Neutral Citation Number: [2017] EWHC 1485 (Ch) Case No: C30BM093 B30BM271 B30BM376

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre Bull Street, Birmingham B4 6DS

Date: 23/06/2017

Before :

HHJ DAVID COOKE

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Between :

Alistair Kenneth Bruno Trow **Stephen Roderick Trow Charlotte Jane Trow**	**Claimants**
- and -	
Durmast Group Ltd **Duncan Richard Trow PFC Group Ltd**	**Defendants**

- -

Andrew Maguire (instructed by **Quality Solicitors Parkinson Wright**) for the **Claimants**
Christopher Lundie (instructed by **Gateley Plc**) for the **Defendants**

Hearing dates: 22-24, 27-30 March 2017

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Approved Judgment

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

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HHJ DAVID COOKE

HHJ David Cooke:

Introduction and factual outline

1.
This is the trial of three consolidated claims which are fought, essentially, between three brothers. Two of them, Alistair Trow ("Alistair") and Stephen Roderick Trow (known as "Rod") are on one side, with Alistair's wife Charlotte Trow, as claimants in the consolidated action. The third, Duncan Trow ("Duncan") is a defendant, together with two companies now controlled by him. I will refer to the family members by their given names, as they have been throughout the proceedings.

2.

Prior to 2009, the brothers were, indirectly, equal shareholders in two trading companies, PFC Group Ltd ("PFC", the third defendant) and Service Business Forms Ltd ("SBF"). The two companies were engaged in the printing business; PFC operated as what is known in the industry as a print service company, obtaining orders from customers and arranging with one or a number of different suppliers for the various materials and work necessary to meet the customers' requirements. SBF was referred to as a manufacturing company; it performed actual printing work and other related operations such as assembling printed material and inserting it into envelopes for mailshots. SBF was thus a supplier to PFC, but not its exclusive supplier. SBF also had other unconnected customers of its own, referred to as "trade" business.

3.

On 9 June 2009 Durmast Ltd ("Durmast", the first defendant) bought out the interests of all three brothers in both companies for a total consideration of £3.564m, paid partly in cash and partly by issue of loan notes and divided as to £2.979m for PFC and £585,000 for SBF. Durmast is owned as to 86.5% by Duncan, who effectively controls it. The buy-out was regarded as a sale to him. The remaining 13.5% is held by Alistair. After the sale Duncan took charge of the business though Alistair remained involved as a minority shareholder, director and employee. Rod, who had previously run SBF, retired.

4.

In 2012 there was a financial crisis in the business and SBF went into administration (and later liquidation). PFC survived, though evidently things were difficult for a period.

5.

The claims now brought can be summarised as follows (this is not the order in which they were brought, and I ignore certain others that have been abandoned before trial):

i)

Alistair and Rod claim against Durmast for payment of loan notes issued in the buy-out (£70,256 and £107,500 respectively)

ii)

Durmast claims damages from Alistair and Rod for misrepresentation in the buy-out, originally said to have been fraudulent though the allegations of fraud were abandoned just before trial. The misrepresentation is said to be as to the margin charged on inter-company sales from SBF to PFC, the allegation being that Duncan understood this to be 20% but it was in fact 5%. As a result, he alleges, unknown to him PFC was effectively subsidising SBF which without that subsidy was not commercially viable. He contends that had he known the truth he would not have completed the buyout. Durmast seeks damages put at some £1.7m, though by order of DJ Kelly the issue of quantification of loss, if

I find for Durmast in principle, is to be addressed later

iii)

A series of cross claims between Alistair, Charlotte and the company defendants relating to Alistair's employment:

a)

Alistair claims against Durmast for unpaid salary of £111,154 and bonus or dividend payments to which he says he is contractually entitled totalling some £157,000

b)
Alistair seeks payment by Durmast of alleged shortfalls in pension payments for his benefit of some £52,000

c)
PFC alleges that pension contributions have in fact been overpaid by it by a similar amount and seeks recovery from Alistair and Charlotte (some of his salary and pension having at Alistair's instigation been paid to his wife)

d)
Durmast seeks recovery from Alistair of contributions said to be payable by him to a BUPA policy (£2,983)

e)
PFC sought recovery from Alistair of non-business expenses paid by him (£9,365). However during the course of cross examination Mr Lundie said he would not pursue these claims.

6.
During the trial I expressed surprise that the disclosed documents did not include material likely to have existed and to have been relevant to the issues from the files of the auditors and insolvency practitioners involved in the buy-out and the insolvency of SBF. As a result, further enquiries were made, and after the trial a substantial number of documents were received from the auditors, Horwath Clark Whitehill ("HCW") who advised both sides on the buyout. The parties have made written submissions on those documents, which I have taken into account in preparing this judgment. References to the "late disclosure" are to these documents.

The misrepresentation claim

7.
The most significant aspect is the misrepresentation claim, which I will deal with first. In doing so I will need to refer to the relevant factual background in more detail. I heard evidence from all the individual parties, and from Mr John O'Neill who was from 2001 employed by SBF as Financial Controller, but effectively in charge of internal accounting and financial management for both companies. His employment was transferred to Durmast after the buyout, but his role remained the same. He was dismissed in February 2012 after the insolvency of SBF.

8.
The business was originally established by Mr Ken Trow, the brothers' father, and traded through one company, PFC (the initials standing for "Print For Commerce"). Alistair joined in 1983, working on the sales side. Rod joined some years later, taking charge of the manufacturing work. In 1989 it was decided to separate into two arms and PFC became a print service company based in Droitwich dealing with end customers while SBF (standing for "Service Business Forms") was established to run the manufacturing operation from a factory at Cradley Heath. Alistair and Rod were directors of both companies.

9.
By the time material to this action at least, each of the operational companies was a wholly owned subsidiary of a holding company, and the three brothers were equal shareholders in each of the holding companies. Those holding companies do not

appear to have traded or held any assets other than the shares in the operational companies, so for present purposes they can be ignored and the brothers treated as if they were shareholders in the operational companies. By virtue of the separate ownership structure those companies were not, however, a group.

10.
The common ownership was not concealed, but the commercial rationale for the separation was said to be that it would not be obvious to outsiders and would make it easier for PFC to deal with other suppliers and for SBF to supply to other customers.

11.
Duncan, although he is the eldest brother, did not become involved in the business until the early 1990's, by which time the separation of the manufacturing business was in place. His main role was, as with Alistair, in sales on behalf of PFC. He was not appointed a director of either company. However the evidence of Alistair and Rod, who are supported by Mr O'Neill, is that Duncan was treated as a director of equal status with his brothers, and that all management and strategic decisions were taken at regular quarterly meetings of the three of them, attended by Mr O'Neill. Duncan denies this and says he was not at all the meetings, and complains that even though he participated in many such meetings there was in effect an "inner circle" consisting of Alistair and Rod together with Mr O'Neill, from which he was excluded.

12.
Although there is some substance to the last complaint in that Duncan was able to show that Mr O'Neill had taken some actions in relation to Alistair's personal affairs without consulting him (such as increasing pension contributions for Alistair's benefit) and even contrary to his own direction (reinstating Charlotte as an employee and diverting part of Alistair's salary and pension benefits to her when Duncan had said he wanted wives to be taken off the payroll) there was no persuasive evidence of any significant commercial decision taken outside the forum of these regular meetings or without Duncan's participation. Mr O'Neill's evidence, which I accept, was that he was present at all such meetings because he was responsible for preparation of all the financial information and would be the only person who could answer questions about it, which was the principal purpose of the meetings. He supplied all such information to all three brothers and treated them as equals during the meetings. He answered any financial or accounting questions put to him by any of the brothers. Any significant decision was dealt with at those meetings, and if any of the four participants was unable to attend, the meeting would be rearranged so that they all could.

13.
In general therefore I am satisfied that Duncan operated and was treated as a director of both companies and had equal access to all financial and management information for both of them.

14.
The way in which the companies traded between themselves was agreed by all the witnesses. All contact with a customer (other than a trade customer dealing with SBF) was conducted through PFC, which would discuss what was required and consider how it could be delivered. PFC would then contact any necessary suppliers, including SBF where some or all of the work could be done by SBF, and get quotes from them.

15.
SBF would provide a quote for any work it was to do, which was said to represent its cost of doing that work. This was made up from cost figures for any necessary purchases, and for the use of SBF's

own machines and labour as appropriate. Rod said that SBF had assessed what it cost to run each machine, for instance, and these cost figures were used to produce quotes to PFC and to trade customers. These quotes were evidently the subject of some discussion; Rod and Duncan both said that if a

figure was considered too high they might discuss whether it could be reduced, for example by using less employees or working a machine on double shifts.

16.
PFC would then provide its own quote to the customer, based on the quotes it had received from SBF and/or other suppliers and such mark-up as it felt it could negotiate, which the witnesses agreed could vary enormously. When the job was done, PFC would invoice to the customer whatever price it had agreed.

17.
No sales invoice was generated between SBF and PFC for any individual job. Instead, Mr O'Neill described a process by which after the end of each month, an analysis of PFC's sales leger was conducted, the sales value of jobs (or, presumably, parts of jobs) that had been placed with outside suppliers was deducted and the balance was taken to be PFC's sales value of work done by SBF. A composite monthly invoice was produced from SBF to PFC for that figure, less the agreed inter-company margin (sometimes referred to as a "discount") percentage. The example Mr O'Neill gave was that in a given period PFC might have total sales of £3m, of which £2m represented work sourced outside, so that £1m would be taken to have been sourced from SBF. SBF would invoice PFC £1m less 5% (which was the discount rate from 2007 onwards).

18.
The inter-company invoice thus bore no necessary relation to the "cost" quotes that SBF had submitted for individual jobs, partly because it was a composite sum in respect of all sales by PFC in a month rather than individual jobs or parts of jobs done by SBF and partly because the sales price charged by PFC for individual jobs was not based on a consistently applied mark-up percentage of the SBF quotes.

19.
These monthly invoices were prepared manually by completing figures and dates on a photocopied pro-forma, and kept in a file in the accounts office. They were not entered on the computer accounts system in the sales ledger of SBF or the purchase ledger of PFC.

20.
Regular management accounts were prepared by Mr O'Neill. These were effectively on a consolidated basis for the two companies as a combined entity, since they showed income for PFC from all sales, split between sales of product manufactured by SBF and by outside suppliers, and income for SBF consisting only of its sales to its own external trade customers. Costs were shown as PFC's costs of external purchases and its own overheads, but not including any cost of purchases from SBF, together with SBF's total cost of manufacturing, not distinguishing between trade and PFC sales. Thus there were no entries for the inter-company sale and purchase, and the management accounts showed the combined income, costs and profitability of the two companies as if they were one entity.

21.
At the year end, separate statutory accounts for the two companies were drawn up. These, necessarily, did show a figure for inter-company sales. That figure corresponded to the total value of

PFC's sales for the year of work manufactured by SBF (which could be seen in the year end management accounts) less the intercompany discount percentage.

22.

This system had been in operation for many years. It appears from the evidence that the discount percentage applied was at one time 20%, but by the time Mr O'Neill was appointed financial controller in 2001, taking over the system as operated by his predecessor, it had already been reduced to 15%. At some point in 2004 it was reduced to 7.5%. Mr O'Neill gave evidence that it was further reduced to 5% at one of

the regular management meetings called to discuss the results for the 2006 financial year. That meeting he said had been attended by all three brothers. He had proposed that in light of the results the discount percentage should be reduced to 5% so as to cover the costs incurred in SBF and distribute profit more evenly between the companies (so reducing the overall corporation tax payable). All three brothers had been aware of this and had approved it. The revised percentage was reflected in the statutory accounts for 2006.

23.

This meeting must have taken place at some point in 2007, probably at a date between about March, when the 2006 annual management accounts would have been available, and July when the statutory accounts were approved. Such a change must have meant either that the monthly inter-company invoices were not prepared until after the year end or that, if they had been done during the year, those for 2006 were re-written after the year end to support the figures that went into the statutory accounts.

24.

Alistair and Rod both said they recalled the meeting. Duncan denied that any such meeting had taken place, at least with him present, and said he had never been told of any reduction in the rate from 20%, let alone a reduction from 7.5% to 5%.

25.

Alistair and Rod's pleaded case is on the footing that all the brothers knew what the discount rate was, because it had been specifically discussed and agreed at the management meetings, and in particular the meeting in 2007 referred to. Somewhat inconsistently, Alistair's evidence was to the effect that although the overall system was clearly known to and understood by all the brothers, the actual discount figure was regarded as unimportant because the business was regarded as a composite whole and focus was on the trading and profitability of the combined operation. He said he could not be certain himself what the percentage was, though he recalled the 2007 meeting agreed to reduce it, which was he said readily agreed by all as it would save tax.

26.

The 5% rate was used in all the annual accounts and inter-company invoices prepared from 2006 until the insolvency of SBF in 2012, before and after the buy-out. It was Duncan's evidence that he was not aware of the percentage until he asked Mr O'Neill about it shortly before the insolvency. Until then he had thought the applicable rate was 20%, and he relied on a number of occasions on which he said he had asked questions or made statements at the management meetings expressly referring to a rate of 20% and not been contradicted. Thus, he said, his belief had been confirmed and he had no reason to revisit the matter or make any changes to the system after the buy-out.

27.

The buy-out came about after Rod indicated his wish to sell the business and retire. The possibility of sale was explored and in early 2009 discussions had progressed with potential purchasers, Mr Hobbs and Mr Matthews, to the point where a subject to contract offer was made by M3, a firm of corporate finance advisers on their behalf, to buy the share capital of both companies (in fact, of their respective holding companies) for a combined total of £2.9m. That offer was set out in a letter dated 19 January 2009 and was subject to contract and to a due diligence process. It is not in dispute that the due diligence was conducted, that it included the instruction of investigating accountants who inspected the financial books and records and asked questions of Mr O'Neill. Mr O'Neill was however challenged on his evidence that they had specifically asked and been told the discount rate was 5% but had regarded it as unimportant because they were looking at the consolidated position. It is not in

dispute that the purchasers were satisfied with their due diligence and wished to proceed on the terms they had proposed.

28.
However at a meeting at the Chateau Impney hotel near Droitwich on 23 February 2009 Duncan told the prospective purchasers he was not prepared to proceed because he would not accept the terms they offered for his own continued employment. After that meeting the prospect of that sale was effectively at an end. Although Duncan maintained no absolute rejection had been given and it would have been possible to go back and reopen discussions, I do not accept that. It is apparent from the correspondence that the purchasers had feared Duncan might not proceed, as he had pulled out of previous discussions, and that they unsuccessfully (and rather bitterly) sought payment by the companies of their abortive costs when their fears were realised.

29.
Instead, Duncan stated that he would be prepared to purchase on the same terms as Messrs Hobbs and Matthews had offered. According to him, he put this forward immediately after the Chateau Impney meeting. According to Alistair and Rod it was not until the end of March or early April that Duncan said he wanted to pursue this. Certainly there is no documentary evidence of it being discussed until that time. The late disclosure obtained from HCW supports the claimants' position; the first record of instructions to them is on 31 March, and though it was suggested this did not rule out earlier discussions, if there had been any they were apparently not sufficient to generate even a manuscript file note.

30.
Thereafter the buyout proceeded, essentially on the terms that Messrs Hobbs and Matthews had offered, though Duncan negotiated an increased shareholding participation by Alistair (13.5% instead of 10%) and different remuneration terms for Alistair in order to encourage him to remain involved. I will return to these terms later, since a number of the claims revolve around them.

31.
Duncan's evidence is that he discovered the 5% rate shortly before the administration when he made an enquiry of Mr O'Neill, and that he was shocked to find that the rate was not the 20% he had assumed and considered his brothers had confirmed or led him to believe was the case. That enquiry and the response were by email on 16 February 2011 and are in the bundle (C1/451). I set out the content now for convenience, since I will need to refer to it in some detail later in this judgment.

32.
The background to the emails is that Duncan was evidently in discussion with the companies' bank and a firm of insolvency practitioners about placing SBF at least into administration, and was taking

advice from the companies' auditors, HCW. There were, remarkably in my view, no other documents disclosed before the trial relating to this set of circumstances, though one would expect that documents exist from the files of the bank, the insolvency practitioners and the accountants, and probably in the records of the companies and individuals who were in communication with them. A certain number of additional documents did emerge from HCW in the late disclosure.

33.
According to Alistair, there had been a cash flow crisis in January (which would be consistent with the cessation of loan note payments from that month) and an emergency meeting with HCW, followed by a meeting with one firm of insolvency practitioners, Begbies Traynor, who had advised Duncan that both companies should go into administration. Duncan had asked whether any steps could be taken to eliminate the debt of about £500,000 due from PFC to SBF on account of intercompany trading and been told nothing could be done. There are no documents disclosed relating to that advice either. Duncan had, according to Alistair, subsequently obtained an introduction to a second firm of insolvency practitioners and sought to obtain different advice from them. Duncan denied there had been any risk of insolvency of PFC, but I consider that unlikely to be true, given the fact that the joint banking arrangement meant that both would be affected by running out of cash, and because despite the extraordinary steps taken in relation to the inter-company debt it was his own evidence that PFC remained in a difficult financial position and had to negotiate extended terms with creditors for some time afterwards.

i) At 7.34 am on 16 February 2012 Duncan emailed Mr O'Neill saying

“John

I have been asked by the bank/IP to explain the SBF-PFC intercompany debt. We need to clarify this today when they are here at 10 AM.

How was the intercompany invoicing calculated?

What period is this for? ” ii) Mr O'Neill replied at 7:54 AM:

“The intercompany indebtedness between SBF and PFC has been in existence since the day SBF began manufacturing products for onward sale by PFC (25+ years??)

The sales invoice from SBF is generated upon a monthly basis.

The formula is: the PFC sales value of product manufactured by SBF, less 5% (plus VAT)

PFC has never paid to SBF the specific sum stated upon each invoice – but has credited the intercompany account via monies

"transferred" via the bank sweep system.” iii) Duncan responded almost immediately at 7:58 AM:

“Thanks John

As we have effectively credited via bank sweep can we maintain/demonstrate that PFC have in reality paid these down by effectively supporting SBF to the tune of a minimum

500,000 over a similar period?” iv) Duncan sent the email chain to Mr Darlaston at HCW at 8:09 AM saying:

“Hi Dave

I wonder if you can help with this. We need to explain to the IP how this works ”

v) There was evidently then a meeting or discussion between Duncan and Mr Darlaston at which a way forward was agreed. At 9:03 the following morning, 17 February 2012 Duncan sent a further email to Mr Darlaston saying:

“Thanks for your help yesterday filling in some of the gaps.

The IP agreed and we will be raising appropriate invoices for 2011 and January 2012 for the difference between the 5% and our average margin on outsourced work.”

34. Duncan's evidence was that what this last email meant was that he arranged to produce a replacement set of monthly invoices between SBF and PFC for the period mentioned in which the discount rate was changed from 5% to 20%. This can only have been necessary if the "bank sweep system", ie the automatic daily transfer of funds between the companies' accounts to clear overdrawn balances, had not in fact resulted in transfers from PFC to SBF sufficient to clear its inter-company trading debt. It must have involved concealing or destroying any invoices previously prepared by Mr O'Neill based on the 5% rate. The effect was that the amount shown payable by PFC was reduced by an amount of at least £500,000, sufficient to eliminate the balance on intercompany account so that when SBF went into administration there did not appear to be anything due to it from PFC. Although the email to Mr Darlaston indicates that the insolvency practitioner has agreed with the proposal, I have no documentary or other evidence of what he was told about it or said in relation to it, and so do not express any conclusion about his involvement.

Duncan's case on the Misrepresentation claim

35.
Duncan's case is that he was throughout concerned as to whether running a manufacturing operation was viable and that he expressed this concern to his brothers frequently at the management meetings and elsewhere, but they always maintained that it was a commercially viable business. He was concerned about SBF's results, as shown in the year end accounts, but was prepared to agree that these were acceptable if they had been achieved using a 20% inter-company margin. Crucially, he asserts that he stated this qualification and understanding on his part on many occasions such that his brothers knew that was the fundamental basis of his understanding, and they either failed to correct him or positively affirmed that figure. If he had known that the actual rate was 5% his concerns would have been shown to be well founded, because PFC would plainly be subsidising cost incurred at SBF in an uncommercial way- it would never have done business with an unconnected supplier if it could only apply a markup of 5% when selling on to the end customer, as this would not cover its own overheads. It was, he said, generally accepted that 20% was the minimum markup that would generally be worthwhile for PFC. If he had known the true figure he would not have proceeded with the buyout at all.

36.
Duncan said there had been many discussions about the viability of SBF in the management meetings and elsewhere. According to his witness statement Alistair had "used 20% as the baseline on numerous occasions and agreed in our management meetings that if PFC was not making 20% on SBF work then it was not worth keeping the factory as PFC could make a margin of at least that amount and usually much more [on external purchases]... Rod agreed this was the key measure as anything below 20% meant PFC should outsource to trade suppliers and the factory was a liability, not an

asset… We both made it clear to Rod what PFC could buy products/services for and he always stated SBF could hit this margin…" (B/247)

37.
Duncan referred to a number of specific instances in which he said an intercompany margin of 20% had been referred to by him without contradiction in circumstances which he said amounted to confirmation (B/248-262):

i)
a discussion in early 2006 about whether SBF should continue to do work printing election material. This involved printing a large volume of material in a concentrated time period, typically in relation to local authority elections in May each year. Duncan said he was concerned as to whether it was financially worthwhile and about the fact that it tied up resources at SBF so that work for PFC and other customers was delayed. He said this was discussed at a management meeting when "I told Rod that to take on this election work we must make at the very least the same margin or ideally more than the SBF selling price plus 20%. Rod confirmed that the election work was worth having and that he "would invoice so that SBF's margin would be more than the intercompany margin of 20%."

ii)
when the audited accounts for 2006 were being finalised in July 2007, Duncan said he was concerned that operating profit had gone down by £30,000. He had said at a management meeting that "PFC could outsource and did not need SBF to be successful on its own, SBF appeared to be a white elephant, that we should look at scaling back or closing down the factory. Rod and Alistair were both adamant that SBF was worth preserving and they both stated that SBF could maintain the 20% intercompany margin."

iii)
Similarly when the 2007 audited accounts were produced in May 2008, there had been a disappointingly small increase in SBF's operating profit. He raised this is at a management meeting and "I specifically asked both of them about the future and viability of SBF as PFC had outsourced work and had no issues that could not be overcome… Rod responded that with the 20% intercompany margin SBF was viable, worth keeping and we should continue running it within the group. On that basis I said at the meeting that as long as we maintained the intercompany margin at 20% level SBF still looked to be a viable business based on the figures for that year and what they both told me."

iv)
When discussing the purchase by SBF of a second Hunkeler printing machine in or around September 2006 at a cost of about £140,000 "I said that any additional work generated to make use of the second Hunkeler machine must make a minimum margin of 20% on the trade price that we could get without it [i.e. the price at which the work could be outsourced] in line with the intercompany margin. Rod told me that he would be able to sell capacity and make a minimum margin of 20%". Similarly when considering SBF buying a Rototek press "I said to Rod that there was no point investing in the press if we did not make at least the 20% intercompany margin as we were achieving this margin as a minimum from orders we placed with trade suppliers for colour printing work."

v)
Immediately after the Château Impney meeting Duncan said that he, Alistair and Rod had all gone back to PFC's offices at Droitwich. He said that Alistair and Rod had been annoyed with him that the sale would not proceed "but I said that based on the 2008 management accounts it showed that SBF

had turned the corner and was a good little business. I said that with the 20% intercompany margin the factory was working as a stand-alone business and I

thought they were wrong to sell. I proposed that instead I was prepared to buy

them out at the headline figure agreed with Tim and Simon as long as SBF's year-end accounts were in line with the management accounts… I said that with the 20% intercompany margin if SBF accounts showed the improvement we thought they would it showed the trade work was also profitable. Both Rod and Alistair knew that the intercompany margin was not 20% but did not respond that it was actually 5% which would have immediately highlighted that SBF was loss-making and I would have withdrawn the offer to buy them out… I did point out that they could not compel me to sell my shares but as long as the final accounts showed that SBF was a viable business and based on the intercompany margin of 20%... I considered it had a future and I would be interested in doing a deal."

vi)
When Rod bought him the statutory accounts for 2008 for signature in March 2009 "I took the opportunity to discuss with him the 20% intercompany margin in detail… At no point did Rod correct me on the intercompany margin… I said to Rod and Alistair that the SBF accounts showed it was now a viable business, I referred to the PFC/SBF margin at 20% and pointed out that this meant PFC was no longer subsidising SBF to the same level as previous years … Rod agreed …".

vii)
At about the same time he had had discussions with Alistair to try and persuade him to stay with the business after the buyout in which he "told Alistair that because he knew PFC was a strong business and now we know SBF with the 20% margin is holding its own that he should really rethink and stay with the company."

viii)
When considering in April 2009 whether to take in-house an enclosing operation (i.e. insertion of material into envelopes) comprising equipment and operatives who previously carried on a separate business as subcontractor to SBF "I specifically stated that with lasering and data processing intercompany margins at 20% we could justify bringing this in-house as PFC consistently marked up enclosing by 80% to 100% so it would add to SBF's profitability… Neither of them informed me that the 2008 figures or the earlier figures were actually based on a 5% intercompany margin ".

38.
The first three of these involve allegations that Alistair and/or Rod themselves made statements referring to a 20% intercompany margin. The remainder are to the effect that Duncan himself referred to an intercompany margin of 20% and one or both of his brothers heard him doing so but failed to correct him. Both the positive statements and failures to correct Duncan's own misapprehension are said to be actionable under the Misrepresentation Act, in the latter case because it is said that given the circumstances in which Duncan made his own statements the silence of his brothers in the face of them amounted to a positive representation to him that his own statements were correct. In addition, it is said that both Alistair and Rod were under duties to Durmast to correct the misunderstanding on behalf of Duncan. In the case of both of them, a duty at common law is said to arise because it was foreseeable that Duncan, who was not a director of PFC or SBF, would act on information provided by his brothers who were. In Alistair's case he was appointed a director of Durmast a few days before completion of the buyout and it is said that as a result of his duties to Durmast as its director he should have known that Duncan, and therefore Durmast, was relying on the

20% intercompany margin in pursuing the buyout and he was therefore under a duty to correct that misapprehension.

39.

There is a stark conflict of evidence between Duncan and his brothers in relation to these allegations. Alistair and Rod both say that no such conversations as Duncan alleges took place at any time. On their account all the brothers treated the two businesses as effectively one, and they were interested in the overall profitability and not that of the manufacturing part separately. There were no discussions about closing or selling SBF, and Duncan at no time raised any concern about its viability or the business model. There were frequent discussions about investment decisions and whether SBF could generate work to support new machines, but these were on the basis of the business that could be done and the cost prices for work produced by those machines, ie the cost quotes that SBF would give to PFC or trade customers, rather than the intercompany margin.

40.

While there were a number of criticisms of the reliability of evidence of Rod and, particularly, Alistair, it is very relevant that their evidence was supported in almost all respects material to this claim by Mr O'Neill. Although there were some matters on which his account was a little confusing, and in one matter his apparent failure to remember a note (which was referred to as the "SBF memo" and which I discuss below) was surprising, in general I consider I can rely on his evidence as to the way in which the business was conducted, the extent of the brothers' participation in it and their approach to that business. He was firm that all of them received the financial information he produced, that they all participated in the major decisions and were fully aware how the business ran, and that there had been no issue as to the viability of SBF or conversations about the intercompany margin such as Duncan alleged. There had never been any proposal or suggestion that PFC might do better without SBF by using external suppliers exclusively. All the brothers (and he) had regarded the business as one combined operation, not two separate ones. That is supported by the way the management accounts were drawn up.

41.

Mr O'Neill seemed surprised that none of the brothers appeared to know the actual discount percentage, particularly since there had been the meeting in 2007 at which it was agreed to reduce it to 5%, but was adamant that it was regarded as a way of apportioning revenue so that costs incurred in SBF would be covered. He made the point that there were a number of employees and their associated costs, his accounting staff and their functions being one example, that could be regarded as serving both operations, and that while they were looked on as a combined entity it did not particularly matter where they were incurred, nor was it necessary to apportion them as it was dealt with by this overall mechanism that ensured costs were covered. The late disclosure shows that he made a similar point in February 2012 when Duncan was considering reconstituting the inter-company invoices; at that time he said he considered that employee costs of £489,000 pa were incurred by SBF on behalf of PFC.

42.

The onus is on Duncan to prove, on the balance of probabilities, that the various statements he relies on as representations were made as he alleges. Having regard to the evidence as a whole, I am not satisfied that he has done so, and I find that none of the alleged statements was in fact made. There are a number of matters that lead me to that conclusion, the most important of which I set out below.

43.

Firstly, with one possible exception there are no contemporary documents supporting either the specific statements alleged or Duncan's alleged long term concern as to the viability of SBF and the commercial justification for having an in-house manufacturing facility. No doubt it would be unlikely that there would be any direct

record of comments made at unminuted management meetings, but if this really was a long running issue one might expect that some emails or other correspondence, or some internal analysis documents, would have been created that referred to it. Mr O'Neill was not contradicted for instance when he said that he would frequently at the request of one or other of the brothers prepare "what if" documents, providing financial information on aspects of the business or possible scenarios. If Duncan was regularly raising these points, it would be expected that Mr O'Neill would remember it but he does not, and it is the sort of matter he might well have been asked to assemble some information on, particularly if there was a difference of opinion between the brothers. Duncan was, it appears, a prolific email correspondent so it seems unlikely that none of his contemporary communications would have made any reference to a matter of material concern to him.

44.
The possible exception is the document referred to as the "SBF memo" (C1/567), which Duncan said he found in Alistair's office after he was dismissed. It is headed "SBF without PFC" and analyses what the revenue loss would be to SBF if it no longer had PFC as a customer, concluding that after cost savings through employee reductions the net loss would be £586,000 pa. Because these figures are reconciled to those in the 2006 statutory accounts, it appears that this document must have been created at some point in 2007.

45.
Duncan says he knew nothing of this document and it must have been concealed from him. It confirms, he says, that SBF was wholly unviable without support from PFC and shows his concerns that SBF was a drain on PFC were well founded. Mr O'Neill agreed he must have prepared it but said he could not recall who asked him to or why, and he would often prepare information on a "what if" basis if asked to. Alistair and Rod said they had no memory of it.

46.
I find it hard to believe that Alistair, Rod and Mr O'Neill can all have as little recollection of this document as they maintain, and consider that it is likely they are not being entirely candid about it, which may well be because they consider it lends some support to Duncan's case. But it is not in my view the smoking gun he makes it out to be.

47.
The SBF memo addresses the position of SBF if it were cut loose from PFC, but does not show why this possibility is being addressed. It is not an analysis of the position of PFC, and so does not necessarily show that PFC would be better off, by an equivalent amount or at all, if it stopped buying from SBF. That analysis would depend on what costs FPC would incur if it bought elsewhere, and in providing functions (such as accounts) to replace those performed by SBF employees. Duncan may well be right that such an analysis would have shown a benefit for PFC, but since that is not what this document does it cannot be said that it was created in order to explore the possibility Duncan says he was concerned about, namely closing SBF.

48.
No doubt one reason for looking at SBF's separate position might have been if there was a prospect of PFC ceasing to buy from it because the brothers concluded it would be better for PFC to use external

suppliers. But there could equally have been others- such as a possible sale of PFC (or SBF) separately. If Duncan had been pressing any point, one might have expected it would be him asking for financial information for the options he wished to explore, but he evidently did not do so. It would be too speculative to conclude that this memo came about because Alistair or Rod was recognising a desire by Duncan to separate PFC and looking to explore whether SBF could survive if he did so.

49.
Secondly, to my mind the various discussions Duncan said he had and the occasions on which he said he referred to the inter-company margin simply do not ring true. He well knew, as he accepted, that the margin was not related to individual transactions but something applied after the fact on a global basis such that it amounted to an apportionment of total income rather than a price for the individual transactions. In any discussion about individual transactions, or the cost or viability of particular types of work (eg if a new machine was to be purchased) the more obvious focus would have been on the matters directly relevant to those transactions, such as the cost figures calculated by SBF that were used to make up the quotes which it gave for those jobs, and the margin that PFC could apply to them when quoting to the end customer. All the witnesses agreed that these were discussed on many occasions and in detail. It is of course perfectly plausible that there might have been a concern that these cost figures cannot have been accurate if, at the end of the year, SBF was not making overall the sort of margin that its cost quotes suggested it ought to be- but there is no evidence of any discussion of such a concern or any analysis that might have prompted it.

50.
Thus for instance the suggestion that in a discussion of the viability of purchasing an individual machine Duncan would have said that it would be acceptable because SBF was profitable despite receiving only 80% of the sales margin on inter-company sales, rather than because the expected volume of work for that machine and prices that could be quoted to PFC and charged to SBF's trade customers would cover its cost, is not to my mind realistic. Similarly, if he had thought the margin was and had always been 20%, why would he need to express that repeatedly as a qualification of his approval of SBF's results when he saw a set of accounts? He says he referred to it when he saw the 2008 management accounts, but it is common ground that these would not have showed either the inter-company sales or the separate profitability of SBF. If considering the viability of SBF's election work, which did not involve any inter-company sales, the inter-company margin would be irrelevant. All these occasions, and the others I have not specifically referred to, seem to me to be forced to suit Duncan's case.

51.
Thirdly, if Duncan was raising any issue about the margin rate, or making statements about it being 20% when that figure was many years out of date, there is no credible reason given why Alistair, Rod and Mr O'Neill would all lie about it or fail to correct him. At the highest, Duncan suggested that Rod might have wanted to protect his job by avoiding any enquiry into whether PFC would be better off on its own. But that would not apply to Alistair, whose salary came from PFC, nor realistically to Mr O'Neill since although he was immediately employed by SBF he was running the finances of both companies and might expect to be transferred to PFC if it was decided to concentrate operations in that company. Duncan says that since the administration he has managed in PFC with a single employee and external accounting services, but there is no evidence that was under consideration beforehand such that Mr O'Neill's position was under threat.

52.

There would seem to have been very little point in giving Duncan false information about the margin rate, or allowing statements by him based on it being 20% to go uncorrected. The rate actually applied was very easily established from a comparison of the management accounts and the statutory accounts. Although it is not the case (contrary to the claimants' pleading) that the rate was expressly stated in either set of accounts, it was readily ascertainable from the fact that the value of inter-company purchases by PFC was stated in the statutory accounts as a related party transaction,

and was 5% less than PFC's sales value for those purchases, which was shown as a separate line in the year end management accounts. Duncan had both sets of accounts at all times, he knew (as he accepted) that the system operated by applying a percentage reduction to that aggregate sales value and he is more than capable of using the documents to find out what the percentage was, if he had been interested to do so.

53.
Fourthly, I am not satisfied that I can rely on Duncan's evidence to be accurate where it might be contrary to his interests. It is right to say that there were grounds urged for doubting Alistair's reliability as well, but this issue depends fundamentally on the credibility of Duncan's evidence on matters that are not supported by contemporary material. Particular factors in this respect are:

i)
It is evidently the case that the offer made by the third party purchaser was a combined offer for the business as a whole, and it was put to Duncan that since they had not attributed any importance to the level of the inter-company margin, and he had agreed to buy on the same terms, it cannot have made any difference to him either. Mr O'Neill said he had been asked what the figure was in the course of the third party due diligence; he had said it was 5% and the purchasers had evidently not been concerned. Duncan said he did not believe this and was sure that if the purchasers had known the true figure "they would have run a mile". But there is no reason to doubt Mr O'Neill's evidence that he gave a true explanation of the inter-company system and in any event if he had not done so, or had not even been asked, it is impossible to believe that the accountants who performed the due diligence would not have been able to work out for themselves what the percentage was from the available accounts, as described above. Duncan in my view was seeking to assert a likely concern on behalf of the external purchasers in order to support his own case, but he had no evidence for it and the scenario he was forced to create was implausible.

ii)
Documents from HCW advising Duncan on the purchase also suggest that Duncan did not address the viability of SBF as a separate business in that process; there is no reference to the transfer pricing and only a note that there will be a need to "split the proceeds between the two companies". The late disclosure included a number of other documents addressing the terms of the deal; these are all on the basis of a single price for the combined business. It is true that there is a page noting how the split was done, by reference to the respective net assets of the two companies, but this is only by way of support for the division settled on. There is also a profit forecast prepared by Mr O'Neill for submission to potential lenders; this shows projected profit for each trading company and a consolidated figure. If anything this emphasises that it was the consolidated picture being presented; both the actual figures for 2008 and projected figures for 2009 show payment of a management fee from PFC to SBF, on top of the payment for inter-company sales, and that without that fee SBF taken alone would be loss making.

iii)

Duncan expressed shock and dismay that the inter-company invoices were prepared by hand and not recorded on the normal sales or purchase ledgers of either company, such that they had to be incorporated in some way at the end of the year to move from the year end management accounts to the separate company statutory accounts. This he said can only have been done to conceal

the percentage rate from him when he looked at those sales and purchase ledgers. But in my view this supposed concern was synthetic; he knew perfectly well that the inter-company system involved booking the intercompany charge after the fact on an aggregated basis rather than by invoicing individual transactions, so the existence of invoices to implement this was not concealed from him. Concealment would have been futile; he had to accept that if he had in fact looked at either the computerised sales ledger of SBF or the purchase ledger of PFC it would have been readily apparent that neither of them showed anything at all for the inter-company sales, which represented those companies' largest customer and supplier respectively, so that if he had been looking at the individual performance it would be obvious that the missing figures would have to be added in. Further, it seems to me, even if the amounts on the monthly invoices had been so entered, the ledgers would not have shown the margin on their face and it would have been necessary to extract it by comparison of the sales vales recorded by SBF and PFC respectively for a given period, a task he could, probably more easily, have done from the annual accounts as described above.

iv)
Duncan's professed long term concern about the viability of SBF is in my view wholly inconsistent with the fact that after the buyout he continued the operation exactly as it was before, including the inter-company accounting system, for another three years. During that time he was in overall control and could at any time have asked Mr O'Neill for financial information to confirm whether SBF was performing well or badly, or whether it would be advisable to consider switching to a model of outside purchasing. Evidently, he did not. If he had been so concerned about the inter-company margin that he had worked it into management discussions and other conversations on numerous occasions up to and including his consideration of the set of accounts that, on his account, persuaded him to pursue the buyout, it is not credible that once the buyout had happened he ceased to mention it and took no steps to verify what he thought he had been told.

v)
When the question was asked, in the email exchange with Mr O'Neill shortly before the administration recorded above, the tenor of those emails is in my judgment wholly inconsistent with Duncan believing that the margin was and had always been 20% and, as he maintained in his evidence, being shocked and angry when he discovered this was not so. Given that he knew all along the overall system of accounting by retrospective discounting on aggregate sales value, if he knew or thought the discount rate was 20% he would not have needed to make the initial enquiry at all, but at most to ask for confirmation about the rate. When told it was 5%, he does not respond to Mr O'Neill with any anger or disbelief, or even say that he thought the rate was 20%. His immediate concern is not to challenge the accuracy of the figure but to see if he can "maintain/demonstrate" that the balance it results in has been discharged through the bank sweep. When (presumably) it becomes apparent that will not work, he tells Mr Darlaston of his alternative method of eliminating the debt by creating extra or replacement invoices. In doing so he does not say he has discovered Mr O'Neill had been invoicing wrongly in the past, or at a rate different from what he understood to apply. He does not describe the new invoices as being to correct an error or show what he had always thought was the position. The basis of the new invoices is said to be "our average margin on outsourced work", ie not a rate that he understood had previously been in force but one he thinks can now be justified. Although Duncan said

he was seeking to contain his anger and not display it to Mr O'Neill by challenging him for not doing what he should have, there would be no reason not to say to Mr Darlaston that the new invoices were necessary because he had only just found that Mr O'Neill had produced the old ones incorrectly.

vi)

The late disclosure also contains no evidence of any such surprise; it includes an email from Mr O'Neill to Duncan on 20 February 2012 saying that if the transfer price was to be adjusted retrospectively SBF would be justified in invoicing for staff costs it bore for personnel who, he said, worked only for PFC, which he put at £489,000 pa. Mr Darlaston says he cannot argue with this, and notes that it would justify the "original" pricing structure, without which SBF "would not have been a viable business long ago. This is the problem with looking at individual aspects of a business in isolation rather than assessing it as a whole". This would seem to confirm that up to that point the business had been regarded as one whole rather than two parts. He comments further that the effect of introducing the revised pricing would be to generate a huge differential in profitability of the two companies and raise the prospect of enquiry by creditors as to why the basis had changed and whether the directors should have realised earlier that SBF was as unprofitable as it now appeared to be. He is plainly commenting as to the credibility of a change of treatment on the eve of insolvency, with no reference to it being justifiable as restoration of a position Duncan had always understood to prevail.

vii)

Duncan does not seem to have raised the supposed deception until some months after the insolvency of SBF, when Rod began to press for resumption of loan note payments. These had been stopped in February 2012, no doubt because of Durmast's financial difficulties, and at a meeting with him in November 2012 it seems Duncan accused Rod of what Rod described (see letter at p 454) as "withholding information about the internal company transfer" which Rod said "mystified" him. Duncan went on to say in a letter of 10 January 2013 (p456) that "we were under the impression" that the intercompany discount was 20% and that Rod had not "corrected this assumption". His solicitors on 26 March 2003 (p462) said that Duncan and Alistair (who must have been the "we" referred to) had both understood the rate was 20% and this "was the basis on which all investment decisions were taken". At this stage, Duncan had not fallen out with Alistair, so presumably must have been seeking to present him also as having been misled by Rod, but it is utterly implausible that the inter-company rate can have been fixed by Rod as director of SBF without the knowledge and co-operation of at least someone on the part of PFC, and if Duncan was maintaining his ignorance that would have to have been Alistair.

viii)

Duncan's position shifted in 2014 when he had fallen out with Alistair also and began to assert that Alistair should receive less remuneration "in light of the overstated profitability of SBF" (p489). He asked Alistair to write off £57,000 due on his loan notes for the same reason. Thereafter Duncan asserted that Alistair had been, rather than a fellow victim of deception by Rod, a party with Rod to deception of himself. This chain of events in my view is most consistent with Duncan, at best, magnifying his own previous lack of interest in the inter-company transfer price into a supposed concealment of it and using

that, adapted as seemed convenient from time to time, as a pretext for renegotiating his arrangements with first Rod and then Alistair.

54.

I conclude therefore that contrary to his evidence Duncan either knew but had forgotten what the inter-company margin rate was, or did not know because he was never in fact interested in the amount of it until the period immediately before the administration, when he sought to manipulate it to abandon SBF and save PFC. I find, as stated above, that the statements he relies on were not made, and he did not (and therefore Durmast did not) act in entering into the buy out on any belief, let alone one generated by misrepresentation by Alistair or Rod, as to the amount of that rate. I do not need to address the legal issues surrounding representation by silence or the alleged duties owed to Durmast, and the claim based on misrepresentation fails.

The loan note claims

55.
It is accepted that the amounts claimed by way of principal by Alistair and Rod had fallen due before these proceedings were issued, since the contractual redemption date had by then passed. There was an issue raised as to whether Alistair had validly accelerated the due date for payment to him by a Redemption Notice dated 3 October 2014. However Mr Lundie abandoned that issue at the hearing. The effect is that a slightly greater amount is due to Alistair by way of interest at the default rate from the accelerated repayment date, which the parties accept they can agree.

56.
There remains a similar issue in relation to a Redemption Notice served on behalf of Rod, dated 22 February 2013. It is accepted that Rod was entitled to demand early redemption under Condition 2.3 of the conditions attached to the loan notes (C1/349ff), one or more of the triggering events listed in that condition having occurred. Condition 2.7 then provides, so far as relevant:

“The Company shall not be obliged to make payment to any Noteholder by way of redemption of his Notes except in so far as it receives his Certificate… together with a redemption notice substantially in the form set out in schedule 2. If any Noteholder fails or refuses to deliver up the Certificate for his Notes to the Company at its registered office at the time for their redemption… the monies payable to such Noteholder shall be set aside by the Company and paid into a separate bank deposit account. Such setting aside shall be deemed for all the purposes of these Conditions to be a payment to such Noteholder”

57.
The demand for payment was made by way of a solicitor's letter, which enclosed a redemption notice in the form set out in the schedule to the loan note conditions. It did not, however, enclose the loan note certificate and the form of redemption notice was not itself signed, though the covering letter presumably was signed by the solicitor.

58.
The absence of the certificate is not in my view fatal. The condition does not require the certificate to be sent with notice of redemption, but only that the certificate must be delivered up at the registered office at the time for redemption, and read as a whole it does not absolve the company from liability to pay the noteholder if that does not happen, providing only that instead of paying the money over to the noteholder the company is obliged to set it aside and pay it into a bank deposit. There is no doubt that it did not do this, so if the notice is otherwise valid, the company is in default.

59.
In my judgment, the notice is "substantially" in the form set out in the schedule in circumstances in which although the notice itself is not signed by the noteholder it contains the particulars of his notes

and is sent with a covering letter making clear that he is demanding repayment, which is signed on his behalf by a solicitor. Such a notice conveys the substance required, in that it identifies what is being demanded by the noteholder and that it is sent with his authority. I hold therefore that Rod has given a valid notice and is entitled to default interest from the accelerated payment date resulting.

The employment related claims

60.
These claims depend on a number of issues of principle, which I propose to determine. The application of those principles to the detailed figures can then be resolved either by agreement between the parties or by directions for an account, since the evidence was not in my view sufficiently complete for me to reach conclusions on the exact amounts contended for (which were not in any event consistently presented).

61.
On completion of the buyout Alistair's employment was transferred from PFC to Durmast and he signed a new written employment contract (C1/318). It provided that:

i) his job title was Director of Durmast Group Ltd and Managing Director of PFC Group Ltd, ii) his continuous employment period commenced on 5 July 1982,

iii) his salary was £89,034

i) and stated in Appendix 5 that the company operated a contributory money purchase pension scheme, and that he was "entitled to membership of this scheme after 6 months continuous employment". The contract does not state what contributions the company will make to that scheme.

62. In addition Alistair and Duncan entered into a shareholders' agreement (p331). Durmast was a party to that agreement and agreed to comply with its provisions so far as they affected it. It dealt mainly with issues of minority protection and transfer of shares, but also included the following:

“13 **Dividend policy**

The Shareholders shall procure that … subject to there being £229,630 of distributable reserves in each year available for dividend and subject to [Alistair] still being employed by the company at that time that [Alistair] shall be entitled to 13.5% of such dividend, should [Duncan] not wish to take his entitlement to all or some of his 86.5% entitlement, [Duncan] agrees to waive such rights to all or any part. Any dividend due shall be paid as soon as reasonably practicable after the consolidated audited accounts of the company and its group have been approved and signed. If there is insufficient cash available to pay a dividend due under this clause, then such amount shall be credited to the relevant Shareholder's director's loan account

and paid as soon as there is available cash.”

63.
The first group of issues relates to Alistair's salary. It was his case that he had orally agreed with Duncan that he would be entitled to remuneration of £120,000 per annum, which was referred to as a "salary guarantee", but that Duncan had proposed that it would be tax advantageous to the company if part of this could be paid by way of dividend rather than salary. Alistair said it was not important to him exactly how it was paid as long as he received the total amount, and he therefore agreed this. He considered that this meant he was entitled to a guaranteed bonus or dividend of about £31,000 each year to make up his salary from £89,000 as stated in his service contract to £120,000, and that this

obligation was enforceable as against the company. To the extent that part of this entitlement was set out in the shareholders agreement as being the subject of a dividend policy, if that was not initially enforceable against the company as salary he says that it became so as a result of subsequent emails from Duncan which accepted that his salary was £120,000.

64.
The emails referred to are as follows:

i)
On 18 March 2010 Mr O'Neill, evidently responding to a query, told Duncan (p426) that salaries totalling £89,034 had been or would be paid in the year to June 2010 between Alistair and his wife, and continued "Therefore £30,966 for £120,000. £30,966 for 13.5% = £198,412 for 86.5%". This evidently was to show the amount of dividend that would have to be paid to Alistair to reach a total of £120,000, so implying he recognised an expectation that this total would be paid, and the corresponding dividend that would imply on Duncan's shares.

ii)
On 23 March 2010 Duncan emailed Mr O'Neill (p427) to say that "At the AGM on 18 March the Board approved a dividend for the 2009 financial year of £458,756. This is to be paid as follows: Alistair £30,966 now, the remainder

(£30,966) he will leave in the business as an interest free loan until 20 January 2011…". Duncan said the aim had been to declare a double dividend, bringing forward payments due the following year, as it was feared tax rates would go up in the forthcoming budget. The implication is that he recognised an expectation that he would pay Alistair a dividend of £30,966 each year., which supports the case of an agreed total remuneration of £120,000. Alistair, incidentally, denied there had been any AGM (or board meeting) held to discuss such a dividend and said that Duncan had acted unilaterally.

iii)
On 3 December 2010 (p429) Duncan emailed Mr O'Neill, apparently to advise him of imminent cash requirements, saying "As mentioned mid/end Jan my tax will be £101,280 plus Alistair's 2nd half of dividend (£120k less salary from memory)…".

iv)
In September 2014 (p489) when Alistair was pressing for payment of amounts he regarded as overdue, including shortfalls on the annual amounts of £120,000, Duncan said he was "prepared to make the 'salary' up to £120k" for the period to April 2014 but thereafter "you accept a reduction in the 120k to take into account the benefit you receive as a result of payment via dividend as opposed to through the payroll".

65.
Alistair also relies on what was referred to as the "internal memo", a document produced by Duncan dated 21 April 2011 (p443) after Alistair had sought additional remuneration by way of commission on new sales he had obtained. Duncan rejected that, and said:

“At the time we originally discussed your remuneration I mistakenly thought we were on the same salary/package and a salary guarantee up to £120,000 was I felt both fair, reasonable and considerably more than Simon and Tim were prepared to offer. In essence the "bonus" part, as a result of our remuneration differential, was not as great a proportion of the package as I thought. But

notwithstanding that £120,000 plus £21,000 (pension) and car is I believe a fair and generous package…

I also agreed that there was no cap and the dividend/bonus would increase with improved results but nothing was formally established. As of January 2011 you have received 2 dividend payments that take you up to the £120k mark for two years to the end of June. After one full year of results I think it is appropriate to use the 2010 group figures as the benchmark. If 2011 and future years are better I propose an increase in the "bonus/dividend" component of your package of 13.5% of the post tax increase above the 2010 figure… ”

66.
Duncan explained that what the first paragraph meant was that he had originally thought that he Alistair were both being paid salaries of £60,000 and the figure of £120,000 therefore involved a "bonus/dividend" element of £60,000. He had been surprised to discover during the buyout that Alistair's salary was in fact £89,000, so that the "bonus/dividend" element was only approximately £31,000. What he offered Alistair in the second paragraph was a payment over and above the £31,000 if profits in years from 2011 onwards were greater than those in 2010 (i.e. greater than £205,000). I accept his evidence on these points.

67.
His position generally in relation to the "bonus/dividend" was that clause 13 of the shareholders agreement meant that he was only obliged to pay a dividend if the company had reserves of £229,000 at the end of any financial year, in which case the whole of it would be distributed. If there was anything less than that, he was not obliged to pay any dividend at all, although he might choose to do so. The references to a "salary guarantee" were in effect only figures of speech and did not convey any commitment. It does appear from the late disclosure that Ms D'Cruz's intention in drafting the shareholders' agreement was to provide for what was referred to in extensive correspondence with Duncan and Ms Moore at HCW on his behalf (not copied to Alistair though HCW were also acting for him) as a "fixed dividend", ie a payment if and only if there were reserves of £229,000 or more, but limited to 13.5% of that amount even if more than £229,000 was distributed. Eventually the draft document was sent to Alistair with an explanation by letter of 4 June 2009 that this was the effect of clause 13 (as then drafted). It seems that Alistair must have read this and objected to the cap on his dividend; two days later on 8 June Ms D'Cruz sent a revised version noting "I understand Alistair is no longer waiving his rights to any dividend over £31,000…".

68.
Whether Alistair understood the intention that no dividend would be payable at all if there were reserves of less than £229,000 is not clear. Whatever Ms D'Cruz's subjective intention, the muddled language of clause 13 as drafted does not actually provide that a dividend of £229,000 will be paid if there are reserves of that amount, or state that no dividend will be paid at all if there are not. The contemporary documents passing between Duncan and Alistair suggest, in my judgment, that Duncan had agreed with Alistair at the time of the buyout that, one way or another,

Alistair would receive £120,000 pa, which they both referred to (and conveyed to Mr O'Neill) as a "salary guarantee". They also show however that, at Duncan's request in order to benefit the company (but also carrying a tax benefit for Alistair) part of this was not to be salary representing a contractual commitment by the company, but was expected to be paid as "bonus/dividend", which I take to mean that Duncan would procure, if possible, that a dividend would be paid but if it could not be, that a bonus on salary would be paid so that Alistair received the agreed total of £120,000.

69.

Duncan also later committed, by one means or another, to make an additional payment equal to 13.5% of post tax profits above £205,000, which Alistair referred to (without contradiction) as a "profit share". This is inconsistent with his assertion that Alistair was due nothing over his contracted salary of £89,000 if reserves were less than £229,630, since he referred to it himself as being a payment to ensure remuneration was not capped at £120,000, the implication being that Alistair would receive £89,000 plus £31,000 plus the profit share. There could obviously be circumstances in which the company made profits above £205,000 in a year but had reserves less than £229,630 (for example if it had paid a dividend in the previous year using up all its distributable reserves) in which case Duncan's position at trial would mean Alistair was entitled to the profit share but not the £31,000.

70.

As to what other means might be used, Duncan came up with alternative routes over time, which Alistair was prepared to go along with as long as he received the same overall amount. In 2012-4, Duncan with the benefit of tax advice arranged to establish two entities, Corbett Promarc Ltd and CP Marketing LLP. Monies were cycled through these vehicles by way of charges to PFC or Durmast for services said to have been provided by them and paid out to their owners and/or employees, which must have included Alistair and his wife. Some payments were made to Alistair and his wife from the payroll of PFC, notwithstanding Alistair was employed under a contract with Durmast.

71.

The analysis of these arrangements is, in my view, as follows. The overall arrangement between Duncan and Alistair for a "salary guarantee" of £120,000 (and later additional profit share) was an understanding between them as shareholders, which they both expected to be implemented flexibly to provide the most tax advantageous result for the company and themselves as individuals. Part of this implementation was the contractual commitment of Durmast to pay salary of £89,034. However Alistair was prepared to agree arrangements by which he did not have a contractual commitment from the company for the balance of £30,966, and relied on his understanding with Duncan to ensure he would receive that amount by some other means, the preferred and intended source being dividends. It is true that Duncan might have elected to make payment by way of bonus on salary paid by the company, but that would be his choice and did not create any obligation on the company unless and until such a bonus was approved.

72.

References to these arrangements in the "internal memo" and other correspondence are, in my judgment, to this personal understanding, and were not intended to, and did not, convert it into a contractual commitment by the company. The late disclosure is also consistent with this; an email to the auditor on 8 April 2009 refers to Alistair receiving "a package of £120k (same salary as current plus dividends) plus current benefits", and not (as Alistair's case would imply) to a salary of £120,000, part of which could be replaced by dividends. The same is true of the later arrangement for a

share of profits above £205,000; this was intended as an extension of the "bonus/dividend" element, ie that which was beyond what the company had committed to by contract.

73.

The question arises therefore how payments from sources other than Durmast should be treated. All parties accept in general that the gross amount paid goes toward satisfying the £120,000 (I do not think anything has been paid in any year in excess of that amount so the "profit share" is not in issue in this respect). But are they to be treated as satisfying first the contractual salary or Duncan's

personal commitment for the additional £31,000? There is nothing in the contemporary documents to shed light on this. It was not suggested that the pattern of payments shows a clear substitution of one mode of payment for another.

74.
In the end I have concluded that the appropriate approach is to treat all these payments, whether made to Alistair or his wife, and whether from Durmast, PFC or the other entities, as satisfying first Durmast's salary obligation. This is because that is the implication (at least) of Alistair's pleaded case as regards most of them. For instance in para 11.6 of his particulars of claim against Durmast (A/7) he pleads that in the financial year 2013 he received "only £80,240 by way of salary from [Durmast]". There is no alternative plea, in the event it might be held (as I have) that the £120,000 claimed was not all due as such salary.

75.
The figure of £80,240 includes payments to both Alistair and his wife by way of salary from PFC and Corbett Promarc and a dividend paid by Corbett Promarc. It does not include two other payments, accepted to have been made, by way of distribution from CP Marketing LLP, but there is no logical reason advanced why these should be treated differently. Alistair has, therefore, in my judgment accepted by his pleading that all these arrangements amount to partial satisfaction of Durmast's obligations to him.

76.
The result is that there is still a shortfall on Durmast's obligation to pay the contractual salary. I leave the parties to agree the amount of it. To that extent Alistair's claim for unpaid salary succeeds, but as to the balance (including claims to the additional share of profits over £205,000) it fails because Durmast is not liable to pay more than the contractual salary.

77.
Duncan's personal commitment to procure what amounts to further distributions of the profits or revenues is not in issue in these proceedings, though it would plainly be relevant in, for example, any proceedings under Companies Act 2006 s 994.

Pension payments

78.
Alistair's pleaded claims and written evidence in relation to his pension entitlements and the amounts he has received are somewhat confused and contradictory. His case and evidence at trial can be summarised as being:

i)
Prior to the proposed sale to third parties he received two sets of contributions by PFC towards personal pension policies.

ii)
A total of £848.66 pm was paid to an arrangement administered by Brown Shipley. This was paid partly in respect of himself and partly in respect of his wife, for the same reasons as his salary was partly paid to her, and consisted of employee contributions of £376.81 and £137.39 respectively which were deducted from their payroll salaries (£514.20 total) plus employer contributions of £334.46 pm. Similar payments were, he said, made in respect of the other brothers.

iii)

In addition payments of £500 pm were made to a second arrangement. Again, he said, similar arrangements were in force for the others. That was denied by Duncan, though Alistair was able to produce at the hearing a document apparently showing that Duncan did in fact have a similar arrangement. Alistair was criticised for producing this as late and selective disclosure, but in my view his explanation that he had not regarded it as something he needed to look for until Duncan (wrongly) denied the arrangement was persuasive.

iv)
When Duncan had made clear he would not go along with the proposed third party sale, he and Rod had instructed Mr O'Neill, without disclosing it to Duncan, to make additional monthly payments of £450 for each of them towards their personal pensions. He said that they regarded this as "punishment" for Duncan having frustrated the deal for his own ends.

v)
Thus immediately before the buyout PFC was paying £334+£500+£450 (£1284) monthly towards his pension.

vi)
The solicitor who had previously acted for the business, Hilary D'Cruz, acted for all parties in the buyout. She prepared the draft service agreement between himself and Durmast. He had seen it and discussed the arrangements briefly with her but not paid the document much attention beyond confirming the salary stated was the same as his existing rate. She had told him (as he understood from discussions with Duncan) that apart from the change of employer all his existing terms would remain the same. She had said this was because "there would be a TUPE transfer". He relied on this and believed this was so in any event because his statement of terms acknowledged continuous employment from 1982.

vii)
Accordingly he was entitled to continuing company payments of £1284pm.

79.
It would not of course be true that the transfer of a single employee from one company in a group to another, in the absence of any transfer of any business or activity (and there was none here) would by virtue of TUPE amount to a deemed transfer of contracts of employment. This was an expressly agreed transfer, the terms of which would on the face of it be governed by what was agreed between the employee and the new employer. Nor is it the case that acknowledgment of continuous employment on a transfer between related employers means the terms remain unchanged.

80.
But I accept Alistair's evidence that he was assured, and understood from conversations with both Duncan and Ms D'Cruz, that his benefits would remain the same. This is consistent with Duncan's own approach; the email referred to above in the late disclosure shows that he told the auditor Alistair would receive a package of £120k "plus current benefits". Insofar as this assurance was given by a solicitor acting for his employer (as well as himself) it would in my judgment be binding on his employer and it irrelevant that it included an erroneous reference to TUPE.

81.
Further, such assurances would be consistent with the way in which the transaction was dealt with generally. After the buyout Duncan did not seek to put in place any

new Durmast pension arrangement, so the statement in the written contract that Alistair would be entitled to join a company scheme after 6 months seems to have been nothing more than standard wording in the precedent document used. Duncan had no figures in his own mind as to what the pension payments would be, since in the internal memo written in 2011 he seems to have accepted that Alistair was entitled to receive £21,000 pa towards pension provision, which can only have come from information (apparently overstated) by Alistair of what arrangements were in fact in place.

82.
I reject the arguments for Durmast that Alistair is not entitled to any pension provision because he did not elect to join a Durmast scheme, and that any payments made after the buyout by PFC are recoverable because it was no longer his employer. The evidence shows a history of payments from PFC towards employment benefits as and when it suited Durmast to do so such that it could not be said any such payment was in breach of duty and it would be a matter of internal accounting between the companies if it was to be reimbursed by Durmast.

83.
It is however pleaded on behalf of PFC that any increase in his pension provision immediately after the aborted sale is unenforceable because it was put in place by Alistair and/or Rod in breach of duty to PFC. That argument is in my judgment made out; insofar as any such increase was authorised or approved by Alistair or Rod acting as directors of PFC they were bound to act in what they considered in good faith to be in the best interests of that company and to exercise their powers for the purpose given. Action taken for the admitted purpose of punishing a shareholder who refused to sell his shares is in my judgment plainly for an improper collateral purpose, and the transaction entered into is unenforceable against the company as a result.

84.
There was some confusion at the hearing, following from the changing statements made as to what pension benefits had been in force prior to the buyout and what changes had been made after the Chateau Impney meeting, as to whether the documents showed a history of payments of £500pm and an increase of £450pm in that amount, or a new series of payments of £950pm. There was further confusion about whether the documents supported Alistair's claim that some monies deducted from salary as employees' contributions had not been paid over to the pensions administrator, and exactly what a payment of £11,256, made by Mr O'Neill at Alistair's request and referred to as a 'top up', represented. This should be resolved, as both counsel suggested, by directing an account if the amounts cannot be agreed. The basis will be that

i)
Alistair is entitled to continuation of employer pension contributions in the amounts paid prior to the Chateau Impney meeting, and to any employee contributions deducted but not paid over to the pension provider, but

ii)
He must pay back or give credit against this for any increased amounts actually paid by way of employer contribution after the date of that meeting.

BUPA payments

85.
Alistair's contract of employment provides that he must pay 50% of the cost of provision of BUPA private health insurance. It is accepted in his statement of case that these amounts were deducted

from his salary until January 2012. Thereafter they were not deducted; according to Alistair because an employee in the accounts department processed the salary without making any deduction, from which he assumed the company had agreed to pay the whole cost.

86.
Alistair does not however plead that he was not liable under his contract to pay a contribution, nor any positive agreement to change those terms, nor anything that might amount to a waiver. The claim to recover those amounts succeeds.

Conclusion

87. I invite the parties to agree the order resulting, including if possible the financial amounts payable in consequence of these findings but alternatively directions for the necessary accounts to be taken. I will list a hearing at which the judgment will be handed down. There need be no attendance if the order is agreed. If it is not, I will be able to deal with matters arising at that hearing if they can be accommodated in 30 minutes, but if longer is required there need be no attendance at handing down and counsel should agree a time estimate and submit a joint list of available dates for a later hearing.