness statement stated (paragraph 13): "I confirm that during the meeting nothing was ever discussed between the parties regarding the shareholding position in AGM in the event that a party to the business passed away." At paragraphs 16 and 17 she referred to the subsequent meeting with the bank manager and said: "I remember saying to Mark and Suzanne at the relevant time that everything had to be done legally and documented. Mark's response to that was that there was no need to do that as it was a family business. ... I remember [the bank manager] saying that unfortunately families are the worst when money becomes involved." Pamela did not suggest that the question of what would happen in the event of the death of a shareholder was mentioned in the conversation with the bank manager, although at one point in the cross-examination of Mark it was suggested to him that it had been.
51. In cross-examination Pamela said that the September 2003 meeting was very informal. She had known that it was going to be about setting up the company, but she had not understood that it was intended to have formal or legal consequences. She was insistent that, while the shareholdings and the appointments of Suzanne as secretary and Mr Freeman as accountant were discussed, there was no mention of what would happen if Alan or Mark died: Mr Freeman did not raise the question and Alan did not say anything such as Mark and Mr Freeman have alleged. Pamela also said that the alleged Share Agreement would never have been made: Alan would not have left his shares to Mark and left her in the position in which she now finds herself, and Mark would not have left his wife with four children to look after and no more than a 10% shareholding. Mr Freeman had not mentioned the possibility of a shareholders' agreement; this had first been mentioned by the bank manager.
52. Having considered all of the evidence adduced at trial, including in particular the evidence summarised and quoted in the preceding paragraphs, I have come to the conclusion that the evidence of Mark and his witnesses is to be preferred. I find that there was an oral agreement as set out in the first and second sentences of paragraph 14(c) of the particulars of claim (above). It is somewhat fanciful to attempt to reconstruct the precise conversation, but I think that Mr Freeman asked his question and that Alan immediately said the words mentioned in Mark's oral evidence, or words to the same effect. There was probably no debate or formal conversation among the family members; probably there were simply words and noises of assent and gestures of approval, of the sort it is not difficult to imagine. I make the following observations.

- 1) There are no contemporaneous documents. Therefore any finding of fact must rest on an assessment of the witnesses in the light of the contents of their evidence and the other known facts and circumstances. Of course, the absence of documents is itself a fact to be taken into account and weighed in the balance.
- 2) As I have already mentioned, I can draw no useful conclusions from the demeanour of the witnesses when giving evidence.
- 3) Mark, Suzanne and Pamela all have possible reasons of self-interest for describing the September 2003 meeting as they do.
- 4) The decision to appropriate the Disputed Shares to Mark, reflected in the annual return for 2010, was made at a time when the relationships within the family remained close. Although this does not exclude the possibility that Mark was cheating his mother of what was rightfully hers, it is relevant nonetheless. The consistent evidence is that this was a close-knit and happy family. The parties did not fall out until 2017, and they did so because of a breakdown in the relationship between Suzanne and Pamela. Mark's assertion of entitlement to the Disputed Shares was made at a time when, so far as the evidence shows, his previously close relationship with his mother remained unimpaired. It would be potentially misleading to look at Mark's behaviour in 2010 through the lens of that later breakdown. Mr Modha submitted that Mark need not have been acting dishonestly in 2010; he might have assumed that, as he was the surviving "partner" and had been running the business without his father's help for some time, the shares would automatically be his. I regard that as possible but not at all probable, unless there had been something akin to the Share Agreement. The possibility also raises the further difficulty that Mr Freeman must either have shared this misapprehension (which, though possible, is even less probable) or have completed the annual return without even the most rudimentary enquiry or, perhaps, with knowledge—uncommunicated to Mark, *ex hypothesi*—that Mark was not entitled to the Disputed Shares.
- 5) Mr Freeman's evidence is important. There were two aspects to Pamela's response to that evidence: first, that Mr Freeman was partisan and, by implication, that he was giving false evidence to assist a friend, Mark; second, that his account of the Share Agreement was devised in order to provide some justification, or at least excuse, for his completion of the annual return in 2010. (It was not suggested, at least not clearly, that in 2010 he dishonestly took steps to misappropriate Alan's shares for Mark with knowledge that Mark was not entitled to them.) Having considered these possibilities, I reject them. The undoubted fact that Mr Freeman has built up a cordial business relationship with Mark over the years, so that they are (as I find) friendly albeit not friends as such, is not a sound basis for concluding that he is willing to perjure himself for Mark's sake. No other reason has been shown for considering Mr Freeman to be dishonest. When giving evidence at trial he appeared to be frank and straightforward; that impression does not prove his honesty, but it provides no reason to suppose his dishonesty. The differences between Mr Freeman's evidence and Mark's evidence count slightly in favour of independence and against collusion. The inconsistencies between Mr Freeman's written and oral

evidence—in particular, as regards the question whether there was discussion only of what would happen to Alan’s shares or also of what would happen to Mark’s—are to be noted, but I think that they are unsurprising in the context of an informal discussion some twenty years ago, especially as Alan was doing the talking. It is possible that Mr Freeman is now giving dishonest evidence in order to provide some justification for an honest mistake made in 2010, but this seems to me to be unlikely. Similarly, although it is possible that Mr Freeman’s evidence regarding the Share Agreement is both honest and fundamentally incorrect, I regard that as improbable.

- 6) In my view, it is inherently plausible that Mr Freeman did ask concerning the fate of the shares in the event of Alan’s or Mark’s death. The question is a sensible one.
- 7) I also consider the alleged Share Agreement to be inherently plausible. For Pamela it was objected that, to the contrary, it was unlikely that either Alan or Mark would have made such an agreement, because it would leave the widowed spouse in a significantly disadvantaged position. There is some force in the objection, but I do not find it compelling. First, at root AGM was a vehicle for Alan and Mark, successful workmen but (as Mr Modha himself emphasised) unsophisticated businessmen, to carry on and develop their business. If either died, the other would be (so to speak) the last man standing and the sole means of keeping the business going. (Indeed, it has not been demonstrated that, in the event of Alan’s death and Mark having only a 40% shareholding, there would have been anything to prevent him leaving AGM and setting up in business solely on his own account.) I think that, if one puts oneself in Alan’s or Mark’s shoes at the time, the alleged agreement seems far from improbable. Second, and related, AGM had no existing business. The situation would not have been viewed with the benefit of hindsight. The company was in all likelihood viewed as a vehicle for the production of income by way of the profit from contracts, rather than as a (potentially) valuable asset in its own right. And the potential value of the company might anyway depend, or have been thought to depend, on the continued involvement of the surviving quasi-partner.
- 8) I bear in mind that Alan did not subsequently make a new will or seek to revisit the question raised by Mr Freeman; however, he remained commercially unsophisticated and generally uninterested in matters other than work on site and would probably not have considered that the question required further thought.
- 9) The letter of 7 January 2021 from Pamela’s solicitors is significant. It must have been sent with Pamela’s authority. It tends to indicate that, at that date, she believed that she had only ten shares. Even if the precise figure came from the solicitors’ initial investigations, the letter tends to indicate that Pamela did not believe that she had more than ten shares, which she knew to be a 10% shareholding. Mark’s evidence—unchallenged in cross-examination, though subsequently contradicted in oral evidence by Pamela—was that prior to March 2021 Pamela had never claimed to have anything other than a 10% shareholding. Pamela’s evidence was that she knew the terms of Alan’s will at or shortly after his death. An explanation to the effect

that she did in fact have only ten shares, with only an entitlement to a further forty shares, would be unconvincing, not least because, if Pamela believed herself to be entitled to the Disputed Shares but had taken no steps to formalise her holding, she must have thought that her entitlement to the shares sufficed for her entitlement to the dividends—which was the point of the letter. It is relevant to note that in cross-examination, when asked concerning the payments received from the Remuneration Trust (that is, in the period after Alan’s death), Pamela remarked that she had not known what Suzanne had been receiving and said, “I assumed she would get the same as me.” That evidence suggests that Pamela did not distinguish her position from that of the other 10% shareholder. Again, after the bitter falling-out in 2017, Pamela would have been very likely to assert her 50% ownership if she believed in it. I consider it probable that Pamela did not believe that she had Alan’s shares, or any entitlement to them, and that the suggestion that she did only resulted from her solicitors’ investigations into the company records, which showed an irregular record of them in Mark’s name. It is, again, worthy of note that Pamela did not take out a grant of probate of Alan’s will until 2023 and that, when she did so, she did not include Alan’s shares when declaring the value of his estate.

53. In my judgment, the Share Agreement is most conveniently to be analysed as a contract binding both Alan and Pamela. It involved mutual promises among the four prospective shareholders as to the disposition of the shares belonging to the first to die of Alan and Mark. Further, those promises have to be seen as part of the wider agreement among the four as to the basis of their involvement in AGM: as Mr Modha himself observed in his skeleton argument, at the time of the September 2003 meeting there was a single shareholder and director (Business Information Research & Reporting Limited); therefore Alan, Pamela, Mark and Suzanne were reaching an agreement as to how and on what basis they would become members of AGM. In his skeleton argument Mr Modha submitted that the Share Agreement, if it existed, could have no contractual force because it was unsupported by consideration, but in oral submissions he rightly accepted that mutual promises could be consideration if they were intended to have legal effect. Mr Modha did not positively submit that the Share Agreement, if it existed, was not intended to have legal effect, and I agree with Miss Page’s submission that, viewed objectively, it was intended to have such effect. The unwillingness to reduce it to writing merely demonstrates that no formality was deemed necessary. The effect of the promises was that any shareholder who became entitled to the deceased’s shares for the purposes of articles 29, 30 and 31 was obligated to nominate the survivor as the transferee. In the circumstances, Pamela can properly be required to make the nomination and execute the necessary share transfer.
54. For the avoidance of doubt, I do not accept Miss Page’s alternative submission, made in opening but not in closing submissions, that the Share Agreement constituted an actual election by Pamela under article 30. At the time of the making of the Share Agreement, Pamela was not even a member of AGM, let alone a person with power to make an immediate election.
55. If I had taken a different view about the contractual analysis, I would have held that Mark was entitled to the Disputed Shares on the basis of promise-based proprietary

estoppel. For present purposes, the law can be taken shortly from paragraph 12-036 of *Snell's Equity* (34th edition) (references omitted):

“It applies, it is submitted, where A makes a promise that B has or will acquire a right in relation to A’s property and B, reasonably believing that A’s promise was seriously intended as a promise on which B could rely, adopts a particular course of conduct in reliance on A’s promise. If, as a result of that course of conduct, B would then suffer a detriment were A to be wholly free to renege on that promise, A comes under a liability to ensure that B suffers no such detriment.”

In the present case, the promise in question is the promise by Alan—and, indeed, the other prospective shareholders, including in particular Pamela—that, if he predeceased Mark, the latter would receive his shares. Mark was reasonably entitled to understand this promise as seriously intended and capable of being relied on. The fact that Alan did not want the Share Agreement or other arrangements put in the form of a written shareholders’ agreement is not, in the present case, a contrary indication: see *Snell's Equity* at paragraph 12-042 and the cases there cited. I accept Mark’s evidence, given orally and in paragraphs 56 to 60 of his witness statement, that after his father’s death he continued to work in AGM and to dedicate hard work and commitment to building up its business in reliance on his belief that he and Suzanne now owned 90% of the shares. Mr Modha submitted that such reliance on something said once, in 2003, was unreasonable. I disagree. In circumstances where there was a clear agreement and understanding that had never been disputed, where Pamela never suggested that she was entitled to more than a 10% shareholding and did not even mention Alan’s will, and where the practical situation was that AGM was now a trading vehicle for Mark, I regard his reliance as reasonable. In the light of my findings of fact, it would in my judgment clearly be unconscionable and a detriment to Mark if Pamela were now permitted to dishonour the promise and assert entitlement to the Disputed Shares. The simplest way to satisfy the equity that would arise in Mark’s favour would be to direct Pamela, as Alan’s executrix, to transfer the Disputed Shares to Mark.

The Petition

56. In his closing oral submissions Mr Modha acknowledged that the Petition turned “in part” on the Claim and that the financial benefits accepted to have been received by Pamela might perhaps mean that she has not suffered prejudice, if (contrary to her case) she has only an entitlement to a 10% shareholding. However, even on the basis of that alternative he did not abandon all of the allegations in the Petition; therefore I shall address those that were pursued.

Some Law

57. The Companies Act 2006 makes the following relevant provisions regarding unfair prejudice petitions:

“994 *Petition by company member*

(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

...”

“996 Powers of the court under this Part

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

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

- (a) regulate the conduct of the company's affairs in the future;
- (b) require the company—
 - (i) to refrain from doing or continuing an act complained of, or
 - (ii) to do an act that the petitioner has complained it has omitted to do;
- (c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;
- (d) require the company not to make any, or any specified, alterations in its articles without the leave of the court;
- (e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.”

58. In *In re Neath Rugby Ltd, Hawkes v Cuddy (No. 2)* [2007] EWHC 2999 (Ch), [2008] BCC 390, Lewison J set out the statutory provisions and continued at [202]:

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

- (i) The acts or omissions of which he complains consist of the management of the affairs of the company;

(ii) That the conduct of those affairs has caused prejudice to his interests as a member of the company and

(iii) The prejudice is unfair.”

59. As indicated in that dictum, there must be a causal link between the acts or omissions complained of and the unfair prejudice suffered by the petitioner; see too *In re Southern Counties Fresh Foods Limited* [2008] EWHC 2810 (Ch), per Warren J at [47].

60. Regarding prejudice, in *In Re Coroin Limited* [2012] EWHC 2343 (Ch), David Richards J said at [630]:

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

61. Regarding the concept of unfairness, in *O’Neill v Phillips* [1999] 1 WLR 1092, with reference to the corresponding provision in the Companies Act 1985 to section 994, Lord Hoffmann said at 1098-1099:

“In section 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history (which I discussed in *In re Saul D. Harrison & Sons Plc* [1995] 1 B.C.L.C. 14, 17-20) that it chose this concept 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. ...

In the case of section 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the share-holders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman *societas*, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.

The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.”

62. As directors of AGM, Mark (from October 2003) and Suzanne (from January 2017) owed to the company duties in accordance with the following provisions of the Companies Act 2006:

“170 Scope and nature of general duties

(1) The general duties specified in sections 171 to 177 are owed by a director of a company to the company.

...

(3) The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.

(4) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and

equitable principles in interpreting and applying the general duties.

...”

“171 Duty to act within powers

A director of a company must–

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

“172 Duty to promote the success of the company

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

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

“174 Duty to exercise reasonable care, skill and diligence

(1) A director of a company must exercise reasonable care, skill and diligence.

(2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with–

- (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and

- (b) the general knowledge, skill and experience that the director has.”

“175 Duty to avoid conflicts of interest

(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.

...

(3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.

(4) This duty is not infringed–

- (a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or
- (b) if the matter has been authorised by the directors.

(5) Authorisation may be given by the directors–

- (a) where the company is a private company and nothing in the company’s constitution invalidates such authorisation, by the matter being proposed to and authorised by the directors; or

...

(6) The authorisation is effective only if–

- (a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and
- (b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted.

(7) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.”

63. The directors’ duties are owed to the company, not to the individual shareholders. Breach of the duties is not itself sufficient to ground a petition under section 994. In *In Re Blackwood Hodge plc* [1997] 2 BCLC 650, Jonathan Parker J said at 673:

“[T]he petitioners must establish not merely that the BH directors have been guilty of breaches of duty in the respects alleged, but also that those breaches caused the petitioners to

suffer unfair prejudice in their capacity as preference shareholders.”

64. Section 180 of the Companies Act 2006 provides in relevant part:

“(4) The general duties—

(a) have effect subject to any rule of law enabling the company to give authority, specifically or generally, for anything to be done (or omitted) by the directors, or any of them, that would otherwise be a breach of duty, and ...”

One such rule of law is the principle, recognised in *In re Duomatic Ltd* [1969] 2 Ch 365, that assent by all the shareholders entitled to vote in a general meeting is as binding as a resolution passed in a general meeting.

65. In *THG Plc v Zedra Trust Company (Jersey) Limited* [2024] EWCA Civ 158, [2024] 3 WLR 59, the Court of Appeal held, contrary to received wisdom (see the Court’s judgment at [20]), that limitation periods apply to petitions under section 994. (The Supreme Court has given permission to appeal.) As such a petition is founded on statute, it is in principle subject to the limitation period laid down in section 8 of the Limitation Act 1980: see [72]. That limitation period is generally twelve years from the date on which the cause of action accrued. At [77] Lewison LJ, with whose judgment Arnold and Snowden LJJ agreed, said:

“Where the petition alleges that the affairs of a company have been conducted in a way that is unfairly prejudicial (as in this case) I see no obstacle to holding that the cause of action is complete once the conduct complained of has taken place. There is no further fact that needs to be established.”

The twelve-year period does not apply if a shorter limitation period is prescribed by any other provision of the 1980 Act. Section 9 prescribes a six-year period for an action “to recover any sum recoverable by virtue of any enactment”. As Lewison LJ observed at [88]: “The scope of this section seems to depend on what remedy is claimed, rather than the underlying cause of action.” Having reviewed numerous authorities, he continued:

“102. If that approach is applied to petitions under section 994, it would appear to follow that different limitation periods would apply to different petitioners, depending on what relief they sought. If, for example, the petitioner sought an order regulating the affairs of the company in the future, that would not be a monetary remedy. But if, as in this case, the petitioner’s surviving claim was merely a claim for compensation, then section 9 would apply.”

Later in the judgment, he said:

“124. One remedy which was discussed in argument was the normal form of relief in section 994 petitions which required (usually) the majority shareholders to buy the shareholding of the petitioner, sometimes on the basis of valuation assumptions imposed by the court. I do not consider that such a claim would be a claim for the recovery of money. ...

125. In this respect a buy-out order is analogous to an order for specific performance of a contract. The vendor who obtains such an order does not have a money judgment; nor indeed any entitlement to money unless and until he executes a transfer in exchange for the purchase price. In the same vein, as Arden LJ said in *Hill*, a claim to set aside a settlement is clearly not a claim to recover a sum of money (though it may lead to a consequential order for the payment of money). Nor do I see any great hardship in requiring a petition seeking such an order to be brought within 12 years of the events giving rise to the unfairness alleged.

...

129. Where, therefore, as in this case (a) the right to go to court is purely statutory and (b) the only relief sought is the payment of money (whether liquidated or unliquidated), I would hold that the action falls within section 9 of the Limitation Act 1980, with the consequence that it cannot be brought more than six years after the matters complained of.”

66. Finally, I mention section 1157 of the Companies Act 2006, which provides in relevant part:

“1157 Power of court to grant relief in certain cases

(1) If in proceedings for negligence, default, breach of duty or breach of trust against—

(a) an officer of a company ...

it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit.”

Limitation

67. The Petition was presented on 22 December 2022. The relief claimed in the Petition is stated as follows:

“23. The Petitioner, Mrs Pamela Lane, will seek an order that the First and Second Respondents (namely Mr Mark Lane and

Mrs Suzanne Lane) be required: (i) to purchase the Petitioner's shares at fair value as determined by an independent expert; to (ii) pay the costs of the Petitioner; and/or (iii) make such alternative or further order as the court shall in its discretion deem to be appropriate for remedying the unfairness particularised in this petition. The Petitioner will seek for the fair value of the shares of the petitioner to be assessed with an uplift (and/or other allowance) to reflect any diminution in the value of the shares caused by the prejudicial conduct of the First and Second Respondents.

24. The petitioner therefore prays as follows for the following relief:

(i) That the First Respondent and Second Respondent be ordered to purchase the shares of the Petitioner (including the Disputed Shares) at a fair value to be determined;

(ii) That 'fair value' for the shares to be purchased includes compensation to reflect the unfairness which is particularised in this petition;

(iii) Such further or alternative order as the court may in its discretion deem fit;

(iv) Costs".

68. Mark and Suzanne have raised a limitation defence. In agreement with Mr Modha, I consider that the applicable limitation period is twelve years pursuant to section 8(1) of the Limitation Act 1980. However, the analysis is something of a double-edged sword for Pamela.
69. In paragraph 45 of his written submissions, Mr Modha, citing Lewison LJ in *THG v Zedra*, submitted: "The Petition is not a claim for a sum of money. Pam seeks a buyout order, which is 'analogous to an order for specific performance. The vendor who obtains such an order does not have a money judgment; nor indeed any entitlement to money unless and until he executes a transfer in exchange for the purchase price'." I agree with that. A claim for a monetary award of compensation would be subject to a six-year limitation period. However, that is not what is being claimed. The claim is for an order for purchase of Pamela's shares. Pamela seeks a price that is adjusted to take account of any diminution in the value of her shares that is attributable to the alleged unfairly prejudicial conduct: that is, the Petition seeks a price reflecting the value that her shares would have had, but for the conduct complained of. That is common in petitions under section 994. It does not affect the nature of the relief claimed; it relates only to the terms on which the respondents are ordered to purchase the shares.
70. The difficulty for Pamela is apparent in paragraph 47 of Mr Modha's written submissions. As will appear below, the primary complaint on the Petition is that Mark and Suzanne, as directors, have not been paying the dividends to which

Pamela's shares (including, she says, the Disputed Shares) entitled her. Mr Modha submitted:

“47. In the event that a buyout order is made, and given that the appropriate period of limitation could only bar relief in a petition in respect of complaints about conduct prior to December 2010, any adjustments to the purchase price should reflect the imbalance between payments from the Remuneration Trust received by Mark and Pam since that date.”

However, there is no logical or evidential basis for supposing that any imbalance in the loans made by the Remuneration Trust has had any effect whatsoever on the value of Pamela's shares. Further, as will appear below, the Petition does not rely on any imbalance between payments received from the Remuneration Trust as constituting unfairly prejudicial conduct: what it complains of is the failure to pay dividends. But a failure to pay dividends, similarly, does not concern a loss to the company, such as might warrant an adjustment of the share price if an order for purchase were made. Anticipating an analysis on Pamela's behalf that was more clearly tied to the terms of the Petition, Miss Page submitted that point (ii) in the prayer in the Petition was a “claim for the amount of a hypothetical dividend that she would have received *but for* the RT [Remuneration Trust]” and as such was “undoubtedly a claim for a sum of money” and subject to the six-year limitation period under section 9 of the Limitation Act 1980. I disagree with that analysis of the relief actually sought in the Petition: as Mr Modha said, it is simply an order for a share buyout. However, to adjust the price of the shares to include compensation for something that does not relate to the value of the shares is both clearly impermissible as a method of share valuation and an obvious attempt to obtain disguised monetary relief—what Miss Page referred to as “monetary relief [being] sought by the shareholder in respect of a personal loss (rather than loss to the Company) and dressed up and prayed for as an adjustment to a share buyout order.”

71. I turn to consider the allegations of unfairly prejudicial conduct, on which the claim to relief is based. The Petition makes a number of such allegations, but only two of them were maintained by Mr Modha in closing submissions. I shall deal with them in turn.

First Allegation: the Remuneration Structure

72. The first allegation (paragraphs 13.2 and 14 to 17 of the Petition) relates to the remuneration structure operated within AGM and the non-payment of dividends. The essence of the allegation is put as follows:

“13.2. [As directors of the Company, Mark² and Suzanne have owed a duty to the Company:] To promote the success of the Company for the benefit of members as a whole pursuant to s. 172 Companies Act 2006. This involved having regard to: (i) the need to act fairly as between members of the Company; (ii) the need to promote the Company's interests; (iii) the need to consider the potential liabilities involved in any remuneration

² In quotations from the pleadings, I shall substitute the parties' proper names for their procedural titles.

and/or dividend structure; (iv) the need to consider the long-term structure of the Company's assets and liabilities; (v) likely long-term impact of a business decision.

...

14. Further to the duties outlined at paragraph 13.2, Pamela avers that Mark and Suzanne were under a duty to: (i) genuinely consider whether to make distributions to members; (ii) to have regard to whether to make distributions when considering any remuneration policy of the Company; (iii) to consider the impact, fairness and reasonableness of a refusal to pay dividends (when the Company is able to do so) on the members of the Company; and (iv) to ensure that any remuneration structure did not expose the Company to tax penalties.

15. In breach of the obligations pleaded at paragraph 13.2 and paragraph 14, Mark and Suzanne have conducted a policy in relation to dividends which is contrary to their fiduciary duties and/or the duties pleaded at paragraph 14 ...”

The particulars of the alleged breach in the lengthy paragraph 15 are, in summary, as follows. In the period of the financial year ended 31 March 2009 to the financial year ended 31 March 2021 inclusive, Mark (and, from the financial year ended 31 March 2017, Mark and Suzanne) caused AGM to make contributions to the Remuneration Trust in the total sum of £2,697,000. In the same period, no dividends were paid by AGM, with the sole exception of the financial year ended 31 March 2018, when dividends of £10,000 were paid (and contributions of £380,000 were paid to the Remuneration Trust). Paragraphs 16 and 17 address Mark's contention in the Claim that since 2009 Pamela has received substantial loans from the Remuneration Trust, most of them advanced pursuant to applications that she herself had signed. The Petition denies that Pamela signed the applications. It also denies that she knew she was receiving loans and avers that she believed she was receiving dividend payments arising from her entitlement as a shareholder. The Petition does not deny that Pamela knew of the Remuneration Trust itself, but it puts Mark and Suzanne to proof that she “ever acquiesced to the establishment of the Remuneration Trust”.

73. In respect of this first allegation, the following passages in the re-amended points of defence may be noted.

“10 (b) On 18 March 2008 the Company founded the Remuneration Trust. The Remuneration Trust was entered into with the agreement and approval of Alan Lane and Mark (in their capacity as directors) in reliance on advice from the Company's accountant (Craig Freeman) and representations and/or advice from Baxendale Walker Solicitors (including that the Remuneration Trust was lawful). The decision to found the Remuneration Trust was discussed between and orally approved by all four shareholders, including the Petitioner. It is averred that at all material times, Alan Lane (until his death)

and Pamela agreed and/or acquiesced in the Company making contributions to the Remuneration Trust from which they received payments.

11. Furthermore, Pamela agreed to and/or assented to and/or acquiesced in the Remuneration Trust:

- (1) by signing trust documentation ...
- (2) [by] accepting payments from the Remuneration Trust totalling £121,500 since Alan Lane's death ...
- (3) further or alternatively, Pamela knew of the Remuneration Trust and/or that payments received by her were from the trust and/or that they were by way of loan. In particular, it was the practice of the trustee of the Remuneration Trust to send letters acknowledging requests for payments from the trust to the recipient's home address. The said letters expressly stated that the monies requested from the trust would be paid by way of loan. Mark and Suzanne rely on letters including (but not limited to) a letter from the trustee to Pamela dated 28 July 2010 addressed to Pamela at her home address which expressly stated that the monies from the trust were a loan.
- (4) by not raising any objection to the Remuneration Trust or contributions thereto for over 11 years, leading Mark and Suzanne reasonably to believe that she assented to the Remuneration Trust. Mark and Suzanne continued to make payments to the Remuneration Trust in reliance on Pamela's agreement (as set out in paragraph 10 above) and / or conduct (as set out above). Alternatively, they would have sought to address any concerns raised by Pamela at the time and/or have sought to acquire her 10% shareholding. As such it would be unconscionable for Pamela now to be awarded relief in respect of the same."

The contributions to the Remuneration Trust are admitted, save that the contributions in the financial year ended 31 March 2018 were £250,000 not £380,000. In respect of dividends it is averred that in the financial year ended 31 March 2009 a dividend of £40,000 was paid, of which Pamela received £10,000 as a 10% shareholder, and that in the financial year ended 31 March 2018 a dividend of £10,000 was paid, of which Pamela received £1,000 as a 10% shareholder. Paragraph 19 denies that the setting up or operation of the Remuneration Trust was unfairly prejudicial to Pamela; it says:

“(a) the Remuneration Trust was entered into with the unanimous consent of members (including Alan Lane and Pamela).

(b) The directors at the time (Mark and Mr Alan Lane) reasonably and honestly believed that the Remuneration Trust was in the best interests of the Company in reliance on independent professional accountancy advice from the Company's accountant and representations and/or advice from Baxendale Walker Solicitors.

(c) Pamela agreed to and/or assented to and/or acquiesced in the Remuneration Trust ...

(d) It is averred that Pamela has also benefited from the contributions to and payments made by the Remuneration Trust. ...”

Paragraph 20 (d) states:

“(d) Save for a dividend in 2018, the Company has not paid dividends since 2009. Pamela has not complained or objected to the non-payment of dividends for over 11 years (until Red Kite's letter dated 16 August 2021) such that she led Mark and Suzanne to believe that she accepted the non-payment of dividends and/or acquiesced in the same. Mark and Suzanne have acted in reliance on Pamela's non-objection in continuing not to pay dividends and/or in making the further payments [to the Remuneration Trust] such that there is no 'unfairness' in Pamela not having received dividends and/or it would be unconscionable for Pamela to now to be given relief on the grounds of unfair prejudice in respect of the same. ...”

74. As I have already mentioned, this first allegation is not pleaded as a complaint about any imbalance of the loans from the Remuneration Trust as between Pamela on the one hand and Mark and Suzanne on the other hand. It is in essence a complaint about the failure to pay dividends from the profits of the company, dividends that Pamela says ought to have reflected her entitlement to 50% of the shares. There is also a complaint that, in using the Remuneration Trust, Mark and Suzanne failed to ensure that AGM was not thereby exposed to tax penalties.
75. Mr Modha's oral and written closing submissions may be summarised as follows. The remuneration policy operated by Mark and Suzanne, through the Remuneration Trust, has unfairly prejudiced Pamela, because she has not received payments commensurate with her position as a shareholder. Even after allowance has been made for the proper levels of remuneration for Mark and Suzanne if there had been no Remuneration Trust, Pamela has received less than 10% or 50% of AGM's distributable profits “prior to gifts to the Remuneration Trust”: written submissions, paragraph 6. (The share valuation experts were agreed that the correct approach to estimating the distributable reserves was to consider the hypothetical scenario in which no contributions were made to the Remuneration Trust. Of course, the point of the Remuneration Trust was, in a sense, to eliminate or diminish the distributable reserves.) The only benefit she has received from her shareholding was a dividend of £1,000, representing a 10% shareholding, in 2018. The evidence does not show (it is said) that Pamela understood that the operation of the Remuneration Trust would

result in her receiving no or practically no dividends. Payments made to her from the Remuneration Trust were gratuitous, in the sense that she had no contractual or other entitlement to them and that after 2012 they were actually paid by Mark and Suzanne from advances to them, and are thus irrelevant when considering the unfair prejudice she has suffered as a shareholder. There is no evidence that the respondents took advice on the appropriate operation of the remuneration structure of the company. In his oral submissions, Mr Modha said that he relied on the respondents' breach of duty since 2017, that is, after the falling out.

76. In his skeleton argument (paragraph 69), Mr Modha began from the premise that it was agreed by all shareholders that the profits of AGM would be split 50:50 as between Alan and Pamela on the one hand and Mark and Suzanne on the other. He continued: "It is obvious that in order for profits to be split dividends would need to be declared and paid in accordance with its members' shareholdings." As for the first part of that submission, in the light of my findings on the Claim the premise of a 50:50 split of profits cannot be maintained after Alan's death. As for the second part of the submission, it is undermined by the decision to operate the Remuneration Trust.
77. The Remuneration Trust was established and in operation more than twelve years before the presentation of the Petition. Reliance on the decision to establish and operate it as unfairly prejudicial conduct would therefore be barred by limitation of time. Mr Modha does not seek to rely on it. Even so, the events of 2008, narrated above, are significant for the later conduct of the company's affairs.
78. In his skeleton argument, Mr Modha characterised the suggestion that Alan and Pamela had both discussed and approved the creation of the Remuneration Trust as "far-fetched", the allegation that the Remuneration Trust was founded with the "unanimous consent of members" as "a desperate attempt to palm off liability for this tax avoidance scheme onto Pam", and the claim that Pamela led Mark and Suzanne to believe that she accepted or acquiesced in the non-payment of dividends as "seriously unreal" (paragraphs 71 and 77). Yet it is beyond doubt that the creation of the Remuneration Trust was indeed a matter of discussion among the four shareholders and was approved by both Alan and Pamela, and I find as a fact that Pamela knew full well that she was receiving loans from the Remuneration Trust rather than dividends.
79. The fact that all shareholders in AGM discussed and consented to the creation of the Remuneration Trust and that the decision to create it was approved by Alan and Mark as the directors was established by the evidence and ultimately proved not to be controversial. Pamela confirmed in cross-examination that Mr Freeman had assured them of the legality of the Remuneration Trust and that "everyone"—not just she and Alan but also Mark and Suzanne—thought it was a good idea. (She was unable to explain why, in May 2024, she had signed a statement of truth on her Reply, although paragraph 9 had stated in terms that she "did not agree that the Company should establish or 'enter into' the Remuneration Trust" and paragraph 17 had said, "The Petitioner did not agree or consent to or acquiesce in the Remuneration Trust.") She also confirmed that Mr Freeman had explained that, instead of paying dividends and salaries, the company would make contributions to the Remuneration Trust and that the object of the exercise was to reduce tax liabilities.
80. Despite those admissions, Pamela continued to assert that she understood the payments she received from the Remuneration Trust to be dividends and that she did

not understand that they were loans. She said that, although Mr Freeman had told them that the company would be making payments to the Remuneration Trust instead of dividends and had given an explanation of how the Remuneration Trust worked, she “didn’t really take it all in”, because the meeting was informal and people were “laughing and joking”. I do not accept her evidence. She clearly understood the substance of the proposal and was sufficiently engaged to think about the risk that might be involved in the use of the device and to enquire as to its lawfulness. I am quite satisfied that she knew that the payments to be received were not dividends but loans.

81. Pamela did not receive any money at all from the Remuneration Trust before Alan’s death. All the advances were made, in equal amounts, to Alan and Mark. (It may be noted that Pamela did not receive any dividends from her 10% shareholding either.) Thereafter, and until 2012, the payments to Pamela from the Remuneration Trust were made pursuant to written applications from her for loans. There were typically two documents. The first was a letter from Pamela to the Trustees of the Remuneration Trust:

“As the Founder of the Trust, I am writing to request that you give your consideration to the following matters. I appreciate that you must exercise your own discretion in such matters and I hope you find the following information of use.

I would like the Trustee to give consideration to advancing a loan to myself, Mrs P Lane of [amount] upon commercial terms to be agreed, for the purposes of general investment.

I reaffirm our understanding that you are in no way bound to follow our wishes in this or in any other respect.”

The second document was a Finance Agreement between Pamela and HWC as nominee of the Trustees, whereby the Trustees agreed to make the requested loan. The letter was purportedly signed by Pamela. The Finance Agreement was signed by Mark and Suzanne on behalf of HWC and was purportedly signed also by Pamela. Pamela’s purported signature on the Loan Agreement was witnessed usually by Miss Liscombe and occasionally by another individual employed by Mr Freeman. The letter and the Loan Agreement would bear the same date. (After 2012 this method of obtaining the loans was discontinued; instead, the money from the Remuneration Trust was advanced to Pamela via Mark and Suzanne.)

82. Pamela denied that she had signed either the letters or the Finance Agreements. In her witness statement she said:

“42. In the beginning, when AGM was first established, Suzanne would ask me to sign some paperwork in order to send off for what she referred to as the dividends. This was just a signature page without any document attached to it. I don’t know when exactly, but Suzanne advised me to stop signing for the dividends and told me that she could sign for the dividends on my behalf. Suzanne said it was easy to do my signature.

43. I understand that Mark and Suzanne have produced copies of finance agreements. It is my firm position that I never signed any of the finance agreements. I have never seen the loan documentation/finance agreements Suzanne and Mark disclosed. I only knew of their existence when they came out during the course of litigation. On their face, the copies I have seen suggest that I signed the documents in the presence of 'witnesses'. I did not sign any documents in front of the witnesses on the documents. The only thing that I signed was the paperwork required to receive my dividends."

As indicated by paragraph 42, however, and as Pamela said in cross-examination, she accepted that she had signed some documentation. She also stated in her witness statement:

"20. In relation to the trust, my understanding was that Mark and Suzanne were sending money away from AGM and apparently the money would come back and be split between us (equally between Suzanne and Mark on the one hand and Alan senior and I on the other when Alan senior was alive and then Suzanne and Mark on the one hand and I following Alan senior's passing). I understood that the monies I was obtaining was for my shares (including Alan's senior's shares following his death) and what Craig would refer to as my dividends, which I will discuss further below. It is my understanding Suzanne mainly dealt with the trust. She had a freehand and I assumed she was doing right by me following Alan's death."

83. The letters and Loan Agreements were put to Pamela in cross-examination. The gist of her evidence was that some of what purported to be her signatures were certainly not hers and that, while the appearance of others was consistent with the possibility that they were genuine, she had never signed any documentation for a loan and had never attended at Freeman's for the purpose of signing documentation.
84. It was put to Suzanne that she had forged Pamela's signature on the documents or told Mr Freeman or Miss Liscombe that they could do so. She denied this. She said that, when it was necessary for Pamela to sign documents, she would contact Pamela and ask her to attend at Freeman's. It was put to Miss Liscombe that neither she nor the other purported witness had in fact witnessed Pamela's signature and that Miss Liscombe's evidence that Pamela had attended to sign was false.
85. Each side adduced expert handwriting evidence in respect of the genuineness of what purported to be Pamela's signatures: for Mark and Suzanne, from Mr Stephen Cosslett; for Pamela, from Ms Ellen Radley. They are both professional and accomplished experts, who gave their evidence well, and I mean no disrespect to them when I say that their evidence did not greatly advance matters. Therefore I shall take their evidence briefly and without going into detail. Mr Cosslett considered that there was "some limited evidence" that all but one of the disputed signatures were genuine, by which he meant that it was more likely than not that the signatures were genuine. In the case of one signature he regarded the evidence as "inconclusive", which meant that he could not offer an opinion one way or the other. Ms Radley regarded the

evidence for all of the disputed signatures she examined to be “inconclusive”. I note that both experts were provided only with copies of the disputed signatures, and that both of them regarded Pamela’s known signatures to be variable (or, according to Ms Radley, highly variable) and, to that extent, perhaps rather more easily forged than a more consistently written signature. The expert evidence does not, therefore, provide any positive support for the contention that someone other than Pamela wrote her signatures on the documents. On the other hand, if the factual evidence tended to suggest that the signatures were indeed forgeries, the expert evidence would not dictate a contrary conclusion. It all really comes down to the factual evidence.

86. I find as a fact that Pamela did indeed sign the documents. First, while of course signatures are sometimes forged, the natural working assumption in the absence of good evidence to the contrary is that a signature is genuine. Second, there is no sufficient objective evidence to show that the signatures are forgeries. Third, I see no good reason why Pamela’s signature should have been forged at all, as I am satisfied that she knew she was receiving loans from the Remuneration Trust, so there was nothing to be kept hidden from her, and there was no apparent impracticality in obtaining her signature. Fourth, if the disputed signatures are forgeries, they are carefully executed forgeries, as shown by the fact that the handwriting experts have not been able to identify them as such. As the documents in question were effectively internal documents, it is not entirely clear to me why a forger should have been greatly concerned with verisimilitude. (I do not place a great deal of weight on this point, but it seems to me to be of some interest nonetheless.) Fifth, I am unimpressed by Pamela’s reliability as a witness: in this regard, I refer to my previous remarks concerning the Share Agreement and generally in respect of the Remuneration Trust. Sixth, if the signatures are forgeries, both Suzanne and Miss Liscombe—not to mention the other witness to the purported signatures—are implicated in the deceit. They deny wrongdoing, and I find no sufficient reason to conclude that they are so implicated.
87. After 2012 the mechanism by which Pamela received money from the Remuneration Trust changed, as a result of legal advice received by Mark from Hayden Wealth Management, who were managing the Remuneration Trust, to the effect that payments ought only to be made to directors of AGM. (It is not absolutely clear to me that the advice was correct, but I do not have to decide the point.) Now, the loans were advanced to Mark and paid into the bank account he held jointly with Suzanne, and from the money so advanced Suzanne made payments to Pamela. Both in her written evidence and orally at trial Pamela acknowledged that she understood the source of the money to be the Remuneration Trust, though she continued to insist in cross-examination that she believed the money to be by way of dividends, which I do not accept.
88. In circumstances where Pamela agreed to the use of the Remuneration Trust and understood that payments under it would be by way of loans and were instead of dividends, she cannot be heard to complain that she has been unfairly prejudiced by the substitution of the Remuneration Trust for the payment of dividends. (See *Richards v Lundy* [1999] BCC 786 (Nicholas Strauss QC) at 802; *Kholi v Lit* [2009] EWHC 2893 (Ch), [2010] 1BCLC 367, (HHJ Purle QC) at [142]; *Croly v Good* [2010] EWHC 1 (Ch), [2011] BCC 105, (HHJ David Cooke) at [94].) The only complaint of unfairness that has actually been advanced in respect of the *amounts*

received by Pamela is that moneys paid to her other than as dividends are to be totally disregarded as having been gratuitous and not by reason of her entitlement as a shareholder. In the light of my findings of fact, however, that is an unsustainable position. Mr Modha's realistic, though non-committal, remarks in closing submissions (see paragraph 56 above) indicated some appreciation of that. I add that the sum of £188,500 actually received by Pamela from the Remuneration Trust (including moneys received directly and moneys received indirectly via Mark and Suzanne but known by Pamela to come from the Remuneration Trust) exceeds the amount that would have been available for distribution to her on the basis of a 10% shareholding even according to the evidence of Mr Haddow, who was Pamela's accountancy expert; and this does not include further receipts of £33,437 in respect of dividends (of which £12,500 was paid from 2008) and of £24,280 from Suzanne and representing a proportion of the salary that Suzanne had earned from the company before her appointment as a director.

89. In his skeleton argument (paragraph 72), Mr Modha said: "Pam submits that it is the potential unlawfulness of the Remuneration Trust—and the inherent riskiness of such a scheme—which gives rise to unfair prejudice." If and insofar as it is being alleged that the simple fact of the operation of the Remuneration Trust constituted a breach by Mark and Suzanne of their duty of care, skill and diligence under section 174 of the 2006 Act and that Pamela was unfairly prejudiced by this breach, I reject the allegation. First, having regard to the facts of the case and to the terms of section 174(2), I am not persuaded that the decision by the directors to operate and continue operating the Remuneration Trust involved a failure to exercise the care, skill and diligence properly to be expected of them. They had what they clearly—and, I think, reasonably—understood to be favourable advice, and what was certainly encouragement, from Mr Freeman and they considered it in the light of the Baxendale Walker documentation. The evidence given by Mark, which I accept, is that, after HMRC had issued and stayed protective proceedings constituting a challenge to the use of Remuneration Trusts, the advice provided to him by Hayden Wealth Management continued to be that the device was both lawful and effective. The device of the Remuneration Trust continued to be operated for many years and without complaint from Pamela until the solicitors' letter in January 2021. I note, additionally, that there is no pleaded allegation that Mark and Suzanne were in breach of duty in failing to take advice or further advice. Second, even if the Remuneration Trust were held to be ineffective as a tax mitigation scheme, I cannot see that the fact of its use has *unfairly* prejudiced Pamela or any other member, though it might prove to have been disadvantageous for the company and to that extent to the members as a whole.

Second Allegation: Loans to the Company

90. The second allegation appears in paragraph 19.2 of the Petition and alleges breaches of the directors' duty under section 171 of the Companies Act 2006 to exercise their powers only for the purposes for which they were conferred (paragraph 13.1) and their duty under section 175 of the Companies Act 2006 to avoid opportunities where their interests would conflict with their duties to AGM (paragraph 13.5):

"19.2. Mark has recorded himself as a creditor of the Company from the financial y/e March 2017 onwards (the year in which the Company paid £380,000 to the Remuneration Trust) in the

sum of £316,708. To the extent that at any juncture (whether at or prior to March 2017) Mark has been a debtor of the Company then no approval was sought for this transaction from the members of the Company (in accordance with s. 197 Companies Act 2006 or otherwise). The Company has continued to pay (and receive) funds from Mark in the financial y/e 2018, 2019 (when the loan was re-characterised as a loan from Mark and Suzanne) and 2020. Pamela avers that: (i) the establishment of the debtor/creditor relationship between Mark (and Suzanne) and the Company was not for a proper purpose and/or in the best interests of the Company particularly in circumstances when the Company was then making payments to the Remuneration Trust for the Respondents' benefit; (ii) that in permitting and continuing the loan (and payments to and from the Company pursuant to that loan) from 2017 to 2020, Mark and Suzanne have allowed their duties and interests to conflict. Further, Pamela will seek for an account to be produced to determine the true nature and extent of the Company's indebtedness to Mark (if any)."

91. In respect of this second allegation, paragraph 31 of the re-amended points of defence admits that Mark is a creditor of AGM but avers that he has not been a debtor of AGM. It avers that Mark and Suzanne honestly and reasonably believed that lending moneys to AGM was in the best interests of the company, and it denies that lending moneys to the company caused any prejudice to Pamela's interests as a member of the company or that any prejudice was unfair.
92. I have not found it entirely easy to understand the second allegation. The original complaint appears to have rested, at least in part, on a misapprehension that Mark was borrowing money from AGM; in fact, he was lending money to AGM, as shown in his director's account. The loan of money by a director to his company is commonplace—for example, and frequently, by not drawing one's full salary—and does not itself involve the exercise of the individual's powers *qua* director. The making of loans to the company did not itself amount to or give rise to prejudice to members, far less unfair prejudice. Further, it was not put to Mark that in making the loans Mark did not in good faith believe that he was acting in the best interests of the company; and I find that he did so believe. The point underlying the manner in which the allegation was advanced at trial appears to be that Mark and Suzanne were causing AGM to pay large amounts of money into the Remuneration Trust without properly understanding that the company required money for cashflow purposes and as working capital, with the result that Mark ended up having to lend back to the company some of the money that he had received from the Remuneration Trust. In submissions this complaint was bolstered by the further complaint that the moneys received by Mark were far in excess of what would have been reasonable remuneration for him as a director of AGM. However, these were not pleaded complaints and, in consequence, were not capable of being fully explored at trial.

Conclusion on the Petition

93. I do not find the allegations of unfair prejudice established. Therefore the Petition will be dismissed.

94. Mark and Suzanne ought not to take this conclusion as relieving them of their responsibility as directors to give proper consideration to the exercise of their powers in the interests of AGM and its members. They will have to consider whether or not, and if so to what extent and in what manner, the continued operation of the Remuneration Trust is appropriate and whether or not they ought in future to exercise their power to declare dividends. The facts, as I find them to be, that Pamela agreed to the Remuneration Trust in 2008 and thereafter agreed to or acquiesced in the use of the Remuneration Trust in substitution for dividends does not mean that the question of its continued use after she has objected to it is to be regarded as settled once and for all.

Conclusions

95. The Claim succeeds. I shall hear counsel as to the appropriate form of relief, but it seems to me that there is probably no need for anything more than an order that Pamela transfer the Disputed Shares to Mark.
96. The Petition fails.