Neutral Citation Number: [2022] EWHC 1751 (Ch)

Case No: CR-2020-BHM-000447

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
COMPANIES AND INSOLVENCY LIST

Birmingham Civil and Family Justice Centre
33 Bull St, Birmingham B4 6DS

Date: 11th July 2022

Before :

Mr Recorder Adrian Jack
(sitting as a High Court Judge)

IN THE MATTER OF INTERNATIONAL AUTOMOTIVE ENGINEERING PROJECTS LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

BETWEEN:

(1) KEVIN GEOFFREY DODSON
(2) MURRY DODSON

Petitioners

and

(1) CHRISTOPHER RICHARD SHIELD
(2) CHARLES CATTANEO
(3) DAVID KEITH COTTERILL
(4) ALAN DAVID COTTERILL
(5) NEIL JOHN COLLINS
(6) NICHOLAS HARMAN COULBORN
(7) JOHN WILLIAM ROCK
(8) INTERNATIONAL AUTOMOTIVE ENGINEERING PROJECTS LIMITED

Respondents

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- -

Avtar Khangure QC (instructed by **Trowers & Hamlin LLP**) for the Petitioners
Stephen Reed and Lois Norris (instructed by **Shakespeare Martineau**) for the First to Seventh Respondents
The Eighth Respondent did not appear and was not represented.

Hearing dates: 9th to 13th, 16th, 17th and 24th May 2022

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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.

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for handdown is deemed to be 10am on 11th July 2022.

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Mr Recorder Adrian Jack sitting as a Judge of the High Court

1. This is a petition brought under section 994(1) of the Companies Act 2006 by two shareholders for unfair prejudice. The company, International Automotive Engineering Projects Ltd ("IAEP"), the eighth respondent, was incorporated on 26th September 2012 with a share capital of £2,106. The business of IAEP was defined in a shareholders' agreement of 2nd October 2012 as "the design, sale and implementation of turnkey automotive engineering projects on an international basis". The initial project (and the only project which was ever pursued) concerned the six manufacturing lines used by Bayrische Motoren Werke AG ("BMW"), the well-known German automobile company, to manufacture its NG4 engine used in the BMW 3 series, 1 series and Mini motor cars. IAEP intended to acquire the six lines and install them at a buyer's premises. The "turnkey" element of the project was that IAEP would ensure that the buyer could commence the manufacture of motor car engines immediately after installation was complete.

2. Each line consists of a large number of interlinked machines. A line can be 170 metres long with as many as 63 "stations" or machines on it. Storage of lines, once they were removed from the premises where they had been in use, required tens of thousands of square feet of warehousing. Machines are all operated by computer software. Some machines are specially designed for a particular engine; others are more generic. Generic machines can be reprogrammed to make different engines at a reasonable cost. The specialist machines can also be reprogrammed but the cost is very much greater. In a turnkey project, it is possible to acquire from different sources machines which are missing or damaged, so as to install complete lines, but specialist machines are more difficult to replace.

3. The petitioners' case is that in the latter part of 2013 they were excluded from the project, which was subsequently diverted to a separate company, CGI Automotive Consulting Ltd ("CGI") in which they had no participation. They also allege that some

of the technical libraries, which they say were acquired by IAEP and were necessary for the installation and running of the lines were transferred from IAEP without payment. Further a duty to negotiate was broken.

The shareholders and their shareholdings

4. The shareholders and their shareholdings in IAEP were and have been since 2nd October 2012 as follows:

A Shareholders	
David Keith Cotterill, 3rd Respondent ("Mr Cotterill")	200
Alan David Cotterill, 4th Respondent ("Alan Cotterill")	200
Neil John Collins, 5th Respondent ("Mr Collins")	200
B Shareholders	
Kevin Geoffrey Dodson, 1st Petitioner ("Mr Dodson")	300
Murry Dodson, 2nd Petitioner ("Murry Dodson")	150
John William Rock, 7th Respondent ("Mr Rock")	150
C Shareholders	
Nicholas Harman Coulborn, 6th Respondent ("Mr Coulborn")	300
D Shareholders	
Christopher Richard Shield, 1st Respondent ("Mr Shield")	500
Charles Cattaneo, 2nd Respondent ("Mr Cattaneo")	106

5. The main decision-makers at board level in IAEP were Mr. Cotterill, Mr. Dodson and Mr. Shield. Each had a number of companies, but the companies relevant to the current litigation are these. Mr. Cotterill had DNA Technologies UK Ltd ("DNA"). Mr Dodson had Key Technical Solutions Ltd ("Key" or "KTS"). Mr Shield had Shield Engineering (Syston) Ltd ("SES"). Mr Coulborn, who dealt with logistics, and Mr Cattaneo, who was a financial advisor, both had some involvement at board level, but less than the other three.

6. For tax reasons all the other shareholders were also directors, however, this did not reflect the lesser rôles played by them in the business. Alan Cotterill was Mr. Cotterill's son. He was a toolmaker and mechanical engineer and worked on the technical side of DNA. Mr Collins was a very experienced technical engineer, but confined himself to the technical aspects of the business. Mr. Murry Dodson was Mr. Dodson's son. He had no technical qualifications and carried out comparatively menial duties at Key. None were central decision-makers. Mr Rock was a director of Key and effectively Mr Dodson's right-hand man until they had a falling out in November 2014. He too had only a small function in the management of IAEP itself. He was on the logistics side.

7. The day-to-day management of IAEP was divided between Mr Cotterill, who dealt with the technical side, and Mr Dodson, who dealt with the sales and commercial side. When I refer in this judgment to "the respondents", I shall mean the first to the seventh respondents, thus not including IAEP, the eighth respondent.

The start of the project

8. Mr Cotterill in his witness statement describes his background in these terms:

> "I am a qualified mechanical engineer with experience in toolmaking and machine building for the automotive industry. During the period 1969 to 1993 my concentration was on design and manufacture of tooling and special purpose machines for both white goods and automotive industries. Since 1993 my concentration has been with large automotive projects in China and worldwide carrying out project management tasks at director level covering both commercial and technical requirements for complete turnkey operations."

9. In 2011 a UK machine dealer, Bernard Bulmer ("Mr Bulmer"), told him of BMW's intention to discontinue its production of NG4 engines. The six engine lines involved in the production of the NG4 engine were as follows: (1) the crankshaft; (2) the cylinder head; (3) the cylinder block; (4) the conrod; (5) the camshaft; and (6) the engine assembly and testing. Lines 1, 2, 3 and 6 were at BMW's engine manufacturing site in Hams Hall, Coleshill near Birmingham. Line 4 was at a BMW site in Austria. Line 5 was in Germany. This line was run under contract by a separate company called Mahle Ventiltrieb Brandenberg GmbH ("Mahle").

10. At first only Lines 1, 2 and 3 were available for purchase, but if the production of the NG4 was going to cease, it was reasonable to expect the other three lines to come available as well. Mr Bulmer, Mr Cotterill (through DNA) and a German automotive consultant based in Germany, Wolfgang Keuntje ("Mr Keuntje"), agreed to carry the matter forward.

11. At this time, Mr Cotterill was having discussions with Mr Dodson about his possibly joining the project with a sales and commercial function. The two men had known each other for many years through their involvement in the automotive industry, but were not particularly close. The plan was to sell all six lines to a buyer on a turnkey basis. Once the six lines had been installed at the buyer's premises, the seller would ensure that the buyer could start engine production immediately.

12. Although the timing is unclear (Mr Cotterill suggests late 2011, Mr Dodson March 2012), it is common ground that Mr Cotterill and Mr Dodson with various others attended Hams Hall to discuss a possible purchase of lines 1, 2 and 3. What precisely occurred there is in dispute. Mr Dodson says that BMW asked him and Mr Cotterill to leave, because Mr Cotterill was banned. Mr Cotterill had been made bankrupt in 2011 and it is said that there was some bad blood with BMW as result of that. Mr Cotterill denies that they were escorted off the premises as alleged by Mr Dodson.

13. I do not need to determine this. It is, however, common ground that BMW did not agree to sell the lines to the men. Instead, BMW made at least a gentleman's agreement to sell the three lines to a metal dealer, Stuckenberger Handel-Beratung-Demontagen ("Stuckenberger"), which was German (or possibly Austrian) and dealt with BMW on a regular basis. Stuckenberger in turn sold the lines to Pagus eK Machinenhandel ("Pagus"), a German machine dealer. The first sale to Stuckenberger was of line 1 in May 2012.

14. By this time, Mr Dodson and Mr Cotterill had agreed informally to a joint venture for the purchase of the six lines and their sale under a turnkey project. They had entered negotiations with a small financing company, Blue Square Commercial Ltd ("Blue Square") which resulted in an agreement for financing dated 20th July 2012 between DNA and Blue Square, but Blue Square were in the event unable to provide the money for the purchase.

15. At this point Mr Cotterill approached Mr Cattaneo for assistance. Mr Cattaneo had a small corporate advisory company, Cattaneo LLP. He had been introduced to Mr Cotterill in April 2012 by Mr Coulburn, who was going to deal with logistics if the project eventuated. However, it was only after Blue Square pulled out of the agreement to provide funding that Mr Cattaneo had any active involvement. Mr Cotterill explained the venture's need for finance in an email of 18th August 2021 sent to Mr Cattaneo:

> "We are contracted to purchase the Complete Engine Manufacturing Facility for a Euro V engine, which is built at BMW Hams Hall Birmingham UK. The engine is 1.6 and 2.0 [litre] and used in BMW series 1 and series 3 and the mini vehicles. The lines are designed for a capacity of 500,000 UPA [units per annum] and is currently running at a rate that of 440,000 UPA. The complete investment by BMW between 2000 and 2006 was circa £400 million and this facility is being decommissioned early into its manufacturing life and has a further projected manufacturing life of 15/20 years.
>
> We are purchasing in two phases these being;
> 1) Phase 1 comprising [lines 1 to 3]
> 2) Phase 2 comprising [lines 4 to 6]
>
> We currently have the Crankshaft Line equipment in our own storage facility and as you will see from the valuation file its worse case value of £4.3m.
>
> Unfortunately our financial partner Blue Square Commercial Ltd has not been able to fund the stage payment due this week due to lack of funds and has agreed for us to pursue further funding. We urgently require £700,000 to pay for the Crankshaft Line, we can offer security for this investment using the Crankshaft Line equipment in our warehouse.
>
> We have major companies interested in purchasing the whole facility, they have signed [non-disclosure agreements] and are currently undertaking Due Diligence. The total project value is circa £37million. We expect to secure a sale within the next 3 months. The agreement with the original investor was to double his investment therefore for £700,000 investment we would repay £1.4m. The £1.4m would be paid from our customer deposit payment. This of course would be negotiable with any serious investor.
>
> Obviously this matter is extremely urgent and we would be most pleased to meet and discuss at the earliest opportunity to a seriously interested investor."

16. The proposal was supported by a valuation prepared by Mr Keuntje dated 14th August 2021, who valued the eleven machines comprising line 1 at €7.1 million. Mr Cotterill

did not explain Mr Keuntje's involvement in the project nor that his valuation was not independent. Nor is there any documentation disclosed in the current action showing that potential buyers had at that stage signed non-disclosure agreements and were conducting due diligence.

17. Mr Cattaneo introduced the men to Mr Shield and charged an introductory fee. After its incorporation, IAEP formally retained Cattaneo LLP to provide financial advice on 27th September 2012.

18. Mr Shield in his witness statement describes his background in this way:

> "I have been running the Shield group of companies, which includes SES, since 2002. I have a background in economics but have also worked in London as an independent financial advisor where I also obtained stockbroking and investment management qualifications before I came back and bought out the Shield family business. Over the 10 year period up to when the activities with IAEP began in 2012, I had gathered a significant degree of experience in production engineering and the manufacturing sector as well as delivering small scale industrial projects involved in transferring equipment from competitors and supporting customers with engineering programs and so on."

19. He was asked about the proposal in cross-examination as follows (transcript, day 4, pp 70-71):

> "Q. [W]hat Mr Dodson and Mr Cotterill wanted at that stage was: not that somebody comes in and takes equity, not somebody who — what they wanted was a straightforward funding agreement whereby the security to be given to the funder would be the assets. That is the whole purpose of the valuation?
> A. They were proposing that, but my view was that those values were not sustainable on an open market basis.
> Q. So, you looked at them carefully?
> A. Well, I knew enough about — well, I didn't look — at that time I hadn't seen any of the equipment, but I knew enough about the industry to suggest that they were much higher than I would have...
> Q. They were optimistic, were they?
> A. Well, if you had to sell them reasonably quickly on the open market, the difference between that and storing them, for cleaning them up and managing them and bringing customers in from all around the world and doing a proper machine tool sale business — that is very different. And I felt they would be very toppy on an open market, short-term sale basis."

The legal documentation

20. Mr Shield wanted SES to take ownership of the lines as they became available. Negotiations ensued, which resulted firstly in IAEP being incorporated on 26th September 2012 and secondly five documents, all dated 2nd October 2012, coming into existence. These comprised (a) a shareholders' agreement (the "SHA"); (b) an option agreement; (c) a facility agreement; (d) a debenture; and (e) a resolution amending the articles of IAEP (including a change of name to the current name).

21. All the formal documentation was prepared by Shakespeares (now Shakespeare Martineau), solicitors introduced by Mr Shield.

22. The parties to the SHA were not just the nine shareholders but also IAEP and SES. So far as material it provided as follows:

> "2. The Business of the Company
> 2.1 the business of the Company shall be the design, sale and implementation of turnkey automotive engineering projects on an international basis (Business).
> 2.2 The first project for the Company will involve the acquisition of the Lines and subsequent design, sale and implementation of a turnkey automotive manufacturing facility to customer specification.
> 2.3 Each party shall use its reasonable endeavours to promote and develop the Business to the best advantage of the Company…
> …
> 5. Directors, management and voting at shareholder level
> 5.2 Each of the Shareholders shall be a director of the Company.
> …
> 7. Restrictions on the Shareholders and Shield
> 7.1 Subject to clause 7.2, none of the Shareholders shall (other than with the consent of the Board (such consent not to be unreasonably withheld or delayed)) for so long as they hold any Shares, carry on or be employed or engaged, concerned or interested in any business which is in competition with any part of the Business of the Company (as described in clause 2.1), including any developments in the Business after the date of this agreement.
> 7.2 The undertakings in clause 7.1 shall not apply:
> (a) in the case of any project or opportunity duly offered to the Company which the Board has determined not to pursue or which the Board has not responded within 30 days;
> (b) to prohibit either of Kevin Geoffrey Dodson or David Keith Cotterill from maintaining their respective business interests in Key… and DNA… to the nature and extend of the activities carried on by those companies prior to the date of this agreement…
> …
> 17. Whole agreement
> 17.1 This agreement, and any documents referred to in it or executed contemporaneously with it, constitute the whole agreement between the Parties and supersede all previous arrangements, understandings and agreements between them, whether oral or written, relating to their subject matter.
> 17.2 Each Party acknowledges that in entering into this agreement, and any documents referred to in it or executed contemporaneously with it, it does not rely on, and shall have no remedy in respect of, any representation or warranty (whether made innocently or negligently) that is not set out in this agreement or those documents.
> …
> 21. No partnership
> The Parties to this agreement are not in partnership with each other and there is no relationship of principal and agent between them.
>
> 22. Good faith

> 22.1 All transactions entered into between any Party to this agreement or any of its subsidiaries and the Company shall be conducted in good faith and on the basis set out or referred to in this agreement or, if not provided for in this agreement, as may be agreed by the Parties and, in the absence of any such agreement on an arm's length basis.
> 22.2 Each Party shall at all times act in good faith towards the other and shall use all reasonable endeavours to ensure that this agreement is observed.
> 22.3 Each Party shall do all things necessary and desirable to give effect to the spirit and intention of this agreement."

23. The option agreement was made between SES and IAEP. It granted a 15 month option period, expiring on 2nd January 2014, to purchase such of lines 1 to 3 as SES might from time to time own. The price was:

> "in the case of any Lines acquired by Shield, a sum equal to
> (i) 2 x the aggregate of the actual price paid by Shield for the Line's together with any other costs incurred by Shield in connection with the dismantling, transport and storage of the Lines which have been invoiced to but not paid by IAEP, plus
> (ii) an amount equal to the Loan.
> Plus any applicable VAT thereon."

24. SES was forbidden from encumbering any of the lines it might come to own.

25. Clause 7.2 of the option agreement provided:

> "Each of the parties to this agreement hereby undertakes that, in the event that IAEP is unable to purchase all of the Lines owned by [SES], then during the Option Period the parties will enter into good faith negotiations to agree an alternative mechanism or strategy for selling the remaining Lines either to IAEP or some other third party buyer."

26. The facility agreement provided:

> "2 The Facility
> 2.1 The Lender grants to the Borrower a secured Sterling term loan facility on the terms, and subject to the conditions, of this agreement of a total principal amount of up to £1,500,000 of which:
> 2.1.1 £800,000 shall be available for drawdown from the date of this agreement; and
> 2.1.2 the remaining £700,000 shall be available for drawdown subject to
> (i) the Lender acquiring the Line 3 Assets and
> (ii) the Lender (acting reasonably) being satisfied that there is a viable prospect of the Option being exercised and the Company being able to repay the Loan in accordance with the terms hereof.
> …
> 3 Purpose
> 3.1 The Borrower shall use all money borrowed by it under this agreement for the ongoing working capital requirements and operational costs of the Borrower."

27. The debenture secured SES's lending to IAEP, but since IAEP had no substantial assets the debenture was of little commercial significance.

The project commences

28. A number of potential purchasers were identified. The most promising were Beijing Automotive International Corporation ("BAIC"), which was part of a large group in the People's Republic of China ("PRC") and Infinity Max Ltd ("Infinity Max"). Infinity Max was a BVI company but it was backed by PRC interests (although the identity of the real backers was kept a secret). It was interested in having the lines installed in the PRC.

29. On 2nd November 2012 IAEP entered a non-disclosure agreement with Infinity Max. Infinity Max's solicitors were Rosenblatts, where the matter was dealt with by Neil Sampson ("Mr Sampson"). He had a background in litigation and all the witnesses who had dealings with him concurred that he was an extremely hard negotiator.

30. On 13th November 2012 Pagus acknowledged payment by SES of the price for lines 1 and 2. Title in these lines passed to SES.

31. In December 2012 Mr Dodson started discussions with BMW about acquiring the "technical library", initially for the four lines at Hams Hall. Questions of what the technical library comprised, how it was acquired and who ultimately owned it are important issues in this case. I shall discuss this topic separately.

32. On 19th February 2013 Stuckenberger gave SES a first option to purchase lines 4, 5 and 6 including "[r]elated engine technology and IPR". At this stage it was still anticipated that BMW would make these further lines available in the reasonably near future.

33. On 25th February 2013 Infinity Max sent a detailed six page letter of intent. It was expressed not to be legally binding. The proposed terms were expressed as follows:

> "2 ACQUISITION AND TURNKEY SOLUTION
> 2.1 The Buyer proposes to purchase from the Seller, free from all restrictions and encumbrances (specifically, requiring the Buyer to release the first fixed charge in favour of [SES] for the Consideration:—
>
> > (a) the entire plant, machinery and equipment comprised in the manufacturing facility for the BMW NG4 range of engines (2005-2011) ('the Engine Plant') owned or in the process of being acquired by the Seller and located at Hams Hall, Birmingham UK, and the BMW plant in Germany (the 'Current Locations'), including such consumable parts, spare parts and replacement parts as agreed by the parties. To the extent that the Engine Plant or any part thereof is not available for purchase, is incomplete or in need of replacement the Seller shall provide replacement equipment and/or parts to at least the same specification as included in the Engine Plant prior to its decommissioning/disassembly at the Current Locations;
> >
> > (b) all drawings, manuals, handbooks, back-up tapes and discs, documents and other information (including all electronic data files and visual recordings) relating to the design, construction, installation and operation of the Engine

> Plant including production records, maintenance records, technical upgrade records and any other relevant documentation (including 'soft copy' data files) (the 'Technical Information');
>
> (c) all intellectual property rights in and necessary for the installation, operation and complete exploitation of the Engine Plant and the Technical Information required for the production and sale throughout the World by the Buyer of the engines as previously manufactured by BMW at the Engine Plant (the 'IP Rights'); and
>
> (d) full design plan and specification for the construction of the factory facilities required for the installation and operation of the Engine Plant in a location in China to be specified by the Buyer (the 'New Location').
>
> 2.2 The Buyer and the Seller will enter into the Turnkey Agreement for the Consideration will procure:—
>
> (a) the disassembly of the Engine Plant at the Current Locations;
>
> (b) the storage and transportation of the Engine Plant to the New Location;
>
> (c) the design, build, assembly and installation of the Engine Plant in the New Location;
>
> (d) testing of the Engine Plant once installed in the New Location to ensure a fully effective operation in manufacturing engines using the Engine Plant to meet any standards that are required of such engines and to the satisfaction of the Buyer; and
>
> (e) a guaranteed level of performance of the Engine Plant to be further detailed in the Turnkey Agreement for twelve months following completion of the installation.
>
> 3 CONSIDERATION
> The aggregate Consideration for the purchase of the engine Plant, the Technical Information, the IP Rights and the Turnkey Agreement shall be not less than Fifty Five Million Pounds (£55,000,000) based on the indicative costings provided by the Seller but in any event not to exceed Sixty Million Five Hundred Thousand Pounds (£60,500,000) such price to be negotiated between the parties in good faith."

34. The term as to IP Rights was to prove particularly problematic, because no agreement (even in principle) had been reached between IAEP and BMW to allow further production of the NG4 engine once the lines were reinstalled in the PRC. Mr Dodson had budgeted £5 million for the cost of the IP Rights, but it was likely that BMW (if they granted IP Rights at all) would also want a royalty on each engine manufactured.

35. By this time, Mr Dodson had found premises at Longbridge to be used as an office for the business. Because IAEP had not been incorporated, the lease was taken in Key's name. Possession was taken by IAEP after it was incorporated. This later caused an issue as to whether it was Key or IAEP which was liable for the business rates.

36. On 12th April 2013, Infinity Max (described as the buyer), IAEP (described as the seller) and SES signed a non-binding heads of agreement in similar terms to the letter of intent. The consideration was to be £58 million. As regards the IP Rights the heads of agreement provided:

> "4.5 The Seller will use reasonable endeavours to obtain an assignable licence or assignment of the NG4 IP Rights from BMW and/or assist the Buyer in negotiations for such an assignment or licence from BMW. In the event that the Seller is able to obtain an assignment or assignable licence of the NG4 IP Rights, the Seller shall licence, assign or sell the NG4 IP Rights to the Buyer at the same price as the Seller acquired the NG4 IP Rights."

37. Clause 7 of the heads of agreement was expressed to be legally binding. It provided for exclusivity until 14th June 2013, extendable by 28 days if IAEP could not show title to lines 4, 5 and 6. The exclusivity fee was £500,000 plus VAT.

38. Clause 7.6 provided:

> "The Exclusivity Fee shall become immediately repayable to the Buyer:
>
> (a) in the event of any breach by the Seller and/or [SES] or any of their Connected Persons of any of the [exclusivity and confidentiality] provisions… hereof during the Exclusivity Period; or
>
> (b) if the Seller is unable to reasonably demonstrate by the date on which the Exclusivity Period expires that it has title to and is able to deliver the equipment comprised in Lines 4, 5 and 6 including the Technical Information (other than any equipment which is to be retained by BMW and for which the Seller will provide a replacement)."

39. In contemporaneous documentation Mr Dodson calculated that the profit on the turnkey project would be £19,350,000.

The project starts to founder

40. By March 2013, IAEP had drawn down £918,000 of the £1.5 million agreed under the facility agreement with SES. SES did not advance any more. By June 2013 IAEP had used all its available cash to fund DNA and Key. No further payments were made to Key. The date of availability of lines 4 to 6 had slipped.

41. Around this time an issue arose as to whether Mr Dodson had overcharged for Key's services to IAEP. I shall consider this issue separately.

42. Relations between the shareholders deteriorated. By June 2013 Stephen Murphy ("Mr Murphy") had, unbeknownst to Mr Dodson and his son, been introduced to the project by Mr Cotterill. Mr Murphy had a consultancy, Satam Automotive Consulting Ltd, which later, on 24th March 2014, changed its name to CGI. Murry Dodson says he overheard a conversation between them. In his witness statement he said:

> "24. It was around June/July 2013 that I had reason to have some concern. I had gone into the Oldbury office and was in the makeshift changing room area

> collecting some tools. The area that I was in was separated from a small conference room by a glass partition. I didn't go in to eavesdrop but when I was collecting the items I needed, I overheard a conversation between Dave Cotterill, Neil Collins and another gentleman (who shortly afterwards I came to understand was Steve Murphy). I had not seen or met Steve Murphy previously. It was not a pleasant conversation to overhear. I heard Dave Cotterill call my dad a c**t. It was upsetting to hear but I stayed to listen to more of the conversation. Dave was speaking to Steve Murphy — it was a slanderous onslaught towards my dad. The basis of what they were saying was what Steve Murphy's role would be as commercial director (which was my dad's role). Dave went onto explain the details of the Project and the Turnkey in China. All I can recollect from the conversation about my dad was that Dave Cotterill was getting very nasty and heated — he called him various names — it was a character assassination as to why they wanted Steve instead. I didn't have any inclination that there was anything wrong before hearing that conversation. My dad and Dave had been close and when I saw them together, they seemed close, even days before. Dave was really nice to me and so it was a real shock. I didn't hear why they wanted my dad out. I didn't hear anything in terms of getting me out. From the time that I had started at IAEP, everything seemed perfect and everyone got on. When the funding stopped in around May, that's when things started to go wrong but I didn't know why that was."

43. Murry Dodson attended trial in order to be cross-examined on his witness statement, but in the event Mr Reed did not wish to cross-examine him. This evidence is therefore unchallenged, as Mr Khangure QC noted expressly when putting Murry Dodson's witness statement in as evidence: see transcript, day 4, p 48.

44. When Mr Cotterill later gave evidence, there was the following exchange (transcript, day 6 pp 212-213):

> Q. …[H]ave you had a chance to read Mr Murry Dodson's witness statement?
> A. I have.
> Q. And do you agree that he overheard a conversation between yourself and Stephen Murphy?
> A. Categorically not, complete nonsense.
> Q. Well —
> A. Complete — complete and utter nonsense and Murry Dodson is not a shrinking violet.
> Q. Mr —
> A. Let me tell you that, but I know the conversation you are referring to and it is nonsense.
> Q. Mr Cotterill —
> THE RECORDER: Is that because it didn't happen, the conversation, or because he didn't overhear it?
> A. The conversation didn't happen, categorically not.
> MR KHANGURE: So, why was wasn't Murry Dodson challenged on that?
> A. Challenged?
> Q. Yes.
> A. By who?
> Q. By your counsel.

> A. All right. You had better ask my counsel that. I'm not qualified to comment on that. I'm telling you the conversation never happened. Despicable. Complete nonsense."

45. No explanation was or has been proffered by Mr Reed as to how Murry Dodson's witness statement came to be adduced unchallenged. In my judgment, elementary fairness to Murry Dodson requires me to treat his account as true. There is in any event nothing inherently improbable about what Murry Dodson says here. Relations did deteriorate between his father and Mr Cotterill. Mr Murphy was, it is common ground, brought into the project.

46. Mr Dodson started to be excluded from the day-to-day running of the business. On 2nd, 4th and 19th July 2013 there were various meetings, to which Mr Dodson was not a party, between Mr Cotterill and Infinity Max, or Mr Sampson. The discussions focussed on SES selling lines 1, 2 and 3 direct to Infinity Max with the turnkey project being delivered by DNA.

47. On 16th August 2013, SES advanced the monies to repay the exclusivity payment made by Infinity Max. On 19th August 2013, Infinity Max offered to buy lines 1 to 3 from SES direct.

48. On 16th September 2013 Rosenblatts sent a detailed 40-page letter before action, attaching nearly 150 pages of supporting documents. The claim was said to be for £5,859,576 and was made against IAEP, SES, Mr Dodson, Mr Cotterill, Mr Cattaneo and Mr Shield. The main claim was for fraudulent representations:

> "i) that IAEP/Shield Engineering had acquired legal title to the whole of the Plant, i.e. all of lines 1-6; and/or
> ii) that IAEP/Shield Engineering otherwise had the ability to deal with and dispose of legal title to the whole of the Plant; and/or
> iii) that IAEP/Shield Engineering had acquired, or had the ability to transfer, the IPR for the NG4 engine range; and/or
> iv) that IAEP/Shield Engineering had reached an agreement with BMW for the acquisition of the IPR and (b) expected to acquire the same by July 2013."

49. On 23rd September 2013 Shakespeares took instructions from Mr Cattaneo on the letter before action. Their attendance note records him saying "that before this claim came in, they were about to suggest that Kevin Dodson sell his shares in IAEP to [SES]." Consideration started to be given by Shakespeares to professional conduct issues arising from the potential conflict between acting for both IAEP and SES. This was an issue which continued into 2014.

50. On 14th October 2013 Shakespeares sent a detailed reply.

51. Notwithstanding Infinity Max having caused the letter before action to be sent, all the witnesses who were concerned in negotiations with Rosenblatts and Infinity Max agreed that Infinity Max were still interested in finalising the deal. (Although on its face this is surprising) they all considered that the letter before action was merely a hard-nosed (albeit a very hard-nosed) negotiating strategy being advanced by Mr Sampson. Indeed this belief was born out by the letter of 21st November 2013, discussed below, from Roseblatts seeking to "foster a more open dialogue".

52. On 11th November 2013 Mr Dodson emailed Mr Shield to complain that his invoices had been outstanding since June 2013 and that Mr Shield had not formulated his proposals. On the same day, SES charged lines 1, 2 and 3 with a chattel mortgage in favour of Lombard. This was a breach of the terms of the option agreement.

The proposal to exclude Mr Dodson and Key

53. In response to Mr Dodson's email, on 18th November 2013 Mr Shield circulated what he described as "Project Bavaria Review and Future Plan". This began:

> "In September 2012 we agreed a structure for IAEP and its funding by Shield [i.e. SES]. In that proposal we were talking about €2,550,000 (c£2.1m) for lines 1,2&3 plus a loan facility of up to £1.5m. Giving a total of c£3.6m of funding. IAEP has drawn down circa £1.5m of loan and Shield had funded circa c£4.1m directly. Total Shield funding being c£5.6m (c£2.0m over the original estimate);
>
> We envisaged a project where a purchaser would have been found and a deposit been paid by December 2012. As of 1st November 2013 no successful sale completed. We need to accept there have been errors in strategy along the way and that the project needs a greater focus to achieve a successful result. It is also, however, reasonable to conclude that the primary reason for the failure to sell is largely as a result of the inability to control lines 4-6 (predominately line 6). It is clear the project is taking longer than originally envisaged and will require significantly increased funding to achieve a successful project.
>
> Further to the above the current legal situation with [Infinity Max] is adding cost and absorbing a lot of time to deal with and there is the possibility of further disruption as a result of this situation. There is also some concern about the ability to definitely conclude a successful sale if lines 4-6 cannot be brought within the scope of the project in a reasonable period of time.
>
> All these factors have dramatically increased the risk to [SES] and this has resulted in the requirement to alter the structure and organisation of the project."

He then outlined various cost-saving measures and continued with the following proposal:

> "IAEP to be retained and have an option to sell on the asset purchase rights to a new company 'IAEP 2'. For this it would receive a £1m fee only if a profitable sale figure is achieved ie. Shield's doubled up costs and interest is repaid). This way all of the original shareholders will benefit and receive a fair reward for their involvement even if they are not directly involved going forwards.
>
> IAEP 2 to be set up with the following arrangements:
>
> - KEY to be removed from the ongoing costs as it would appear that KEY's specific skills are not required at this time. Accounts & financial admin to be transferred to Cattaneo who will find a cost effective day to day solution for the minimal level of admin that exists. No shareholding for KEY in IAEP 2. [Mr Dodson] to commit to supporting [Infinity Max] legal situation. On this basis

the excess invoices charged are not to be repaid. IAEP 2 to cover costs of concluding Longbridge but not the business rates — this is a KEY issue and in light of the lease transfer and shared costs with KEY this is reasonable. In the event KEY introduces the final buyer to the project then agent fees to be agreed prior to any [Heads of Terms] with the buyer.

- Steve Murphy to manage sales at an agreed monthly cost of £6k. Steve also to be Managing Director of IAEP 2 and responsible for controlling the project through to a successful sale including management of subcontract work and costs. In the event that no profit is made after Shield's costs (see above) Shield to pay a fair contribution from its uplift (if applicable).

- Cattaneo to remain involved and if acceptable to remain on its current fee-free arrangements until a successful sale is concluded. In the event that no profit is made after Shield's costs (see above) Shield to pay a fair contribution from its uplift (if applicable).

- DNA team involved moving forwards to complete the Due Diligence and assist Steve Murphy and Shield/Cattaneo in managing the project. Propose agreed hourly rates of £40p/h for [Mr Cotterill], £35 p/h for [Mr Coulborn] and £30p/h for other support staff (manual workers to be paid as current). Hours to be confirmed in advance and only as required to fulfil company requirements. Outstanding invoices to be paid in full up to 1st October.

- Nic Coulborn. To remain involved at the existing £1000 per week level."

54. SES was to have 51 per cent of shares in the new company. Mr Cattaneo and Mr Murphy were to have 12 per cent each; DNA 18 per cent; and Mr Coulborn 7 per cent. The interest payable to SES was to increase to 20 per cent per annum rolled up.

Subsequent developments

55. On 21st November 2013 Rosenblatts set out Infinity Max's proposals. They gave IAEP three options. Offer One was that the "Buyer will pay a consideration of £58,000,000 (fifty eight million pounds) to the Seller to acquire the Complete Engine Plant, the Technical Information, IP Rights and for the performance of the Turnkey Agreement."

56. Offer Two was that for "a consideration of £23,000,000 the Buyer will purchase:
i) An assignment from the Seller or BMW (as appropriate), free from all encumbrances, of all IP Rights as are required and/or reasonably desirable to manufacture any one variant of the NG4 engine or its equivalent.
ii) Within 28 days of the Seller providing the assignment referred to in paragraph (i) above the Buyer will purchase… Lines 1, 2 and 3 together with the Technical information and any related materials relating to those lines:
iii) The Seller will deliver the three lines referred to above to the New Location;
iv) The Seller will grant an option to the Buyer to acquire those parts of the Complete Engine Plant not included in paragraph (ii) above (generically known as Lines 4, 5 and 6 and Technical Information and any related materials relating to those lines) on the basis of a Turnkey Agreement on similar terms to those set out in Offer One above for a total additional consideration of £9,000,000.

> v) The consideration shall include the provision by the Seller of such parts of manufacturing Lines 1, 2 and 3 which are required to be sourced from third parties in order that Lines 1, 2 and 3 are complete and capable of full operation;
> vi) The consideration is inclusive of delivery and re-assembly of manufacturing Lines 1, 2 and 3."

57. I do not need to set out Offer Three.

58. The same day Mr Cotterill sent an email updating the position on lines 4, 5 and 6. Line 4 had been "substantially" decommissioned in Jena, Germany and was due to be shipped to England on 11th December 2013. The sale to Stuckenberger, then to Pagus and then to SES was proceeding. Investigations into obtaining substitutes for any machines which BMW decided to retain were continuing. The timing on line 5 was uncertain, because Stuckenberger had not even visited Mahle's plant. Decommissioning of line 6 was:

> "currently estimated by BMW as being end March/Early April 2014. As for confirming timing for acquisition this MAY be April/May 2014 but again at this time it is still to be confirmed and without guarantee."

59. Mr Shield's proposals were discussed at a meeting attended by Mr Cotterill, Mr Dodson, Mr Coulborn, Mr Rock and Murry Dodson on 28th November 2013. Mr Dodson was unhappy with the proposals, in particular that the £1 million fee would be distributed to all the shareholder-directors and was subject to the project being profitable. He wanted the £1 million to go unconditionally to the three outgoing shareholder-directors, himself, Mr Rock and Murry Dodson. No agreement was agreed to that effect at the meeting. By a letter of 4th December 2013 to Mr Shield Mr Dodson attempted to negotiate further, but there was never any settlement reached.

60. On 13th December 2013 SES wrote direct to Infinity Max proposing an asset sale to Infinity Max with Infinity Max then retaining IAEP to complete the turnkey aspect of the project. The same day Mr Shield emailed Mr Cotterill, Mr Murphy, Mr Cattaneo and Shakespeares to request that:

> "you keep us up to speed with progress (or not) in China. Did you have a chance to forward documentation to the customers in particular BAIC?
> I think any feedback or likely communication that may be happening in China with IM is important to understand we want to get the pressure back onto Neil [Sampson]."

61. BAIC was, it will be recalled, a rival to Infinity Max in the PRC.

62. On 16th December 2013 Mr Cattaneo told Mr Dodson in an email that Mr Murphy was now dealing with the sales side of IAEP and that he (Mr Dodson) should cease to approach potential purchasers. On 18th December 2013, Mr Cattaneo told Mr Dodson in an email copied to Mr Shield and Shakespeares:

> "Sorry if there has been any confusion but I believe you are aware from our discussion the other day that the longstop date in the IAEP asset option is 1.1.14 (and there were other conditions) that mean the asset sale is now a Shield project, Shield owning all of the assets purchased and being owed c £1.5m by IAEP as well as having committed a significant amount of additional cost outside of IAEP since the summer. Chris [Shield] has made a proposal regarding making a payment into

> IAEP for the shareholders to benefit from should Shield achieve a successful sale (although this has not been formally agreed by any party) and as such Shield are now running with the sale process and have decided to appoint Steve Murphy to handle that process for them (Steve has already demonstrated considerable knowledge of the likely buyers, the technical requirements for an engine line and has been innovative in his approach to a number of the issues being faced), again apologies if that was not clear the other day when Steve joined the meeting at Shakespeares."

63. Mr Dodson responded to say: "I am also greatly concerned with the lack of communication and reporting as a whole within IAEP which has been mentioned many times over the past few months and astounded to be told that IAEP has now sub-contracted out the services associated to sales to which I was not consulted and most certainly do not approve."

64. In the latter part of 2013 line 4 became available and was sold via Stuckenberg and Pagus to SES. The line was dismantled and transported into storage at Oldbury over 16th and 17th December 2013.

65. On 20th December 2013 Rosenblatts sent an aggressive letter to Shakespeares. From this it is apparent that there was no possibility of a deal between IAEP and Infinity Max before the option agreement expired.

66. On 2nd January 2014 the option agreement between SES and IAEP lapsed unexercised. Shakespeares subsequently informed Mr Dodson that SES could sell the lines without IAEP's approval.

67. On 13th January 2014 Shakespeares on behalf of IAEP and SES wrote to Rosenblatts rejecting the proposals in the letter of 20th December 2013 and pointing out that the delays in obtaining lines 4, 5 and 6 were outwith IAEP's and SES's control. The letter also denied that any concrete proposal had been made to design a different engine if the IP Rights for the BMW engine could not be obtained.

68. On 15th January 2014 an internal memorandum of Shakespeares addressed the question: "Can we remove Kevin Dodson, Murry Dodson and John Rock as directors and shareholders in [IAEP]?" The author concluded:

> "Unfortunately under the terms of the [SHA] the Shareholders have the right to be appointed as directors of the company, so if we remove Kevin, Murry and John then they can request to be appointed."

69. The memorandum added that there was no means of forcing a share sale by them. It pointed out that the board of directors could appoint Mr Shield as sole representative of IAEP under Article 5 of the Articles of Association.

70. On 24th February 2014 there was a teleconference, which Mr Dodson did not attend, between Infinity Max and Rosenblatts on the one hand and SES and Shakespeares on the other. In a follow up email, Shakespeares said:

> "[SES] is pleased with the progress made this morning… As Mr Cattaneo explained…, please can you set out in writing the proposal mentioned by your Mr Sampson, namely that (a) your client now wishes to purse an asset deal with [SES];

> and (b) any turnkey delivery of the project will be pursued by your client separately and with a third party and not through our client."

71. On 27th February 2014 Mr Murphy circulated drafts of two alternative heads of agreement to Shakespeares as well as to Messrs Shield, Cattaneo, Cotterill and Coulborn. The first proposed a turnkey sale between IAEP and Infinity Max at a total cost of £61 million. This included the design of a new generic engine to meet Euro 5/6 standards. Provision was made in relation to line 5 in the event that Mahle were not prepared to sell that line. The second was an asset sale for £34 million. The parties to this document were to be Infinity Max, SES and IAEP. These heads of agreement and the covering email were not disclosed by the respondents until a very late stage in the current litigation.

72. On 7th March 2014 Rosenblatts sent two letters to Shakespeares, one closed, the other open. The closed letter included an offer to settle the proposed litigation pursuant to CPR Part 36 for £5.25 million. The open letter complained about the information being given to Infinity Max. Shakespeares circulated the letters. Mr Dodson replied complaining that he was being kept in the dark about the commercial progress of the deal. Shakespeares then discussed with Messrs Shield, Cattaneo and Cotterill whether to reply to say that "the potential commercial transaction with [Infinity Max] is under the control of [SES] and not IAEP… [so] all communications on that subject are being passed to the relevant Shield Engineering representatives."

73. On 11th March 2014, Mr Cotterill, describing himself as IAEP's project director, sent an email to Shakespeares copied to Messrs Shield, Cattaneo and Murphy, in which he said:

> "In our project general discussions with Tim and Chunan we touched on the site survey and Civil design construction works carried out by Chunan's company China SANAN Construction Corporation on behalf of [Infinity Max].
> I asked if the works carried out to date would have cost as much as £3.85 million (the amount stated within the [Neil Sampson] item of expenses breakdown).
> Tim relayed this to Chunan and it was deemed laughable as Chunan confirmed his company had carried out the works, which were only preliminary, that he had received no payment from [Infinity Max] and had basically funded the works through China Sanan…
> All this of course to remain strictly confidential for our internal discussions further down the line. I have not copied Kevin in for obvious reasons."

The end of IAEP's involvement in the project

74. In April 2014 there was a board meeting of IAEP with all the major players present. A disproportionate time was taken up with the issue of what monies were owed as between IAEP and Key. The question of how the project was to be taken forward with Infinity Max was however, discussed. Mr Dodson said in the recording of the meeting:

> "IAEP as it is still an entity at this moment in time it's not been wound up yet or whatever then it still has a potential client who wants to do a deal for a Turnkey job. The fact that the deal wasn't concluded with Shield in January shouldn't detract from the fact that we have still got a customer over here who wants to deal with us and would still allow IAEP to purchase the assets from Shield. I don't

know of any resolution where we said okay, IAEP was going and telling them please Mr Shield pick up that ball and go and deal with our customer in layman's terms.

75. Mr Shield's position, as recorded, was:

> "[Th]ere was a business proposition which ultimately failed sadly. There is now a revised situation, Shield is taking control of its assets which obviously it needs to and if it can it will try and do a deal but there clearly is a point well into last year where IAEP wasn't going to be able to conclude that. I think despite all of our best efforts.
> …
> Let's be clear because I think it's, with due respect it is a little bit easy to say well if there is a deal it should go through IAEP or whatever. We don't know there is going to be a deal. We are not going to do a deal. We don't know if we are going to lose money on it or make money on it. We don't know if we are going to get nailed on the litigation for £5 million or £6 million plus legal fees. There are lots of things but all the liabilities sit here effectively and with due respect they don't largely sit outside of that area because of the reality of the scale of the situation so if someone says well I think it should through IAEP it should go through where it should go through that is the best situation for the project. Now if, if in theory, yes it could be IAEP… I made it quite clear I have no personal issue with anyone but we have got a job to do and so far it's not been very successful. We have got ourselves in a mess and we all take responsibility for that including me but it is very easy to say well I think this when someone hasn't put £6 million or £7 million of their money yet. In a different man's shoes it is a very, very different perspective which is we will do what is right for the project but if that means people and if that means it goes to IAEP or goes to Timbuctoo Limited that is where it will go. At this point in time we are dealing with this. Now the easy thing is Shield may say I don't want to put in £31,000, what is the point. It's £31,000, it buys a lot of stuff. So forget that and let IAEP go its way. It might say and this is the purpose for today's discussion I think largely it might say well I've got the £31,000 in but I want to own the company and be done with all this bollocks. I can't be doing with it. We might say well let's find a way between the various assets and liabilities and all the other stuff that is being around to see if we can even stevens it and then see what happens in the future but there has to be a resolution of one form or another and that is where I am coming from."

76. The £31,000 referred to a VAT debt owed to the Revenue by IAEP. The company did not have the funds to pay it. The directors (including Mr Shield) did not want IAEP to be wound up as insolvent, because of the effect on their commercial reputations as men who had been directors of an insolvent company.

77. No agreement was reached at that board meeting. It was for practical purposes the last meeting of IAEP, which thereafter carried out no further commercial business. There was ongoing correspondence into May 2014, but nothing was agreed.

78. On 11th June 2014, Mr Welsh of BMW sent an email to Mr Dodson at his Key email address inviting him to remove some 100 lever-arch files of the technical library stored at Hams Hall. This invitation was repeated in January 2015. Mr Dodson arranged for the whole of the technical library for lines 4 and 6 to be removed from Hams Hall.

After CGI became involved

79. On 23rd June 2014 Mr Cotterill was appointed a director of CGI, which it will be recalled was Mr Murphy's company. CGI at this time had minimal assets and was conducting very little business.

80. On 31st October 2014 Mr Cotterill wrote to Mr Dodson to demand delivery up of the archive technical library. He asserted "that a second copy [of the technical library] is held by BMW Munich and can be supplied to complete the whole Assembly line asset purchase for Shield." There is no evidence to support this assertion.

81. On 14th November 2014 Mr Dodson responded and said:

> "• I did not collect documentation relating to any of the lines on behalf of IAEP.
> • I used my own connections at BMW to acquire the documentation from BMW.
> • I attach correspondence from BMW dated 22.10.13 setting out that Key Technical Solutions Limited was given permission to remove the obsolete documentation from their BMW Plant, Hams Hall associated to the Crankshaft, Cylinder Head and Cylinder Block obsolete machine tools…
> • Title to the documentation for all lines rests with Key Technical Solutions Limited.
> • Stuckenberger did not buy the documentation from BMW. Stuckenberger bought the lines as scrap from BMW. As a scrap dealer Stuckenberger would not have needed the documentation.
> • The documentation was not part of the deal between Stuckenberger and PAGUS. There is no reference to the documentation in the 'Notification of Change of Ownership' dated 25.06.12 and the 'Notification of selling Rights' dated 21.01.13.
> • The documentation was not part of the deal between PAGUS and Shield. I refer to the Invoice from PAGUS to Shield dated 24.08.2012 (Crankshaft), 11.09.2012 (Cylinder Head) and 28.02.13 (Cylinder Block)."

82. The following month there was an informal meeting between Mr Dodson and Mr Cotterill, who said: "We've achieved the lot, Kev… This project is going over the line." He then suggested that Mr Dodson could be brought "back into the fold." He added: "It's time we all had something out of the project." Mr Cotterill then pressed Mr Dodson to deliver the technical library.

83. On 8th December 2014 Mr Dodson wrote an email to Mr Cotterill to confirm the discussion they had had. Mr Dodson said:

> "1. You mentioned that the project is progressing with a customer contract likely signed within 3 to 4 months however you were not able to confirm if [IAEP] or another company would be the contracted suppliers and mentioned potentially DNA or CGI as examples, although I assume that proposed contract documentation will have been issued between parties at this stage. Please clarify the position.
> 2. You mentioned that the deal that is to be done is the same as the Full Turnkey Project, as originally proposed by IAEP Ltd in early 2013. It is to include all manufacturing lines and IPR. If the IPR is to be sold it must already have been purchased and the buyer therefore known to you. Again, please clarify the position.
> 3. Speaking personally, I stated that I did not object to any company progressing the project, however, I was clear that IAEP was, in my opinion and for the reasons

> that I have set out previously, the only company able to currently supply the project. For any other company to take over from IAEP the correct commercial and legal processes would need to be implemented. This should be a straightforward process and does not need to be contentious but at the moment this has not been agreed or documented."

84. He went on to assert that Key owned the technical library.

85. By a letter dated 1st January 2015 (although the actual date is likely to be different) BMW confirmed that Mr Dodson of Key had collected various parts of the technical library with BMW's permission.

86. On 20th January 2015 there was a board meeting of IAEP attended by all nine directors. Mr Shield said that SES was going forward with a company other than IAEP. He indicated a willingness for SES to pay off the outstanding monies owed in respect of the Longbridge office and offered a vague promise that SES might pay bonuses to IAEP directors if the project went forward, but no agreement was reached. Mr Dodson repeated his position that Key owned the archive technical library. It was clear that IAEP would not be going forward with the project and that its commercial purpose was at an end.

The project proceeds between Infinity Max, SES and CGI

87. On 5th February 2015 Mr Cotterill in his capacity as managing director of CGI circulated to, inter alia, Mr Murphy and Mr Shield draft heads of agreement proposed by Infinity Max.

88. On 9th February 2015 SES held a formal board meeting attended by Mr Shield and a Mr Cooper which approved the sale of the six lines to Infinity Max at a price of £41 million. The same day Lombard gave a settlement figure of £312,692.84 to release its chattel mortgage.

89. On 11th February 2015 SES and Infinity Max signed a binding agreement for the sale of the six lines, including the control systems, and the technical library at a price of £41 million, payable in stages on the shipping of each line, with a payment in escrow in relation to line 2. Line 5 was described as "the Camshaft production line previously owned and used by BMW Germany and Opel Germany as purchased by [SES] from Open or BMW or its authorised agents." By Schedule 7 to the agreement, Infinity Max released SES, IAEP and Messrs Dodson, Cotterill, Cattaneo and Shield from all the claims made in Rosenblatt's letter before action.

90. The same day Infinity Max, CGI and SES signed non-binding heads of agreement in respect of a turnkey agreement. The heads of agreement were incorporated into a formal binding contract on 28th April 2015.

91. On 3rd March 2015, Shakespeares, acting on behalf of SES, wrote what was effectively a letter before action to Mr Dodson and Key in order to assert that SES owned the technical library. A valuation obtained from BDO, the accountants, by Key of the technical library suggested the library was worth £4.9 million. At some point thereafter Mr Shield caused the technical library which Mr Dodson had physically obtained from

BMW to be removed from Oldbury, where it had been stored. It was later sent to China for use in the installation of the lines.

92. On 27th March 2015 Shakespeares wrote further to Mr Dodson and Key, but this time on behalf of IAEP, to complain of overcharging and other breaches of his fiduciary duties as director of IAEP.

93. Subsequently, there were a number of variations of the agreements between SES, CGI and Infinity Max. What precisely occurred has not been the subject of full evidence, disclosure and cross-examination and is quite obscure. I shall not make any findings. Some documents suggest that by 2016, lines 2 and 3 had been shipped to the PRC. A variation agreement recites that Infinity Max paid £25.1 million, which was received by Shakespeares (by now Shakespeare Martineau) in respect of those two lines. There were delays with the other lines. SES complained that Infinity Max had shipped containers holding machines from Liverpool without its permission. Various machines had sustained water damage. All the lines were returned from China and eventually sold in the United Kingdom largely as scrap. This was, it is suggested, because the NG4 engine was only built to Euro 5 standard, whereas Chinese law required the 6C standard. Mr Shield says SES only just broke even. I make no determination as to any of this.

The law

94. The parties were substantially in agreement as to the law. The differences were as to how the law should be applied on the facts of this case. Section 994(1) of the Companies Act 2006 provides:

> "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."

95. In *O'Neill v Phillips* [1999] 1 WLR 1092 at pp 1098-99 and 1101, Lord Hoffman considered the principles on which the Court should act:

> "In the case of [what is now section 994], the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.

> The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith…
>
> I think that one useful cross-check in a case like this is to ask whether the exercise of the power in question would be contrary to what the parties, by words or conduct, have actually agreed. Would it conflict with the promises which they appear to have exchanged? In *Blisset v Daniel* (1853) 10 Hare 493 the limits were found in the 'general meaning' of the partnership articles themselves. In a quasi-partnership company, they will usually be found in the understandings between the members at the time they entered into association. But there may be later promises, by words or conduct, which it would be unfair to allow a member to ignore. Nor is it necessary that such promises should be independently enforceable as a matter of contract. A promise may be binding as a matter of justice and equity although for one reason or another (for example, because in favour of a third party) it would not be enforceable in law."

96. The principles are summarised in Hollington on Shareholders' Rights (9th Ed, 2020) at para 7-01:

> "(vi) [I]t 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. Although it is impossible to provide an exhaustive definition of the circumstances in which the application of equitable principles would render it unjust for a party to insist on his strict legal rights, those principles are to be applied according to settled and established equitable rules, whether arising independently of the statutory remedy or borrowed from the law of partnership under the remedy in appropriate circumstances labelled 'quasi-partnerships', and not by reference to some indefinite notion of fairness;
>
> (vii) the norm is that relations between shareholders are purely commercial and subject to no equitable restraints, whether borrowed from the law of partnership or not. It is an acutely fact-sensitive exercise to determine whether and if so what equitable constraints will apply in what are labelled quasi-partnerships, the hallmarks of which are: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company—so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere."

97. The test of unfairness is an objective one. As well as shareholders keeping promises and honouring agreements, the Court needs to consider whether directors are properly exercising their fiduciary powers and duties. Whether directors are acting unfairly "often turns on the fact that the powers which the shareholders have entrusted to the board are fiduciary powers:" *Re Saul D Harrison & Sons Ltd* [1995] 1 BCLC 14 at p 18.

98. Directors' fiduciary obligations are now codified in sections 170 to 180 of the Companies Act 2006. Mr Khangure QC relied particularly on section 175, which provides:

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

99. The respondents raise the question of delay in bringing this petition. I discuss this issue separately below.

The parties' cases

100. The petitioners put their case on three bases. No substantive relief is sought against Mr Rock. Instead the Dodsons, father and son, say Mr Shield, Mr Cattaneo, Mr Cotterill, Alan Cotterill, Mr Collins and Mr Coulbourn have caused unfair prejudice by:

> (1) Diverting the project to a third party, CGI;

(2) Procuring that the technical library was transferred to CGI, SES and/or Infinity Max without payment to IAEP; and

(3) Failing to and/or refusing in accordance with clause 7.2 of the option agreement to enter good faith negotiations to sell the lines to IAEP or a third party buyer.

101. These three points are disputed by the six respondents. In his skeleton opening Mr Reed argues in relation to base (1):

> "60. The affairs of the Company were conducted in accordance with the terms upon which the parties agreed to do business together and it is not unfair for the affairs of the Company to be conducted in that way.
>
> 60.1 It was well known to all parties prior to the incorporation of the Company that, if funding were to be provided, Shield required complete ownership of any lines acquired, expected a return on the investment and that any funding would be time limited. These requirements were later embodied in the [SHA], the Facility Agreement, the Option Agreement and the Debenture and formed the basis upon which the parties agreed to do business together.
>
> 60.2 All parties accepted and agreed that in the event that the Company was unable to exercise the Option, which included paying back the sums loaned pursuant to the Facility Agreement, by 2nd January 2014, the Option would lapse. At that point, [SES], as owner, could deal with those assets as it saw fit and could engage whichever agents or sub-contractors it required to realise the assets and recoup its investment.
>
> 60.3 [B]y the end of October 2013:
> 60.3.1 None of the lines had been sold;
> 60.3.2 Lines 4, 5 and 6 had not become available as expected;
> 60.3.3 Ownership of intellectual property rights had not been resolved;
> 60.3.4 The Company was not negotiating with any potential purchasers other than Infinity Max;
> 60.3.5 The Company, various directors and Shield had been threatened with a £5.8m claim relating to the transaction with Infinity Max;
> 60.3.6 The Facility was all but used up;
> 60.3.7 The Option was to expire in two months, which included the intervening Christmas break; and
> 60.3.8 There was no further third party funding available or alternative proposal for funding being suggested.
>
> 61. The Company was not in a position to exercise the Option at any time before 2nd January 2014 and therefore the Option lapsed, the Facility loan became repayable and the Company no longer had any entitlement to any assets acquired by Shield. No complaint can be made about what happened thereafter.
>
> 62. The Company is not a quasi-partnership. But, even if it were, it would be in no way inequitable for the agreements entered into to be enforced."

102. In relation to base (2), he says:

"64. The Petitioners' claim that the 'Technical Library' for each of the Lines is a separate and distinct asset owned by [IAEP]. That is an untenable position on the evidence, as, inter alia:

64.1 Despite Kevin Dodson asserting that the Project would 'not have been possible' without the Technical Library, there was no consideration as to how this would be obtained before the Company was incorporated, nor did it feature in any proposal, plan or presentation.

64.2 The Heads of Agreement and draft agreements with Infinity Max did not separate the Technical Library as a separate asset. In due diligence, IAEP answered: 'Ownership of the Technical Information has been transferred to Shield as part of the purchase of Lines 1, 2 and 3'.

64.3 There is no admissible evidence as to the value of the Technical Library. In any event, if the Technical Library had a value as a separate asset, it is nonsensical that BMW would simply provide the same to Key for free.

64.4 Kevin Dodson was instructed by David Cotterill to arrange collection of the technical documentation. That physical collection of technical information from Hams Hall does not equate to a transfer of ownership of a separate and distinct asset.

64.5 Kevin Dodson has sought to use the Technical Library to his advantage depending on how it suited him at the time. Initially, Kevin Dodson claimed that he was the owner of the Technical Library and sought to use it as leverage in his favour. Latterly, he has resiled from ownership (seemingly) in order to support his unfair prejudice claim.

65. The Technical Library was not a standalone asset of the Company and there was nothing to transfer or that was transferred from the Company to a third party. Ownership of the Technical Library always formed part of the purchased Lines."

103. As to base (3), Mr Reed submits:

"66. The parties to the Option Agreement are the Company and Shield.

67. By clause 7.2 of the Option Agreement the Company and Shield undertook to enter into good faith negotiations during the Option Period 'to agree an alternative mechanism or strategy for selling the remaining Lines either to IAEP or some other third party buyer' in the event that the Company was unable to purchase all of the lines owned by Shield. Once the Option Period had expired i.e. from 2nd January 2014 there was no obligation to enter into any such negotiations.

68. As set out above, Shield developed a proposal, which was provided to Kevin Dodson, David Cotterill and Charles Cattaneo, and Chris Shield suggested a board meeting to consider the proposal, any other proposals and agree a way forward.

69. The proposal was discussed at a meeting between David Cotterill, Nic Coulborn, Kevin Dodson, John Rock and Murry Dodson on 28th November 2013.

No alternative mechanism or strategy for selling the remaining lines either to the Company or some other third party buyer was suggested.

70. By letter dated 4th December 2013 from Kevin Dodson (but said to be on behalf of John Rock and Murry Dodson as well) to Chris Shield and the Company, Kevin Dodson asserted that the Shield proposal was not acceptable to them but proposed, in the alternative, that there be payment of outstanding invoices to Key up to 18th November 2013 and an agreement of a final payment for their shares upon successful completion of the sale of the lines and/or turnkey project. No alternative mechanism or strategy for selling the remaining lines either to the Company or some other third party buyer was suggested.

71. Even now the Petitioners are unable to advance an alternative mechanism or strategy for selling the remaining lines either to the Company or identify what different outcome would have been achieved if further negotiations had taken place.

72, In any event, in light of the above, the Petitioners clearly acquiesced in the conduct now complained of in respect of a breach of clause 7.2 and therefore the Petitioners should be denied any relief in respect of this ground of conduct complained of.

73. Further or in the alternative, any breach of clause 7.2 of the Option Agreement would be a breach of contract claim by the Company, which would be statute barred, pursuant to section 5 of the Limitation Act 1980, from 2nd January 2020 at the latest, being 6 years from the expiry of the Option Period. Whilst there is no limitation period for a section 994 claim, the courts will not allow stale claims. The Company would only have been allowed to bring proceedings against Shield for breach of clause 7.2 if issued prior to 2nd January 2020. Yet the Petition was presented on 2nd September 2020, 9 months after limitation expired for the Company's claim. The Court should, by analogy, deny any relief in respect of this ground of conduct complained of."

Demeanour

104. I shall discuss the individual witnesses shortly. However, I first remind myself of the limitations of the assessment of the demeanour of witnesses. As Leggatt LJ (as he then was) said in *R (SS (Sri Lanka)) v Secretary of State for the Home Department* [2018] EWCA Civ 1391:

> "36. …[I]t has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth. The reasons for this were explained by MacKenna J in words which Lord Devlin later adopted in their entirety ("Discretion" (1973) 9 Irish Jurist (New Series) 1 at p 10) and Lord Bingham quoted with approval:
>
> > 'I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that

> the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help.'

37. The reasons for distrusting reliance on demeanour are magnified where the witness is of a different nationality from the judge and is either speaking English as a foreign language or is giving evidence through an interpreter. Scrutton LJ once said that he had 'never yet seen a witness giving evidence through an interpreter as to whom I could decide whether he was telling the truth or not': *Compania Naviera Martiartu v Royal Exchange Assurance Corp* (1922) 13 Ll L Rep 83 at p 97. In his seminal essay on 'The Judge as Juror' (1985) 38 Current Legal Problems 1, Lord Bingham observed:

> 'If a Turk shows signs of anger when accused of lying, is that to be interpreted as the bluster of a man caught out in deceit or the reaction of an honest man to an insult? If a Greek, similarly challenged, becomes rhetorical and voluble and offers to swear the truth of what he has said on the lives of his children, what (if any) significance should be attached to that? If a Japanese witness, accused of forging a document, becomes sullen, resentful and hostile, does this suggest that he has done so or that he has not? I can only ask these questions. I cannot answer them. And if the answer is given that it all depends on the impression made by the particular witness in the particular case that is in my view no answer. The enigma usually remains. To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm.'

105. This warning echoes the earlier observation of the judge, sitting at first instance, in *Gestmin SGPS SA v Crédit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) where he said at para [22]:

> "[T]he best approach for a judge to adopt in the trial of a commercial case is… to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose — though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

106. Now this is not a binding rule. On the contrary, as the Court of Appeal held in *Kogan v Martin* [2019] EWCA Civ 1645, [2020] FSR 3 at para [88]:

> "We start by recalling that the judge read Leggatt J's statements in *Gestmin v Credit Suisse* and *Blue v Ashley* [2017] EWHC 1928 (Comm) at paras [65]-[69] as an 'admonition' against placing any reliance at all on the recollections of witnesses.

> We consider that to have been a serious error in the present case for a number of reasons… *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed… But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence."

107. An oft-cited summary of the appropriate approach (albeit in the context of fraud) is that of Robert Goff LJ in *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1 at p 57:

> "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth."

108. I shall thus take a holistic view of the case when I reach a final view of the facts.

The witnesses

109. I turn then to the witnesses. The only live witness for the petitioners was Mr Dodson himself. He obviously had a very material interest in the outcome of the litigation, but I found him a careful witness who was prepared to admit where he was unsure in his evidence. (See for example the discussion of powerpoint presentations at transcript, day 1 pp 72-73.) Most of his evidence was born out by the contemporaneous documentation. The main area where his evidence had changed was in relation to the ownership of the technical library. His contemporary case was that this was owned by Key. At trial his case was that it was owned by IAEP. In my judgment, this change results from a realisation that as a matter of law any acquisition of the technical library would have been for the benefit of IAEP rather than his own company. It does not cause me to doubt the overall honesty of his evidence.

110. Murry Dodson's evidence, as I have noted above, was not challenged.

111. On the respondents' side, I heard live evidence from Mr Shield, Mr Cattaneo Mr Cotterill, Mr Collins, Mr Rock and Alan Cotterill. Mr Coulborn did not give evidence due to a sudden health issue. His witness statement was admitted in evidence without his being cross-examined on it.

112. Mr Shield was an obviously astute businessman with a good grasp of the relevant commercial possibilities. His background in economics and the City of London gave

him a wider perspective than the other witnesses. As a witness he was less impressive. On occasions he shaded his evidence. For example, he downplayed the way negotiations with Infinity Max languished in the last months before the option agreement expired and then picked up. He was also on occasions truculent and difficult: see for example, transcript, day 5 pp 129-130. At para 52 of his witness statement, he sought to give the impression that his first dealings with Mr Murphy were after the option agreement had elapsed, whereas Mr Murphy's involvement with the project started in the middle of 2013. He had an obvious interest in the outcome of the litigation, in particular because he was the wealthiest of the respondents. Overall I treat Mr Shield's evidence with caution.

113. Mr Cattaneo had relatively little relevant evidence to give. He had, as I have noted, his own corporate advisory company and was willing to act in circumstances where there was an obvious conflict of interest between, for example, IAEP and SES. He did not have day-to-day involvement in the management of IAEP and was latterly very much in the Shield camp. He did not see any problem with excluding Mr Dodson from the project. Whether he is right about that is of course a matter for me to determine. His evidence about overcharging I discuss below.

114. Mr Cotterill I found an unsatisfactory witness, whose evidence I do not accept save where it is either non-contentious or corroborated. I have already set out the way in which he challenged Murry Dodson's evidence after its truth had been accepted by his counsel. No explanation has been forthcoming for this.

115. At some points he seemed to be inventing evidence. At transcript, day 6, p 178, he was asked about an aspect of how the technical library was acquired. There was this exchange:

> "A …Nick Coulborn, as part of the decommissioning in the construction design management, went through the machines and picked up all the manuals.
> Q But they were not there in 2012.
> A There were there, sir. Yes, they were there. There's pictures of them there, sir.
> Q Okay.
> A We've got hundreds and hundreds of thousands of pictures, sir, of BMW — taking the manuals from BMW. They're not in this bundle.
> Q Well, nobody has ever seen those pictures other than the full archive —
> A Sir, I've got one in my case now, sir."

116. No such photographs were produced. That passage was followed by further cross-examination in which Mr Cotterill made an unsatisfactory attempt to explain how (on the respondents' case) the technical library was already SES's, yet it was (as he said in an email of 14th January 2013) a "great day" when Conrad Billingham, their contact at BMW, agreed to allow Mr Dodson to collect the archive technical library. The email is in my judgment inconsistent with any belief on Mr Cotterill's part that SES already owned all the technical libraries.

117. Further he showed clear animosity to Mr. Dodson. The reason for this was unclear. I shall discuss the issue of Key's invoices shortly, but apart from that issue there was no discernible reason for this aversion, which in my judgment affected his willingness to give balanced evidence.

118. Mr Collins had no involvement on the management side of IAEP. He was DNA's technical manager and only became involved in sales if a customer had a technical issue. His evidence is largely relevant to the technical libraries, in relation to which his evidence was balanced, not favouring one side's case or the other's. He was happy to make concessions, even if these were potentially damaging to the respondents' case. I found him an honest witness in relation to the technical library.

119. Mr Rock was called by Mr Reed, although, as Mr Rock admitted, he was in the Dodson camp. He was called to give evidence about the alleged overcharging. I shall deal with the details shortly, but I can indicate that, although I shall find he is mistaken about some matters, he was nonetheless an honest witness.

120. Alan Cotterill had little relevant evidence to give. As he put it, he "was… on the shop floor." He had little involvement in the management of IAEP, despite being a director.

121. Mr Coulborn, it will be recalled, did not give live evidence. Paras 3, 4, and 8 to 10 of Mr Coulborn's witness statement are largely commentary on matters which are well documented. In paras 5, 6 and 7, he outlines the issues with overcharging and other alleged misbehaviour on Mr Dodson's part, which he said led to relations between Mr Dodson and the others deteriorating. This largely copies what is said by other respondents and adds little to what they say.

122. The main matter which is not covered by others concerns the technical libraries, where he says:

> "11. I refer to the ownership of the NG4 project technical documentation, which is a disputed issue in the proceedings. [Mr Dodson] has suggested this was separate to the machinery itself. This supply formed part of the sale of the equipment from Stuckenberger with eventual transfer to Shield as part of the Shield purchase. To facilitate this, I worked closely with BMW asset disposal manager Mr Joe Whitehouse to ensure the 'full' collection of technical documentation on behalf of Stuckenberger and ultimately Shield.
>
> 12. Following [Mr Dodson's] unauthorised removal of part of the technical documents and in and around late August 2014 I met on BMW Hams Hall site with BMW production process manager Conrad Billingham prior to his departure to China to work at BMW China partners China Brilliance. Conrad apologised for being duped by [Mr Dodson] into releasing the technical documents and formally handed over a complete separate hard drive electronic copy to include the information within the technical documentation [Mr Dodson] had removed. This electronic copy complemented the first copy taken at shop floor level with each assembly machine station and transferred to the IAEP technical centre at Oldbury. The copy [Mr Dodson] removed was the BMW archive copy."

123. Mr Coulborn will not have had any personal knowledge of the contractual arrangements between BMW and Stuckenberger about the technical library, so his evidence on this is of no weight. The alleged discussion in late August 2014 is inconsistent with Mr Cotterill's email of 31st October 2014 where he was seeking to persuade Mr Dodson to deliver up the technical library voluntarily. If Mr Coulborn had already obtained a complete electronic copy, obtaining the physical library would have been unnecessary. The supposed electronic copy obtained by Mr Coulborn was not adduced in evidence

at trial. The alleged conversation with Mr Billingham is also inconsistent with BMW's letter of 1st January 2015, which absolves Mr Dodson of any misconduct in acquiring the technical library. Moreover Mr Coulborn gives no details of how Mr Dodson is alleged to have "duped" Mr Billingham. If Mr Billingham was proffering an apology, it would have been easy for Mr Coulborn to obtain details of what Mr Dodson was said to have done wrong, but his witness statement is a blank on this.

124. Overall I attach very little weight to Mr Coulborn's witness statement.

Overcharging by Mr Dodson

125. I turn then to the overcharging allegation, which also included allegations in relation to the lease of Longbridge office and breach of fiduciary duty in talking to Mr Sampson direct. These alleged breaches are pleaded by the respondents as follows:

> "45.2. The First Petitioner was responsible for charging the Company for, inter alia, Key Tech project management services, KTS contractor services and general expenses ('the Key Tech services').
>
> 45.3. In or around June 2013, the Company became aware that the First Petitioner had knowingly overbilled the Company for the Key Tech services provided between October 2012 to June 2013. The amount overbilled was £110,124.00, exclusive of VAT.
>
> 45.4. In a meeting on 28th August 2013:
> 45.4.1. The First Petitioner accepted that he, in his capacity as a director of Key Tech and the Company, had overbilled the Company £104,124.00;
> 45.4.2. The First Petitioner falsely represented that the further £6,000.00 had been paid by Key Tech for services required by the Company. Key Tech had also invoiced the further £6,000.00 to SES and accordingly was not owed £6,000.00.
>
> 45.5. By a letter dated 28th August 2013:
> 45.5.1. The First Petitioner accepted that he, in his capacity as a director of Key Tech and the Company had overbilled the Company £104,124.00;
> 45.5.2. The First Petitioner proposed that the sum could be repaid by deductions from future Key Tech invoices and/or any dividends payable;
> 45.5.3. The First Petitioner stated that Key Tech would not raise any invoices for work completed during July and August 2013.
>
> 45.6. The First Petitioner thereafter invoiced the Company for the Key Tech services in July, August and September 2013. The First Petitioner knowingly overbilled the Company for these services. That overbilling amounted to £38,620.00 plus VAT.
> …
> 45.8. The First Petitioner made an unauthorised withdrawal from Company funds of £10,606.83 on 24th December 2013.
>
> 45.9. The First Petitioner and/or Key Tech was the original leaseholder of Suite 4, G Innovation Centre, Longbridge Technology Park, 1 Devon Way, B31 2TS ('the

> Office'). In or around September 2013, the First Petitioner, without authority of the Company, changed the leaseholder from Key Tech to the Company.
>
> 45.10. On 19th February 2014, the Company was issued with a summons for non-payment of domestic rates for the Office. These amounted to £6,967.80. The non-domestic rates were the responsibility of the original leaseholder and had only been levied on the Company as a result of the First Petitioner's conduct.
>
> 45.11. There was a lengthy notice period required for the Company to surrender the lease of the Office and further costs were incurred by the Company as a result."
>
> 45.12. The First Petitioner's conduct amounted to breaches of sections 171 to 175 and 177 to 185 of the Companies Act 2006 and to breaches under common law of the duty not to misapply the Company's property and/or money in order to attempt to make secret profit, the duty of confidentiality and fiduciary duties to act in the best interests of the Company."

126. The evidence about overcharging was largely oral. I was taken to little paperwork demonstrating the alleged overcharging, although one would expect a paper trail to exist if there had been overcharging. The witness evidence of overcharging was not impressive. Mr Shield said at para 48 of his witness statement that the "costs relating to the offices and the charges of Key… were heavily overcharged." However, in cross-examination it was clear that he did not investigate this himself. He considered that any overcharging was in principle a matter for Mr Dodson and Mr Cotterill at least at first instance to sort out between themselves.

127. Mr Rock's evidence was:

> "Throughout 2012 leading up to around July 2013 many questionable poor conduct matters were revealed regarding [Mr Dodson]. I became aware of this from Project and IAEP fellow directors David Cotterill and Nic Coulborn. These included 1) overpayment to KTS through inflated invoices, 2) [Mr Dodson's] unauthorised IAEP bank withdrawal, 3) IAEP Longbridge office lease anomalies, 4) Indiscretions regarding a claim against IAEP by Infinity Max… those indiscretions being [Mr Dodson] having contact with opposing [Infinity Max] lawyer against other IAEP directors wishes."

128. It can be seen that Mr Rock's belief in Mr Dodson's misconduct was a result of what he was told by Mr Cotterill and Mr Coulborn. It is thus not independent evidence of misconduct. His cross-examination (transcript, day 7 pp 69-71) included the following:

> "Q. Okay. So let's just go through the numbered points, overpayment to KTS through inflated invoices, yes?
> A. Mmhmm.
> Q. That's what you were told?
> A. I was approached and discussed about the wage I was taking.
> Q. Approached by whom?
> A. I was approached by Dave Cotterill and Nic Coulborn.
> Q. When?
> A. We were — I can't remember the actual year or the timing but we were at Oldbury and I was asked about the wage I was receiving, which I felt a bit odd.

> Then they reversed the question and told me the wage that was being drawn down for me, which was a lot higher than the wage I was actually getting myself.
> THE RECORDER: We have heard there were two rates, £35 an hour, and £45 an hour. Which were you being charged out as?
> A. £35 I think.
> THE RECORDER: I see. And your hourly rate — were you paid hourly or were you paid on a monthly basis?
> A. I was paid monthly.
> THE RECORDER: Monthly, but how did that compare to the hourly rate?
> A. It was working about £17 an hour.
> THE RECORDER: I see, but that's what you were receiving in your hand or was that before tax?
> A. Yeah. [Indicating the former.]
> THE RECORDER: So you've got to add the tax onto the £17 and the national insurance.
> A. Which obviously was dealt with with KTS.
> THE RECORDER: Yes. And then why do you say Key shouldn't have been allowed to put some profit margin on top?
> A. No, I understand there has to be a margin mark-up, but I thought it was considerably high…"

129. No pay slips for Mr Rock were produced, but it can be seen that the difference between £35 and £17 an hour is substantially eroded. Firstly the £17 net is increased by the PAYE tax and the employee's National Insurance which has to be deducted to reach the £17 an hour in the hand. Secondly the £35 an hour charged by IAEP is reduced by employer's National Insurance. (No evidence was adduced about NEST or other pension contributions, which, if they had been made, would have reduced the mark-up still further.) Mr Rock's evidence, properly analysed, does not support the case that there was heavy overcharging.

130. The reliability of Mr Cotterill's evidence I have already considered, however, it is noticeable that he mentions overcharging only briefly in para 22 of his witness statement and gives no particulars of why the mark-up billed by Key to IAEP was wrong in principle. Likewise, all Mr Coulborn says is that Mr Dodson's misconduct "included 1) overpayment to KTS, 2) KTS overcharging and [Mr Dodson's] unauthorised IAEP bank withdrawal…" No particularisation is given at all.

131. Mr Cattaneo's evidence in para 18 of his witness statement was this:

> "The relationship with [Mr Dodson] also soured mid way through 2013. I remember that in July, [Mr Coulborn] brought to our attention that he thought [Mr Dodson] had been overcharging IAEP. [Mr Coulborn] had looked at Key's invoicing to IAEP and identified that what Ocean ([Mr Coulborn's] company) had billed Key was being marked up in Key's invoices to IAEP. [Mr Coulborn] did some work with [Mr Cotterill] and reported back a significant level of overcharging into six figures. I recall that [Mr Cotterill] and [Mr Coulborn] had met with [Mr Dodson] in August a few days before we met with Rosenblatts in London and discussed the issue. [Mr Cotterill] and [Mr Coulborn] reported to [Mr Shield] and I that [Mr Dodson] had admitted the overcharging and I recall Key issued credit notes for just over £100,000 but as Key had already been paid, a significant balance remained owing from Key to IAEP. Subsequently in December 2013 [Mr Dodson],

> who was still able to control the bank account, made an unauthorised payment of just over £10,000 to Key. Once this had been discovered when I was looking at the bank account [Mr Dodson] confirmed that it was in respect of VAT on a Key invoice. He claimed to have submitted a payment request for authorisation and when he didn't hear anything decided to make the payment anyway. Following on from this I along with [Mr Shield, Mr Cotterill and Mr Coulborn] lost trust in [Mr Dodson] and it was decided between us that I should take on the operation of the IAEP bank account along with [Mr Cotterill] and I should file VAT returns."

132. It appears from this that Mr Cattaneo had little personal knowledge of any overcharging and was relying on which he was told by Messrs Cotterill and Coulborn. (The agreement Mr Dodson reached, I consider below.)

133. Mr Dodson's evidence is:

> 68. …I was accused of overcharging IAEP, which is a completely false allegation and my/KTS's position was well set out in writing to the Respondents. The agreement between KTS/DNA and IAEP was approved and documented between us from early 2012 and again with all documentation relating to IAEP and the project. From the outset and both KTS and DNA were paid by IAEP for the services provided to it by each of those companies. KTS was not paid for its services by IAEP from May/June onwards, despite numerous assurances and promises.
>
> 69. The hourly rate for each individual was clearly outlined and agreed within the budgets prior to and following the setup of IAEP. It comprised of KTS and DNA invoicing £45/hr for myself and Dave [Cotterill], and £35/hr for other personnel, this was the agreed standard rate. It was also agreed that chargeable hours were capped at 40hrs. This made it easier to budget and prepare cash flows from as early as 2012 onwards, and based upon this, an initial [purchase order] was issued to both KTS and DNA for up to and including June 2013, because we forecast in 2012 that we would likely have a customer signed up by June 2013 or we would continue on with the funding agreement and drawdown, which actually did not happen.
>
> 70. At a meeting at IAEP's offices, on either 4 or 5 July 2013, which was intended to be an update meeting on the project with all of the key directors in attendance, Chris [Shield] and Charles [Cattaneo] turned up late, and prior to them arriving I was accused by Dave [Cotterill] and Nic Coulborn that KTS was profiteering/overcharging the job. It was suggested that the £45 and £35 being invoiced was not paid directly to the individuals and that a level of profit was being taken by KTS, as David Cotterill claimed that DNA paid all monies received directly to the individuals.
>
> 71. It is absurd to consider that KTS did not have other overhead costs including motor vehicles, leases etc and that a 'profit' was not to be made to cover such costs.
>
> 72. In fact, both KTS and DNA received a [purchase order] from IAEP which defined work content and an overall budget of £400,000 and KTS invoiced less than the order value, whilst ironically DNA exceed their order value.

> 73. I disagreed with the accusation and reiterated over many weeks/months that the charges and invoicing were all agreed, in fact from the start of IAEP all monthly invoicing was itemised and approved by Chris, Charles, Dave and myself before payments were made. I obtained legal advice at the time and I was comforted that I had done nothing wrong and had done exactly as agreed. I remained focussed on the IAEP project as best as I could.
>
> 74. I had several discussions with both Dave and Nic regarding this point and they told me quite categorically that no individual or company was being paid unless this matter was resolved. Dave wrote a draft letter for me which I copied onto a KTS letterhead, which stated that I agreed I would credit some invoice payments and agreed to overcharging and this was based upon continuing on the project and invoicing going forward. This allowed for KTS/DNA and others to get paid. It was also, I have to say, based upon an agreement that all other parties e.g. DNA, Dave and Nic would look at their own invoicing and offer a cost back to IAEP, which never happened. Dave and Nic had mislead me when stating that no one had been paid and this was purely stated to get me to agree to their proposal and to move forward together, which again never happened."

134. In cross-examination Mr Dodson explained that the terms of the letter meant that Key did not have to pay any monies up-front to IAEP. It was only if the project completed that the obligation to pay the £104,000 odd arose. Mr Dodson's view that it was worth making that concession to resolve matters. If the project succeeded and profits of £19 million were generated, then £104,000 would be effectively loose change: see transcript, day 3 pp 214 and 217. There would in any event need to be a general accounting on the successful completion of the project.

135. On balance of probabilities I accept Mr Dodson's evidence. He disputed that he had overcharged, but the agreement reached (particularly if DNA was also going to account) meant everything was put into abeyance pending a successful outcome of the project. I find as a fact that there was no deliberate overcharging on Mr Dodson's part.

136. The evidence in relation to the £10,606.83 is equally deficient. Key had raised an invoice on IAEP. Key had to account to HM Revenue and Customs for the VAT. It recouped that VAT from IAEP. Now it may be that internal procedures for obtaining the approval of the reimbursement were deficient, but on balance of probabilities I find the money was properly owed by IAEP to Key.

137. The issue of the business rates is simply resolved. The lease of the Longbridge premises was taken out initially by Key because IAEP had not been incorporated. Now again it is possible that internal procedures could have been carried out better, but the evidence is that the premises were used by IAEP. It was therefore IAEP which was liable for the business rates. There was no impropriety in transferring the lease to IAEP. Even if that were wrong, Key would have a right to recharge the cost of leasing to IAEP in so far as it was an expense of the project.

138. The issue of Mr Dodson speaking directly to Mr Sampson is equally a red herring. Normally, the principals of IAEP and Infinity Max would negotiate on the commercial aspects of the proposed deal and the solicitors would negotiate the legal aspects. In the current case, however, the principals of Infinity Max were in China. They were not in England with great frequency. Continued commercial discussions sensibly had to

involve Mr Sampson. Mr Dodson was not the only director to have direct discussions with him. I do not accept that Mr Dodson did anything other than try to keep the negotiations going. As the commercial director he was entitled to do that. I find that there was no breach of fiduciary duty.

139. Accordingly, I reject the allegations in para 45 of the Defence. For completeness, I should say that even if I am wrong in this, Mr Dodson's behaviour would not afford a defence to the unfair prejudice petition, if the claim were otherwise made out.

The technical libraries

140. The best evidence as to what the technical libraries consisted of was that given by Mr Collins. There are, as is pleaded in para 31.4 of the Defence, three copies of the technical library. Firstly, each machine has its own manual. A physical copy is kept with each machine for ease of use. Each machine also had software, which could be on a hard drive or, in older machines, kept in antiquated forms of computer storage like 5¼ inch floppy discs. The manual and software were specific to the particular machine and were kept with the machine. Secondly, there was a complete set of all the manuals and software kept in the engineer's office on the shopfloor. This was not just the documentation for particular machines, but also the plans etc for installing the whole of the line. Thirdly, there is an archive set of all the technical documentation, both physical and electronic, kept separately by BMW in secure storage.

141. There is no evidence about the shopfloor and archive copies of the technical libraries for lines 4 and 5. The witness evidence was about the technical libraries at Hams Hall.

142. When machines were decommissioned, Mr Collins checked what manuals had been delivered with the machines. He also checked that the hard drive had not been wiped. (None of the hard drives were.) He would also have Mr Coulborn collect manuals piecemeal from the engineer's office on the shopfloor. So far as the archive copy was concerned, there was the following exchange at the end of Mr Collins' evidence (transcript, day 7 p 63):

> "THE RECORDER: Do I take from what you're saying that the archive library had some value to it but you in fact had most of the material already. Would that be a fair summary?
> A. Yes, my Lord, that's correct, certainly correct."

143. As to property in the technical libraries, the physical manuals and the hard-drives and floppy discs are all chattels. (No argument was presented about whether there was, or needed to be, any passing of intellectual property rights in the software. All parties proceeded on the basis that only the chattel assets, i.e. the physical manuals, hard-drives etc, were relevant.) Property can pass in chattels inter vivos (a) by the giving of possession with the intention that property passes, (b) by deed and (c) by a contract supported by consideration. (b) can be ignored in the current case.

144. The respondents' case is that property in all three libraries passed from BMW to Stuckenberger to Pagus to SES. It was to be understood, they assert, that the various contracts under which the lines were sold through the middlemen to SES included a term that property in all three technical libraries passed. (No issues of German law were argued.)

145. Now there is in my judgment no difficulty with the manuals and hard drives etc attached to the individual machines. Property in these passed with the machines. Thus they passed to SES as the chain of title BMW to Stuckenberger to Pagus to SES completed on physical removal of individual lines from BMW to storage arranged by SES. Mr Khangure QC did not argue the contrary. Either the manuals and hard drives were physically ancillary to the machines, so they passed under the contracts of sale, or property passed on BMW giving possession to the buyer.

146. The position is different in relation to the shopfloor and archive copies. These were not physically ancillary to the machines. Further, possession in them was not passed at the same time as the machines were removed. In my judgment, the only way the respondents' argument could succeed in relation to these two libraries was if there was a contractual term to that effect. The BMW/Stuckenberger, Stuckenberger/Pagus and Pagus/SES contracts contain no express term selling these two technical libraries. The respondents must therefore rely on an implied term.

147. Mr Shield suggested in his evidence that (I put this in lawyer's terminology rather than his words) it was so well understood in the industry that property in the technical libraries would pass that there was no need to spell it out. Further obtaining possession of the technical libraries was necessary to give business efficacy to the sale of the machines, since otherwise they could not be reinstalled save at disproportionate expense.

148. I do not accept this. Firstly, Stuckenberger was primarily a dealer in scrap. As such, it had no need for the shopfloor or the archive copies. Indeed, it had no need for the manuals and hard-drives delivered with the machines; property in those came to Stuckenberger either (a) as items ancillary to the machines which were the subject of the contracts of sale or (b) by virtue of physical delivery. In relation to the shopfloor and archive libraries, no implication of terms to ensure business efficacy can be made in my judgment. Secondly, BMW did not sell all the machines from the various lines. Particularly in line 1 it kept machines back. Mr Collins accepted (transcript, day 7, p 50) that in such cases "BMW would not release the manuals in any form because the machines were being re-purposed for another use, so we didn't have those." Thus there would be gaps. The respondents' case is that *all* of the shopfloor library and *all* of the archive library passed, but this is inconsistent with what Mr Collins is saying. Obtaining all the shopfloor and the archive libraries would have to be done in some other way (which is what happened: see the next paragraphs).

149. Thirdly, Mr Shield's evidence is inconsistent with what in fact occurred. I have outlined the evidence of how Mr Dodson was able to get the archive library from BMW and Mr Cotterill's jubilatory email of 14th January 2013. If SES already owned the archive library, none of that would have been necessary. SES could have demanded the archive library as of right.

150. So far as the shopfloor library is concerned, obtaining the manuals etc also seems to have been a matter of leaning on BMW's goodwill. Mr Collins' evidence (transcript, day 7 pp 50-51) was:

> "The machines which had been scrapped, for want of a better word, on site, before we moved in, were machines which were very important to us, and that was the normalizing, the crankshaft normalizing oven, which is a very large piece of

> equipment, and the induction Harn, the crankshaft induction Harn machine. Mr Coulborn went to the lines under instruction of myself, verbal instruction, because we had many conversations, and I said, 'Look, Nic, I need these manuals from the normalizing oven and from the induction Harn machine.' Nic went around and sourced manuals from the process control engineers and maintenance departments to secure as many manuals as he could, bearing in mind that Mr Coulborn is not technically minded. So, he collected under my instruction as many manuals as he could put his hands on… [T]here was hundreds of manuals, hundreds. And that took a long time to sort.
> Q. But there was no guarantee that you got everything, was there?
> A. However, what transpired, if I may state, I'd say 95 to 98% of the manuals collected from the technical archive at BMW, we already had. There was some holes in the library, and that's why I was pleased with Mr Dodson being able to have permission to collect the manuals on behalf of IAEP."

151. Once SES's claim to property in the shopfloor and archive libraries is rejected, the only plausible contender for ownership of those libraries is IAEP. As see from the passage above, that was Mr Collins' understanding and in my judgment he was right in that understanding. Mr Coulborn, when he acquired the shopfloor library piecemeal, was not acting for SES; he was doing it as a director of IAEP. As regards the archive library, Mr Dodson originally claimed he was acting on behalf of Key, but he resiled from that and said he was acting for IAEP. That, I find, is right. The claim that SES was the owner is based on Mr Shield's claim to a contractual right, not any assertion that Mr Dodson owed SES duties to account for items like the archive library. Accordingly, there is in my judgment no basis for saying Mr Dodson was acting on behalf of SES. On the contrary, by the time Mr Dodson had obtained the archive library, relations between him and Mr Shield were strained by Mr Shield's sponsorship of the plan which involved Mr Dodson ceasing to be involved in the project.

152. The draft due diligence prepared in June 2013 stated that "[o]wnership of the Technical Information has been transferred to [SES] as part of the purchase of Lines 1, 2 and 3." However, it is unclear whether Infinity Max were aware that there were three separate libraries. The answer is correct in relation to the individual machine libraries. Even if the answer did refer to all three libraries, the answer would reflect Mr Shield's (erroneous) view that SES owned all three. In any event it did not matter, so far as due diligence by Infinity Max was concerned: IAEP would make the shopfloor and archive libraries available as part of the proposed turnkey project.

153. Accordingly, I find that the shopfloor library and the archive library belonged to IAEP. The library attached to each machine belonged to SES.

154. I have heard no evidence about valuation. If relevant, I will need to hear submissions about how that should be determined.

Was IAEP a quasi-partnership?

155. Mr Reed argues in his written closing:

> "By clauses 17.1 and [21] of the Shareholder Agreement, the parties have expressly agreed that there is no partnership, which would include a quasi-partnership, and that the agreement and any documents referred to in it or executed

contemporaneously with it, being the Option Agreement, Facility Agreement and Debenture, constitute the entire agreement. In such circumstances, there is no scope to introduce 'equitable considerations'; the parties' 'legitimate expectations' are set out in the Shareholders Agreement and the documents referred to in it or executed contemporaneously with it.

156. It is true that clause 21 provides that the parties are "not in partnership with each other". However, that is not in my judgment inconsistent with there being a quasi-partnership. A company cannot as a matter of law be a partnership of the shareholders. That, however, does not prevent the company being a quasi-partnership: *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360. It necessarily follows that a term which says the shareholders are not in partnership does not prevent the company being a quasi-partnership. Indeed the expression quasi-partnership is more of a metaphor: the company is not a partnership but the relations between those interested in the company are more akin to those of partners.

157. I agree with Mr Reed that clause 17.1 requires the Court to interpret solely the five documents executed on 2nd October 2012. The central obligations relevant to the quasi-partnership issue in my judgment are these. Firstly, the business of the company as set out in clause 2.2 of the SHA was the acquisition of the six NG4 lines from BMW and the selling of a turnkey facility to a buyer. (The business was wider than this, but in fact no other projects came to fruition.) Secondly, by clause 7.1 of the SHA none of the parties could compete with IAEP on turnkey projects. By clause 2.3 they were obliged to use reasonable endeavours to promote and develop the project. These obligations were open-ended. Thirdly, clause 22 of the SHA required the parties to act in good faith to one another. Fourthly, all the shareholders were entitled to be directors. Fifthly, clause 7.2 of the option agreement provided that "in the event that IAEP is unable to purchase all of the Lines owned by [SES], then during the Option Period [IAEP and SES] will enter into good faith negotiations to agree an alternative mechanism or strategy for selling the remaining Lines."

158. Mr Reed laid weight on the argument that once the option period elapsed on 2nd January 2014 SES's duty to negotiate in good faith lapsed. At that point, he submitted, the project was dead. Even if (which he argued was not the case) there was a quasi-partnership up to 2nd January 2014, the substance of the business (and with it any quasi-partnership) went after the expiration of the option agreement.

159. All the shareholders were entitled to be directors. Mr Reed argues that this was purely for tax reasons. There was no pre-existing personal relationship between the directors. Therefore, there was no "association formed… on the basis of a personal relationship". I disagree. The relationship has to be found in the five documents. Even if the shareholders had no personal relationship before becoming directors (and of course some did), they did afterwards. There was no means of forceable buy-out, so if "member is removed from management, he cannot take out his stake and go elsewhere." They all owed duties under the SHA of good faith to each other, so there was a relationship of "mutual confidence". None could compete with IAEP on turnkey projects: each shareholder was entitled to "participate in the conduct of the business". These in my judgment are the three indicia of a quasi-partnership identified in para 7-01 of Hollington in the passage (vii) set out above.

160. The option agreement is relevant, but not in my judgment the key factor in deciding whether IAEP was a quasi-partnership. The business of IAEP was not limited to the NG4 lines: it extended potentially to the making of turnkey agreements for other engine lines. Further, the option agreement was not between any of the shareholders; it was an agreement between IAEP and SES only. Even once the option agreement lapsed, it was possible for IAEP to agree with SES to carry on with the NG4 project (and this is of course what happened between CGI and SES). IAEP, in such a case, would have remained a quasi-partnership.

161. What changed on 2nd January 2014? The significance of the expiration of the option agreement in my judgment is that once it elapsed SES could sell lines 1, 2 and 3 independently. As Mr Shield explained in evidence, SES could not put itself in the position of having to hold on to lines 1, 2 and 3 indefinitely. There were financing and storage costs which SES was having to meet. A turnkey agreement was attractive to SES, because such an agreement was more profitable that a simple asset sale. Mr Dodson's calculation of a profit on a turnkey agreement with Infinity Max of in excess of £19 million shows this. However, SES needed a means of bailing out, if no turnkey agreement was signed within 15 months.

162. This, however, is not in my judgment sufficient to mean that any quasi-partnership in IAEP came to an end. The non-compete and business promotion obligations continued — and it will be recalled that SES was bound by those terms of the SHA. If SES was still going to pursue a turnkey agreement, the non-compete and business promotion clauses meant it could not go elsewhere. In my judgment, that meant that the key elements of the quasi-partnership continued.

163. I find that IAEP was a quasi-partnership and remained one after the expiration of the option agreement. This, however, is not in itself sufficient to determine the case in favour of the petitioners. As Mr Reed rightly submits, there must be prejudice to them which is unfair.

The failure to negotiate

164. It is convenient to consider allegation of a failure to negotiate between SES and IAEP in the period leading up to 2nd January 2014. Although Mr Khangure QC also sought to rely on clause 22 of the SHA, this in my judgment adds little to the obligation under clause 7.2 of the option agreement, which it will be recalled was to "enter into good faith negotiations to agree an alternative mechanism or strategy for selling the remaining Lines either to IAEP or some other third party buyer."

165. Mr Reed somewhat faintly submitted that Mr Shield's "Project Bavaria" report and the subsequent meeting on 28th November 2013 amounted to negotiations for the purpose of clause 7.2. These discussions were not, however, directed at developing "an alternative mechanism or strategy". The meeting was to consider buying out the Dodson/Key interest in IAEP on what Mr Dodson considered were unfavourable terms.

166. Mr Reed also submitted that clause 7.2 was unenforceable. He relied on authorities saying that an agreement to agree is not capable of enforcement: *Walford v Miles* [1992] 2 AC 129 and *Petromec Inc v Petroleo Brasileiro SA* [2013] EWCA Civ 150. These, however, have to read against authorities like *F&C Alternative Investments v Barthelemy* [2011] EWHC 1731 (Ch), [2012] Ch 613 and *Astor Management AG v*

Atalaya Mining plc [2017] EWCH 680 (Comm), [2017] 1 CLC 724 at [98] (appeal dismissed [2018] EWCA Civ 2407, [2018] 2 CLC 829), which give a duty to negotiate in good faith limited force.

167. I do not need to determine this issue. The essential problem was that the timetable for acquiring lines 4, 5 and 6 had slipped beyond what the parties had contemplated. As 2013 advanced, it was increasing likely that those lines (of which line 6 was the most critical) could not be acquired before the expiration of the option period. By November 2013 there was virtually no prospect of all those lines being acquired in time. Although IAEP was trying to continue negotiations with Infinity Max, the reality was that no turnkey deal could be agreed without progress on the acquisition of lines 4, 5 and 6. That would not happen before 2nd January 2014.

168. In my judgment there was nothing which could sensibly have been the subject of negotiations under clause 7.2 in the latter half of 2013. The clause did not require SES to consider granting an extension of the option period. It was always important for SES to have the right to cut its losses after the expiration of the option period. Clause 7.2 cannot be interpreted to prevent that. Yet without lines 4, 5 and 6 coming available, there was no juggling of the option agreement possible to produce a workable solution.

169. Thus, although I find there was a technical breach of the obligation under clause 7.2 to negotiate, it has in my judgment no consequences. The project in 2013 was stymied by BMW having put back the date of decommissioning of lines 4, 5 and 6. No negotiations between SES and IAEP would have overcome this problem.

170. Accordingly in my judgment, the petitioners cannot rely on the failure to negotiate to show unfair prejudice.

The use of the technical library

171. As I have found, the library attached to each machine belonged to SES, however the shopfloor and the archive libraries belonged to IAEP. I have accepted Mr Collins' evidence that the shopfloor library was 95 to 98 per cent complete. I have heard no evidence on the extent to which the 2 to 5 per cent missing from that library impaired the value of the shopfloor library compared to the complete archive library. (Mr Cotterill's attempts to persuade Mr Dodson to deliver up the archive library suggests that there must have been some value added, as Mr Collins' evidence quoted above confirms.) The shopfloor and the archive libraries included the documentation for the commissioning or recommissioning of whole lines. Thus, these two libraries contained materials which were not available in the individual libraries attached to those machines which were sold. I find they were of real value to an end-purchaser such as Infinity Max and a company, like CGI, which needed to commission the lines.

172. The shopfloor library was made available to SES and CGI at no cost. As Mr Collins' evidence shows, he knew that that library belonged to IAEP. I do not accept Mr Shield's evidence that he believed the shopfloor and archive libraries passed to SES via the chain of contracts through Stuckenberger and Pagus. He is an astute businessman. I find he knew IAEP owned those two libraries. The difficulties experienced in acquiring the shopfloor and the archive libraries can have been no surprise to him. Mr Cotterill was, I find, also aware of the true ownership of the shopfloor and archive libraries.

173. The giving of the shopfloor library to SES and CGI for no consideration was a breach of fiduciary duty. The shopfloor library had a substantial value and was owned by IAEP. In my judgment, giving it away caused prejudice to the petitioners and that prejudice was unfair.

Diverting the project

174. The petitioners say that the project was diverted from IAEP to CGI. Mr Reed's answer to this in his written closing is:

> "28. The affairs of the Company were conducted in accordance with the terms upon which the parties agreed to do business together and it is not unfair for the affairs of the Company to be conducted in that way.
>
> 28.1 It was well known to all parties prior to the incorporation of the Company that, if funding were to be provided, Shield required complete ownership of any lines acquired, expected a return on the investment and that any funding would be time-limited. These requirements were later embodied in the Shareholders' Agreement, the Facility Agreement, the Option Agreement and the Debenture and formed the basis upon which the parties agreed to do business together.
>
> 28.2 All parties accepted and agreed that in the event that the Company was unable to exercise the Option, which included paying back the sums loaned pursuant to the Facility Agreement, by 2nd January 2014, the Option would lapse. At that point, Shield, as owner, could deal with those assets as it saw fit and could engage whichever agents or sub-contractors it required to realise the assets and recoup its investment.
>
> 28.3 It is clear from the evidence that by the end of October 2013 onwards [and he set out various ways in the project as at that date was effectively dead].
>
> 28.4 The Company was not in a position to exercise the Option at any time before 2nd January 2014 and therefore the Option lapsed, the Facility loan became repayable and the Company no longer had any entitlement to any assets acquired by Shield. No complaint can be made about what happened thereafter.
>
> 29. There is an absence of reality to the Petitioners' repeated assertions that the Company could deliver the Project in any form either before or after 2nd January 2014."

175. I agree with these points, as far as they relate to the period up to 2nd January 2014. However, it does not seem to me that they answer the gravamen of the allegation of diversion. There were two reasons CGI rather than IAEP signed the turnkey agreement with Infinity Max on 11th February 2015 and 28th April 2015. Firstly, Mr Shield and Mr Cotterill wanted Mr Dodson replaced by Mr Murphy. Secondly Mr Shield would have a larger shareholding in CGI than in IAEP. The respondents (apart from Mr Rock) acquiesced in that.

176. There could, I agree, have been no objection to SES just selling the lines it owned. What, however, is contrary to the SHA is SES and the respondents entering into a turnkey arrangement with Infinity Max, using CGI as the vehicle for the turnkey agreement. That was in my judgment a breach of the non-competition and business promotion clauses in the SHA. It caused prejudice to the Dodsons and that prejudice was unfair.

Breach of fiduciary duty

177. Mr Khangure QC submits that the breaches I have found in respect of the technical library and the diversion of the project to CGI are also breaches of fiduciary duty by the respondents. No meeting of directors was held to ratify the transfer of the shopfloor technical library nor to permit CGI to carry the turnkey project forward. There was, I find, no informal meeting of directors either. The main actors, Mr Shield and Mr Cotterill, decided what should happen and Mr Catteneo, Alan Cotterill, Mr Collins and Mr Coulborn went along with it. All of them continued to work for CGI in the roll-out of the project and acquiesced in the diverting of the project to CGI. That in my judgment put them in a position of conflict between their duties as directors of IAEP and their function in CGI.

178. Further I agree with Mr Khangure's submission that section 175(6) of the Companies Act 2006 requires that any waiver of a director's duty to avoid conflict be authorised by directors who are not conflicted. That never occurred. Nor could it have occurred in the event that a formal board meeting had been held for that purpose: the only non-conflicted directors would have been Mr Dodson, Murry Dodson and Mr Rock, but Mr Dodson and his son could have outvoted Mr Rock (even assuming he would have been willing to waive the conflict).

Delay and acquiescence

179. Mr Reed submits in his opening:

> "72. In any event, in light of the above, the Petitioners clearly acquiesced in the conduct now complained of in respect of a breach of clause 7.2 and therefore the Petitioners should be denied any relief in respect of this ground of conduct complained of.
>
> 73. Further or in the alternative, any breach of clause 7.2 of the Option Agreement would be a breach of contract claim by the Company, which would be statute barred, pursuant to section 5 of the Limitation Act 1980, from 2nd January 2020 at the latest, being 6 years from the expiry of the Option Period. Whilst there is no limitation period for a section 994 claim, the courts will not allow stale claims. The Company would only have been allowed to bring proceedings against Shield for breach of clause 7.2 if issued prior to 2nd January 2020. Yet the Petition was presented on 2nd September 2020, 9 months after limitation expired for the Company's claim. The Court should, by analogy, deny any relief in respect of this ground of conduct complained of."

180. In his closing he added that "[a]ny breach of fiduciary duty is also subject to a 6-year limitation period, which would also have expired by the beginning of January 2020 at the latest."

181. In *Re C F Booth Ltd* [2017] EWHC 457 (Ch), Mr Mark Anderson QC, sitting as a deputy High Court judge, was considering an unfair prejudice petition alleging directors had adopted a policy over many years of not paying dividends, but instead of paying themselves excessive salaries. At paras [104]-[105], he held:

> "There is no limitation period under section 994 but the courts will not allow stale claims. If the Company had brought proceedings against the Booth directors to reclaim excessive remuneration, the claim would not have been allowed to go back beyond six years before proceedings were instituted. I therefore think there is force in the point that I should limit any remedy which I will afford the petitioners by analogy with that limitation period...
>
> But in my judgment there has been no acquiescence in the no-dividend policy such as to preclude this petition from proceeding. In particular, the omission to turn up at the AGM to complain does not amount to acceptance that the dividend policy is appropriate, nor does it involve any form of indication that a complaint about it will not be pursued."

182. As regards clause 7.2 of the option agreement, I have already held that, even if there was a technical breach of the duty to negotiate, in fact in the second half of 2013 there was no prospect of negotiations being productive. Unless and until BMW released all the remaining lines, negotiations with Infinity Max could not make substantial progress. Negotiations between SES and IAEP were thus equally futile. (The only negotiations which would have been of practical use to IAEP would have been for an extension of the option period, but SES were not obliged to consider this and would justifiably have refused to do so.) A breach would therefore attract at most nominal damages. Mr Reed's point on limitation in respect of clause 7.2 is thus in my judgment immaterial.

183. As to breach of fiduciary duty, the difficulty with Mr Reed's submission is that the breaches alleged were ongoing. Thus, it is only realistically with the signing of the non-binding heads of agreement between CGI, SES and Infinity Max on 11th February 2015 and the making of them legally enforceable on 28th April 2015 that a duty to account to IAEP for profits started to arise. As profits were made, so too did the ambulatory duty to account: *Regal (Hastings) Ltd v Gulliver* (1942) [1967] 2 AC 134 (Note) at p 145 ("The liability [to account] arises from the mere fact of a profit having… been made" *per* Lord Russell of Killowen). It was only after the signing of those documents that any use of the shopfloor technical library started to be made and any question of remedy arose.

184. Accordingly in my judgment, the two matters where I have found a breach are not statute-barred.

185. Nor is acquiescence made out. The respondents were from 2014 onwards remarkably coy about what steps CGI was taking to sell the turnkey solution to Infinity Max. This resulted in Mr Dodson bringing proceedings in 2016 against Mr Shield, Mr Cotterill and Mr Cattaneo for pre-action disclosure in support of a proposed derivative action. That claim for disclosure failed; this Court refused to give any pre-action disclosure. However, the bringing of that action is inconsistent with any acquiescence on the Dodsons' part. There is nothing else which could amount to acquiescence.

Conclusion

186. Accordingly, in my judgment:

(a) No unfair prejudice was caused by the failure in the period leading up to 2nd February 2014 to negotiate under clause 7.2 of the option agreement or under clause 22 of the SHA.

(b) The making available of the shopfloor technical library to SES and CGI at no cost did cause unfair prejudice to the petitioners.

(c) The diversion of the turnkey agreement to CGI also caused unfair prejudice to the petitioners.

(d) These two matters were also breaches of fiduciary duty.

(e) The petitioners' claims are not barred by the Limitation Act 1980 (whether applied directly or by analogy) and are not otherwise waived.

187. I shall hear counsel on the question of what relief should be granted and the date of any valuation.