Neutral Citation Number: [2022] EWHC 76 (Ch)

Case No: CH-2020-000223

IN THE HIGH COURT OF JUSTICE
ON APPEAL FROM THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANY LIST (ChD)
ICC JUDGE BURTON
IN THE MATTER OF PROSPECT PLACE (WIMBLEDON) MANAGEMENT COMPANY LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

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

Date: 17/1/2022

Before :

THE HONOURABLE MRS JUSTICE JOANNA SMITH DBE

- -

Between :

(1) LILY PROPERTY NOMINEES LIMITED
(2) GURUPARAN CHANDRASEKARAN

Petitioners / Appellants

- and –

(1) WILLIAM GEORGE STONEBRIDGE
(2) PAUL JOHAN VOGT
(3) RICHARD MICHAEL JOSEPH
(4) PROSPECT PLACE (WIMBLEDON) MANAGEMENT COMPANY LIMITED

Respondents

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Daniel Lightman QC and Elaine Banton (instructed by **BDB Pitmans LLP**) for the **Appellants**
Richard Samuel and Hafsah Masood (instructed by **Peacock & Co Solicitors**) for the **Respondents**

Hearing date: 14 December 2021

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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.

Covid-19 Protocol: This judgment has been handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 17 January 2022.

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THE HONOURABLE MRS JUSTICE JOANNA SMITH DBE

Mrs Justice Joanna Smith:

1. This is an appeal against the decision of ICC Judge Burton ("**the Judge**") of 31 July 2020 dismissing an unfair prejudice petition ("**the Petition**") under section 994 of the Companies Act 2006 ("**the 2006 Act**"). The decision followed a five day trial at which evidence and argument was heard in respect of eight general allegations, many including groups of connected complaints, said to amount to unfair prejudice arising in the context of the management of the fourth Respondent ("**the Company**"), a private management company set up for the purposes of owning the freehold in, and managing, a road ("**the Road**") at Prospect Place, Wimbledon, London SW20.

2. Prospect Place is a private estate ("**the Estate**") made up of 8 freehold residential houses whose owners each hold one of the 8 issued shares in the Company. In April 2010, the Second Appellant ("**Mr Chandrasekaran**") and his wife moved into 7 Prospect Place ("**7PP**") as tenants. On 15 January 2016, 7PP was purchased by the First Appellant ("**Lily**") a Jersey company which holds the legal title to 7PP under a nominee agreement. Lily holds one share in the Company. Mr and Mrs Chandrasekaran are now the beneficial owners of 7PP, their family home, which they occupy with their three children. It was common ground at trial that, for the purposes of section 994 of the 2006 Act, Lily's interests could include the interests of Mr and Mrs Chandrasekaran.

3. The Petition arose out of the manner in which Mr and Mrs Chandrasekaran, considered they had been treated by the other owners of property at the Estate since they moved in to 7PP. In particular, (i) the First and Second Respondents (respectively "**Mr Stonebridge**" and "**Mr Vogt**"), each owners (with their respective wives) of property at the Estate, each holders of one share in the Company and the Company's only current directors; and (ii) the Third Respondent ("**Mr Joseph**"), owner of 3 Prospect Place, a member of the Company and director of the Company between 5 March and 24 September 2018.

4. In the sad and extremely unusual circumstances of this case, I am told that the Judge's decision ("**the Judgment**") has not enabled the Appellants to draw a line under the historic events which prompted the Petition (as they had hoped); hence this appeal. It is their view that the outcome of the Judgment on one issue raised in the Petition ("**the Gardener Issue**") has instead served to mirror what they perceive to be a persistent failure on the part of the Respondents properly to engage with, and address, that issue. The Judge refused an application for permission to appeal, as did Fancourt J on the papers, but permission in respect only of the Gardener Issue was obtained from Adam Johnson J on 26 March 2021.

5. Notwithstanding that the Appellants seek no financial relief, the appeal on the Gardener Issue has been extremely hard fought. The Appellants have been represented by leading and junior counsel and have relied upon a 25 page skeleton argument and numerous authorities. Their oral submissions were divided between submissions directly addressing the issues on the appeal (made by Mr Lightman QC) and submissions addressing the existence of racist conduct in connection with the Gardener Issue (made by Ms Banton). The Respondents have also been represented by two counsel (Mr Samuel, who appeared below and Ms Masood, who focused on the allegations of racist conduct), themselves relying on a lengthy skeleton argument. The submissions at the hearing from all four counsel ran well over their allotted time and it was necessary for the Appellants' reply submissions to be provided to the court in writing. I am bound to

say that I very much doubt that approaching the appeal in this way has assisted in returning much-needed harmony to the Estate or in mending fractured relationships between neighbours.

6. The Judge resolved the Gardener Issue in four paragraphs of her extremely lengthy (258 paragraph) and comprehensive Judgment, albeit also dealing elsewhere with matters relevant to that resolution. Before I turn to consider the Appellants' complaints in relation to these paragraphs, I need to begin by setting out rather more of the history to the Gardener Issue.

Background to the Petition

7. In late January 2016, an incident occurred between Mr Chandrasekaran and a gardener known as Jakub Lapzcynski ("**the Gardener**"). The Gardener was employed by Mr David Birley ("**Mr Birley**"), one of the three then directors of the Company and the owner of 5 Prospect Place.

8. In an email of 3 February 2016 ("**the February 2016 Email**") (which also addressed another incident concerning a request by Mr Birley that the Chandrasekaran family should pay the service charge for a period prior to Lily acquiring the ownership of 7PP) Mr Chandrasekaran raised the Gardener Issue for the first time:

> "Last week, your gardener, who identified himself as Jakob, no less confronted me with a very menacing and aggressive approach and tone respectively, in which he told me I was "wasting everybody's' time" and that I should pay him "at least twenty to twenty five quid" to clear the leaves. He told me that the was employed by you and that you had told him to ask me. Having spoken to me in this manner, he goes on to ask, menacingly, "can you speak English?". Ironically, a first generation immigrant, who can hardly string a grammatical sentence in the language together, asks this of a second one! **It seemed obvious to me that he had been put up to the whole task**; this had shades of the past of course to which I refer above. For the record, I was educated in the English medium, attended two (English medium) top ranked Universities, was an advisor to the UK CBI (in English), advisor to the Dti (in English) and advisor to the Prince of Wales (in English), am a Visiting Professor in a leading (English speaking) University, am a director of a English Company of which all matters are discussed in English and am a father and husband within a house where only English, with poor but passable French, is the 'mother tongue' and more (in English); we can therefore reasonably deduce that I have passed the English test and **I would thank you not to send your gardener around to ask such rude and impertinent questions**. I trust this type of incident will never again take place. I now have a note from Jakob for £700:00 for the clearance of my garden. This is clearly intimidation and harassment. You might like to remind him that I have paid my dues for his welfare as a recent immigrant himself and that as house owner in the close he will in future treat me and more

> immediately my family with more respect - as in the alternative I will take swift and pretty harsh action - please do not underestimate me on this. If you think me a shrinking violet - 1 warn you to think carefully, again please" (**emphasis added**).

9. This email led, first, to a letter of 9 February 2016 from the then directors expressing their regret and then to a further letter from the directors dated 18 February 2016 which apologised for their conduct in relation to the service charge ("**the Apology Letter**"). The Apology Letter went on to say: "We also apologise for the conduct of the gardener and will ensure that this will not be repeated". It then set out the terms on which these two disputes had been resolved between the Chandrasekarans and the then directors of the Company (who each signed the Apology Letter) as follows:

> "In conclusion, the events between the completion of your property purchase on 15th January and the present fell well below the standard we would expect of ourselves and we will ensure that in our future conduct we will treat you fairly and equitably, just the same as we would any other shareholder of Prospect Place. Having said that, in consideration of the distress caused to you, we wish to pay your reasonable legal costs up to £500.00. We wish to have good neighbourly relationships going forward, and trust that this will reassure you of our good intentions in that regard".

10. It is common ground between the parties to this appeal that Mr Chandrasekaran's solicitors had been involved in the preparation of the Apology Letter, that he had had input into it and that it had the effect of settling the dispute in relation to the Gardener. It is also common ground that there has never been a repetition of the conduct by the Gardener of which Mr Chandrasekaran had complained.

11. Shortly after the Apology Letter, at some time in the late Spring or Summer of 2016, the Company's existing gardener was injured and the board decided to engage the Gardener to carry out weekly garden maintenance work on behalf of the Company at the Estate. There was no complaint about this at the time from Mr Chandrasekaran and his family.

12. By early 2018, however, relations had once again deteriorated. It is common ground that Mr Chandrasekaran raised the issue of the Company's engagement of the Gardener with Mr Joseph on 1 March 2018, shortly before Mr Joseph became a director of the Company, and that thereafter Mr Joseph took steps to set up a meeting between the directors and Mr Chandrasekaran to discuss his concerns.

13. On 22 March 2018, Mr Chandrasekaran sent an email to Mr Vogt and Mr Joseph (now a director) referring to the forthcoming meeting and attaching a letter from his then solicitors, Gardner Leader, written to Mr Vogt in his capacity as director of the Company, making various complaints about "matters which have run for nearly nine years, which inter alia, have seen our clients be the victims of unwarranted conduct by the Company" ("**the March 2018 Letter**"). Nine separate incidents were included in the letter, including the incident that had occurred with the Gardener in 2016. Specifically, the letter indicated that Mr Chandrasekaran wished the incident to be raised again "**as he requires to know who instructed the gardener to make such a**

request in such aggressive terms and to ask why, even after he complained of this treatment, shareholder funds are being used to employ the same gardener" (**emphasis added**). The letter went on to point out that the Chandrasekaran family had given the Company no cause for complaint since moving into the Estate, yet had been "at the receiving end of targeted and unwanted aggression and prejudice".

14. On 13 April 2018, Mr Vogt sent an email to Mr Chandrasekaran dealing with some of the incidents about which complaint had been made and saying that he was "not involved in any way in the gardener incident (which is not a Board matter)". Mr Vogt indicated that the dispute was now in the hands of the Board's solicitors, Peacock & Co ("**Peacock**").

15. There then followed increasingly acrimonious correspondence between the parties, inflamed, as the Judge found in her Judgment, by the retention of Mr David Archer of Pitmans ("**Mr Archer**") as the Chandrasekaran's solicitor. It also appears that the situation was not helped by errors made by Peacock, presumably on instructions from the Respondents, in describing the role and employment status of the Gardener.

16. In a letter of 16 May 2018 ("**the May 2018 Letter**"), Mr Archer alleged racism in connection with the incident in 2016 involving the Gardener for the first time, saying this:

> "On any view, it is wholly inappropriate to continue to engage an individual for the estate who has been so hostile to one of the long-standing residents. It seems to our clients that by supporting the behaviour of the gardener, the board has supported the obviously racist slur made. **Our clients believe that it was a former board member which encouraged the gardener to be so hostile and as such demonstrates the feeling of the board towards our clients which is clearly one of prejudice**. Our clients further object to being asked to contribute annually to a fund which pays this supplier" (**emphasis added**)

17. Pausing there, I note that the incident in 2016 was here being used (as it had been in earlier correspondence also) as evidence, not only of racist conduct by the Gardener towards Mr Chandrasekaran, but as a manifestation of prejudice on the part of the Board, a complaint also raised in relation to other incidents later in the letter. By way of example, in relation to an allegation about recent treatment of Mr Chandrasekaran's mother, the letter said that "[t]he distress, tension and anxiety in which your client has caused ours to exist can only be characterised as discrimination". The letter concluded by saying that it was now necessary to ask the court to intervene in the dispute and that "[i]t is impossible to assume that your client company directors could justify to their shareholders the use of proceeds to further a campaign against our clients". This was the first time that the conduct of the directors of the Company had been said to amount to a "campaign".

18. Peacock denied the allegations made in relation to the Gardener Issue made in the May 2018 Letter in a letter dated 6 June 2018, saying that the Company's directors "…have no knowledge of the events complained of. The company has no liability anyway…".

19. This denial prompted a yet further letter dated 1 August 2018 ("**the August 2018 Letter**") from Mr Archer stating that Mr Chandrasekaran now considered the Apology Letter to have been disingenuous and the directors to be intent on antagonising him. The August 2018 Letter asserted that

> "…your client's continued retention of the gardener amounts to harassment of Mr Chandrasekaran as it is plainly intended to cause him alarm and distress…By continuing to retain the gardener your client is also effectively condoning his racism towards Mr Chandrasekaran. This amounts to a form of continuing discrimination in the form of victimisation under s.27 of the Equality Act 2010".

The August 2018 Letter went on to address other matters in respect of which complaint was made and then returned to a similar theme to that adopted in the May 2018 Letter:

> "…the Board and its members have treated Mr Chandrasekaran and [Lily] differently than the other shareholders. They have also gone out of their way to antagonise and frustrate Mr Chandrasekaran and his family. This treatment amounts to a campaign of harassment that is prohibited under s.1 Protection from Harassment Act 1997…Moreover, as the campaign has followed Mr Chandrasekaran's complaint that the gardener engaged by the Board racially abused him, the Board's conduct constitutes victimisation prohibited by s.27 Equality Act 2010".

20. Various demands were made at the end of the August 2018 Letter, including that "The contract (of employment or otherwise) with the gardener will be provided to our firm and terminated with immediate effect and a suitable alternative can be found".

21. In a letter of response dated 4 September 2018, Peacock clarified the inaccurate information they had provided to date as to the employment status of the Gardener and went on to say this:

> "The apology of 18th February 2018 (*sic*) does not contain any admissions, our client having no way of knowing what happened. It did say, and this was accepted at the time by Mr Chandrasekaran, that there would be no repetition, and this has been fulfilled. Your letter of 16th May did not allege racism, nor did this suggestion appear in Gardner Leader's letter of 22 March".

In response to the demand made in the August 2018 Letter, Peacock wrote:

> "The Company does not propose to alter its present arrangements for gardening for the reasons given above, principally that there have been no further complaints about the gardener, the matter has already been settled and the allegation of racism is rejected as being groundless and having nothing to do with the Company"

22. There followed further intemperate letters from Mr Archer of Pitmans, including on 20 September and 9 October 2018. It was now Mr Chandrasekaran's position that the board's refusal to replace the Gardener was a clear indicator of the board's stance towards him and his family, which was in the nature of a "campaign". Thus in the 20 September 2018 letter Mr Archer made the following points:

> "Your assertion that the allegation of racism is groundless is offensive, wrong and deliberately intended to promote disharmony…Our clients are outraged at your stance in retaining this individual whose interest your client has so boldly tried to protect…This is a very serious matter and your clients protection of the gardener amounts to demonstrating not just bad judgement on your client's part but also a willingness to defend racism generally and specifically in relation to a shareholder. It therefore has everything to do with the company and its conduct. The gardener enjoys the benefit of the income from the estate and the relationship with the board which protects him. In regards to further intimidating our clients and as we have stated, our clients will never put up with raising a family in this climate. Your client and its members will face this as a separate claim against them, given that it was accepted and established previously that the gardener and his remarks to our clients were unacceptable and yet your client continues to retain him and seek, as we say, to promote racism. Our clients instruct us that, as some members of the board treat the estate as their own fiefdom, it is not surprising to see the turnaround and denial. Mr Chandrasekaran is minded to sue all members of the board individually for the defence of this heinous action."

23. On 31 October 2018, the Petition was sent in draft to Peacock. I shall come to the detailed allegations made in the Petition in a moment, but Peacock & Co's response to allegations made in relation to the Gardener Issue was to say, on 14 November 2018 that:

> "As to 16.1 [of the draft Petition], the Company has sought to strike a balance in managing the altercation with the gardener. An apology has been provided on behalf of the individual in question and the Company does not consider that requiring its contractor to remove him from site is necessary. In any event it appeared to our clients that this matter had been resolved in 2016."

24. The Petition was presented by Lily on 15 November 2018 and subsequently amended twice. At paragraph 14, it asserted, *inter alia*, that despite the purpose of the Company being to manage the Road at the Estate in the interests of the owners and residential users of the 8 properties, Mr Stonebridge, Mr Vogt and Mr Joseph had:

> "discriminated against Mr and Mrs Chandrasekaran and their children…in the way that they have managed the Company…It is to be inferred from the matters set out in this Re-Amended Petition that [Mr Stonebridge, Mr Vogt and Mr Joseph] **have**

> **adopted a policy** in the manner that they have managed the Company aimed at not only diminishing the Chandrasekaran's quality of life but at causing them to sell 7PP or otherwise leave the property. Details of relevant matters are set out in the subsequent paragraphs of this Re-Amended Petition" (**emphasis added**).

25. Paragraph 16 of the Petition alleged discriminatory and damaging conduct on the part of the board of the Company including, at paragraph 16.1, the failure to take suitable steps to terminate the contract of the Gardener notwithstanding the discomfort experienced by the Chandrasekaran family by reason of his continuing presence. The Gardener Issue as it was identified in the Petition therefore appeared to concern the Respondents' conduct in 2018 (rather than their conduct in relation to the specific incident in 2016). In paragraph 17, it was alleged that the matters set out in paragraph 16 were designed to deter the Chandrasekaran family from remaining at 7PP. The relief sought in paragraph 18 and in the prayer was primarily that Mr Chandrasekaran be invited to act as a director and duly appointed as such, however paragraph 4 of the prayer sought an order that "the Company should be run in good faith and fairly in the interests of all the owners from time to time of the 8 Properties and should act in accordance with the rights granted to those owners over the Company's Land including rights of access to and egress from their properties" ("**the Relevant Relief**"). The Relevant Relief is the only form of relief that the Appellants seek to obtain if successful on this appeal.

26. In response to the Gardener Issue in their Points of Defence, the Respondents pleaded at paragraph 41 that they were entitled to conclude that the allegation of racist abuse was groundless on the basis of the delay in making it, that failing to terminate the Gardener's services two and a half years later does not found an allegation of victimisation or unfair prejudice and that "In any event, the incident occurred before the Company retained [the Gardener] and before the allegation had morphed from aggression into racial abuse". At paragraph 77(d) the Respondents pleaded that the Petition was not advanced on the basis of the acts themselves but the inference that the acts were part of a conspiracy between the directors pursued in bad faith to victimise the Chandrasekarans. In paragraph 77(f), the Respondents pleaded that the Gardener Issue had been resolved by the Apology Letter and could not found a Petition for unfair prejudice "save insofar as [it is] evidence of the alleged conspiracy which is behind the later acts relied upon".

27. In paragraph 14 of their Points of Reply, the Appellants explained that the racist element of the Gardener's conduct had not been raised earlier because the Chandrasekarans were uncomfortable raising such an issue and assumed the Company would protect them. It continued "Unfortunately, those controlling the Company deliberately chose not to take any such steps and to ignore the allegations of a racist slur" and so it was decided that matters needed to be set out fully. In response to paragraph 77(f) of the Points of Defence, paragraph 24 of the Points of Reply pleaded that:

> "There is abundant evidence of bad faith by those controlling the company as set out in the Re-Amended Petition and including…(ii) keeping on a racist gardener causing obvious distress".

At paragraph 24(d) it went on:

> "The…gardener issue [has] not been resolved and remain[s] relevant. [It] is indicative of and form[s] part of the course of conduct complained of in the Petition. The undertaking given in the letter of apology has not been complied with".

28. I should make two points about this pleading: first that "the gardener issue" referred to in paragraph 24(d) is the incident that occurred in 2016 (as opposed to the refusal to terminate relations with the Gardener which occurred in 2018); second, it now appears to be accepted that insofar as the final sentence of paragraph 24(d) addresses the undertaking to ensure no repetition of the Gardener's conduct, it was simply wrong.

29. Having carefully considered the pleadings which shaped the way in which this case was advanced at trial, I agree with Mr Samuel that the case in relation to the Gardener Issue (or indeed any other issue) was not pleaded as pure negligence and thus in breach of section 174 of the 2006 Act (notwithstanding that reference to section 174 had been made in paragraph 13.4 of the Petition). On the contrary, the case that the board had "kept on a racist Gardener causing obvious distress", a case premised upon conduct in 2018, was squarely put on the basis of a lack of good faith (i.e. breach of section 172 of the 2006 Act) together with breach of section 171(b) of the 2006 Act.

30. The board continued to retain the Gardener until late November 2019, just over three months before the trial of the Petition. It was the Appellants' position in closing at trial that in the event the court accepted evidence that the Gardener's services were dispensed with on grounds of cost their then counsel was "…not going to look behind that". As I shall come to in a moment, the Judge appears to have accepted Mr Vogt's evidence as to the termination of the Gardener's retainer and accordingly, it is not open to the Appellants on this appeal to assert, (i) as they do in paragraph 40 of their skeleton argument, that "it was apparent from invoices and quotes only disclosed on the fourth day of trial…that the replacement gardening contractor did not offer a saving in costs", or (ii) as they do in paragraph 7 of Ms Banton's written reply submissions, that the reason and timing of the replacement of the Gardener, shortly before trial "was tactical based on the obvious negative optics", the inference being that the Gardener's services were dispensed with to avoid embarrassment at trial.

The Judgment

31. The Appellants' skeleton argument for trial alleged breaches of directors' duties in relation to the Gardener Issue, inconsistent with the objects of the Company including (at paragraph 62) by failing to investigate and take all relevant information into account when making the decision to hire and then retain the Gardener, by not making these decisions in the interests of the members as a whole and by ignoring the obvious upset of the Chandrasekaran family at the Gardener's continual presence on the estate and "giving their account no credence implying a lack of good faith in their decision making". These appear to be allegations of breach of section 172 of the 2006 Act. They do not depend upon allegations of negligence and (consistent with the way the case had been pleaded) "lack of good faith in decision making" was put front and centre. The allegation that the Respondents' conduct was being driven by racism had by this stage been abandoned.

32. The Gardener Issue was addressed at some length in witness statements from both Mr and Mrs Chandrasekaran, with considerable emphasis on the distress that the Gardener's presence at the Estate had caused. Mr Chandrasekaran described the incident in the following terms:

> "60. I was getting out of my car, which I parked outside of my Property, when the gardener suddenly scolded me outside of my Property. He did so in the most uncouth fashion with his voice raised, and demanded I pay him '£25 quids' *(sic - he had an Eastern European accent and his English was not perfect, but his meaning was clear).* **He told me he was employed by the Company**. His ranting at the top of his voice went on. I was baffled and speechless. His attitude and demeanour were very unpleasant. He then asked, 'Do you speak English?' and "do you understand English?'. He was a much shorter man than me and I will not forget the way he seemed to stand on the ball of his feet and the way he leant toward me with disdain in his eye as he was saying the words. I have previously seen such hatred in the eyes of people who would speak to me or my family like this in decades past and I recognised it for what it was – racism. I contend he would not have said this in this way to a fair skinned person. He then repeated the first question. He went on to say that my drive was dirty and demanded £700:00 for clearing it up. This sum made no sense, given the job he was talking about and it was my land he was talking about not part of the private road.
> 61. On any view, this was a slur, and many would and indeed have said it was racist in nature. It certainly seems so to me. I thought these times had passed. I wrote to [Mr Vogt] about this several times, in particular I refer to my email of 3 February 2016, mentioned above. The racist element was not initially emphasised because it was a painful matter to draw attention to. It had been assumed that the board would understand what was going on and take appropriate steps" (**emphasis added**)

33. Mr and Mrs Chandrasekaran were not cross examined on their evidence about the incident involving the Gardener in 2016, or the distress they both experienced in 2018. Messrs Stonebridge and Joseph did not address the Gardener Issue in their statements, but Mr Vogt dealt with it briefly, saying that "It seems that the encounter between [the Gardener] and Mr Chandrasekaran did not go well and two years later it was suggested by Mr Chandrasekaran that he was the victim of racist abuse". He went on explain that Mr Birley had spoken to the Gardener who wanted as little as possible to do with Mr Chandrasekaran and that:

> "On that basis, and in addition to the commitment by the board in the letter of apology, the matter was seen as closed. There have been no further issues between [the Gardener] and Mr Chandrasekaran or anyone else".

34. Mr Vogt was cross examined on the subject and accepted that having regard to the February 2016 Email, the Gardener had said something to upset Mr Chandrasekaran; indeed Mr Vogt said in terms that he accepted Mr Chandrasekaran's account of what

had taken place. However, it was his evidence, which was accepted by Mr Beasley, counsel acting at trial for the Appellants, that he had not read the February 2016 Email as making a racist complaint but that it "became a racism issue" some two and a half years later. On the subject of the Apology Letter, Mr Vogt said it had been written by Mr Chandrasekaran's lawyers and accepted by the Company as an appropriate apology with a view to bringing the matter to an end. Mr Vogt rejected the suggestion that the Gardener's continued presence on the Estate was likely to cause any permanent tension saying "I don't see why, if there was no interaction between them" and he confirmed that when the matter was raised again in 2018, the Gardener had been carrying on in the normal way and "there was no interaction as far as I'm aware with your clients". It was his view that at this point it would have been unfair to change the Gardener and he explained that the Gardener had only recently been removed for cost reasons: "It was nothing to do with the racism allegation".

35. In her careful reserved judgment, the Judge dealt with the incidents giving rise to the Petition in paragraph 22, identifying the Gardener Issue at paragraph 22(i) as follows:

> "The directors failed, in May 2018, when Mr Chandrasekaran asked them to do so, to take suitable steps to terminate the contract of a gardener. Mr Chandrasekaran had complained that the gardener had racially slurred him in February 2016. The gardener's continued presence on the Company's land caused the Chandrasekaran family discomfort, "compounded by the Chandrasekarans' knowledge that those in control of the Company prefer to support an individual accused of racism than the persons the Company was designed to serve"."

36. No complaint is made about the Judge's formulation of the issue as it arose in 2018 and as it had been pleaded in the Petition.

37. The Judge dealt at paragraph 34 and onwards of her Judgment with the legal framework, setting out section 994(1) of the 2006 Act and then dealing with the four elements which it was common ground had to be established in a claim of unfair prejudice. At paragraph 47 and onwards she dealt with the role of equity and its intervention in the case, pointing out at paragraph 54 that:

> "The Company's role is very limited. Its directors are unpaid. Membership arises only as a result of ownership of a home on Prospect Place. Its existence facilitates the maintenance and administration of the common drive, verges and gate entry system by a nominated few, thus avoiding the need for all homeowners to become involved in all decisions and payments as they arise. Members are fairly entitled to expect the Company to be run in accordance with its constitution and for the directors to observe their statutory and common law duties."

38. At paragraph 60 and onwards, the Judge dealt with the witnesses. Her assessment of the Mr Chandrasekaran appears at paragraph 62:

> "Mr Chandrasekaran took care to listen to the questions being asked of him. He appeared to be concerned that the Respondents'

> counsel would try to make him say or agree to statements that were not correct and on occasion, held back from providing detailed answers until the purpose of a particular line of questioning became clearer to him. I did not form the impression that he was trying to hide anything. I believe he answered the questions posed of him as honestly as he could, relying on his recollection, perception and interpretation of events. However, as will be seen, in my judgment it is Mr Chandrasekaran's perception of the way he and his family have been treated, coupled with his inability to anticipate or appreciate the effect of his own actions on others, that lies at the heart of this very sad affair."

39. When commenting on the evidence of Mrs Chandrasekaran, the Judge observed that she had given considered, careful and, in the main, honest evidence but that her

> "…perception of encounters and correspondence in which she was not directly involved, was dependent upon her husband's interpretation of the events. She appears mostly to have heard only his side of the story and appears to have accepted it without question" (paragraph 67).

40. In dealing with the evidence of Mr Archer, the Judge observed that Mr Archer "obdurately refused when giving evidence to recognise that letters which he sent on behalf of Mr Chandrasekaran antagonised an already delicate situation between neighbours" (paragraph 70) and that despite his insistence to the contrary "it is clear to me that the tone of the letters sent by Pitmans on Mr Chandrasekaran's behalf fanned the flames of discord" (paragraph 72).

41. The Judge dealt at some length with Mr Vogt's evidence, finding him to be "an honest and straightforward witness who gave balanced evidence" (paragraph 76). She recorded that Mr Vogt had stated that "he felt Mr Chandrasekaran took offence at things that did not happen" and she summarised Mr Vogt's evidence in respect of the Gardener Issue as follows at paragraph 77:

> "Mr Vogt agreed that the Company's directors could have chosen not to have employed the gardener or could have terminated his contract far earlier than they did. However, he explained that he did not accept that there was evidence that the gardener was racist. Mr Chandrasekaran had described the conversation he had with the gardener but in Mr Vogt's opinion, did not describe why it was racist. He referred to a letter of apology which the directors at the time had been led to believe would diffuse matters. He was not aware of any further interaction between the gardener and Mr Chandrasekaran after that letter was sent."

42. The Judge also accepted Mr Joseph's evidence, finding that he was "an impressive witness" (at paragraph 86). She expressly identified that she found his evidence as to why the planned meeting in early 2018 with Mr Chandrasekaran had not taken place to be credible (i.e. that the March 2018 letter from Gardner Leader "took things to another

level" and "contained a threat which had to be taken seriously"). She rejected Mr Chandrasekaran's evidence that Mr Joseph had agreed to "deal with the racist gardener" finding at paragraph 89 that Mr Joseph had no desire to get involved in historical matters but wished "to remain neutral but if possible, to bring the parties together as neighbours to "sort it out"". I accept Mr Samuel's submission that the clear inference from these findings is that the Judge accepted that the directors were genuinely willing to discuss Mr Chandrasekaran's concerns about the Gardener at a meeting in good faith (see also her findings at paragraph 245).

43. At paragraph 90 and onwards, the Judge then proceeded to analyse the incidents said to give rise to the Petition. She set out Mr Birley's correspondence on the subject of the service charge at paragraphs 97-102 and then at paragraph 103 she set out extensive extracts from the February 2016 Email written by Mr Chandrasekaran. At paragraph 110 she dealt with the Apology Letter "drafted by Pitmans for the Company's directors to sign" (and "insisted upon" by Mr Chandrasekaran (paragraph 124)), setting it out in detail and then recording in paragraph 111 that the signed version had been sent to Mr Chandrasekaran's solicitor on the basis that it "settles the matter".

44. In paragraphs 119 and 120, the Judge returned to the subject of Mr Birley's email of 3 February 2016 (which she found, as I have said, to be "potentially inflammatory"), together with Mr Chandrasekaran's February 2016 Email in response, saying this:

> "Whilst I found Mr Birley's letter to have been potentially inflammatory, I consider Mr Chandrasekaran's response to have been incendiary. This was the first of many occasions when he chose to portray himself as a victim, at the mercy of others whom he perceived to want to bully, harass and generally treat him unfairly. The language he used both in his correspondence and during cross-examination was emotional and resentful. He said in cross-examination that he considered Mr Birley's letter to be "More than irritated. I think he's sending me a message. I'm prepared to fall in but that is an unnecessary and threatening email that threatens to impugn …" . He said: "What he's saying is that he disapproves of how I've bought the house or disapproves of us". He said that he considered the letter to be a clear indication of how his family would be treated and he wanted it to stop."

45. At paragraphs 126-129, the Judge dealt with the Gardener Issue as follows:

> "126. The petition complains that the directors failed, in May 2018, when Mr Chandrasekaran asked them to do so, to take suitable steps to terminate the gardener's contract. Mr Chandrasekaran's email of 3 February 2016 referred at length to his encounter with the gardener. At that time, the gardener was employed by Mr Birley.
>
> 127. The Apology Letter apologised for the gardener's conduct and said that the Company would ensure that it would not be repeated. In his witness statement, Mr Chandrasekaran confirms that:

> "Presumably someone had a word with him because he has not confronted me in the same way since, though he is generally haughty on the occasions when our paths cross".
>
> Nevertheless, he says that:
>
> "His presence on the estate has been a regular and upsetting reminder of the event in 2016 and caused my family continuing discomfort. It has been a constant reminder of the apparent contempt the board has towards my family".
>
> 128. During cross-examination, counsel referred to the Apology Letter, describing the directors as having abased themselves to give Mr Chandrasekaran all that he wanted. Mr Chandrasekaran replied that was not correct because he wanted the gardener to be removed.
>
> 129. I find that, by the wording of the Apology Letter, Mr Chandrasekaran did not ask for the gardener to be removed; rather he asked the directors to assure him that the gardener's behaviour would not be repeated. His own evidence confirms that it was not. Mr Chandrasekaran chose to interpret the gardener's continued presence as a reminder of the contempt that he perceived the board to feel towards him and his family. I saw no evidence surrounding the issue of the gardener to suggest that this was the case. I find nothing prejudicial or unfair in the directors taking on the employment of a gardener whose alleged offensive conduct towards Mr Chandrasekaran, they had ensured, was not repeated".

46. In paragraphs 207 and 208, the Judge set out various extracts from the August 2018 Letter from Pitmans, identifying the allegation made in that letter that the conduct of the Respondents amounted to a campaign, together with the allegations that "…by continuing to retain the gardener your client is effectively condoning his racism towards Mr Chandrasekaran…" and "Our client believes that his treatment is motivated by racism towards him". She returned to deal with the allegation of a campaign in paragraphs 244-247:

> "244. Having considered, in detail, the documentary and oral evidence concerning the incidents relied upon in the Petition, and the conduct of the Respondents and of Mr Chandrasekaran in relation to each of them, I have seen absolutely no evidence to support Mr Chandrasekaran's firmly held belief that the directors wish to diminish his family's quality of life, whether to cause them to sell 7PP or move or otherwise.
>
> 245. I have seen no evidence that the Company has been run other than in good faith in the interests of all of the homes at Prospect Place, including 7PP. Mr Vogt, in particular, expended considerable effort trying to appease Mr Chandrasekaran. Mr

> Joseph wanted to be no part of the historic dispute, seeking only to encourage the parties to find an amicable solution.
>
> 246. There appear to have been some errors in the manner in which the Company's affairs have been conducted [none relates to the Gardener Issue]… Such errors do not appear to have caused any lasting damage to Lily's shareholding.
>
> 247. Applying Slade J's reasonable bystander test (set out at paragraph 46 above), objectively I do not consider that a reasonable bystander observing the consequences, whether separately or cumulatively, of the various incidents relied upon (and I include here also events referred to in evidence but not the Petition, such as potholes outside 7PP's driveway) would regard them as having unfairly prejudiced Lily's interests as a shareholder in the Company".

47. At paragraphs 248-251, the Judge set out her conclusion on the Petition:

> "248. I have found no justification for imposing upon the Company or its members equitable duties over and above those set out in statute, common law, the Company's constitution and the [Deed of Covenant].
>
> 249. Even taking into account the breadth of the jurisdiction set out in Mr Beasley's submissions, I have found, in relation to each of the incidents relied upon in the petition, either that they do not fall within the scope of section 994, or that there was no unfair prejudice and no abuse of power on the part of the Company that requires judicial intervention.
>
> 250. I have seen no evidence of a campaign on the part of the Respondents to harass or force the Chandrasekarans to leave Prospect Place.
>
> 251. The unfair prejudice petition is dismissed."

48. The Judge subsequently held that the conduct of the Appellants in bringing the Petition was so far out of the norm that it warranted an award of indemnity costs in the Respondents' favour, a decision which is not the subject of any appeal.

49. The Judge refused permission to appeal from her Judgment, setting out in detail the reasons for her refusal in a short judgment dated 26 August 2020:

> "3….Mr Beasley explained that the Judge was wrong to conclude that the directors' handling of the complaint concerning the gardener involved no breach of duty giving rise to unfair prejudice that warranted relief. He then sets out a list of particular issues of which either no or an insufficient account was taken. Those include that the Judge did not even refer in the judgment to Mr Chandrasekaran's evidence that when an

> apology letter was given he did not ask for the gardener to be removed because he had already, separately been assured by Mr Beckwith that the gardener would be removed.
>
> 4. They also include that, notwithstanding that the directors were aware from Mr Chandrasekaran's emails of the distress caused to him by the comments made by the gardener in 2016, they nevertheless proceeded subsequently to employ him and then to retain him…
>
> 5. Whilst not every piece of evidence is referred to, the conclusions I reached in relation to the gardener followed a full review of all of the evidence before me including Mr Chandrasekaran's evidence and the written apology demanded and received by him. At the time of the incident, the gardener was not employed by the company. The directors were asked to ensure that the incident which founded Mr Chandrasekaran's complaint was not repeated. The directors spoke to him, the conduct was indeed not repeated and some time later they chose to employ him.
>
> 6. I do not consider that this ground of appeal has a real prospect of success."

50. The Judge said something similar in Form 460 giving her reasons for refusing permission to appeal in relation to the Gardener Issue:

> "The Judgment recites at paragraph 103 the full details of the incident with the gardener. **It proceeded on the basis that the alleged incident did take place.** The conclusions reached were supported by the evidence before the Judge including in particular a written apology demanded and received by P2. The Court found that the directors responded in the manner requested of them by ensuring that the offensive conduct was not repeated. There is no reasonable prospect of an appeal court reaching a different conclusion" (**emphasis added**).

51. Pausing there, the Judge's reference in this passage to paragraph 103 of the Judgment was a reference to the paragraph in which the Judge had set out in detail Mr Chandrasekaran's February 2016 Email, reporting on the incident involving the Gardener.

The Grounds of Appeal

52. The Grounds of Appeal in respect of the Gardener Issue are as follows:

    i) That in dismissing the Gardener issue and refusing to grant the Relevant Relief, the Judge:

        a) Failed to take any, alternatively any sufficient account of the following facts and matters:

i) There was no proper basis for the Judge to have found that the Racist Comment (i.e. the comment made by the Gardener to Mr Chandrasekaran in early 2016) was not made and she did not so find;

ii) The Racist Comment was highly offensive to Mr Chandrasekaran and was self-evidently racist, but was not acknowledged as such by the directors of the Company or any of them;

iii) The Gardener never apologised for his unacceptable behaviour or otherwise sought to make amends for his conduct;

iv) The continued presence of the Gardener was likely to continue to be a source of discomfort to Mr Chandrasekaran and his family;

v) It was wholly inappropriate for the directors to cause the Company to retain the services of the Gardener (who had previously been employed by the owner of one of the properties) thereafter knowing of the Racist Comment;

vi) The fact that the Gardener Issue was not confined to the question whether the Gardener made any further racist comments subsequently, but extended to the directors' decision to cause the Company to retain the services of the Gardener and, notwithstanding Mr Chandrasekaran's complaint, not to dispense with his services until late 2019, and then only on grounds of cost; and

vii) The fact that the directors' refusal to acknowledge the problem of the Gardener's continued presence and the ease and willingness with which they removed him when another stated problem associated with him arose (his cost) and/or in combination with the other matters summarised at 246-247 of the Judgment (including the finding that there were some "errors in the manner in which the Company's affairs have been conducted"), constituted unfairly prejudicial conduct of the Company's affairs within the meaning of section 994 of the 2006 Act such that the Relevant Relief should have been granted under section 996 of the 2006 Act; and/or

b) Erred in law in failing to give any, or any sufficient, weight to the duty of each of the Company's directors under section 172 of the 2006 Act to "*act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole*" and in doing so to have regard inter alia to *"(e) the desirability of the company maintaining a reputation for his standards of business conduct and (f) the need to act fairly as between members of the company*", which duty was breached by reason of the manner in which the directors addressed the Gardener Issue, and which ongoing breach of duty was unfairly prejudicial to Lily's interests as a member of the

> Company and required and/or justified the grant of the Relevant Relief under section 996 of the 2006 Act"

53. Pausing there, I note that it became clear during the course of the hearing before me that (notwithstanding the terms of sub-paragraph (vii) of the Grounds of Appeal) Mr Lightman was not seeking to contend that, as an alternative, the Respondents' approach to the Gardener Issue was unfairly prejudicial when seen in combination with other incidents such as the errors referred to in the Judgment.

54. However, Mr Lightman's skeleton did seek to raise some additional issues not identified in the Grounds of Appeal, i.e. that (i) no properly run board of the Company could have thought it appropriate to employ a person who had or even may have used such language, or who had acted in an offensive and upsetting way towards a resident, let alone persist in employing that person even after the issue had been clearly identified and complained about in 2018; (ii) the directors' approach was intentionally obstructive and dismissive of the Chandrasekaran's serious concerns about the retainer of the Gardener; a board which was genuinely interested in considering the Chandrasekaran's concerns about the Gardener's retainer would have addressed their concerns seriously and directly; and (iii) the Respondents' approach, rather than acting decisively to protect the interests of a fellow member, had involved instead "belittling and turning on the complainant".

55. In my judgment, insofar as these arguments are designed to address the alleged bad faith of the Respondents, they are not open to the Appellants on this appeal and illustrate quite neatly the difficulties that the Appellants face in trying to run such a narrow (they say "focused") appeal in the face of broad findings of fact by the Judge. Thus in paragraph 245 of the Judgment, the Judge found that she had "seen no evidence that the Company was being run other than in good faith" and that "Mr Vogt, in particular, expended considerable effort trying to appease Mr Chandrasekaran" while Mr Joseph had sought "only to encourage the parties to find an amicable solution". Those findings (of good faith on the part of the Respondents) are not challenged in the Grounds of Appeal. Furthermore, the Appellants have no permission for such a challenge, which would potentially go to the heart of the Judge's decision to reject the Appellants' allegations in the Petition that the Respondents had engaged in a campaign and/or pursued a policy of bad faith conduct towards them.

56. In the circumstances, I reject any suggestion on this appeal that I am in a position to determine that the Judge erred in failing to find (subjective) bad faith on the part of the Respondents in connection with the Gardener Issue.

Discussion

57. The Appellants cited a great many authorities in their skeleton argument, but I did not understand the law as set out by the Judge in her Judgment to be in issue. The Appellants' case is essentially that (i) the Judge was wrong in failing to take account of the various facts and matters set forth in the Grounds of Appeal and, had she done so, she should have found unfair prejudice; and (ii) the Judge failed to attach "sufficient weight" to the duty of each of the Company's directors under section 172 of the 2006 Act to "*act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole*".

58. In considering the appeal, I remind myself that this court is limited to a review of the Judge's decision (pursuant to CPR 52.21) and that it will not allow an appeal unless the decision of the lower court was wrong, in that it erred in law (whether by asking itself the wrong question, failing to take account of relevant matters or taking into account irrelevant matters) or unjust because of a serious procedural or other irregularity. A judge will err if she reaches a finding which no reasonable judge could have reached. I was not referred to any authorities on these principles, but they are trite law and are set out in detail in the notes at 52.21.5 to Vol 1 of the White Book.

59. Before turning to the individual Grounds of Appeal, I should first address Mr Samuel's submission that, on the face of the pleadings and as advanced at trial, the Gardener Issue in fact had no life of its own once the Judge dismissed the contention that the directors were engaged in a campaign against the Chandrasekaran family. I am bound to say that I have considerable sympathy with this contention; the pleadings focus on the "deliberate" refusal by the directors to take appropriate steps in relation to the Gardener Issue together with the retention of the Gardener (amongst other things) as evidencing "bad faith" by those controlling the Company and thus a policy or campaign to deter the Chandrasekaran's from continuing to reside at 7PP. The skeleton argument for trial emphasised the lack of good faith in decision making generally.

60. However, it is clear from sections of the transcript to which I have been referred that the Appellants' case as to the existence of a campaign "wobbled" somewhat at trial, with Mr Beasley describing it as "dislike, an enduring dislike of [the Chandrasekarans], which informs decisions as and when they're made…often manifesting as decisions to our detriment…it's not this overarching focus and plan and scheme, but if the court is content to just focus on items of mala fides that's easily sufficient". The Judgment then proceeded to consider each of the alleged incidents in the Petition separately before finding that there was no evidence of a campaign.

61. It was Mr Lightman's case that this argument was not raised by Mr Samuel in his skeleton argument on the appeal, but was addressed for the first time orally in making his submissions. Mr Lightman submits that this is an unsatisfactory way of raising arguments which the Appellants might well have wished to address by way of amendment to their Grounds of Appeal or the filing of a supplementary skeleton argument. Mr Samuel disputes this submission, saying that the entirety of his skeleton argument was designed to communicate his contention that the case at trial was quite different from the case advanced on appeal. I have concluded that given the way in which the Judge dealt with the issues at trial, there is no need for me to make a final decision on this point. It does not seem to me to be fair to dismiss this appeal on the basis of this argument. In my judgment, I need instead to go on to consider the specific individual grounds of appeal, as identified above.

62. Whilst it is true that (as Adam Johnson J pointed out in his short *ex tempore* judgment granting permission) there is some potential ambiguity over what, if any, finding the Judge made in relation to the remarks made by the Gardener in 2016 (and in particular whether those remarks were racial slurs), it seems clear from the short judgment she gave when refusing permission to appeal that the Judge accepted the accuracy of the account given in Mr Chandrasekaran's February 2016 Email. This ties in with Mr Vogt's acceptance in cross examination of <u>that account</u> as accurate and also fits (as Fancourt J said) with the Judge's reference to the Apology Letter from which it is implicit that she accepted the events as set out in the February 2016 Email as having

happened. It was accepted by Mr Beasley at trial on behalf of the Appellants that Mr Vogt had not understood the February 2016 Email to be reporting a racist remark and the Judge describes it both in the Judgment at paragraph 129 and in the form N460 as "offensive conduct".

63. I reject the suggestion that, in the circumstances, there was any need for the Judge to go on to consider whether the Gardener's conduct in 2016 was in fact racist, or whether Mr Chandrasekaran had only come up with that description of it in 2018; further, I reject the suggestion that the Judge would have been in a position safely to determine that issue. Mr Lightman's reliance upon the fact that the courts have stressed the public importance of discrimination claims being examined on their merits does not appear to me to assist him here. Notwithstanding the threats made by Mr Archer to pursue the directors under the Equality Act 2010, the Appellants did not make any discrimination claim against either the Gardener, or the directors of the Company, but chose instead to pursue the Petition. Furthermore, they dropped the allegations of racist conduct by the Respondents in advance of trial and it is not in any event clear that they sought to invite the Judge to make any specific finding as to those comments at trial.

64. Mr Lightman relies upon an extract from a speech by Lord Steyn in *Anyanwu v South Bank Student Union (commission for Racial Equality intervening)* [2001] ICR 391 at [24] to the effect that "Discrimination cases are generally fact sensitive and their proper determination is always vital in our pluralistic society". This is obviously right, but does not inform the approach that the Judge should take to a case in which there was no claim of discrimination being made and insufficient evidence available on which to determine what had happened in 2016. As Mr Samuel said, there was no need for him to cross-examine Mr and Mrs Chandrasekaran on their evidence about the incident in 2016 because (i) that was not the focus of the unfair prejudice allegation which was concerned with conduct in 2018; (ii) the court was not in a position where it could have determined what had happened in 2016 (the Gardener was not giving evidence); and (iii) the question of whether the incident in 2016 had involved a racial slur would have required detailed analysis of the factual context.

65. In circumstances where the Judge accepted the account in the February 2016 Email of the incident in 2016, she plainly also accepted that the language used was offensive to Mr Chandrasekaran, but as I have already said, she could not have found that it was "self-evidently racist" or involved a racial slur; it is therefore axiomatic that she did not err in failing to have regard to the fact that neither the directors nor the Company acknowledged the offensive language as a racial slur. Mr Vogt's evidence, which the Judge accepted, was that he had not read the February 2016 Email as reporting a racial slur.

66. It is not clear to me what point the Appellants are seeking to make in asserting that the Gardener never apologised or sought to make amends for his conduct. This is true but, as the Judge found, at the insistence of Mr Chandrasekaran, the parties entered into a settlement agreement which involved an apology from the then directors – an apology which Mr Chandrasekaran plainly accepted. Indeed, this must be seen against the background of his February 2016 Email which expressly raised his suspicion that the Gardener "had been put up to the whole task", together with his evidence at trial that, at the time of the incident, he believed the Gardener to be in the employment of the Company. Mr Chandrasekaran did not insist on an apology from the Gardener and nor did his solicitors include in the Apology Letter any requirements to be imposed on the

Gardener. On the contrary, the only requirement they sought to impose was that the directors should ensure that the Gardener's conduct would not be repeated.

67. I reject the contention that in circumstances where the Apology Letter expressly envisaged the continuing presence of the Gardener at the Estate, the Judge should have found that such continued presence following the Apology Letter was "likely to continue to be" a source of discomfort to Mr Chandrasekaran and his family and that they were likely to resent being required to contribute to the cost of his engagement by the Company. Certainly, there was no evidence to that effect between the date of the Apology Letter and the beginning of March 2018 (and the illness of the Chandrasekaran's son does not appear to me to cover the entirety of that period). Indeed, even if (as Fancourt J thought when he considered the papers) the Judge in fact concluded that the incident in 2016 had involved a racist slur, the terms of the Apology Letter were inconsistent with any finding that the Chandrasekaran family was uncomfortable with the continued presence of the Gardener. On the contrary, its terms were suggestive only of the matter having been satisfactorily resolved on the assurance that the conduct would not occur again (which it did not). On the face of things, it is difficult to see, as Mr Samuel submitted, why the continued presence of the Gardener at the Estate would amount to anything more than had been anticipated by the terms of the Apology Letter and difficult to see how it could therefore amount to unfair prejudice or a breach of section 172 of the 2006 Act by the directors.

68. The Judge did not dismiss the possibility that the Gardener's continuing presence had (at least by 2018) caused genuine upset. In paragraph 127 of the Judgment she expressly acknowledged Mr Chandrasekaran's evidence to that effect, but she also dismissed his evidence that he had wanted the Gardener removed in 2016: "I find that by the wording of the Apology Letter Mr Chandrasekaran did not ask for the gardener to be removed". This finding appears to me to be unimpeachable and to be an important part of her reasoning in going on to determine that there was nothing prejudicial or unfair in the decision of the Respondents to retain the Gardener to provide services to the Company. There is nothing unfair or prejudicial in that decision because, as the Judge had found, Mr Chandrasekaran had not sought the Gardener's removal from the Estate and so had not given any indication that his continued presence would be a cause of distress. This is particularly significant, to my mind, in circumstances where Mr Chandrasekaran's clear evidence at trial was that during the incident involving the Gardener in 2016 he had in fact been informed by the Gardener that he was employed by the Company (rather than by Mr Birley). In the circumstances, I also reject the suggestion in the Appellants' skeleton argument that the Judge gave excessive weight to the terms of the Apology Letter because it concerned only a situation involving employment of the Gardener by Mr Birley and not by the Company.

69. The next ground of complaint really lies at the heart of the Appellants' attack on the Judgment: namely that, just as the Respondents had failed to engage with Mr Chandrasekaran's requests that the Gardener be removed from post, so the Judge also failed to address that issue, thereby failing to acknowledge the distress and hurt caused to the Chandrasekaran family by the Respondents' conduct. Whilst I do not for one moment underestimate the discomfort, distress and anxiety caused by the Chandrasekaran's perception of the circumstances in which they found themselves in 2018 (and nor, I think, did the Judge), nevertheless the Judge made a very clear finding that Mr Chandrasekaran "chose to interpret the gardener's continued presence as a

reminder of the contempt that he perceived the board to feel towards him and his family". In other words, that Mr Chandrasekaran's mindset in 2018 was not that the Gardener's presence itself created a problem by reason of what had happened in 2016, but rather that, because of the way he perceived he was being treated more generally by the Board in 2018, the Gardener's continuing presence reminded him of the Board's contempt for him and his family (see the reference in the February 2016 Email to the fact that it "seemed obvious to me that he had been put up to the whole task", together with the references in the March 2018 and May 2018 Letters emphasised in bold earlier in this judgment).

70. To my mind, it is important that this finding is seen in its context against the background of (i) Mr Vogt's evidence, clearly accepted by the Judge, that he felt Mr Chandrasekaran took offence at things that did not happen; (ii) her finding that Mr Chandrasekaran had a habit of portraying himself as a victim "at the mercy of others whom he perceived to want to bully, harass and generally treat him unfairly"; and (iii) her finding that Mr Chandrasekaran's perception of the way he and his family had been treated (coupled with his own inability to anticipate or appreciate the effect of his own actions on others) lies at the heart of this sad case. I accept Mr Samuel's submission that the Judge was effectively saying in these extracts from the Judgment that the offence that Mr Chandrasekaran took was unreasonable and disproportionate owing to the flaws she had identified in his perception and interpretation of events. The Judge dismissed all of the other individual complaints made by Mr Chandrasekaran.

71. In circumstances where the Judge firmly rejected the Appellants' case as to the existence of a campaign or policy on the part of the directors to discriminate against and harass Mr Chandrasekaran with a view to persuading him and his family to abandon their home, she equally could not accept that the Board did in fact feel contemptuous towards his family ("I saw no evidence surrounding the issue of the gardener to suggest that this was the case"). Accordingly, it appears to me to be clear from the Judgment read as a whole that it was the Judge's view that the upset to Mr Chandrasekaran and his family was caused not by some real slight by the board, or by the board making decisions about the Gardener in bad faith or with contempt, but by Mr Chandrasekaran's own misconceived perception of the board's conduct and motivations. This amply explains the Judge's findings in paragraphs 126-129 of the Judgment.

72. Whilst it is true that she did not expressly deal with the allegation that the Respondents had repeatedly ignored Mr Chandrasekaran's requests to take suitable steps to remove the Gardener from the Estate, the Judge had accurately framed that very issue in paragraph 22(i) of the Judgment and again in the first sentence of paragraph 126. Accordingly it is to be inferred that she had it in mind when she was dealing with Mr Chandrasekaran's "perception". That perception (which in 2018 apparently involved a belief that the directors were racist and had victimised him following his complaint about the Gardener in 2016) would clearly have coloured his attitude to the Gardener and caused distress; it would also have shaped his approach when it came to his demands that the Gardener be removed. On a sensible reading of the Judgment, the Judge's finding that there was nothing prejudicial or unfair in the directors taking on the employment of a Gardener whose offensive (but not, they believed, racist) conduct towards Mr Chandrasekaran they had ensured was not repeated by way of the Apology

Letter, must equally apply to their decision to keep him on, even after Pitmans had demanded his removal.

73. Against that background, I also reject the contention that the Judge failed to attach "sufficient weight" to the Gardener Issue in considering compliance with the directors' duties under section 172 of the 2006 Act.

74. Mr Lightman accepts that the duty under section 172 of the 2006 Act is a subjective one (see *Regentcrest Plc v Cohen* [2001] 2 B.C.C. 494 at [120] per Jonathan Parker J):

> "The duty imposed on directors to act bona fide in the interests of the company is a subjective one (see Palmer's Company Law (Sweet & Maxwell) para. 8.508). The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test."

75. However, Mr Lightman now contends that the Judge was required to apply an objective test in relation to a breach of section 172 owing to the absence of evidence that the directors actually considered the Gardener Issue in 2018. In making this submission (which is not foreshadowed in the Grounds of Appeal but appears in the skeleton argument), he relies in particular upon *Re HLC Environmental Projects Ltd* [2013] EWHC 2876 (Ch), per John Randall QC, sitting as a deputy High Court Judge) at [93]:

> "…whilst I accept the respondent's submission that the general principle of subjectivity applies to directors' consideration of the interests of creditors as well as to their consideration of the interests of the company, that has no application to a situation such as the respondent suggested arose here, namely that (as his counsel submitted) it simply did not occur to him at the time of the Engenharia payments or the personal payments that FRIE Grupo was a creditor at all..."

76. Applying this observation to the facts of the present case, Mr Lightman says that the Judge ought to have concluded that there was no evidence that the directors actually paid any regard to the Gardener Issue in 2018, that there was no evidence of that issue having been considered at board level and that none of the Company's board minutes from 2018 or 2019 referred to the Gardener Issue. He also relies on the failure on the part of Messrs Stonebridge and Joseph to refer to the Gardener Issue in their witness statements together with Mr Vogt's failure to make any reference in his statement to the Chandrasekaran family's distress caused by the board's persistent refusal to accede

to Mr Chandrasekaran's requests that it dismiss the Gardener on account of his racist comments.

77. This submission culminates in the contentions (to which I have already referred in a different context) that "[a] board which was genuinely interested in considering the Chandrasekaran's concerns about the Gardener's retainer would have addressed their concerns seriously and directly" and that "[n]o properly run board of the Company could have thought it appropriate to employ a person who had or even may have used such language, or who had acted in an offensive and upsetting way towards a resident…let alone persist in employing that person even after the issue had been identified so clearly and persistently complained about in 2018".

78. Mr Samuel accepts the submissions in the foregoing paragraph as evidencing an understanding on the part of the Appellants of the way in which the objective test (if appropriate) is to be applied: namely that where a board of directors has failed to take account of an issue, that is not enough to establish breach - the proper test is whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company (see *Charterbridge v Lloyds* [1970] Ch 62 per Pennycuick J at page 74).

79. However, Mr Samuel points to paragraphs 245 and 247 of the Judgment, submitting that paragraph 245 involves a subjective finding of good faith under section 172 of the 2006 Act and that paragraph 247 applies an alternative objective analysis, admittedly an analysis by reference to section 994 of the 2006 Act and the observations of Slade J in *Re Bovey Hotel Ventures Ltd* (identified by the Judge in paragraph 45 of the Judgment), but nevertheless a relevant objective finding (and indeed a finding that the Judge was invited to make by Mr Beasley during the course of his closing submissions).

80. Having considered the matter carefully, I am bound to say that I agree with Mr Samuel. Insofar as this was a case in which the Judge was required to look objectively at all of the circumstances for the purposes of assessing breach of duty pursuant to section 172 of the 2006 Act (and I am not sure that it was, as I shall come to in a moment) she was invited by Mr Beasley to do so by reference to the "reasonable bystander" test and she did that at paragraph 247 of the Judgment. Implicit within her finding that no reasonable bystander observing the consequences of the various incidents relied upon would regard them as having unfairly prejudiced Lily's interests as a shareholder of the Company, is also a finding that, viewed objectively, there is no breach of section 172 of the 2006 Act (the duty to promote, in good faith, the interests of the company). Whilst I acknowledge (as Mr Lightman made clear in his written reply submissions) that a finding of unfair prejudice will not always require a finding of breach of duty, nonetheless I accept Mr Samuel's submission that there is no difference in substance on the facts of this case between an objective assessment of the unfairly prejudicial effect of the acts complained of in the Petition under section 994 of the 2006 Act and an objective assessment of whether they, or any of them, constitute a breach of section 172 of the 2006 Act. At trial, the primary breach alleged was the directors' improper purpose in retaining the Gardener under section 171(b) and of section 172 as a consequence. On appeal, the primary breach is said to be failing to promote the success of the Company under section 172 by failing to terminate the Gardener's retainer. On both cases, breach of section 171 and section 172 is the very breach on which the Appellants' case under section 994 stands or falls.

81. I therefore agree with Mr Samuel that to succeed in his submissions, Mr Lightman would need to contend that paragraph 247 of the Judgment is perverse, a submission he has not sought to make and for which he would, in any event, have no permission.

82. Finally, on this topic, I note Mr Samuel's submissions that there was in fact no cross-examination of the Respondents to the effect that they never gave any consideration to the complaints made in 2018 by Mr Chandrasekaran about the Gardener incident, that it was never put to them that they did not discuss the issue in a board meeting or give any consideration to what Mr Chandrasekaran was saying. These submissions were not said to be inaccurate in Mr Lightman's reply skeleton. In the circumstances, it is not at all clear that the Judge was required to consider the alleged breach of section 172 of the 2006 Act by reference to an objective test in any event, and it would appear that she was only invited to do so in the context of her general approach to section 994 of the 2006 Act. Further, the contention that the Judge did not give "sufficient weight" to the Gardener Issue in concluding that there was no breach of section 172 (as the issue is formulated in the Grounds of Appeal) is entirely different from the contention that the Judge should have applied an objective test.

83. For all the reasons set forth above, I reject Mr Lightman's submission that the Judge erred in failing to consider the question of breach of section 172 of the 2006 Act by reference to an objective test. It is not clear that she was required to do so, having regard to the way the case was put at trial, but, in any event, her analysis at 245-247 of the Judgment was sufficient.

84. Even if I am wrong about that, and the Judge erred in failing to provide an objective assessment as to the question of breach of the section 172 duty, nonetheless I fail to see that, had she considered that specific question, the Judge would have arrived at any different decision. In light of her findings, I cannot see that it was perverse for the directors to continue to retain the Gardener from May 2018. Their refusal to terminate the Gardener's retainer (against the background of the settlement agreement in the form of the Apology Letter and the absence of any repetition on the part of the Gardener) did not fall outside the bounds of what an intelligent and honest director could reasonably have believed to be in the interests of the Company. It was not suggested at trial that the directors breached their section 172 duty by signing up to the Apology Letter, and to my mind, aside from the fact that a series of (as it turned out, wholly unjustified) "inflammatory and offensive" allegations of racism and bad faith had been made against the directors by Mr Chandrasekaran through Mr Archer, nothing had changed since the date of the settlement in the form of the Apology Letter. Whether the original incident was racist or not, it had been resolved and settled and there had been no repetition of it. As I have said, the Chandrasekaran's distress appears to have been caused by their erroneous perception of the directors' treatment of them (as the Judge held), but this treatment was of course denied by the directors. There was no reason to revisit the settlement (or terminate the Gardener's retainer) in circumstances where, by 2018, Mr Chandrasekaran himself was acknowledging that he had considered the incident to be racist at the time; in other words he had been well aware of what he was agreeing to in February 2016 and he had made no complaint about the Gardener's presence for over 2 years.

85. I need not go on to consider other arguments raised by Mr Samuel to the effect that the Respondents must have discussed the Gardener Issue between them given the fact that they instructed Peacock to respond to letters raising the issue (such that the subjective

approach was in any event correct); that not appearing to be an argument open to Mr Samuel in any event in circumstances where it was not included in any Respondents' Notice. As an aside, I note the criticisms of Mr Samuel's submissions made by Mr Lightman in his written reply submissions, to the effect that, on more than one occasion, Mr Samuel raised arguments designed to seek to uphold the Judgment for reasons different from, or additional to, those raised in the Judgment, notwithstanding that there was no Respondents' Notice. However, I do not need to say anything further about this point in circumstances where I have not had regard to those submissions in preparing this judgment, just as I have not had regard to submissions made by Ms Banton in her written reply submissions which apparently sought to raise new factual matters in support of the appeal.

86. Given my decision, as set out above, I do not need to go on to consider the nature of the relief sought by the Appellants on this appeal. However, it does seem to me to be appropriate to make one or two observations about the way in which the appeal has been fought and the nature of the relief sought.

87. Although, as I have said, permission to appeal was granted by Adam Johnson J on 26 March 2021 following an oral hearing, the application had previously come before Fancourt J on the papers, who refused it, observing, amongst other things that:

> "There is an air of total unreality about the proposed appeal, which is plainly not for the purpose of protecting the Appellants' interest as shareholders, or not directly for the purpose, but in order to seek to vindicate Mr Chandrasekaran's stance over the [Gardener Incident] and the claimed injury to his feelings, and thereby justify the litigation that ensued. That much is evident from the fact that no substantial relief, other than a pronouncement that is not and was not in dispute at trial, is being sought on appeal".

88. I am bound to say that, notwithstanding the significant efforts of their legal team and without in any way diminishing either the distress felt by the Chandrasekaran family (which Mr Samuel accepted during the appeal hearing was genuine) or the significance of an allegedly racist remark, I agree with this assessment of the appeal.

89. The Appellants have spent considerable time and effort in arguing about the factual findings of the Judge and suggesting (in oral submissions from Ms Banton) that judicial intervention is required in this case owing to the racist aspect of the incident involving the Gardener in 2016; the clear implication being that not only did the directors fail properly to deal with this racist element, but so too did the Judge. Indeed it was suggested that it was somehow "telling" that the Judge did not make any findings on the racist allegations but instead chose to "brush them aside". In her written reply submissions, Ms Banton expressly suggested that the Chandrasekaran family had not been afforded dignity and respect by the court below, making direct reference to the Equal Treatment Bench Book. This court was invited not to make the same mistake.

90. I reject these submissions, for reasons I have given. Mr Chandrasekaran's evidence at trial was that he was <u>not</u> saying that the directors were racist (indeed he denied ever having made allegations of racism against the directors or authorising his lawyers to do so) and that although it was his view that the Gardener was racist, nevertheless "This

case, to my mind, is not about racism". I have no doubt that Mr Chandrasekaran firmly believed that the directors had mistreated him, but the Judge, having carefully sifted the evidence, rejected his view of events. It appears that he has been unable to accept her findings and has chosen to pursue this appeal for the Relevant Relief. However, that relief effectively amounts to no more than an order that the Company be run in good faith and, although Mr Lightman took me to *Hawkes v Cuddy* [2009] EWCA Civ 291 per Stanley Burnton LJ at [85] to the effect that the court may make such order as it thinks fit, he did not suggest any different form of relief.

91. Whilst I accept that a petitioner need not necessarily show any financial loss in order to establish unfair prejudice (see *Estera Trust (Jersey) Ltd v Singh* [2018] EWHC 1715 per Fancourt J at [338]-[340]), that the nature of the relief available under section 996 is "wide and flexible" (see *Apex Global Management Ltd v Fi Call Ltd* [2013] EWHC 1652 (Ch) per Vos J at [125]), and that the court is "not limited merely to reversing or putting right the immediate conduct which has justified the making of the order" (see *Grace v Biagioli* [2005] EWCA Civ 1222 per Patten J at [73]), it is very difficult to see why any form of relief would be appropriate in this case (always assuming the success of the appeal), let alone the relief that is proposed. I say that for the following reasons:

i) The Gardener Issue, insofar as it related to the directors' conduct in 2018, was concerned with their failure to terminate his retainer. However, the circumstances surrounding the Gardener Issue have long since been addressed, the perceived breaches are historic and the Gardener is no longer retained by the Company. There is now no existing prejudice to "put right and cure for the future" (see *Re Bird Precision Bellows* [1986] Ch 658, per Oliver LJ at 669).

ii) Insofar as the Gardener Issue was ever concerned with the original incident in 2016, the offensive conduct was never repeated in the period prior to termination of the Gardener's retainer in 2019.

iii) The existing directors have made it clear in correspondence that they wish to resign as directors of the Company and I have been told by Mr Samuel that they will do so once this litigation is over. This will permit a new cohort of directors to take over its management.

iv) There is no reason to suppose that any future directors of the Company will perpetuate the perceived wrongs of the existing directors. In any event, it is difficult to see what significance the Gardener Issue can possibly have to their future management of the Company.

v) When pushed as to the purpose of the order sought by the Appellants, Mr Lightman said that the

> "Gardener Issue [was] not addressed satisfactorily by [the] Board and in those circumstances going forward the Chandrasekarans want a message to be sent to [the] Board that in future you have to be more sensitive to concerns of shareholders and must deal with them more fairly and equitably".

vi) In my judgment, this explanation has nothing to do with protecting the Chandrasekaran's interests as shareholders from existing wrongs and everything to do with vindicating Mr Chandrasekaran's position in the litigation. It is not appropriate for the court to be asked to "send a message" to future directors who have not, as yet, done anything wrong and there is certainly no need for the court to "regulate the conduct of the company's affairs in the future" (see section 996(2)(a) of the 2006 Act) by doing so. There is no dispute that the Company must be run in good faith and fairly in the interests of all of the occupants of the Estate in the future, but I cannot see why an order to that effect is necessary.

vii) The suggestion from Mr Lightman that the grant of relief in the form of the order sought may be some form of "subliminal influence" on how the board conducts the Company's affairs in future does not seem to me to take matters further.

92. In conclusion, I can do no better than refer again to the reasons given by Fancourt J when he refused permission to appeal on the papers:

> "it is not reasonably arguable that the companies court should grant general relief, in the nature of a declaration of the duties of the directors of the company, where the only matters complained of are historic, have not been repeated or threatened to be repeated, and have no continuing significance for the affairs of the company or the rights of the shareholders as a whole. There is no dispute – and the directors of the Company accepted in evidence – that they should conduct the company's affairs in good faith in the interests of the company for the benefit of the shareholders of the company generally. No purpose would be served by making the order sought other than the personal vindication of Mr Chandrasekaran".

93. With respect, I agree. Even if it had proved possible to persuade me that the Judge erred in one or more of the respects identified in the Grounds of Appeal, I would, in the exercise of my discretion, have refused to grant any form of relief. The court is entitled to look at the reality and practicalities of the overall situation, past, present and future. Having regard to that reality and to those practicalities, the relief sought is, in my judgment, neither appropriate nor necessary. No other form of relief was suggested to me.

94. The appeal is dismissed.