Neutral Citation Number: [2018] EWHC 3201 (Ch)

Case No: CR-2017-007969

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS ENGLAND AND WALES

CHANCERY DIVISION
COMPANIES COURT

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

Date: 19/11/2018

Before:

INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS (CHIEF REGISTRAR)

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Between:

FIONA YASMIN WEATHERLEY	**Petitioner**
- and -	
(1) KENNETH EDWARD WEATHERLEY	**Respondents**
(2) JUNE WEATHERLEY	
(3) DEBRA ROSCOE	
(4) WEATHERLEY FENCING CONTRACTORS LIMITED	

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James Knott (instructed by **Francis Wilks & Jones**) for the **Petitioner**
Ben Lynch (instructed by **Brandsmiths Solicitors**) for the **First to third Respondents**

Hearing dates: 5,6,7,8,9, 13 November

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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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INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS (CHIEF REGISTRAR)

ICC Judge Briggs (Chief Registrar):

Introduction

1. This is a dispute relating to a small private company owned and managed by the Weatherley family. The dispute arose after the sudden and premature death of Mark Weatherley, aged 53 ("Mark"). A stark feature of this case is that each member of the Weatherley family has lost, in Mark, a husband, father, son, brother or brother-in-law. Weatherley Fencing Contractors Limited (the "Company") has lost its day to day operating director, or as his father put it "the brains behind" the Company. The petitioner (Fiona) was Mark's wife and his assistant in his role as director of the Company. His father (Kenneth, who prefers to be known as Ken) now 79, mother (June) and sister (Debra who prefers to be known as Debbie) are respondents to the petition. Ken remains active in the Company working at least 40 hours a week. June had a stroke in January 2018 and is now recovering from chemotherapy having suffered from breast cancer. She was unable to attend court to give evidence. Debbie has worked for the Company for her entire working life.

2. Fiona has not worked for the Company since July 2017. She claims to have been unfairly dismissed. She and Mark married in 1997 and have three children. Two of the children do not feature in this case although are potentially affected by the outcome. The third, Aaron, worked for the Company as a young person receiving money from his grandfather. He was keen to work in the Company full-time when he reached 16, however he was still classified as a child and required to continue part-time education or training and only work part-time. The evidence of the directors of the Company is that he refused to continue part-time education. Concerned about breaching the legal requirements for employing a 16 year old, he was asked to leave. Fiona explains that she and Mark had known each other since Mark was 19 years old and she 21. Both had

short first marriages and, on their respective break-downs became a couple. Fiona explains that they had "a very, very happy and solid marriage together". In the witness box Fiona was emotional but stoic, as was Aaron. She felt deeply that the family had wronged her at a time when she was most vulnerable. Ken came across as a man who did not wear emotions on his sleeve. Nevertheless, he had to pause at times: the strain of giving evidence about his son self-evident. At one point in his evidence he bowed his head saying "I don't know what I am going to do without him" and "he was my best friend". Debbie accepted that there were times when she had disagreements with her brother, he was "strong headed" but her evidence demonstrated beyond doubt that she had a deep emotional bond.

A family business

3. Ken started trading as a sole trader employing two people to provide fencing services to the local area. In or around 1975 he purchased a property and began a small hardware and general DIY store. From the store Ken and June sold fencing supplies to commercial customers and the public. The store had a yard where supplies could be kept. As demand for the services grew so did the business and by the late 1970s Ken and June employed five or more people full-time. In 1978 an accountant advised that Ken and June incorporate a company to give them the protection of limited liability. The Company was incorporated on 28 November 1978. Ken and June were equal shareholders and directors. Ten years later the Company had 15 or more employees and a general manager. According to Ken, Mark had commitment and enthusiasm for the work and quickly demonstrated his ability competently to manage the Company. Following his 21st birthday Ken and June gifted to him 20% of the Company's shareholding. The general manager took Mark under his wings and under his guidance

he grew in confidence learning how to manage customer orders, quotations, order and maintain stock, purchase equipment and vehicles and oversee the running of the Company. As his confidence grew, so did his ambition for the Company. According to Ken he gradually took over the running of the Company and by 2003 he was not only in charge of day to day management but also strategic operations. He expanded the business selling fencing products and services, sheds, paving, ready mixed concrete, cement, block paving, cement and other products to trade and retail customers. It is not clear why it took so long for his appointment as director, but he was appointed director in 2006.

4. Ken gave evidence for the duration of the second trial day. He says that when he started the Company no thought was given to succession and he was delighted when Mark showed an interest, if not a passion for the work. His evidence is that Mark had to earn his spurs as did every other family member. A person could do this by demonstrating commitment to the Company and working hard and Mark had done this "in Spades". Once he had earned his spurs Ken trusted him completely and says that from 2003 Mark made decisions in the business without consulting him unless he chose to seek advice. That evidence is contested by Fiona who says that Mark always consulted Ken in relation to financial matters and strategic decisions. Her evidence is that Ken remained in control of the Company at all times, albeit he was less visible.

5. Debbie took a role managing the Company's invoicing, was gifted 20% of the shareholding in 2009 and appointed a director in 2011. Debbie gave evidence on the third day of trial. The management and ownership remained the same from 2011 until Mark's death in 2017 with Ken owning 18,333 shares (36.66%), June 11,667 (23.34%), Mark 10,000 shares (20%), and Debbie 10,000 shares (20%).

6. Fiona undertook some temporary work for the Company around 1998-1999. Her evidence is that from mid-2013 she worked on a permanent part-time basis. Her role was secretary and personal assistant to Mark. Her evidence is that she assisted Mark by producing updated pricelists, updated the website from time to time, answered telephones, took orders and liaised with advertisers. This evidence is accepted by the Respondents. Fiona says that by 2014 her role grew to negotiating energy contracts, on occasions paying wages, and suppliers and assisting with the Company banking. These last matters are contested. Ken says that she would not be permitted to pay wages and should not have known the sums each employee was paid. Only Mark and Ken had access to the bank account before Mark died. If Fiona did have access to the bank account, it would have been because Mark had given her his bank card. She had no permission or sanction from the Company. She was not a signatory on the bank account.

7. Peter Roscoe, Debbie's husband, also worked and continues to work for the Company. First, he was employed as a fence erector but due to arthritis his role altered, and he worked in the yard and shop. His skill set adapted because the family wanted to retain his services. Peter and Mark worked alternate weekends and so Peter gained insight into workings of the business. Peter has now succeeded Mark running the day to day operations. I do not doubt that Debbie helps him in his new role. In the witness box Peter said that he had acted on Debbie's instructions at times, and Debbie demonstrated knowledge and understanding. I have little doubt she is a most capable person and someone to whom Peter would defer. Debbie and Peter's son, Daniel, is employed as a fence erector.

8. There is agreement that the Company was run for the benefit of the family but disagreement as to what "the benefit of the family" means in practice. Ken's evidence

is that he started the business as a sole trader, formed the Company only because his accountant recommended it, and his ambition and that of the Company was only ever to support his immediate family. If there was ever an understanding it extended no further than that simple ambition. Fiona contends that there was an understanding about employment and ownership. First, that every member of the Weatherley family would be entitled to or have an opportunity to work in the family business. Second, that the ownership of the Company, through shareholding, would pass down each side of the family: Mark, his wife and children on one side, and Debbie her husband and children on the other. Ken says that the family company was run informally and on trust for the benefit of him, June, Mark and Debbie. Ken explains that he has six grandchildren and only two have worked at the Company: Daniel and Aaron. He had no problem with a member of the family earning some money by working at the Company, but they would have to show the commitment and hard work that he, June, Mark and Debbie had shown. The notion that each grandchild would become a shareholder in the business, he says, goes against everything he stands for. Any grandchild will need to win their spurs by demonstrating the right qualities and adding to the business. In the witness box it became clear that Ken was in the past, the sole arbiter of whether a family member had demonstrated the right qualities.

The Weatherley family properties

9. The Weatherley family have a complex relationship with properties that they hold. Ken explains that the family owns some properties to provide security for the family, using the rental income to maintain the properties and make personal tax payments. Most properties are registered in Mark and Debbie's name. The Respondents case is that they are held as joint tenants. Fiona's case is that they are held as tenants in common. One

property is registered in Ken and June's name. He refers to these properties as the "Trust Properties". In respect of the Trust Properties Ken says that when Mark and Fiona married in 1997, he was concerned that the Trust Properties would be secure in the event of a divorce and he discussed his concerns openly with Mark and Fiona. This came about because they had previously divorced other people. His evidence is that he suggested an agreement that would ensure that Fiona would not have a claim on the Trust Properties in the event of their divorce. Subsequently Fiona and Mark took the decision to have Fiona sign a letter dated 24 September 1999 stating: "I confirm for the avoidance of doubt, that I do not wish to claim, nor indeed do I have any claim, on any property owned by Weatherley Fencing or any members of the Weatherley family" (the "Disclaimer").

10. The issue of the Trust Properties has raised itself in the evidence, and there was cross-examination on the Disclaimer. The relevance of the Trust Properties is to the fundamental understanding that is said to exist in relation to the purpose of the Company. Fiona claims that the Trust Properties demonstrate that the properties held in the joint names of Mark and Debbie and purchased by Ken show that there was an understanding that ownership would pass to each side of the family. The gift of shares in the Company to Mark and Debbie was done on the same basis. The understanding was that Mark could do whatever he wanted with his share of the Trust Properties, and whatever he wanted with the shares he owned, if there was no breach of the Company Articles.

11. The Company has operated from a property known as 135 North Cray Road (the "Property") since 1989. The Property is a detached house with around 2.5 acres of land. Ken recognised that it could be used as the Company's commercial premises. His

evidence is that he wanted to purchase the Property in his own capacity and had £200,000 cash to use as a deposit (roughly half the asking price). The mortgagor, National Westminster Bank Plc (the "Bank"), agreed to provide a mortgage to fund the remaining purchase costs, on the condition that the Company would be an owner. Ken's evidence is that he agreed with June and Mark, the only other shareholders in the Company at the time, that he would have an option to purchase the Company's interest in the Property whenever he wished at the price of £200,000 no matter what the value at the time of purchase. The option was not reduced to writing. There was no mention of the option in any Company record and no evidence of the option at the land registry. Nevertheless, he contends that Mark and Debbie were aware of the option, it was spoken about regularly and they would have been aware of the Bank's condition.

12. In 2006 the Company entered negotiations with a development company, Asprey Homes Limited ("Asprey"), for the sale of the Property. As Ken was a 50% owner of the Property with the Company, he was party to the legal instruments that were agreed. However, it is accepted that Mark took the lead on behalf of the Company, consulting his father, solicitors, and negotiating the price and terms. As for the counter-party Asprey, it was only interested in the Property if it could obtain planning permission for development. One of the matters negotiated was an advance of money if the Company were to find an alternative trading premises during the option term. The directors of the Company were concerned that if Asprey did obtain planning permission and purchase the Property, the Company would be left without a building or yard. Without a building or yard, the business would either struggle to survive or reduce so substantially that it would no longer be able to employ family members. The negotiated outcome was that Asprey would advance the deposit or a sizeable contribution towards a deposit on alternative premises if the occasion arose. The option agreement was entered into on 22 December 2006 and the terms expired on 22

February 2008, but there was a provision to extend. If the option was triggered, Asprey would purchase the Property for £3,300,000.

13. By the option agreement, Asprey was to submit a planning application for the development of the Property within three months of 22 December and obtain insurance as to title in respect of land behind the Property which had been fenced off and used by the Company since 1989, but for which the Company had no title. Asprey also required planning permission. If these principle aims were satisfied Asprey could serve notice to exercise the option within the specified time-frame. On 13 April 2007 a supplemental agreement was entered between Ken, the Company and Asprey extending the time for submission of a planning permission application. The permission application was subsequently submitted on 18 May 2007.

14. The planning application that was submitted was for a relatively low-density development of 13 detached houses, equating to 15 houses per hectare. Although the application was said to take account of the relevant national planning policy guidance, the proposed development was located within the metropolitan green belt. Asprey was required to demonstrate the advantages of the development outweighed the potential harm to interests of acknowledged importance. The option agreement term was extended on 18 February 2008, and in June 2008 Asprey wrote to Mark and Ken:

"As you are aware, the site at Weatherley Fencing falls wholly within the metropolitan greenbelt and as such there is a presumption against redevelopment of any kind unless special circumstances can be argued and agreed with the Local Authority…..If the site were developed with 4 or 5 detached homes, the footprint would be less and therefore the argument for development would be more straight forward, but the value that would be attributable to the land would not make the project financially viable. When Asprey Homes's original offer (sic) of £3.3m was made for the Weatherley site on a subject to

planning basis, the built foot print we anticipated was 20,352 saleable sq ft and was reflected in our planning application….After extensive negotiations with the Council…..we believe that we are now in a position to agree a housing scheme that the Council feel able to support…..The scheme consists of 12 x 2 storey house and 1 x bunglow giving…..a built footprint area of 16,098. The loss of 4,254 sq ft from the scheme upon which the original offer was made is a result of the loss of units and the fact that the Council wanted to conduct their own survey with regard to the actual amount of current built footprint at the Weatherley site. The loss of this amount of saleable sq ft has obviously had an affect on the viability of the scheme and on the basis of the houses achieving £330 a foot this equates to a loss of £1,403,820 in sales revenue…"

15. Asprey having explained that it had spent over £67,000 on planning applications, legal costs and other fees revised down the offer to purchase the Property. Addressing Mark and Ken the author of the letter (Mr Ogilvie) concluded "I do hope that you are both still mindful to sell Weatherley Fencing for residential development as I feel that even at the reduced figure of £2,500,000 this still offers a substantial uplift over and above the existing value of Weatherley Fencing". Mark and Ken did not agree. The revised offer was insufficient to re-house the Company. Mark called Asprey on 10 June 2008 and explained to Mr Ogilvie that Ken and the Company were not minded to accept the new offer. Mr Oglivie was not going to give up so easily and wrote again on 11 June 2008 "I do still feel that £2,500,000 represents a significant uplift over and above the site's current market value which some agents have advised as being in the region of £500,000. If indeed this figure does represent the site's current market worth the uplift in land value is some £2,000,000 which in today's current economic climate is an

amount worth having". This did not persuade Mark and Ken. The planning application was withdrawn on 7 July 2008 and the option agreement expired on 22 August 2008.

16. Soon after the expiration of the option agreement Mark invited Halifax Estate Agents to value the Property. An appointment was made on 19 September 2008. There is no record of the valuation. It is likely that the valuation advice sought was based on existing use. This is likely as first, Asprey's had already valued the Property on a development potential basis, by making the offer and revised offer, secondly, the invitation came soon after the letter dated 11 June 2008 in which Asprey's said that the current market value was in the region of £500,000, and lastly the valuer did not hold herself out as a development agent. Whatever the position, Mark chased the return of papers from Asprey on 17 September 2008 and on 18 November 2008 Michael Wiltshire made a written offer to Ken to purchase the Property for £375,000. It is not clear from the offer whether it just concerned Ken's share in the Property or the entire interest in the Property. Mr Wiltshire did not give evidence at trial.

17. On 24 December 2008 Mr Rudd of Rudd Jepson set in train the transfer from the Company to Ken of the Company's interest at a price of £200,000 (the "Transfer"). The letter from Mr Rudd to Ken enclosed the form of transfer. Mr Rudd explained that the transfer "has to be signed by two directors or a director and secretary for the company and also by you personally." Ken signed as director and June signed as secretary. At that time Ken and June were directors and held 80% of the shares in the Company. The Stamp Duty Land Tax from was signed by Ken. One of the questions on the form provides "is the transaction pursuant to a previous option agreement?" The answer given was "no".

18. The Transfer took place on 14 January 2009 and the Company year ended July 2009. The accountants' working papers show their knowledge of the Transfer. The accounts for that year, signed by Ken on 9 November 2009, disclose that during "the year the company sold its interest in freehold property at 135, North Cray Road, Sidcup to a director of the company K Weatherley for £200,000." In a letter dated 24 February 2009 Mr Rudd wrote to Ken. However he addressed the letter to Mark in the knowledge that Mark had the day to day control of the Company and dealt with the paper work, explaining that he had the stamped transfer, and had to attend to registration. To deal with registration he required a cheque of £150 "to cover the Land Registry fee".

Mark and the period immediately following his death

19. On 6 July 2007, in the period when Ken and Mark were negotiating with Asprey, Mark drew up his last will. He appointed Fiona as executrix and trustee and bequeathed "the whole of my estate and effects both real and personal whatsoever and wheresoever of or to which I may possess or be entitled, after payment of my just debts funeral and testamentary expenses to my wife Fiona…..". In the event of Fiona predeceasing him he appointed Ken and June as guardians of his three children and his property was to be held on trust for them. Fiona explains that in early 2014 Mark became ill with diverticular disease which resulted in several major stomach surgeries. Fiona says the surgery was hard with the last surgery taking place in September 2016. It is not known whether he knew he had cancer at that time, but just before Christmas 2016 he was diagnosed with oesophageal cancer. Metastasis followed, and he was moved into a hospice. Fiona says that she took a considerable amount of time off work to care and look after Mark, in addition to caring for James who has an illness. Even in the hospice

Mark continued to work and would worry about the day to day running of the Company. On 12 May 2017 Mark died. The cause of death: metastatic oesophageal cancer.

20. Exchanges of text message show a dialogue between Fiona, Ken and June regarding the funeral arrangements. Fiona took the lead. A week after Mark's death Fiona attended the Property to work. At the same time, Aaron clocked-on (except for June, Ken, Debbie, Mark and their spouses, all workers clock-on and off each day as they are paid by the hour) and began working each day, all day. Fiona recorded a conversation with Ken on 26 May 2017 in which she informed Ken that she was going to speak with the Company accountants to ensure that she, in her capacity as executrix, understood the extent of Mark's estate. When probed by Fiona, Ken thought Mark had owned 5% of the shareholding in the Company and that upon advice the shares were worth nothing.

21. On returning to work Fiona could not be the secretary to Mark or his PA and as a consequence if she was to have a role in the Company at all, her job description would need to change. Debbie gave evidence that they did not want to approach Fiona about her role or her future at the Company at the time as it was too close to Mark's death and everyone was feeling "raw". Perhaps because of the "raw" feelings experienced by the family members Ken did not turn his mind to the issue and Fiona did not ask. She did attend the Property for work about a week after Mark's death and busied herself in the office. She did not seek assurance as to her position or seek guidance.

22. In this period Ken said that he wanted Fiona to work if she wanted to do so, and Debbie said in evidence that she was being as sensitive as she could with Fiona. The inevitable result of seeking to avoid dealing with Fiona's work description, or even approach the issue of whether she was needed in the business at all, was confusion. In the short period she was at the Property between the date of Mark's death and her purported dismissal

two months later, Fiona appeared to carry on as if she were still Mark's assistant and PA. It therefore came as a shock to her that her access to the Company bank account was blocked. Having heard the evidence on the issue it is not clear she ever had access to Company information independent of Mark. On the balance of probabilities, she did not. Upon discovering that Fiona had access to the Company server, access was blocked on the ground that her access was for Mark alone. She was not permitted to "till-up". She never had been, but Fiona felt that her role was being reduced unnecessarily. As a matter of fact, I find that the Company accounts and finances were jealously guarded by Ken who allowed only June, Debbie and Mark free access. Ken said in evidence that the information was for the benefit of the family members only, meaning he, his wife and children. Ken said that he told her she could answer the telephone and help with some invoicing. Fiona felt that she was being pushed out of the Company. The reality was that she had only ever worked at the Company as Mark's assistant and then only periodically when Mark required. If she was to continue working for the Company, she required a role that was different to her previous one.

23. In early June 2017, Fiona recorded a conversation with Ken in which Ken was told that she and Aaron were concerned about their future. Ken sought to assure her, "if you remember, Aaron's got no problems." The assurance given by Ken was followed by a statement by Fiona, that did not logically follow from Ken's statement: "whatever you think of me, don't ever take it out on Mark's children". The illogicality of her statement surprised Ken. His response was: "eh?" and "why should I". The statement from Fiona may betray a hidden anxiety, or simple distrust. Ken did not know of the recording. The recording was made covertly.

24. By mid-June 2017 several things happened. First there was a conversation between Fiona and Ken about the shares and his pension. Fiona says that Ken made an honest mistake about how many shares Mark held in the Company after she asked for them to be transferred to her. Her evidence is that Ken wanted to recover the premiums paid for the pension rather than let her collect the death in service benefits. There was CCTV in the office and Fiona says that a new camera was installed that looked onto her desk. It infringed her privacy. This gave rise to her growing concern that Debbie and Ken were watching her. The office already had several CCTV cameras as Company documentation was held there and the office was unmanned at night and on Sundays. Mark did not want a camera on his desk as he used to count cash in the office (and at his desk). According to Debbie there was no need to count money at Mark's desk after May 2017 so a new camera, which she had directed Peter to install, was positioned to ensure the whole office space was covered. The location of the new camera was changed after Fiona made a complaint.

25. Ken set up a meeting with the accountant (Mike Harris) and Fiona to discuss the next steps for her future and the particular items on Fiona's agenda such as the company car, the shares in the Company held by Mark prior to his death, and the laptops Mark had. The meeting took place on 21 June 2017. Without the permission or knowledge of Ken or Mike Harris Fiona recorded the meeting. The recordings continued until July when Fiona was asked not to return to work. She unilaterally recorded conversations on her mobile phone between her and Ken and her and Debbie. She says she did this as she was getting confused. One question that has been raised in this litigation concerns undisclosed recordings. It appears from the transcripts that there were a number of other recordings not provided on disclosure. The Respondents state that she has purposely hidden material that would have been to her disadvantage. Fiona says that the other

recordings were personal to her. I do not need to decide the issue in this litigation but record the Respondents' concerns that important material has been withheld. The covert recordings are material, and I shall return to the subject later in this judgment.

26. In her witness statement Fiona makes a number of points about the meeting on 21 June 2017. It appears, however, to be common ground that the Company's articles of association did not bar the shares held by Mark from being transferred to her under Mark's will. The transcript shows that Mike Harris required probate before transfer and asked for a copy of Mark's will. During the meeting Fiona was told that Mark held 20% of the Company's shares and Mike Harris commented that as the 20% represented a minority holding, the value could be discounted for probate purposes. There was some discussion about the shares being registered in Aaron's name rather than that of Fiona, but Fiona thought it better to have them in her name as Aaron was young: she did not want him getting "above his station". She was informed that she could receive dividends as shareholder and in that way receive an income. The transcript reveals Ken's lack of knowledge about the Company's finances such as how and when dividends were paid, who held what shares in the Company, and the issued shares of the Company.

27. Following the meeting Fiona sent a copy of the will to Mike Harris who passed it to one of his colleagues called Jean Clapson on 23 June 2017. Fiona was not notified but when she chased, she was informed that she had been registered as shareholder on 23 June. In the meantime, Ken had asked for any laptop that the Company had paid for and a return of the Company car. The latter request was, according to Ken, based on his understanding that a car could only be set off against the Company's tax if it was needed for the purpose of the Company's business and used for the Company's business. Mark

had used the car for the required purpose whereas Fiona was merely using the car for personal and domestic use. Fiona took offence and consulted lawyers. Despite being told that the shares owned by Mark had been transferred, by early July the transfer had still not been registered. The reason appears to be that the accountants were waiting for probate.

28. On 5 July Fiona collected Mark's ashes. She has refused to inform Ken, June or Debbie of the whereabouts of the ashes. She was away for the day and did not receive pay. On the same day Aaron was told that his position could not be full-time due to his age. He could work part-time but regulations required him to continue in education part-time until he reached the age of 18. I heard evidence from Aaron and Ken on this issue. I have little doubt that Aaron's version of events is to be preferred. Ken did not handle the situation well, giving three reasons why Aaron could no longer work for the Company. The one that was foremost in Aaron's mind was that if Aaron was not working for the Company there would be no excuse for Fiona to attend as she drove him to work.

29. According to Ken, Fiona subsequently reported the Company to the health and safety executive as she was concerned that the fork lift truck drivers did not have proper licences. They had. On 18 July 2017, she sent a letter to Ken setting out her concerns within the guidelines of the Information Commissioners Office ("ICO"). She reported her concerns to the ICO. These complaints can only have been designed to aggravate. I mention in passing that the reporting would not have been inducive of good relations or supportive of a relationship built on trust and confidence. I shall deal with this more fully below. In the meantime, the Company was still asking for the return of property, and in particular, the laptops. Whilst at the Property on 21 July Ken gave Fiona a letter.

The letter dismissed Fiona from her employment and set out the reasons. Ken, Debbie and Fiona were cross-examined and re-examined on the content of the letter. The shares held by Mark and left in his will were registered in Fiona's name on 24 August 2017. On 4 September Fiona caused a letter of claim to be sent to the Company, Ken, June and Debbie.

30. Probate was granted on 16 October 2017 and on the same day Fiona sent the probate certificate to solicitors acting for the Respondents asking them to ensure that shares were registered in her name. On the same day Fiona received a letter addressed to Mark from the Company enclosing a draft resolution amending the articles with new articles of association ("New Articles"). The New Articles give the Company a discretion to refuse registration of a person entitled to shares under the will of a deceased shareholder. Clarification came in the form of a letter dated 20 October 2017 in which solicitors acting for the Company informed Fiona by e-mail that a resolution had been passed on 16 October 2017 which effected the New Articles. The letter describes the position:

> "We have set out our position repeatedly in correspondence. Your comments on the return of the Confidential Information (sic) and the 2016 Laptop Computers take us no further forward. Our client's position stands: your client has possession of our client's Confidential Information (sic) and the 2016 Laptops and must return them…….The written resolutions were circulated to Mr Mark Weatherley, not your client. Pursuant to the articles adopted on 16 October 2017, our clients will not recognise your client as shareholder of the Company. Those articles give our clients total discretion to refuse that registration. We note that your client has expressed directly to our clients (sic),

> namely Mr Kenneth Weatherley, that she wishes them (sic) to damage them (sic) financially and emotionally by engaging them (sic) in legal claims so that they (sic) spend "all their "money on legal fees."

31. Ken gives evidence that Fiona shouted at him saying she did not care if the Company "went bust". Fiona denies that she said such things to Ken. She accepts, with regret, that she told Debbie that Mark "hated her guts".

Witnesses of fact

32. Fiona gave evidence and was cross-examined for the first day of trial. In general, she gave evidence in a polished manner and generally called a spade a spade. As a general pattern she conceded on matters only where there were documents that fully supported the position being put to her. If a document was put before her that did not bear a date, was not signed or failed to disclose some other detail she would not accept its content. She would not accept that Mark had the final say in respect of the Company's financial matters or any matter of consequence. She maintained that Ken had the final say. My overall impression of Fiona's evidence is that she became too easily entrenched. This led to her using tactics to obfuscate. An example of this came in one line of questioning about Mark's control over the Company, she was asked if Mark dealt with all the weekly and monthly outgoings. She agreed. She was asked if he had a head for figures and answered, "you would have to ask him". On another occasion she was asked if Mark was competent at e-mailing. She answered, "I can't say, I was not sitting on his shoulder to see what he was doing." I have little doubt that at times she tried to help the Court, but if she had a fixed view in her mind, she was not going to be persuaded to change it, even if the evidence was overwhelming against her. This was borne out on a

few occasions during cross-examination. On one occasion Mr Lynch asked Fiona if she accepted that memories can fade. She answered with no hint of doubt: "no".

33. Aaron gave evidence on the second day of trial. His evidence was short as he had little involvement in the issues to be decided by this court. He gave evidence that Mark was the day to day manager, but thought Ken had the final say. He was not able to give an example of Ken having the final say. His knowledge was not from first-hand experience but from what he had heard from Mark in the past and Fiona. An example concerned stock. He gave evidence that his father had said that Ken was not declaring enough stock on the accounts. He was able to give first-hand evidence about the day Ken asked him to come into the office and when he was told that the Company no longer had a role for him. He recalled that Peter was sat at his desk, and Ken said "he's got to sack me because it was illegal to keep me. I went into the stock room and Ken followed me and said that he had spoken to the accountant, I was confused." He then explained that Ken had also said that "my mum was causing a hassle with staff- there was a word for it but can't remember what it was. He said he had to let me go". His evidence was that he left the Property and waited for Fiona to pick him up. There is not much difference in the version of events given by Aaron and Ken. However, where there is a difference, I prefer the evidence of Aaron over Ken. Ken may not have been wrong about employing Aaron full-time at the age of 16, but he did not handle the issue sensitively or Aaron's dismissal with sufficient candour. Whatever the complaints about Fiona's behaviour at work, they had nothing to do with Aaron.

34. Next, I heard evidence from Ken. He proved to be a mostly credible witness and candidly accepting propositions that may not have cast him in the best light. He was asked whether he agreed that the Property was transferred to him for about a million

pounds less than its value at the time. He responded, "yes it was, so what?" He accepted that he did not think about the best interests of the Company. He became irate when he didn't understand the question: "I don't know what you are getting at" was a common refrain. His knowledge of the Company's finances appeared so poor that I wondered whether he was deliberately avoiding giving answers to questions. However the transcript of the meeting with Fiona and Mike Harris in June 2017 is strong supporting evidence as to Ken's knowledge of the finances. There was no reason to have made up his lack of knowledge in that meeting as whatever he said would have been put right by Mr Harris, there was no pending litigation at the time and he was ignorant of the fact that he was being recorded. The curiosity is that he was and is very protective over who should have sight of the Company financial position and even more protective about his own finances. At one point in his evidence he indicated that he did not want to say a figure out loud. Other witnesses gave evidence that Ken and June had always been careful about who knew about their finances.

35. On other subjects Ken was shown to be wrong by reference to documents and his evidence was weakened by his acknowledgment that he did not understand all his own witness statement "I don't know how that got in there". This admission needs to be balanced against his evidence (supported by Debbie and to some extent the accountant Mr Harris) that he was not good at book-work, and not a strong reader. He could read. I noticed, however, that when in the witness box he could take some time to read a short paragraph. When questioned on something he had been asked to read he would more often enough say "if that is what it says, its true". Further questioning demonstrated that he had not assimilated everything he had just read.

36. I have little doubt Ken has many talents, such as the capacity for very hard work over long periods and that he is accomplished in his field. His evidence was not dogged by uncertainty. He gave clear and credible evidence on employee duties and responsibilities such as who could "till-up", who and why a person was entitled to a company car and, who was permitted access to the bank account.

37. Debbie gave evidence on day three. She was an impressive witness. Her evidence was given in a crisp, no-nonsense manner, she was careful but did not shy away from answering hard questions or seek to mask disappointment or family difficulties. She was asked whether she would have known if Mark and Ken had discussed the potential sale of the Property to Asprey Homes when she was not a director. She was clear in her answer that unless they had told her she would not have known. She knew that this left a gap in her knowledge. She did not seek to wallpaper over the cracks. She is clearly a capable and intelligent person. Her primary function is book-keeping but to describe her as a book-keeper would be to understate her position and influence in the Company. She liaises with the accountants when required, has taken charge of health policies with BUPA, she has knowledge of the employment advice received from an employment lawyer in relation to Fiona. Like Mark she watches the CCTV when the office and yard is closed to ensure they are secure, she knows of, and understood the purpose behind changing the articles of association, she appears to understand the accounts and does far more.

38. Her evidence demonstrated that she is intricately involved in the business of the Company. She appears to have a clear, good memory (when measured against contemporaneous documents) and was mostly able to substantiate her evidence or have it corroborated by professional advisors such as Mr Harris. She did not understand the

legal niceties of property ownership and dividends, but on key issues her evidence is to be preferred over that of Fiona.

39. Mr Harris was the next person to give evidence. He is the sole Director of the accounting firm, Goatcher Chandler Ltd Chartered Accountants since 2012. The Company is one of his clients. Mr Harris is a Fellow Member of the Association of Chartered Certified Accountants, and an Associate of the Institute of Chartered Accountants. He took over from Cliff Chandler who dealt with the Company from at least 2009. His evidence is, from around 2014 Michael Watson had taken over the role of preparing the Company accounts. Mr Harris would supervise this and have overall sign-off on the financial accounts. It was not specifically challenged that Mark was heavily involved in managing the finances in the Company. His evidence was that Mark provided accounting information to Mr. Watson and assisted in the preparation and approval of the end of year accounts. The evidence of Mr Harris was corroborated by Mr Watson. Mr Harris also gave evidence about Ken's role in the finances of the Company. He said that Ken would not concern himself with financial details. Mark was far more interested in the details.

40. In cross-examination Mr Harris was challenged about who was really in charge of the Company's finances and who really knew what was going on as far as the corporate governance was concerned: "Ken was the man ultimately in charge?" The answer from Mr Harris was swift and without hesitation: "I disagree with that, it was Mark. I remember a meeting in 2014 Mark did all the talking and Ken just said yes, or no. Mark was in total control." His evidence was that Ken was happy to hear headline figures and if there was insufficient money in the Company, he would inject cash. Mr Harris gave impartial evidence as a professional and was not undermined.

41. Mr Watson gave evidence as to his dealings with Ken and Mark. The focus of the cross-examination was whether Mark or Ken had the majority of dealings with the accountants. Mr Watson was quick to assert that Mark took the lead. He also said that June and Debbie played important roles working out rates of pay and times and producing spread sheets from the sage accounts. He was asked about how the loan accounts worked. He explained that dividends are declared each year to cover personal expenditure. As the directors and shareholders had common identity, the dividend would be credited to the directors' loan accounts and declared on the director's tax return. He explained that in a small company it would be usual, if not a requirement, to have separate loan accounts for each director, but this company was different. There was only one loan account. The explanation Mr Watson gave for this unusual arrangement was "this is a family pot and this is why it is treated as one". The evidence was revealing. The term "family pot" had been used by the Weatherley family members.

42. He gave evidence about the family's approach to the Company finances, the Transfer, the Trust Properties and agreed that the accounts to 2014 did not accurately reflect the loan account balances. He said that Mr Harris was a more careful accountant than his predecessor and ensured that from 2014 the financial statements were accurate. Mr Watson was a careful witness. If he was asked about something about which he did not have direct knowledge, he would say so. If he was asked what his impression was of a situation, even though he had no direct knowledge, he would give his view and back it up with what he did know about the Company's working environment, gained from his experience. He was a credible witness whose evidence was not undermined in cross-examination.

43. Mr Gill constructs fences, garden sheds, is a panel maker and carries out other manual work for the Company. At the time he gave evidence he had worked for the Company for a while and had been hired by Mark. He gave evidence about the respective roles of Mark and Ken in the Company from the perspective of an employee. His evidence was short and credible.

44. I heard briefly from Mike Rudd of Jepson Solicitors. Mr Rudd was the conveyancing solicitor who had acted for Ken and the family in respect of a number of transactions. He explained during cross-examination that the majority of communications on behalf of the Company, in connection with the offer made for the Property by Asprey Homes, came from Mark. He was asked whether Ken had completed the stamp duty transfer form when the Transfer was made. He said that Ken would not have done so, and neither would he. His assistant Maxine would have completed the tax form and asked Ken to sign it. He said that he was unaware of an option agreement and that only one of the Trust Properties had a trust deed.

45. Peter gave evidence of the close ties between Ken, June, Mark and Debbie. His evidence, which was not undermined, was that they kept their finances very personal and even though he would overhear things, the bank statements, rent from the Trust Properties and information about shareholdings was not open to him. He said that the Weatherley family did not want to exclude him but he was not included. He was asked about the Disclaimer letter. He had also written a disclaim which appeared to be a copy of the one provided by Fiona. In his closing Mr Knott for Fiona submitted that Peter's evidence was incredible and highlighted the inconsistent and wrong evidence (measured against the contemporaneous documents) he gave about his disclaimer letter. First he said that he had drafted the letter dated 24 September 1999; he changed his

mind and said Debbie had in fact amended the letter; he then said the original letter had been lost so he recreated the letter; he was asked about the date and said he had guessed the date of the original (which was the exact same date as the letter provided by Fiona); and Mr Knott pointed out that he had got part of his address at the head of the letter wrong. I agree with Mr Knott, Peter's evidence on this issue is unreliable and cannot be trusted. That does not mean that I should dismiss the whole of his evidence as unreliable or untrustworthy. His evidence about how the Weatherley family work together was credible and not undermined. An example comes from a question in cross-examination about whether or not Mark knew of the Transfer prior to the event. Peter answered: "Mark knew everything that went on in that company. I know this because I know how the Weatherley family work together- they speak about everything. I know he would have known. I can't set it in stone. But I just know they knew." He was not seeking to state his knowledge as a fact which would have been incredible bearing in mind his previous evidence about not being in the inner Weatherley family circle. He was not saying that he had asked Mark the direct question, which would have been equally incredible since the issue only arose after Mark's death. He was giving his impression based on his knowledge of the family gained over a number of years.

46. At the end of his evidence he gave his view of why Mark would have approved and known of the Transfer prior to January 2009. The evidence on this issue has the ring of truth and, was not further challenged. He also gave credible and strong evidence about an allegation made against Fiona, that she had shredded Company documents or at least more documents than she claimed to have shredded, whilst at the Property. In summary Peter's evidence was mixed, some of it unreliable, some of it credible.

47. On the issue of whether Ken had been making under-declarations of stock Peter Barnett (a senior sales executive at Taylor Maxwell Timber Limited) has produced a signed witness statement explaining that from 2003 he almost exclusively dealt with Mark who made the orders. He says that he spoke with Mark on a weekly and at times a daily basis about orders, arranging deliveries and other issues. His evidence is that timber is a commodity and as such the price tends to fluctuate on world markets. Due to the fluctuations Mark would order more timber on some occasions and others to stock pile. He estimates that Mark ordered about £235,000 plus VAT of timber each year. He was not called as a witness. The petitioner and respondents agreed Mr Barnett's statement. I accept his evidence.

48. It is perhaps partly to do with Mr Barnett's evidence and partly to do with how the live evidence was given that Mr Knott did not pursue the stock allegation with any vigour in closing. Mr Lynch closed by stating that it was his understanding that the allegation had been dropped. Mr Knott did not demur in his reply.

49. Due to June's ongoing illness a Civil Evidence Act notice was filed and served. In her written evidence she explains how close she, Ken, Mark and Debbie were, "we have always been so close"; and how hard Ken had worked since starting the "family run business" in 1967. Her evidence is that from 2003 Mark "took over the running of the Company as a General Manager. Since then and until he fell ill and was unable to come into the office Mark was running the Company. He was responsible for everything, from providing quotations to finances and employees. Everyone at the Company, and our suppliers and regular customers, knew that Mark was the boss. From this period onward Ken had less and less involvement in how the Company was run. We would discuss the Company when we were together as a family, but Ken did not have the final

say on how it was run, with Mark often overriding his opinion or convincing him otherwise. We all trusted Mark. Ken was happiest working outside in the saw mill." Although Mr Knott did not say so, I have little doubt that this is evidence he would challenge. I also have little doubt that short of a capitulation, the evidence would have been difficult to undermine as Fiona could not, and has not tried to, put a positive case on the issue, other than Ken was the real person in charge of the Company. Although I am cautious to accept June's evidence without more, as it has not been tested, her evidence on this issue has weight as it is corroborated by other third-party witnesses.

50. She also gives evidence about the option to purchase the Property and knowledge of the directors and shareholders prior to the event. This is a matter which would have certainly been tested by Mr Knott and he did not have an opportunity to do so. This evidence is not supported by documentary evidence. I shall take it into account but lend less weight to the evidence than may have been the case if it had stood up after cross-examination.

51. She gives evidence about the difficulty with forming a relationship with Fiona over the years, that this has led to a difficulty with forming a close relationship with her grandchildren and how Fiona has refused to tell her the whereabouts of Mark's ashes. I have no difficulty in finding that relations were and are very strained. June has also given evidence about a change to the articles of association after Mark's death. I state it here as it seems to reflect Fiona's version of how the articles were changed. June said that after relations had broken down "we did not want her having any involvement within the Company at all. As such, in October 2017 Ken was keen to check the Company constitution to see if there was any way that we could avoid registering her as a shareholder as she was bad for the Company. As a result of this Debbie spoke to

our lawyers and the articles of association were changed, at which point we voted not to register her."

Expert evidence

52. After summarising the witnesses of fact, it is convenient to deal with the expert witnesses. Mr Adam Mazalla-Tomlinon MRICS was called on behalf of Fiona. He provided an opinion as to the value of the Property as at 14 January 2009, the date of the Transfer, and 10 July 2018 (the date of inspection). Similarly, Mr Hirani B.Sc (Hons) FRICS gave evidence for the Respondents about his opinion of value on similar dates (the difference being that Mr Hirani inspected the Property on 5 July). Mr Hogden MA (Cantab) FCA acting on behalf of Fiona, gave evidence about his opinion as to what represents a fair value of Fiona's shares as at 21 July 2017, and the date of his expert report on 27 July 2018. Mr Davision BA FCA MAE also gave evidence on his opinion of a fair value.

53. In this case the parties have urged the Court to make findings as to the value of the Company's shares or to provide the tools to establish a value, subject to the timing of any share purchase. This is because Fiona has asked that her shares be purchased, and Ken, June and Debbie have agreed to purchase. By agreeing to purchase the shares they do not concede that there has been unfair prejudice. They agree because they accept that Fiona has no future in the Company, as a result of the relationship break-down, and Fiona has expressed the desire for a "clean-break". They wish for a determination to help facilitate the purchase regardless of the outcome of this petition. The parties disagree on the date that value should be determined. If the Court were to decide that a share purchase order should be made, the appropriate date for value would have to be found: one party prefers 2017 and the other 2018.

54. The aim of both accountancy experts was to reach a realistic value of the Company taking into account its particular business, earnings, assets, liabilities, and taxation: the enterprise value. Mr Hogden deals in his report with the different approaches to valuation of an unquoted business. He considered the asset-based, income-based and market-based approach concluding that an earnings-based approach was most appropriate. As the Company had not produced or provided forecasts, he considered that the best method of valuation was to use earnings before tax, depreciation and amortisation (EBITDA). This was because he considered that the Company had established a pattern of relatively steady income and expenditure suggesting that it had reached a stage in its life-cycle where earning could be predicted with more accuracy. On that basis past financial performance could be used to provide an expected maintainable level of annual earnings and by applying a multiplier to capitalise the earnings a capital value could be reached. Having done this exercise the valuer "arrives at the enterprise value". Mr Davidson agreed. Access to the Company's books and records was important. In order to assess the EBITDA the experts needed to understand the amount of tax paid and any of the obligations owed by the Company to the HMRC. Depreciation and amortization both reduce the cost of assets held by a business over time. Stock will be subject to depreciation and amortization but the major fixed asset of the Company prior to 2009 was the Property. Accordingly, the share valuation experts were reliant, to some extent, on the property valuers to provide a figure for the Property. The value of the Property is in dispute. I have mentioned above that it appears that the stock issue has not been pursued but to ensure there is no doubt I shall deal with it directly after the Property value dispute.

Property experts-valuation

55. The report of Mr Mazalla-Tomlinson was very different to that provided by Mr Hirani. In its present condition Mr Mazalla-Tomlinson valued the Property at £479,000 as at 14 January 2009 and £815,000 as at 10 July 2018. The market value as a 10 July 2018 with planning consent to develop based on 13 dwellings providing 16,00 square meters (approximately 17,200 square meters) is £4,300,000. He was tested on the valuations by Mr Lynch. Mr Mazalla-Tomlinson agreed that the valuation method employed to value the Property on the various dates without planning permission was the comparative method. In his report he says that it "was not possible to find a direct comparable for the property, as obviously that would mean I would have to find a property the same and with the same layout which sold at that time…" He continues "I referred to the comparable property to determine the basis and guide price of property in that locality and then I considered the other facts such as the scope of the proposed development." However, he failed to set out any comparisons in his report. It was put to him by Mr Lynch that either he had not used any comparable or if he had, as he had not disclosed the comparable or comparables. If the comparables had not been disclosed it was not possible to test him on comparability. "Q. You don't set out any comparables? A. no I have just given my conclusion." The next question was cutting: "Q. no reasoning has been advanced as to how you reach the figures? A. correct". He said he could remember values of properties he looked at but couldn't remember more. He was taken to the comparison evidence provided by Mr Hirani, each property one by one. He accepted that the comparisons provided by Mr Hirani were suitable.

56. Mr Hirani had meticulously calculated the square footage (and using a multiplier, the square meters) of the internal accommodation and the land concerning the Property, considered construction issues, services, roads, planning, tenure, rateable value, given a general market synopsis, a SWOT analysis provided evidence of comparables

providing square footage and price per square foot and determined that the value of the Property as at 14 January 2009 was £450,000 and a July 2018 value of £700,000. As Mr Hirani had provided workings, as his opinion was not undermined in cross-examination, I have little hesitation in preferring his opinion over that of Mr Mazalla-Tomlinson. I have been invited to make an adjustment to reflect an admission made by Mr Hirani that the proximity of a dual carriageway is a positive feature to a commercial business. The experts did not assign an increase in land value to reflect the proximity. My understanding of Mr Hirani's evidence is that he agreed it could be an advantage to the business because of ease of access to a roadway network, but he did not agree that the land value would increase as a result. On that basis I do not accept the invitation to increase Mr Hirani's values.

57. Both valuers also valued the Property to include a "hope" value. That is an increased value on the basis that there is a prospect that the local planning authority would grant planning permission to develop the Property and the land behind the Property. The opinion of Mr Mazalla-Tomlinson that the Property has a value of £4,300,000 with hope value is subject to a variance depending upon the planning consent achieved "this value would vary as the specification of the proposed properties, design, layout and ground conditions are fully determined; and for the purpose of stating a value it is assumed as to the build costs, fees and planning consents to be applied." When probed, his evidence was that he had worked out his valuation on the basis that the net development value of the site was £6.8m and calculated that the land would be worth £4.3m (63%).

58. Mr Hirani was unshakable in his condemnation of such a value. His evidence was that Mr Mazalla-Tomlinson had forgotten to stand back and look at the reality of the

situation. He was asked by Mr Knott: Q. "in 2018 would it be fair to say that values have gone up? A. land values are going at around £1.5m per acre. Take a third so on 2.1 acres, take a third, and its about £1.1m.". The reference to a third was a reference to a third for the land value, a third for build costs and a third for developer's profit. This is a rough and ready calculation, but I find it more convincing and realistic than attributing nearly two-thirds of the net development value. Mr Mazalla-Tomlinson justified his high calculation on the basis that (i) he had considered the local development plans (ii) he had taken into account the offer of Aspery Homes and (iii) the revised offer of £2,500,000 in 2009 reflected the near certainty that planning permission would be granted: "my view is based on looking at the planning and what has been granted elsewhere, not in the location but comparable locations". He accepted when asked, that planning permission has not and had never been granted for the Property. He thought that planning permission for 13 houses was "extremely likely". He was unable to substantiate his view other than to say that it was based on the letter sent by Asprey Homes in June 2008. The Asprey Homes' letter of June 2008 does assist as Asprey thought that the value of the Property without the addition of hope value, was approximately £500,000. That figure is not too different, and within a reasonable margin of error, to the figures produced by Mr Mozalla-Tomlinson and Mr Hirani.

59. Mr Mozalla-Tomlinson reached the conclusion that the hope value as at January 2009 must have been the difference between the value of the Property in its current state and the amount offered by Aspery Homes, namely £2,000,000. In reaching his figure he seemed to factor in evidence of Fiona (secretly recorded) that Ken had told her that obtaining planning permission now was a "piece of cake" and that the Property was worth at least £5m. I give no weight to Ken's off-the-cuff remark. There is no evidence that Ken had taken any advice or that his value is supported in any way. Indeed, his

guess of the value is not supported by his own expert or Fiona's expert. I regard Ken's remark as without foundation, said with bravado and cannot be relied upon as a serious factor when reaching a conclusion as to the hope value of the Property.

60. Mr Hirani thought this was simply the wrong approach. The concept of "hope" is not the same as a certainty. If the offer from Asprey Homes was to be taken into account at all it needs to be seen warts and all. He reasoned that there was "no planning consent in 2009, but in July 2007, an application was made for demolition of existing buildings and erection of 13 detached dwellings…..I understand this was not approved and negotiations were in hand to revise the application. With the property market continuing to deteriorate and acceptable terms not being agreed with the land owner this application was withdrawn." Critically Mr Hirani says that the £2,000,000 was not a hope value in the real sense. It was an actual value that would be paid in the event that planning consent was approved. The revised offer of 2 June 2008 states "I confirm that Asprey Homes are willing to offer a revised price of £2,500,000….for the unencumbered freehold interest…on a subject to planning basis for 13 units…".

61. From this position Mr Hirani soberly considered the present position. It is known that there was an offer nearly 10 years ago but it was made subject to planning. It is known that no planning consent was obtained. It is known that there is no current planning consent for development and it is known that there is no current application. It is not known if planning consent for any development will be obtained. If planning consent is obtained it is not known what amount of net square meters of development would be acceptable. It is not known what conditions the planning authority may impose, such as how much social housing will be required or whether there will be an insistence on a cash payment pursuant to section 106 of the Town and Country Planning Act 1990. Mr

Hirani's evidence is that the net return of social housing for a developer is zero. Accordingly, the profitability of any development is or maybe seriously affected by a cash payment or condition that a number of houses be built for social housing. He argues that build costs have changed since 2009. New builds require greater thermal qualities, but other than the usual build costs, certain assessments may have to be undertaken such as an environmental impact assessment which may report protected species.

62. In my view the reasoning of Mr Hirani who takes the reality of the situation as the starting point and then works to a reasoned and calculated hope value is to be preferred as it more accurately reflects the known and unknown facts and does not attribute the June 2008 offer as an offer made without it being subject to the condition of obtaining planning consent. It does not give any weight to the unqualified and unsubstantiated view of Ken. On this basis Mr Hirani values the Property at £1,865,000 with hope value. As a cross-check this figure is not very different to calculating a land value at just under a third of the anticipated gross development value (27%). Mr Hirani thought that 15-20% of GDV would be a likely figure and more in line with the market.

Stock value

63. Mr Hodgen explains that the value of stock has implications on value. If there was an understatement of stock value, as claimed by Fiona, the profitability of the business will also have been understated. The longer the understatement of stock, the greater the distortion. The instructions to both experts was to assume a closing stock figure of £500,000 for the year 2014. Each expert was required to restate the years prior to 2014 in order to understand the underlying profitability. Mr Hodgen analysed the pattern of profits to calculate the potential understatement and then added the figures back into

the accounts to provide a maintainable profit figure. On the other hand, Mr Davidson analysed sales and the stock required to maintain sales. Although it does not always follow that a different analysis will reach a different conclusion, it did in this case. Mr Hodgen made an assumption that the true closing stock figure as at 2004 was £39,000. Taking that figure as a start point and working on the agreed stock figure in 2014, where the gross profit percentage reached 40.9%, he was able to produce a projection of stock levels to maintain the gross profit level. Mr Davidson thought this flawed due to "large fluctuations in gross profit percentage" which meant that it was not possible to reach a "normalised margin". By focussing on sales and making the assumption that the stock carried in each year was consistent with the trading activity he was able to calculate the stock levels. The stock movements were, in his opinion, an appropriate tool to gauge maintainable profits because the stock movement is likely to reflect sales. His starting point was the stock reported in the accounts.

64. I am grateful to the experts for their reports and their explanations as to methodology of stock calculation. I do not need to decide between them. In my judgement the allegation of stock understatement is not made out. I reach this conclusion without regard to Mr Knott's chosen position not to pursue the allegation with any vigour. Fiona's allegation is that Ken was responsible for informing the accountants about the stock levels, Ken purposely understated the stock and Mark complained about the understatements to her.

65. Mr Harris gave evidence that it was Mark who "called the shots" in the Company and it was Mark to whom he referred. His evidence was that at their first meeting in 2014 he was in no doubt that Ken took a "back seat" and thereafter Ken "would not concern himself with financial affairs". It is unlikely on this evidence that Ken gave stock

figures to the accountants and Mark said nothing. The opposite was true in Mr Harris's experience. He addressed the issue of stock directly in his evidence saying that "it is illogical to suggest that Mark would have had any concerns about the levels of stock being declared in the Company accounts given that he was the one reviewing the stock level with Michael Watson".

66. The evidence of Mr Watson also contradicts the allegations made by Fiona. He explained that when he drafted the accounts, he would visit the Property and discuss the accounts with Ken and Mark and discuss stock levels. It was Mark who led these meetings, and Mark who provided the estimates as to the value or amount of any particular type of stock. Mr Watson's evidence, which I accept, was "Mark was entirely and solely responsible for stock (including purchasing and management) within the Company".

67. Mark's involvement with stock is supported by the agreed evidence of Mr Bartlett. In his written evidence he speaks to weekly if not daily conversations with Mark. His evidence is of interest in another way. Mr Bartlett estimated that the stock purchases were approximately £235,000 a year. There would have been purchases from other suppliers, but the approximate sum is an indication that the stock levels were not under stated. The evidence in support of serial under-statements of stock by contrast comes from Fiona's evidence that Mark had told her that this was the case and often complained to her that Ken was making the under-statements. She accepted in cross-examination that she was never present when Mr Watson went through the stock levels with Mark and Ken and was never present at any meeting concerning stock.

68. I conclude that on the balance of probabilities there was no understatement of stock as alleged by Fiona. The EBITDA calculations should be revised to reflect this finding of fact.

Share valuation- experts

69. The share valuation experts have met and were able to agree a considerable number of issues between them. The financial statements for the year ending 31 July 2018 were not available at the time of the joint report which led Mr Hodgen to conclude that the 2017 results would not have been available for a valuation as at 21 July 2017. In my judgment any third-party purchaser would have wanted to see the up to date management accounts, any available forecasts, the asset ledger (if available) and an analysis of creditors (including liabilities to HMRC) and debtors. Although the finalised accounts would not have been ready as Mr Hodgen rightly observes, financial information of a similar kind could have been produced. The Company had and has a good relationship with its accountants and Debbie would have been capable of providing the correct information. I therefore find that it is reasonable to take account of the 2017 accounts.

70. After giving evidence they agreed the multiplier if the shares were to be valued as at July 2018. The multiplier is not agreed for July 2017. I shall deal with the 2017 multiplier only. Mr Hodgen accepted in evidence that although he could justify the multiplier of 6 he chose for 2017, it could be a little high but thought 4.2 was too low. Mr Davidson accepted that 4.2 maybe too low. Both experts agreed that the choice of multiplier was subjective. Mr Hodgen thought that "reasonable experts may reasonably disagree" on the issue. Mr Davidson thought that it would not be unreasonable to conclude that the right figure lies between the two.

71. Mr Hodgen applied a multiplier based on the median of results obtained from the UK200 Group for company sales. This group is an association of chartered accountants and lawyers and the index published by them is based on actual transactions involving the purchase or sale of real businesses over the past few years. The Court was informed that the last index to be published was at November 2016. The report showed that EBITDA multiples were being realised between 4.3 and 6.8. Mr Davidson's evaluation of the multiplier of 4.2 looked out of kilter with these reported results, or at least at the extreme end. Mr Hodgen explained that he had taken the median of the results and come up with the figure of 6. Mr Davidson did not disagree with the methodology only that an adjustment should be made to reflect the size of the Company in comparison to the mean size of the resulted sales. He reasoned that a smaller company carries more risk. Accordingly, he discounted by 25%. The risk to a purchaser would be ameliorated by reason of the Company having operated for a very long period of time and the earnings having stabilised.

72. As the Company is small, private and family-run I agree that the risk is more likely because there are fewer available records, and the knowledge and understanding is kept in the minds of those in control of the Company. Another example of risk lies, so both experts agree, in assessing the correct market rate of salaries for directors. Both experts agree that the directors' salaries would increase under new management. The Company's overheads would increase. Add to this the uncontested evidence of the accountant that Ken added cash to the business when the market cooled, the risk increases further. New management may not have the resource or will to add cash to the business in times of slow trade. In my judgment a discount to the mean is appropriate to reflect the reality of the Company. However, the size of discount has not been justified (understandably due to subjectivity). Taking account of the historic

performance, the size of the Company compared with those sold and resulted in the UK200 Group, the increase in risk of taking over a small family company where costs would inevitably increase, a discount of 15% is appropriate, giving a multiple of 5.1 in 2017. This better reflects the size and nature of the Company, its business, and pays due regard to past performance.

73. The joint report is dated August 2018 and sets out only the issues proposed for discussion by the experts as ordered by Mr Justice Snowden on 5 July 2017. In their joint report Mr Hodgen agreed Mr Davidson's EBITDA figures and agreed that the financial costs should not be deducted as they were bank charges rather than bank interest. They also agreed the concept that a deduction for a market level of remuneration for directors is required. Mr Hodgen thought that directors' salaries should be £80,000 per year based on the Office of National Statistics. Mr Davidson thought £105,000 also based on the ONS. In the witness box the experts both appeared to accept that there was a margin of error. Debbie should be paid as a finance professional earning approximately £30,000 per annum thought Mr Davidson, whereas Mr Hodgen thought that was a lot of money for Debbie's position. Similarly, Ken earning £25,000 was high but I understood both to consider that a figure of £40,000 for Mark was not high. Doing the best I can with the figures and in the knowledge that there is a margin of error a figure for salaries that lies between the two experts would not be inappropriate.

74. The experts agreed that a discount should be applied for the purchase of a minority shareholding. That may not be the case if the Court were to order a share purchase. Mr Davidson agreed that his initial view of a 50% discount for Fiona's minority shareholding was too high. This was rationalised on the basis that there is no guarantee

dividends would continue to be paid. Mr Hodgen had looked at the past position and projected forward. His analysis is that 40% is more appropriate. I accept the reasoning of Mr Hodgen. The appropriate discount is 40%.

Unfair Prejudice- the remaining live issues

75. Fiona's petition was presented on 25 October 2017. Her petition pleads the following that are said to have been prejudicial to her as a member and are unfair:

i) Purporting to pass a resolution and subsequently on or around 20 October 2017 filing at Companies House the New Articles providing the directors with a discretion to refuse to register a new shareholder and following the resolution notifying Fiona that Ken, June and Debbie did not recognise Fiona as a member of the Company;

ii) the exclusion of Fiona and Aaron from the Company in breach of the understanding between the shareholders;

iii) the transfer of the Company's 50% interest in the Property at an undervalue to Ken in January 2009;

iv) non-payment of dividends; and

v) understating stock by the Company.

76. The Company has, since these proceedings were presented agreed to refile another set of articles or update the New Articles to permit a shareholder to bequeath the shares through a members' last testament. Fiona has been recognised as a shareholder and registered as such. Fiona has received the dividends due to Mark as shareholder. The issue of dividends, articles and shareholder recognition remain only as a matter of legal

argument based on a submission that the unfairness may arise again in the future, as Ken, June and Debbie could repeat their actions.

77. I have concluded above that on the balance of probabilities Mark was responsible for the stock calculations and in any event there was no understatement of stock. The remaining live issues concern the Transfer and exclusion of Fiona and Aaron.

Unfair Prejudice- the law

78. I shall summarise the jurisdictional machinery by reference to some well-known authorities in this area. First, the statutory provisions. Section 994 of the Companies Act 2006 (the "Act") provides, so far as material:

"(1) A member of a company may apply to the court by petition for an order under this Part on the ground-

(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or

(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."

79. Section 944 (2) of the Act provides that the unfair prejudice provisions apply to a "person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company." This provision makes wide the net of potential applicants to include not just registered members, but any person to whom shares have been transferred or transmitted by operation of law whether or not they are registered. *Palmer's Company*

Law (8.3802) explains that this "subsection effects two extensions to the normal meaning of member: (a) those to whom shares have been transferred but whose names have not been entered in the register of members and (b) those to whom shares have been transmitted by operation of law and whose names have not been entered in the register of members."

80. The requirements of section 994 of the Act are relatively clear. The law was not debated before me. As far as relief is concerned Section 996 of the Act provides:

"(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…..

"(d) 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."

81. In *Re Unisoft Group Ltd (No. 3)* [1994] BCLC 609 at 611, Harman J. explained that the words "act" and "omission":

"…..are wide and anything that the company does or fails to do can be relied upon. But wide as the category of acts may be it is necessary that the act or omission is done or left undone by the company itself or on its behalf. Thus, voting at a general meeting, whether annual or extraordinary, may result in a resolution being passed or defeated. The resolution is, obviously, an act of the company notwithstanding that the votes which pass or defeat it are the votes of members which are their private rights

which…can be exercised as they choose. The acts of the members themselves are not acts of the company and cannot found a petition under [section 994]."

82. To satisfy the test of unfair prejudice the acts or omissions have to be unfair and prejudicial. Unfairness is a notion. In *Grace v. Biagioli* [2006] 2 BCLC 70 at [61], the Court of Appeal highlighted the following principles from the speech of Lord Hoffmann in *O'Neill v. Phillips* [1999] 2 BCC 1:

"(1) The concept of unfairness, although objective in its focus, is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. This will usually take the form of the articles of association and any collateral agreements between shareholders which identify their rights and obligations as members of the company. Both are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable.

(2) It follows that it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use Lord Hoffmann's words, "consist in a breach of the rules or in using rules in a manner which equity would regard as contrary to good faith"…; the conduct need not therefore be unlawful, but it must be inequitable."

83. The authorities show that prejudice is not a narrow concept. In *O'Neill v. Phillips* [1999] 1 BCLC 1 at 15, Lord Hoffmann said that "the requirement that prejudice must be suffered as a member should not be too narrowly or technically construed". Prejudice

may found in the form of an economic and non-economic act or omission. More recently Lady Justice Arden explained in *Re Tobian Properties Limited* [2012] 2 BCLC 567 that fairness is contextual, and it is "also flexible and open-textured. It is capable of application to a large number of different situations."

84. Mr Knott brings my attention to *Southern Counties Fresh Foods Ltd* [2008] EWHC 2810 (Ch) where the Court considered *Saul D Harrison & Son plc* and *O'Neill v Phillips* reiterating that a "shareholder generally needs to establish a breach of the terms on which he agreed that the affairs of the company should be conducted or that equitable considerations (those referred to by Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at 379) arising at the time of the commencement of the relationship or subsequently, make it unfair for those conducting the affairs of the company to rely on their strict legal rights. Alternatively unfair prejudice may be made out if the board of directors has exceeded the powers vested in them or have exercised their powers for an illegitimate or ulterior purpose; or there is some event putting an end to the basis on which the parties have entered into association with each other, making it unfair that one shareholder should insist on the continuance of the association."

85. The equitable considerations spoken of arise from a principled approach. The company has to have been formed or continued on the basis of a personal relationship involving mutual confidence and the Court has to find that there is an agreement that all, or some, shareholders will participate in the conduct of the business. This was explained by Hoffman J in *Re A Company (No 004377 of 1986)* which concerned a case where there were no allegations in the petition of any wrongful conduct by the board or majority shareholders. There was no suggestion they were paying themselves excessive salaries,

or diverted business to other companies. The petitioner claimed relief because he became a shareholder on the basis of a legitimate expectation that he would participate in the management of the company and would be employed on a long-term basis. In fact, he had been excluded.

86. Hoffman J explained the limitations on equitable consideration by citing *Posgate & Denby (Agencies) Ltd* (1986) B.C.C. 99:

> "But the concept of unfair prejudice which forms the basis of the jurisdiction under section 459 enables the court to take into account not only the rights of members under the company's constitution but also their legitimate expectations arising from the agreements or understandings of the members inter se. There is an analogy in Lord Wilberforce's analysis of the concept of what is 'just and equitable' In *re Westbourne Galleries Ltd* [1973] A.C.360, 379. The common case of such expectations being superimposed upon a member's rights under the articles is the quasi-partnership, in which members frequently have expectations of participating in the management and profits of the company, which arise from the understandings upon which the company was formed and which it may be unfair to other members to ignore…. Although the answer to the question "-of whether such a legitimate expectation exists" must in each case depends upon the particular facts, it is well to recall that in *re Westbourne Galleries Ltd* Lord Wilberforce said that in most cases the basis of the Association would be "adequately and exhaustively" laid down in the articles. The "super imposition of equitable considerations" requires, he said, something more. This was said in the context of the "just and equitable" ground for winding up, but in my judgment it is equally necessary for a shareholder

> who claims that it is "unfair" within the meaning of section 459 for the board to exercise powers conferred by the articles to demonstrate some special circumstances which create the legitimate expectation that the board would not do so. Section 459 enables the court to give full effect to the terms and understandings upon which the members of the company return associated but not to rewrite them."

87. Mr Knott submits that the super-imposition of equitable considerations may extend further than to the shareholders who formed the Company. He argues with force that a company based on personal relationships with understandings of trust and confidence and giving rise to the sort of equitable constraints referred to in the authorities (a "quasi-partnership") is not necessarily limited to those who formed part of the original agreement. Such equitable constraints can survive the death of a shareholder party to them, particularly in the context of small family companies: *Fisher v. Cadman* [2006] 1 B.C.L.C. 499 at [89], per Sales J- as he was). The case of *Fisher* concerned a family company run on an informal basis. The petitioner and her two brothers were effectively equal shareholders in the company which was concerned in property development. They had obtained their shares by reason of their parents' death. The petitioner's brothers were directors but until their father's death they worked for no remuneration. The Court found as a matter of fact that directors would not be paid emoluments in respect of the management of the family company and that the properties were intended to be held until the value of the properties had increased to a point at which it was worth selling. The petitioner played no active role in the company. When their parents died the directors made provision within the accounts for remuneration and the repayment of debt owed to a company owned and controlled by the brothers, with interest. The petitioner objected and demanded that an annual general meeting was held. The Court

found that there was a quasi-partnership, the articles of association were not a complete code for how the family company was governed and that there was an expectation that the business would be carried on under the same terms as it had before unless there was agreement by the shareholders to the contrary. The Judge observed (para 90):

> "it is my view that, in considering whether the conduct of the controllers amounts to conduct unfairly prejudicial to the interests of a member, it is also relevant to take into account any agreement, understanding or clearly established pattern of acquiescence on the part of that member which may have led the controllers to act or continue to act in a particular way, even if their action may have involved a departure from a strict adherence to the terms of the Articles. In such a case, in the light of their common understanding as to what conduct will be regarded as acceptable between themselves despite the terms of the Articles of Association, it would not be correct to characterise the action of the controllers as unfair within the context of the whole relationship between them and the member. In my view, this is a corollary of the approach to the test of unfairness adopted in the authorities to which I have referred above, whereby the agreement between the members as set out in the Articles of Association may be subject to equitable considerations and obligations arising out of the particular circumstances of their relationship overall. There is no good reason why such equitable considerations should not qualify, as well as add to, the expectations about how the controllers of the company ought to behave to be derived from a simple reading of the Articles of Association. In *Anderson v Hogg* 2000 SLT 634, a decision of the Outer House of the Court of Session (Lord Reed) on s. 459 , provides an example of this approach being applied. In that case, there was a finding that the petitioner had acquiesced in a

departure by the controller of the company from strict adherence to the articles (see p. 639D–K). Lord Reed held (p. 640B–D) that the parties:

> "agreed, by their words and conduct, to conduct the affairs of the company on an informal basis which allowed the respondent to exercise powers of management more freely than the articles may have envisaged or permitted. In these circumstances, unfairness has to be assessed against what the members actually agreed rather than against the articles."

88. Considering the mid-trial concessions regarding filing amended articles of association, registration of Fiona as shareholder and the payment of the dividend, Mr Knott reminds the Court of the dicta *in Re Kenyon Swansea Ltd* (1987) 3 BCC 259 where Vinelott J explained:

> "It is in my judgment sufficient to found a petition that an act has been proposed which if carried out or completed would be prejudicial to the interests of the petitioner. Similarly, to found a petition it is sufficient that the affairs of the company have in the past been conducted in a way which was unfairly prejudicial to the petitioner even though at the date of the petition the unfairness has been remedied. The question whether an order is required to protect the interests of the petitioner from the consequences of unfair conduct or of an act which has been proposed and which may again be proposed is one to be answered at the hearing of the petition."

89. Previous conduct was the subject of a decision in the Court of Appeal in *Re Legal Costs Negotiators Ltd* [1999] 2 BCLC 171. The Court of Appeal dismissed an appeal on the basis that as the petitioners were majority shareholders they had control of the company

and were able to put an end to the unfairly prejudicial conduct complained of. Previous conduct and remedy was considered at first instance by Peter Goldsmith QC sitting as a Deputy High Court Judge:

> "The alternative way in which the petitioners put their case is in respect of the previous conduct of the respondent. I can deal more shortly with that aspect of the case. It depends wholly on the conduct of the respondent whilst he was a director and employee. The petitioners have been able to exercise their own remedy in relation to those matters by bringing his employment to an end and producing his resignation as a director. Whilst it is possible (if generally unlikely) that serious mis-management could constitute unfair prejudice (see *Re Elgindata Ltd* [1991] BCLC 959 at 993) I consider the prospects that the court would consider it appropriate to require him to sell his shares against his will when the petitioners had already remedied the particular mischief so remote that neither the respondent nor the company should be required to proceed with this petition. In this respect, I have been influenced by the cases where the courts have declined to act when the wrong has been remedied (eg *Re Estate Acquisition & Development Ltd* [1995] BCC 338 at 352; *Re Baltic Real Estate Ltd (No 2)*). That seems to follow from the fact that s 461 empowers the court to give relief 'in respect of the matters complained of' so that it would be highly unlikely that the court would consider it right to give relief where the conduct complained of had already been relieved."

90. And on the issue of relief from the prospect of future unfair prejudice after finding past unfair prejudice, the Court of Appeal in *Re Legal Costs* (at page 196) said:

> "Mr Collings stressed the width of the jurisdiction and of the relief which may be granted. That is of course correct, but that is not to say that there are no limitations observable in the statutory language. Thus like the judge I too would lay emphasis on the need to show that it is the affairs of the company which are being or have been conducted in an unfairly prejudicial manner or that it is an act or omission of the company that is or would be so prejudicial. The conduct of a member of his own affairs, for example by requesting a general meeting of the company or seeking answers to an excessive number of questions, is irrelevant. Further, I would emphasise the limit imposed by statute on the relief which may be given under s 461, viz the order is for giving relief in respect of the matters complained of. As Oliver LJ said in *Re Bird Precision Bellows Ltd* [1985] BCLC 493 at 500, [1986] Ch 658 at 669, the very wide discretion conferred on the court to do what it considered fair and equitable is –
>
> "in order to put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders of the company ..."

91. The Court of Appeal went on to observe that "If the matters complained of have been put right and cured and cannot recur, it is hard to see how the court could properly give relief. Thus, in *Re Estate Acquisition & Development Ltd* [1995] BCC 338 at 352 Ferris J pointed out that where the matter complained of is the failure to provide information to a member, the subsequent provision of information must be a material consideration—

> "if only because the natural remedy for a failure to provide information is an order that the information be provided and there can be no purpose in making

such an order when the information has in fact been provided before the order is made.""

92. And later on "I do not disagree, provided that what Vinelott J (in *Re Kenyon Swansea Limited*) said is understood in context….In other words, Vinelott J's remarks were made in the context that what had happened in the past may recur. If the remedying of the unfairness was carried out in such a way that the objectionable conduct could not recur, then there is no scope for giving relief under s 461 in respect of the matters complained of. In the present case the judge properly had regard to whether realistically there was scope for relief. In my judgment he rightly concluded that there was no realistic prospect of the court ordering Mr Hateley to sell his shares."

93. As will be observed from this passage the Court of Appeal agreed with the approach taken by Mr Justice Vinelott's and in particular that he was entitled to look at the realities of the situation to determine whether there was scope for relief. I should point out that *Re Kenyon Swansea Limited* was a strike out case. I do not see why at trial the Court should be disabled from looking at the reality. I shall adopt the same approach looking at the reality of the situation when I consider whether there is scope for relief now Fiona is a registered shareholder, has been paid dividends and there is an open offer to change the New Articles.as to prevent her from inheriting the shares once owned by Mark or being able to devolve the shares upon another are in reality more likely than not to reoccur. at the date of the petition the unfairness has been remedied

94. Lastly the petition relies on breaches of directors' duties in respect of the Transfer. In particular it is said that a director is obliged to:

i) act within his powers and to exercise those powers for a proper purpose pursuant to section 171 of the Companies Act 2006;

ii) promote the success of the company for the benefit of its members as a whole pursuant to section 172 of the Companies Act 2006;

iii) exercise reasonable care, skill and diligence, pursuant to section 174 of the Companies Act 2006; and

iv) avoid placing himself in a position of conflicting personal interests, pursuant to section 175 of the Companies Act 2006.

95. There is no argument that these are duties owed by a director of a company.

Company Resolutions

96. A factor that is important to the outcome of the Transfer issue is the validity or invalidity of any resolutions that are said to have taken place during the time Mark was in control of the business. Resolutions were governed by Part 11 of the Companies Act 1985. Since the implementation of the Act resolutions are governed by the mandatory terms of Part 13. That is, the provisions are mandatary unless a contrary provision is contained in a company's articles. It was recognised before implementing the Act that private companies prefer to take decisions by way of written resolutions rather than in general meetings. With this in mind, the Act provides that a resolution of the members (or of a class of members) of a private company must be passed either as a written resolution in accordance with Pt 13 Ch 2 (ss 288–300), or at a meeting of the members to which the provisions of Pt 13 Ch 3 (ss 301–335) apply. It is common ground that there is nothing in the articles of association that override the requirement to hold a meeting or that a

resolution should not be in writing. In this case Ken, June and Debbie contend that they had continuous meetings and discussed all manner of things concerning the business agreeing on a particular course. They can give no evidence of a specific meeting. They rely on the informal unanimous assent rule which provides that a formal general meeting or written resolution is unnecessary if all the members entitled to vote on the matter, informally assent to the transaction. The rule is that it does not matter if the assent is conveyed simultaneously at a meeting or is given at different times. It may be effective as an extraordinary or special resolution: *Cane v Jones* [1980] 1 WLR 1451.

97. The informal assent rule was considered recently and in detail by Neuberger J in *EIC Services Limited v Stephen Phipps & ors* [2003] EWHC 1507. The Judge was asked to determine whether bonus shares made by the Company on 15 December 1999 were valid. Master Moncaster ordered the trial of preliminary issues. The Judge, in determining those preliminary issues, held that a large number of the bonus shares were allotted to shareholders whose shares were not paid up and that the issue of the bonus shares, including the capitalisation of the share premium account for the issue, was not authorised by an ordinary resolution of the Company, as it should have been, or otherwise effectively authorised by members of the Company. However, he also held that, despite those defects, apart from s. 35A (1) of the Companies Act 1985 ("the 1985 Act") the bonus shares were validly issued. During the course of a long judgment that covered other issues (which were appealed) he observed:

> "This principle, on which the first and second defendants rely, is named after *Re Duomatic Ltd* [1969] 2 Ch 365 , and it has been expressed in slightly different ways in different cases. In *Duomatic* itself, Buckley J said at p.373:

'[W]here it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.'

In *Parker & Cooper Ltd v Reading* [1926] Ch 975, the principle was expressed in these terms by Astbury J at p.984: 956

'[W]here the transaction is intra vires and honest … it cannot be upset if the assent of all the corporators is given to it. I do not think it matters in the least whether that assent is given at different times or simultaneously.'

More recently Meagher JA in *Herman v Simon* (1990) 8 ACLC 1094 at p.1096 described the principle as:

'a doctrine that formalities may be disregarded if they have been waived by all shareholders acting in concert who want the same substantial result.'

Although the principle has been characterised in somewhat different ways in different cases, I do not consider that that is because its nature or extent is in doubt or the subject of debate. The difference in language is attributable to the fact that the principle will have been expressed by reference to the particular facts of the case. The essence of the *Duomatic* principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given

> in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppel, and whether members of the group give their consent in different ways at different times, does not matter."

98. Neuberger J was considering the doctrine from a temporal and mechanical perspective. Approval can be given before or after a transaction and maybe transmitted orally or by conduct. The informal unanimous assent rule is not without limitations. At paragraph 133 the Judge commented:

> "If a director of a company informs shareholders of an intended action (or a past action) on the part of the directors, in circumstances in which neither the directors nor the shareholders are aware that the consent of the shareholders is required to that action, I do not think it is right, at least without more, to conclude that the shareholders have assented to that action for *Duomatic* purposes. As a matter of both ordinary language and legal concept, it does not seem to me that, in such circumstances, it could be said that the shareholders have 'assent[ed]' to that action. The shareholders have simply been told about the action or intended action, on the basis that it is something which can be, and has been or will be, left to the directors to decide on, and no question of 'assent' arises. The word 'assent' is to be found in the passages I have cited from *Duomatic* and *Parker & Cooper*; the word used in the passage I have quoted from Herman is 'waiver': waiver classically requires the person who waives to have knowledge of the legal right which he is waiving: see *Peyman v Lanjani* [1985] Ch 457. Indeed, in Herman itself, just before the passage I have quoted, also at (1990) 8 ACLC 1094 at p.1096, Meagher JA described the Duomatic principle in these terms:

> 'where it can be shown that all shareholders having a right to attend and vote at a general meeting of a company assent with full knowledge and consent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.'

99. Neuberger J concluded that before the informal unanimous assent rule can be satisfied "the shareholders who are said to have assented or waived must have the appropriate or 'full' knowledge. If a shareholder is not even aware that his 'assent' is being sought to the matter, let alone that the obtaining of his consent is at least a significant factor in relation to the matter, he cannot, in my view, have the necessary 'full knowledge' to enable him to 'assent', quite apart from the fact that I do not think he can be said to 'assent' to the matter if he is merely told of it".

100. *Re Bailey, Hay & Co Ltd* [1971] 1 WLR 1357 is an example of a case where the Court found that there had been acquiescence, waiver or estoppel. A liquidator had been appointed at a general meeting and had acted as liquidator for four years before a challenge to his appointment was made on the basis that notice of the meeting was one day short and only two of five members had voted in favour of the appointment. The other three abstained. At pp.1366H–1367C, Brightman J said this:

> "Admittedly three of the five corporators did not vote in favour of the resolution, but they undoubtedly suffered it to be passed with knowledge of their power to stop it … What these corporators did and did not do [for the four years] points, in my view, to one conclusion only. The conclusion is that they outwardly accepted the resolution to wind up as decisively as if they had positively voted in favour of it. If corporators attend a meeting without protest,

> stand by without protest while their fellow-members purport to pass a resolution, permit all persons concerned to act for years on the basis that that resolution were duly passed and rule their own conduct on the basis that the resolution is an established fact, I think it is idle for them to contend that they did not assent to the purported resolution."

101. Finally on the issue of resolution, it is worth observing that it is possible for a company to ratify conduct by a director amounting to negligence, default, breach of duty or breach of trust in relation to the company if the decision to ratify such conduct is duly made by resolution of the members of the company, provided the shareholders have knowledge of the facts relating to the transaction to be ratified or the means of knowledge are available to them: *Bamford v Bamford* [1970] Ch 212, [1969] 1 All ER 969, CA which concerned the issue of shares.

Unfair Prejudice- a question of fact

102. In my judgment, when determining whether the Transfer was made pursuant an option or otherwise, and whether it was sanctioned in advance by members or later ratified, it is helpful, if not necessary, to reach a decision about Mark's role in the Company in the period 2007-2017. If the part Mark played is consistent with Fiona's account (he was subservient to Ken) there is a greater chance he did not know of the Transfer at the time, or later, as contested by Fiona. Further it will be more likely that upon discovering the Transfer Mark did not raise the issue with Ken, even though he is said to have been unhappy about the transaction.

103. I take first the third-party evidence. That is evidence from people who had experience of dealing with the Company and were not a family member. One such person was Mr

Harris. I have commented that Mr Harris gave impartial advice as a professional, and that his evidence was not undermined. This is particularly so in relation to who was "ultimately in charge" of the Company. His answer that Mark "was in total control" came from his experience of dealing with the Company. I have no hesitation in accepting his evidence. Earlier in this judgment I said that Mr Harris's evidence was corroborated by Mr Watson. Mr Watson actively engaged with the Company by attending the Property and helping with stock valuation. I have found that Mr Watson was a credible witness whose evidence was not materially undermined in cross-examination. I accept the evidence of Mr Watson in relation to Mark's involvement in the business and his dominant position in the Company. I accept his evidence that he had many years of interaction with Mark and "that in all the years that I met with the client to discuss the accounts Mark attended and indeed led the discussions in relation to estimating the value of stock. He never once appeared at all concerned about the amount of stock being recorded and agreed with the calculation of stock and work in progress". I accept his evidence that "looking back over the last 10 years accounts, the amount of stock being recorded has generally increased, from £39,000 to over £137,000. This would reflect the trend that the business was having to hold more stock, as its profit margins were being cut due to competition. As such, it had to hold more stock to sell at this reduced margin." This concerned Mark's knowledge and prominent position in dealing with the purchase of stock and accounting for stock at year end. I take the view that Fiona may have misunderstood what Mark was telling her, and as a result her memory was always false. Mark would have understood the importance of holding stock and the reason why more stock was held at that time.

104. On the issue of the Directors' Loan Account, I accept Mr Watson's evidence that Mark was fully aware and approved of its operation. Mr Watson was tested more generally

about Mark's role in the Company. In cross-examination he was asked "if something wanted to happen in the business and Ken wanted it to happen it would happen? The answer: "not necessarily, no." The inference I draw is that Mark had the last say, or at least Ken would be persuaded by Mark who had a greater knowledge and understanding of the business. Mr Watson's knowledge of the Weatherley family, from a third-party perspective was that they acted as one unit and trusted one another.

105. As a result of his dealings with the Company, its directors and shareholders over many years, his evidence in respect of the Transfer is persuasive. He accepted that he was not involved in the Transfer, but his evidence, which was not undermined was it was "extremely unlikely" that that Mark did not know about the "Property transfer until later in 2009, after it had occurred". When challenged about his view he responded in a straightforward way and honestly: "When you act for clients, one gets to know clients. My statement is made looking back, so this is what I thought. I don't know what happened, but how can anyone know, who was not there?" Both in his witness statement and in cross-examination Mr Watson reasoned that the Transfer was included in the 2009 Accounts "which explicitly recorded that "During the year the company sold its interest in freehold property at 135, North Cray Road, Sidcup to a director of the company K Weatherely for £200,000." Mark would have approved these accounts. I certainly do not recall (and think I would remember) Mark ever making any reference to the freehold property when discussing later financial years, when the Property was no longer included on the Company's balance sheet."

106. Mr Barnett is another third-party witness. In his experience it was Mark with whom this major supplier dealt, who made the decisions on the phone and without consulting Ken. As Mr Gill remains an employee of the Company, I lend less weight to his evidence.

His evidence is that he was hired by Mark, and he was always his manager: "Mark would manage all of the staff at the Company, and was definitely seen as the "boss" and in charge. What he said goes. I would say, as I'm sure others at the Company would agree, that although Mark was a strict manager, nothing happened in the business without him knowing it. That said, I do think it is because of this that the Company ran so smoothly". His evidence has the ring of truth and when taken as part of all the evidence heard over a period of 6 days, I conclude it is accurate. In cross-examination he reinforced his written evidence by clearly articulating his position "all my instructions to do with work- came from Mark" and "I would say that Ken is an important person in the business, but Mark could and would overrule him." Asked to give an example of Mark overruling Ken he remembered a repair to a sign above the green house. Mark had contradicted Ken and won the day.

107. Having focussed on the third-party evidence, as more possibly more reliable than the evidence given by family members, I mention briefly the evidence of Fiona, Ken and Debbie.

108. It is Fiona's evidence that Ken "maintained total control of the Company and all of the finances and strategic decisions." She maintained this position in cross-examination, but her evidence, I regret to say, was not always helpful, or sustainable. She was asked to accept that it was Mark who had the majority say when dealing with the stock and dealing with the accountant. She responded that it was not and that "Mark spoke with Ken about stock". I assume she was thinking, but did not articulate, that Mark deferred to Ken. She was then asked whether she was present when these conversations took place between Mark and Ken. Her response was "no I was not present". She was giving

evidence about an event or events that she had not witnessed and was unable to bridge the gap between what she thought had happened and she knew as a witness to events.

109. As regards Mark's handling of the finances, paying the bills and working with the accountants, Fiona was asked in cross-examination to identify Mark's hand writing on invoices and cheques. Once she did identify his writing, she was asked to notice what Mark had written down. He had written "paid", the figure and the cheque number. She was then asked, "it looks as if he has a system in place- write on the invoice, payment, when paid, cheque and the amount paid?" Answer: "yes he did." She accepted that he paid the monthly bills and produced monthly spending sheets and finally was asked "the reality is that Mark knew the entire financial position, didn't he?" The answer: "no, not entirely, Ken did…… Mark thought Ken was a liar, at times." The documentary evidence is that no-one else had the "system" that Mark introduced, and only Mark dealt with the records. Her response "not entirely" was disingenuous. Her response that "Mark thought Ken was a liar" had nothing to do with the question asked. In my judgment she found the questions asked of her difficult and established a tactic of saying something unconnected to reflect the cross-examination to a different area. Fiona would go on to use a similar tactic in response to many questions put to her. She would make an assertion to support her position and although it generally did not contradict the documentary evidence, was designed to give the impression that the documents could not be taken at face value. At that same time, perhaps recognising that she could not support her position, she introduced an entirely different theme "Mark thought Ken was a liar, at times" is one example. The tactic displayed her inability to answer challenging questions and contributes to my finding that her evidence was not reliable on important issues.

110. By stark contrast Debbie gave clear, unequivocal evidence supporting her position with explanations. When asked who was really in charge she explained: "Dad is a manual-working gentlemen, and Mark could do most things. He did the paper work and that is how we work as a family." She was pressed in cross-examination: "Ken was the ultimate boss, if Ken didn't want something to happen it wouldn't happen would it?" Her answer was short, was to the point and contradicted the proposition put to her. She said emphatically: "if Mark wanted it to happen it would happen".

111. Ken was in no doubt who was in control and his evidence was given with some pride about his son's achievements. He considered the business "my business" but it was a "family company" and "Mark was the key man, I will be lost without him. He did everything.". He was asked a hypothetical question. If Mark had held the view that the Property should be sold to Asprey, would you have overridden him? It didn't take long for Ken to answer: "if my son said we should have sold we would have sold, and we would have done what we could have done."

112. The evidence, in my judgment, from third-parties (as I have described them), and family members, assisted by the contemporaneous documentary evidence, is overwhelmingly in favour of a finding that Mark was not only in day to day control of the Company but knew its business more intimately than any other director or shareholder, was more involved with suppliers, accountants and lawyers and more in control (if not solely in control) of the corporate governance. Debbie gave two examples of his dominant control, which I accept as true. First, in March 2015 Mark wanted to purchase 2 new vans "at a costs of around £50,000 my dad was not keen on the idea but Mark went ahead and did it anyway. I think that whilst my dad wasn't that happy that Mark didn't take his opinion on board, ultimately, he knew that Mark had the Company's best

interests at heart". Secondly, her evidence about Mark's ambition for the Company and that he was the "driving force" was not undermined in cross-examination. She said:

> "Mark was ambitious and had secured good relationships with schools and local authorities such as the London Boroughs of Bexley and Lewisham. Part of his job was to provide quotations for those large-scale works. These were big contracts, but my dad did not get involved in such things and left it to Mark to manage. I don't think that my dad ever imagined the Company could grow to be as big as it was, he would have been happy with the Company staying smaller, as long as it was ticking over. Mark was the driving force."

113. The term "driving force" suggests more than day to day management. Indeed, Debbie's account of Mark's position in the Company and his control of the corporate governance, making not just the day to day decisions, but the major and strategic decisions is in some respects supported by Fiona's own evidence that "Mark was totally devoted to the Company and worked extremely hard". His devotion and hard work, in my judgment, was in part reflective of his "driving force" behind the Company, and his true position as managing-director even though he was not called "managing-director". I do not doubt that he was not only happy to consult Ken, June and Debbie but wished to do so from time to time, but this does not detract from his position in the Company.

114. Although he was bound to consult Ken about the sale of the Property as Ken was a 50% owner, the evidence supports the view that Ken left all negotiations and communications with the developer to Mark. This is indicative of both Ken's trust in Mark and Mark's position as managing-director of the Company. The potential sale of the Property would have been of great importance to the family, the business and Ken. In my judgment, these matters together with the totality of the evidence demonstrates

that on the balance of probabilities it was Mark and not Ken who was the dominant manager in the Company. The term I have used above, managing-director, is apposite.

The Transfer

115. Having determined that Mark's role in the Company was, on the balance of probabilities, dominant, and perhaps more akin to a managing-director, it is more likely than not that he knew of the Transfer both before and after January 2009. Fiona's evidence is that she first became aware of the Transfer from a conversation with Mark in late 2009. She says that Mark questioned his father and that Mark "expressed how unhappy he was about removing the Company's main asset". Her evidence is that Mark had tried to discuss the issue with Ken, and Ken would not engage: "I am aware that Mark complained to Ken several times over the years about the transfer." The lack of knowledge or assent from Mark and the other members is said to be bolstered by three factors namely 1) Mr Rudd only dealt with Ken in respect of the Transfer, 2) the TR1 was signed on behalf of the Company by Ken and June in their capacities as director and company secretary respectively and 3) there is no minute or note evincing Ken having declared his interest in the proposed Transfer at a meeting of directors in advance of the Transfer or that consent from members had been secured.

116. Ken's position is that this allegation does not amount to unfair conduct. When the Property was purchased in 1989, he and June were the only directors and shareholders of the Company. Ken wanted to purchase the Property in cash but only had sufficient cash funds for 50% of the asking price. He approached the bank to lend 50%. The Property would not be used as Ken and June's home, but would be used for the business as it had a yard that could be used for storage. According to Ken the bank insisted that the Company be a 50% owner. I have asked to see the loan documentation, but it is not

available. It is reasonable to assume that the bank wanted to secure its borrowing against the Company as occupier. The assumption is not critical to my findings but may assist in understanding why the Property was purchased in joint names of Ken and the Company. Ken's position is that he or they would seek to pay off the lending and he would have the option to purchase the Company's interest in the Property at a later date, and at the 1989 purchase price.

117. It is accepted that an option was not reduced to writing. The option may have been oral (having been agreed prior to the coming into force of the 1989 Law of Property Act (Miscellaneous Provisions) Act) making it a binding agreement but not enforceable. In my judgment the evidence supports the contention that there was at least an intention known to the Company, its directors and shareholders that Ken's desire to purchase the Company's interest would be available in the way he explains. The Company acquired the Property knowing of the intention, and held it subject to the intention. Whether or not the intention amounts to an option is not the most important thing, but it has been termed an option. On that basis the Company took its interest subject to the option, and it would have been unconscionable for the Company to deny Ken. June explains in her written evidence:

> "Ken would have the option to buy the Company's half share back from the Company at a later date for £200,000 that it was contributing. That was fair: we wanted Ken to own the Property himself to give us security if anything ever happened to the business. Ken and I have always been very open with Mark and Debbie about our finances, and Mark and Debbie knew about this agreement. We are a small family business, and would have never thought to

> have the agreement formalised or written down as between ourselves we trusted one another."

118. They did not know at the time if house prices would increase or decrease, and did not know that there was any prospect that the Property, situated as it was in green belt, would be suitable for other uses. No evidence was led as to whether Ken considered other uses as a remote possibility in 1989. In accordance with the Company's practice, described by June, nothing was reduced to writing. There was a simple agreement between the directors and shareholders that this would be the course they would follow.

119. Ken's evidence is that the finances of the Company were discussed with Mark and Debbie and their assent was sought and required even though, at the time, Debbie was not a director or shareholder. They discussed and agreed on everything to do with personal and business affairs. Their discussions informed, and their approvals given. The discussions and approvals are a reflection of the tight family unit. They also reflect the fact that Debbie and Mark were fully engaged in the Company. As Ken held 50% of the Property and the Company was in occupation he and June decided, with the approval of Debbie and Mark, that the Company could pay the mortgage rather than a rent to Ken. To pay a rent would be circular as Ken would have used the rent to pay the mortgage. The Transfer in 2009, although coming soon after the collapsed negotiations with Asprey Homes, was a direct result of the Company's trading at the time. Ken thought it best to shelter the Property from trading fluctuations, and that this was best done by carrying out the agreed option, or original intention that the Property would be transferred at a time after the lending bank no longer held security. His unequivocal evidence is that the Transfer "was discussed and approved by all of Mark, Debra, June and myself prior to the execution of the TR1 transfer form in January 2009. As I say

we are a close family, with a large number of shared assets, who trust one another with our business affairs. I have never had any reason to hide my business affairs from June, and Mark knew our and the Company's business better than I did. June, Mark and Debra all agreed..…"

120. In her evidence Debbie summarised the purchase of the Property and Transfer this way:

> "….after the proposed sale had fallen through, dad explained to Mark, mum and me that he wanted to buy back the Property from the Company in accordance with the agreement that him and my mum had made when the Property was originally purchased in 1989. I think my dad wanted the additional security, particularly given the general economic downturn which was affecting the Company at that time. Although it was a long time ago I do distinctly recall a discussion in the office around this. It seemed to me that my dad and Mark had already discussed the transfer together before my dad spoke to the four of us. In my mind (and Mark and mum's also) there was no doubt that the Property was rightfully Dad's, such that we were all happy for Dad to do this. He had put his life into the Company, and given both Mark and I not only our shares in the Company for free but also various rental properties that he and mum had paid for. Mark and I were always respectful of that, and neither Mark or I opposed this."

121. I have said that Debbie gave impressive evidence and appeared to have a clear memory. I accept the evidence that Debbie recalls the meeting in the office. I infer from this that "happy to do this" has its equivalence in "consent". The reference to the Property being "rightfully Dad's" is in my view a reference to an intention, known to all, that Ken could and would, if he wanted, purchase the Company's interest at a future date for the

same sum that the Company purchased its interest in 1989 as a result of Ken's efforts. She gave evidence that helped explain her and Mark's attitude to the Transfer:

> "It is perhaps worth explaining that, from mine and Mark's perspective, this was not a particularly big deal or an important shift as the Property was not leaving the family. Our family, that is my mum, dad, Mark and I, operated our shared assets closely and informally on relationships based upon trust. As I have already referred to above, my mum and dad had already contributed the entirety of the purchase price of five properties purchased between 1989 and 2001, registering them in mine and Mark's names (the "Trust Properties") to provide security for ourselves."

122. In cross-examination it was put to Debbie, "none of this happened did it?" she replied, "yes it all took place and there was a discussion as I said". I accept her tested evidence. During cross-examination Debbie corrected part of her written evidence that spoke to an understanding that Ken would have an option to purchase the Company's share. She said, "I don't know why I used the word "understanding" I meant "agreement". I accept her evidence.

123. Further circumstantial evidence supports Mark's knowledge and consent. In my judgment it is unlikely to be a coincidence that Mark invited Halifax Estate Agents to value the Property soon after the Asprey Homes had written on 11 June 2008 saying that the Property may have a value of £500,000 without planning. Neither was it a coincidence that he chased the return of papers from Asprey Homes on 17 September 2008. When considered against the factual background, it is more likely that not that these steps were taken due to discussions with Ken and June about the exercise of the option. By taking the actions he took Mark was conducting himself in such a way as to

demonstrate informed assent. Bolstering this is Debbie's evidence that Ken and June informed Mark that they had signed the TR1 when they were together in the office and Mark and she agreed that "it was fine". She says that she never once heard Mark complain. Her evidence was credible.

124. Documentary evidence supporting Mark's knowledge and consent (and lack of complaint to other shareholders) comes in the form of the cheque written by Mark, and upon which Fiona was cross-examined. I have found that on the balance of probabilities Mark had control of the finances and he did sign the cheque. As he wrote, signed and sent the cheques, he will have had knowledge of the Transfer. As Mark was in the position of managing-director I find that he would have known of the Transfer before and immediately after by reason of his office.

125. He was aware of the accounts; he approved the 2009 accounts and the accounts for subsequent years. Contrary to Fiona's position there is no evidence that Mark complained about the Transfer to June, Ken or Debbie. There is no evidence that he complained to Mr Rudd, Mr Harris or Mr Watson. I accept Mr Watson's evidence that it is "extremely" unlikely that Mark did not know of the Transfer prior to and at the time. For a man who has been described as strong-headed and wrote hard hitting memos to staff and others, there is an absence of memorandum setting out his purported complaints. It is more likely than not, that Fiona had confused what she remembered as a complaint for something else. Mark may have mentioned that as the asset was no longer on the balance sheet, credit may be more difficult to obtain. However, there is no evidence that credit was in fact more difficult to obtain. The evidence of an important supplier, Mr Barnett, does not allude to credit issues.

126. In my judgment the evidence of the family who were present at the time of the original purchase, prior to and after the Transfer is to be preferred. Fiona has no direct knowledge of the events. I find that Mark, Debbie, June and Ken were more likely than not to have known about the intended Transfer, knew of the effect on the Company of transferring the 50% interest in the Property from the Company into the hands of Ken, knew of the price of the Transfer, knew how the price would be paid, knew about the Asprey Homes offer, agreed to the Transfer prior to January 2009, knew of the Transfer immediately or soon after it had been made and did not demur by conduct or complaint after the event. The circumstances of the Transfer, the part Mark played in the Transfer and his knowledge after the Transfer are sufficient, in my judgment, to find that, in any event, he acquiesced.

127. I have found that there was unanimous agreement prior to the Transfer and doubt whether it matters if the assent was given at one meeting or given at different times. In any event, I accept the evidence of Debbie and find that on the balance of probabilities there was at least one meeting prior to the Transfer where informed assent was given by Mark, June and Debbie, even though Debbie was not required to give assent at the time.

128. If I am wrong as to that, it has not been argued that ratification of the Transfer is beyond the powers conferred by statute. I find that there is sufficient evidence which can be found in my findings of fact, to support ratification by conduct after the date of the Transfer.

129. As for the consideration paid for the Company's interest, it has been pleaded that Ken should prove the £200,000 was paid. By closing, the issue was not advanced with force, but for the sake of completeness I find the evidence given by Mr Watson compelling.

He had reconstructed the accounts to persuasively show that Ken had paid the Company £200,000 reducing the sums owed to him by the Company. The consideration was an accounting exercise by which Ken suffered a loss of £200,000 on his directors' loan account.

130. In summary, the Company is a small family company run for the principle benefit of Ken, June, Mark and Debbie. They did not reduce resolutions made to writing. They held meetings by sitting around the kitchen table drinking coffee or in the office. They openly discussed all their finances between them but were jealous not to permit anyone outside of the four to know their financial dealings. It would not have occurred to Ken to inform the solicitor that there had been an intention or option to purchase the Property when the security had been paid. The intention was not limited by a time frame and was optional. In the light of their common understanding as to how the Company business was run, how decisions were made and how resolutions were passed, despite any terms of the articles of association, it would not be correct to characterise the resolution passed that Ken purchase the Company's interest in the Property as unfair. It would not be right to characterise the Transfer, when there had been informed informal consent by all shareholders, as unfair between them and a member. The petition relies on the same facts to allege breaches of directors' duties in respect of the Transfer. In light of the consent the allege breaches do not succeed.

Fundamental understanding and exclusion

131. The petition claims that there was a fundamental understanding and that the understanding was the basis upon which the Company would be run. The Respondents do not disagree that the Company was run on the basis that it was to benefit members of the family and that ownership of the shares should stay within the family in the

expectation that new generations would be interested in the business and take ownership. Debbie did not disagree, in cross-examination that this would mean that Mark's heirs would benefit from a shareholding, and so would her heirs. Fiona's case is that the fundamental understanding spread to include benefits. Each member of the family and their children would be covered by the Company's private medical insurance policy. In his evidence Ken said that the understanding was not fundamental, it was more of a hope that a new generation would come along and be interested in the family business and demonstrate that they could work hard and be committed. He expected, and according to Ken, so did Mark, every worker to be hard working. If there was a fundamental understanding it was that the Company was run for the benefit of Mark, Debbie, Ken and June only. It is agreed that any member of the family would be given the opportunity to work. That was subject to Ken and Mark's strongly held belief that a living should not be gift but earned.

132. In my judgment the understanding that shares could be passed down each side of the family is borne out by the permissibility of a shareholder to bequeath their shares in their last will. There is a difference between the shares held by Mark and Debbie being capable of transmission by will to their family and an agreement compelling Ken and June to pass their shares equally to Mark and Debbie's family. There is no evidence of such an agreement. If there was such an expectation, it was subject to the condition that the person would have to "win their spurs".

133. In my judgment there is no fundamental understanding that each family member would have the benefit of private medical insurance. During the trial I asked to see the insurance certificate. It was plain that the insurance policy covered only employees of the Company and their family. I conclude that medical insurance is a benefit in kind

provided by the Company to its employees who were shareholders and directors. There is no basis to find that there was an understanding that the benefits in kind would extend further afield. Similarly, there is evidence, supported by Ken and Debbie, that members of the family should have an opportunity to work for the Company.

134. In my judgment Fiona has observed that Mark, Debbie and Peter Roscoe had all worked for the Company, that she had worked for the Company and Aaron had been willing and wanted to work for the Company. From this observation she concluded that there was an understanding that every family member could work for the Company regardless of their abilities or skills. There is no other evidence to base this assertion, and it does not withstand being tested. There is a difference between an opportunity and a right to work for the Company regardless of competence or skill set (or lack of skill set). There was no evidence to support that a family member would be guaranteed a job at the Company. I accept Ken's position that an opportunity would be given if a member of the family was keen to work for the Company. If the opportunity was squandered or if the family member failed to show commitment and hard work, there was and remains no certainty that the Company would or will retain their services. His evidence is supported to some extent by the present situation in that Debbie's son Daniel, who works for the Company. This can be contrasted with Aaron, who was (and I understand may again be) given an opportunity. It is also supported by Debbie's evidence. When asked in cross-examination whether an opportunity would be given to Fiona, Debbie responded "yes including Fiona and definitely the children. There wouldn't have been a problem if Fiona wanted, wanted to work as everyone else did and took a role".

135. Although it has been claimed that Fiona was in charge of advertising, the Company's website, pricing lists and energy contracts, her live evidence did not support her pleaded

position of being in "charge". This is because she acknowledged that she worked part-time for Mark, at times she could not attend the office at all due to her son's ill-health which had a long history, and that the nature of her role was as a "part-time" secretary or PA to Mark. In my judgment it is more likely than not that Fiona did deal with the website, pricing lists, visit the bank and deal with some of the energy contracts, but those dealings were as agent of Mark, and were on the instructions of and under the supervision of Mark. Evidence from other family members was that Fiona worked "ad-hoc" or "turned-up as she pleased". The ad-hoc arrangement is supported by the hours recorded in a calendar for the purpose of her pay. This disclosed that she worked a handful of days each month. In my judgment, her role at the Company during Mark's lifetime was symbiotic of Mark's role, who worked as managing-director. She acted as a second pair of hands for Mark, giving him more time to deal with pressing matters. I have no doubt that the arrangement worked well. However, after he passed away so did her role as his PA. In the two months June and July the Company was finding its way and trying to cope with the loss of its managing-director. Likewise, Fiona was perhaps seeking to stay busy and cope with her obvious and deep personal loss. Debbie and Ken wanted to give her an opportunity. It is during this period that Fiona is alleged to have shredded Company documents, made secret recordings, worked beyond her permitted boundaries and was disruptive. The opportunity was taken and lost. Trust between the parties completely broke down.

136. There was no written contract of employment during the days of Mark, and no new contract of employment was entered in June or July. The terms of employment may be derived from conduct. I have little doubt that there would be an implied term of mutual trust and confidence. I do not need to concern myself in this judgment as to whether there was unfair dismissal. I shall restrict my findings to whether there was a break-

down of mutual trust and confidence and whether the circumstances are such as to render Fiona's loss of work unfair and prejudicial as member. In order to do so I shall highlight two matters. First the secret recordings and second the allegation about shredding.

137. Fiona not only admits to making secret recordings in June and July but has relied upon them during the course of these proceedings. Her explanation for making the recordings and how she went about making the recordings was unsatisfactory. She gave evidence that she would turn on her phone randomly if she guessed that Ken (and it was mostly Ken) was about to say something "interesting". I take the use of that word to mean "revealing". She said that if a conversation began which she categorised as interesting, she would "nip to the loo" or "go and put the kettle on" and at the same time switch on her phone. The recordings do not evince a break in conversation consistent with a departure and return to the conversation. She did admit to switching on her phone covertly at times. In cross-examination, it was put to Fiona that she was trying to "set Ken up" and that she had conveniently selected the passages of recordings that she thought were helpful to her. The cross-examination was as follows:

"Q. its obvious you selected passages, isn't it?

A. No its not.

Q. You selected passages within the recordings

A. No it was just because, I was turning it on and off. I was very concerned. I could not remember things, I wanted to make sure I got everything right. One day I thought I would record conversations. I felt vulnerable. If my husband did not trust Ken I was concerned. I only put it on when I thought it worth recording.

Q look at this recording, divider 237, its clear isn't it you were trying to set Ken up?

A no

Q explain the recording page 88/89 ["but Ken, you've blatantly lied to me and incited me to lie to the Inland Revenue, haven't you? When you say over there that day and I asked you what about- is there anything I need to know for probate um…]

A. On this occasion I fully knew where the conversation was going and recorded it. I was terrified that the tax office would not be told the truth."

138. In my judgment there was no justification for making secret recordings of this nature and no justification for leading a conversation in an attempt to obtain an admission from a company director that he had lied to an employee or family member. The excuse used by Fiona that she "was terrified" of failing to make full disclosure to HMRC has not been made out, but even if she felt terror, her actions were not justified. Her terror was better allayed through work co-operation rather than attrition. Her actions were not justified. I agree with Mr Lynch, she was seeking to "set Ken-up". In my judgment her actions were sufficient to breach any implied term of trust and confidence and is illustrative of other complaints made at a highly emotional time for all family members. Her conduct demonstrably destroyed or made a large contribution towards destroying, the relationship.

139. In respect of the complaint made against Fiona that she had shredded company documents and moved documents around the office making them difficult to find, I find the allegation made out. I accept the evidence of Debbie that she was watching the CCTV from home and noticed that Fiona was in the office shredding documents. I accept the evidence of Peter which is consistent with Debbie's evidence that when he

got to the office, cupboards of documents were missing but the shredder was full. He said that the shredder was never full. This compares with the evidence of Fiona that she only ever shredded debit or credit card receipts. In my judgment the amount of material shredded is inconsistent with Fiona's account. If trust and confidence had not completely broken down as a result of covert recordings and trying to "set Ken-up", shredding company documents will have ensured the relationship had broken down.

140. As regards Aaron I have found that Ken is likely to have been right that he could not employ Aaron full-time at the age of 16. In the course of the trial Ken has made an open offer to employ Aaron on terms that he would continue in part-time education. Ken spoke warmly of Aaron and it became clear that although Ken was right about the status of Aaron's employment, Aaron had become a victim of the break-down of trust and confidence between Fiona and the Company.

Remedy anticipated future unfairness

141. I have little doubt that the introduction of the New Articles in October 2017 with the intention of exercising a discretion not to register Fiona as shareholder was unfairly prejudicial. The position as at the end of trial was that there had been an open offer to change the New Articles to reflect the original articles in respect of the right to bequeath shares to family members. Fiona has not, to my knowledge, accepted the offer. Fiona has now been registered as shareholder.

142. The argument advanced by Fiona is that unfairness may reoccur, and the unfairness may be prejudicial. In so far as the argument has relied on Fiona and Aaron's exclusion it must fail on the facts as I have found. I have found that there was no fundamental understanding that every family member would be guaranteed employment at the

Company. There was an understanding that an opportunity would be given. I have found that Fiona was instrumental in the break-down in trust and confidence and author of her own misfortune.

143. In respect of dividends it was the Company policy not to pay dividends in cash. Dividends would be declared and then set off against a directors' loan account or expense account. If Mark were alive, he would not have received dividends. Once the shares were transferred to Fiona the issue of declaring and paying dividends was reconsidered. Mark had a positive balance on his account. As a result the dividend was paid out to Fiona shortly before trial. Ken's evidence on the issue was:

> "I understand that the petition alleges that the Company failed to pay Mark its declared dividends. As the evidence from the accountants shows this is incorrect: none of the Directors have ever directly received any of these funds declared- the figures have instead been added to their director's loan account. I was previously of the understanding that Mark's director's loan account was not in credit however I have since, during the course of preparing this evidence, been shown a spreadsheet prepared by our accountants showing a positive balance of £29,972.04. I need to consider this further given that the Company has a counterclaim against Mark/Fiona for the value of the Range Rover (at £44,000) but if any of the funds are owed by the Company to Mark, then we will pay them out."

144. There is no reason to distrust this evidence. In order to grant a remedy, the Court needs to be satisfied that there is a likelihood that (i) Fiona will be deregistered as shareholder or (ii) that the New Articles will be changed in some other way that will be detrimental to Fiona or (iii) that she will not receive future dividends.

145. I take into account the fact that dividends have now been paid to Fiona and Ken's positive assertion that any balance on the account will be paid to her. Although Ken did not like the idea of a shareholder standing idle while collecting money, he also gave evidence that he had no issue with Fiona receiving what is due. There has been an offer to change the New Articles. The offer will put Fiona back into the position Mark had been in before he died. There is no basis to find that it is more likely than not that Fiona, now registered as shareholder will be deregistered. If the Company by its directors and majority shareholders would take such action, she would have available an obvious and clear remedy; particularly in light of this judgment. I accept the position taken by the Respondents that Fiona will receive what she is due in the future. In my judgment, on the evidence I have seen and heard, the probability of unfair prejudicial conduct in respect of the matters complained of, in the future is too minimal to grant relief.

146. Mr Knott has urged the Court to take account of the acts of unfair prejudice that have gone before and conclude they are likely to re-occur or occur in a different form. In *Re Legal Costs Negotiators Ltd*, the Court of Appeal explained that the court is concerned with remedies for future only in respect of the matters complained of. In any event it has not been suggested what a different form would look like. In my judgment the conduct complained of occurred in very special circumstances. The petition arises from events that took place at a tumultuous time for the Company and the individuals involved. Each were adjusting to a new reality. I have no doubt that feelings run deep, but that is no basis to conclude that it is more likely than not that unfair prejudice will arise in respect of a minority shareholder in the future, in respect of the matters complained of, whether in the same form of prejudice or unfairness or a different form.

147. I take into account the reality of the situation. An open offer has been made to purchase Fiona's shareholding. Ken, June and Debbie wish to purchase the shares and Fiona has expressed a wish to sell the shares and have a "clean break". The parties have not, prior to this hearing, been able to settle on a value for the shares. This judgment will enable a value to be ascertained. I have not decided the year of valuation because the Court is not making an order for share purchase. This will be a matter of negotiation between the parties. Subject to this negotiation, there should be no bar to realising the petitioner's and respondents' wishes. I also take account of the open offer made during the trial that the respondents will rectify any unfairly prejudicial acts or omissions found to be made out. As Oliver L.J. has said a wide discretion is given to the Court, "to put right and cure for the future the unfair prejudice which the petitioner has suffered". In my view an order protecting the interests of Fiona as member from the consequences of unfair conduct which has been remedied, and where there is a nominal, if not zero risk that it may again be proposed is not warranted on the facts.

Conclusion

148. In conclusion, and for the reasons I have given, Fiona did not suffer unfairness as a result of the Transfer. I find that Fiona was instrumental in the break down in trust and confidence in relation to any employment rights she may have had after Mark died. Her position as his PA or secretary was not sustainable and the Company sought to accommodate her by permitting her to work during June and July. They did this in accordance with an understanding that family members would be given an opportunity to work for the Company. She had an opportunity but set out to undermine Ken accusing him of lying to her, and on one occasion at least attempting to "set Ken up" by making secret recordings. I also found that she shredded Company documents without

authorisation. Such actions are inconsistent with the understanding held by shareholders and directors of the Company regarding a person's opportunity to work and prove themselves as hard working and committed. These actions led to a break down in trust and confidence. Her position at the Company was made untenable by her own actions.

149. All the relevant members gave their informed assent to the Transfer. If I am wrong as to that there was consent by conduct. I have no hesitation in finding Mark knew and consented contrary to Fiona's case. At the very least he had full knowledge and stood by without protest. There is little or no likelihood on the evidence that there will be repeat of the unfairly prejudicial conduct claimed by Fiona during a tumultuous time for all parties to this petition and a nominal or no risk of ongoing unfair prejudice of the type complained of. Fiona has been made a shareholder of the Company, she has received dividends and there has been an open offer to re-instate Aaron as a part-time employee and rectify, in so far as it is required, the New Articles.

150. I shall dismiss the petition.