Neutral Citation Number: [2024] EWHC 3191 (Ch)

Case No: BL-2024-001139

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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

Date: 11 December 2024

Before :

MR JUSTICE MILES

- -

IN AN INTENDED ACTION

Between :

(1) SIR RONALD DENNIS
(2) MR JOHN KELSEY-FRY KC
(3) MR DERMOT DESMOND

Applicants

- and –

QUEENWOOD GOLF CLUB LIMITED

Respondent

- -
- -

Andrew Thompson KC & Philip Morrison (instructed by **Herbert Smith Freehills LLP**) for the **Applicants**
Nigel Dougherty & Tom Hall (instructed by **Charles Russell Speechlys LLP**) for the **Respondent**

Hearing date: 26 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 11 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE MILES

Mr Justice Miles :

Introduction

1. The applicants seek pre-action disclosure from the respondent (the "Company") under CPR 31.16.

2. The Company runs the Queenwood Golf Club (the "Club"). The Company's articles of association dated 11 October 2023 provide for different classes of members (collectively, the "Members") depending on the class of shares they hold. Each of the applicants is a "B Member" of the Club within the meaning of the articles. The B shares carry very limited voting rights.

3. The applicants contend that the articles confer almost complete voting control on a company associated with the founder of the Club, Mr Frederick Green ("Mr Green"). The Articles confer voting control on the "A Member", defined as the holder of the two A Shares. The A Member is Queenwood Development Group LLC ("Queenwood Development"), a Colorado based limited liability company. Queenwood Development is in turn owned by the trustees of the Queenwood Trust. The applicants have not seen the underlying documents, but it appears that Mr Green and his wife are both trustees and (at least formerly) beneficiaries of that trust.

4. The board of the Company comprises Mr Green, Mrs Green (who is Mr Green's wife), Mr David Haythe and Mr Gerard Tvedt (the "Board").

5. The application arises in respect of an intended action under section 994 of the Companies Act 2006 in relation to alleged unfair prejudice in the conduct of the Company's affairs.

6. The applicants have to date identified Queenwood Development as a substantive respondent. The Applicants say that they do not know at the moment whether Mr Green or Mrs Green will be respondents.

7. It is common ground that in such proceedings the Company will be a party (indeed this is a mandatory procedural requirement). The parties also agree that the Company would take a neutral position in such proceedings. They agree that it is common for the subject company in unfair prejudice proceedings to give disclosure of documents, as the company will often be the principal custodian. They agree that in unfair prejudice proceedings any disputes about the issues for disclosure and disclosure models will principally be debated by the substantive parties, although the company may provide evidence about the costs and disruption involved in giving disclosure.

8. This application has been made against the Company without joining any of the expected substantive respondents. The applicants say that all of the jurisdictional requirements for an order under CPR 31.16 are met and that the Court should make an order in the exercise of its discretion against the Company. The Company submits that, as a neutral party, it is unable to engage on the potential substantive issues between the real protagonists, but it raises various concerns about the orders being sought.

Relevant principles

9. There was no material dispute about these.

10. Section 994 provides that a member of a company can apply for relief on the grounds that a company's affairs are being or have been conducted in a manner that is unfairly prejudicial. Section 996 gives the Court wide powers to grant relief.

11. The category of individuals against whom relief can be ordered is very wide: see *F&C v Barthelemy (No 2)* [2012] Ch 613 at [1096].

12. The power to order pre-action disclosure arises under s. 33(2) of the Senior Courts Act 1981. The rules governing such applications are found in CPR r. 31.16. Sub-rule (3) provides:

> "(3) The court may make an order under this rule only where—
>
> (a) the respondent is likely to be a party to subsequent proceedings;
>
> (b) the applicant is also likely to be a party to those proceedings;
>
> (c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and
>
> (d) disclosure before proceedings have started is desirable in order to—
>
> (i) dispose fairly of the anticipated proceedings;
>
> (ii) assist the dispute to be resolved without proceedings; or
>
> (iii) save costs."

13. In *Carillion Plc (in liquidation) v KPMG LLP* [2020] EWHC 1416 (Comm) Jacobs J helpfully summarised some of the applicable principles at [66] – [67]:

> "66. The relevant legal principles are conveniently summarised by Blair J. in paragraph 17 of *Assetco*. CPR 31.16 provides that the court may make an order for pre-action disclosure only if certain conditions are satisfied:
>
> i) The respondent and applicant must both be likely to be parties to subsequent proceedings. It is not however necessary to show in addition that the initiation of such proceedings is itself likely: *Black v Sumitomo Corp* [2002] 1 WLR 1562 at [71]–[72], Rix LJ, which is the leading case on the rule.

> ii) The documents sought must fall within the scope of the standard disclosure which the respondent would have to give in the anticipated proceedings. It follows that at the time of the application, the issues must be sufficiently clear to enable this requirement to be properly addressed.
>
> iii) Disclosure before proceedings have started must be desirable (i) to dispose fairly of the anticipated proceedings, (ii) to assist the dispute to be resolved without proceedings, or (iii) to save costs: CPR 31.16(3)(d).
>
> iv) In considering whether to make an order, among the important considerations are the nature of the loss complained of, the clarity and identification of the issues raised by the complaint, the nature of the documents requested, the relevance of any protocol or pre-action inquiries, and the opportunity which the complainant has to make his case without pre-action disclosure (*Black v Sumitomo Corp* at [88]).
>
> v) The anticipated claim must have a real prospect of success.
>
> vi) In the commercial context, a pre-action disclosure order, even if not exceptional, is unusual.
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> 67. The request must be "highly focussed" and confined to what is "strictly necessary" for the purposes for which pre-action disclosure may be ordered: *Hutchinson 3G UK Ltd. v O2 (UK) Ltd*. [2008] EWHC 55 (Comm) at [40] (Steel J.); *Snowstar Shipping v Graig Shipping* [2003] EWHC 367 (Comm) at [35] (Morison J)."

14. At [75] Jacobs J noted that the jurisdictional conditions are a relatively low bar which may be crossed in very many, if not most, cases. The real debate is often about discretion.

15. At [68] and [107]–[108] Jacobs J characterised such applications as case management decisions requiring the judge to look at the case in the round and consider whether the efficient case management of the dispute would be assisted by the disclosure sought. The court should ask whether the request for pre-action disclosure furthers the overriding objective on the facts of the case.

16. There is no specific pre-action protocol for s. 994 claims. So the position is governed by the Practice Direction – Pre-Action Conduct and Protocols (the "General Protocol"). As to that:

    i) The General Protocol [3] indicates that, before commencing proceedings, the court will expect the parties to have exchanged sufficient information to understand each other's position and try to settle the issues without proceedings (among other things). Where there is no relevant pre-action protocol, the parties should "exchange correspondence and information to comply with the

objectives in paragraph 3" ([6]). That will usually involve a letter before claim, a letter of response, and "the parties disclosing key documents relevant to the issues in dispute" ([6a-6c]).

ii) The protocols are to be followed generally but not slavishly, and the Court should look for substantive compliance: White Book at C1A-005; General Protocol [13].

17. *Carillion* arose in the specific and specialised context of the Pre-Action Protocol for Professional Negligence which provides specific steps for the exchange of documentation by way of the exchange of pre-action correspondence. Where that Protocol applies, Jacob J noted at [102] that there may be cases where a request for documentation is nonetheless justified at an earlier stage and before the pre-action process is undertaken:

> "102. I accept Carillion's point that the Protocol does contemplate that a reasonable request for documents can be made "at any time", at least if the claimant "needs to make" such a reasonable request. However, the usual course – as *Assetco* indicates – is that such request will be made at the time when the claimant has formulated his Letter of Claim. There may of course be cases where a request is justified at an earlier stage, for example where a claimant knows that something has gone wrong very badly, but has little idea as to why, and needs documents in order to formulate a Letter of Claim. But that does not apply in the present case, and I was unpersuaded that Carillion needed to make any request for documents, let alone the request that was made, prior to setting out its case in a compliant Letter of Claim."

Evidence and factual background

18. The parties have relied on witness statements from their solicitors, being the statements of Mr Alan Watts dated 6 August 2024, Mr Manoj Vaghela dated 11 October 2024, and Mr Watts dated 12 November 2024. I read a second statement of Mr Vaghela but that was not in the event material to the application. To avoid any doubt, I should state that the applicants' allegations are not accepted by the Company and I make no findings about their merits.

19. The applicants allege that Mr Green exercises control over the Company and the Club. The Company alleges that Mr Green exercises practical control over the A Shares by virtue of his control over the Queenwood Trust and Queenwood Development.

20. Watts 1 at [23] to [31] summarises the applicants' complaints relating to the Club's management, finances and future governance. The most important issues concern a series of payments which had been made to the Greens in relation to the A Shares. The payments run into several millions of pounds.

21. The applicants and the Company have been engaged in correspondence since early 2024. The applicants have sought information and documents from the Company. This is summarised in Watts 1 at [32]–[82]. The correspondence shows the applicants making repeated requests for the documents now sought. There is a table in Watts 2 at

[19] which sets out the requests and the Company's response (essentially its refusal to provide the documents). The key points are as follows:

i) Between 10 February 2024 and 26 April 2024 the applicants personally sought information and documentation from the Company. The Company said it would engage but in the event none of the documentation sought was provided.

ii) On 26 April 2024 the applicants' solicitors ("HSF") wrote to the Company, explaining the applicants' concerns about the management of the Company and seeking documentation.

iii) Reynolds Porter Chamberlain LLP ("RPC"), responded not on behalf of the Company but on behalf of the directors in their personal capacities. This did not result in the production of the documentation.

iv) The Company responded to HSF's document requests on 5 July 2024 in a short letter which refused to consider any disclosure requests until a pre-action letter had been sent to Queenwood Development and it had replied.

v) On 14 July 2024 the Company circulated a report prepared by Deloitte ("the Deloitte Report") to all Members (see further below).

vi) The applicants (both personally and via HSF) indicated their concerns with the Deloitte Report and requested the documents provided to Deloitte in order to enable them to understand the Deloitte Report. The Company did not provide the documents.

22. The applicants then made this application on 6 August 2024.

23. The applicants contend that such information as has been provided, including the Deloitte Report has been piecemeal, incomplete, and contradictory. The main complaint concerns a series of payments made by the Club to Mr and Mrs Green. It appears from the Company's answers to date and the Deloitte Report that some of this was paid in connection with their agreement to transfer control over the A Shares.

24. A table in Watts 2 at [22] summarises the information provided in relation to the A Shares. The applicants contend as follows:

i) There is no dispute that the Company has paid Mr and Mrs Green £6.2 million between 1 January 2009 to 31 May 2024. There has, however, been a lack of clarity over (i) the purpose of those payments and the basis and terms on which they have been made, and (ii) the governance changes which have been purportedly agreed or proposed as regards the future ownership and control of the A Shares (at least in part in return for those payments).

ii) In particular, the applicants rely on the contents of a table in Watts 2 at [22] which (in summary) sets out the following:

a) The Company's accounts for 2013 record that the Club made a commitment to Mr Green in August 2011 of circa £1.8 million "in relation to the acquisition of the controlling interest in 'A' shares for the benefit of the Members of the Club" and that Mr Green "transferred his

ownership interest in the 'A' Shares" to the Queenwood Trust by providing that "the directors of the Club will be the successor trustees of the Queenwood Trust".

b) The Company's accounts for 2014 to 2020 record differing amounts owed to Mr Green each year "in relation to the acquisition of the controlling interest in 'A' shares for the benefit of the Members of the Club". The accounts for 2015 record the sum owed to Mr Green as £4,314,939, a significantly greater amount than the sums recorded for other years.

c) A board resolution dated 13 September 2021 contains an unexecuted amendment to an operating agreement which states that, in 2016, Mr Tvedt was granted the sole right to vote the A Shares while he was Chairman of the Board and for a period after the Board of the Company were to be trustees of the Trust. The resolution also states that this decision was reversed in 2021 so that the Company's Board (not its Members) would decide how to vote the A Shares.

d) The Company's accounts for 2021 and 2022 provide that the payment was made "in relation to the acquisition of the controlling interest 'A' shares for the Board of Directors". No explanation was given for this change from the previous formulation used (ie "for the benefit of the Members of the Club").

e) On 15 March 2024 there was another reformulation, when Mr Green wrote to Members stating that some time after 2009, the beneficiaries of the Queenwood Trust became Mr and Mrs Green "during our lives and thereafter Queenwood Golf Club for the benefit of the members of the club".

f) Mr Green stated in an email to Mr Desmond on 15 March 2024 that the Company's Members "are" the ultimate beneficiaries of the Queenwood Trust.

g) A letter written on 15 March 2024 made statements as to the basis on which payments had been made to Mr Green in relation to the transfer of control of the A shares; and on 22 March 2024, the Company suggested that payments had been made to Mr Green as follows:

    i) £3.3 million in the period 1 January 2009 to 31 December 2024 "in respect of the A shares and Fred Green's management fees".

    ii) a one-off payment of £2.6 million to Mr Green on 4 January 2016 "to in effect buyout the obligation to make future payments for the balance of [Mr and Mrs Green's] lifetime beyond 31st December 2024".

h) A letter from Mr Green to Members dated 30 March 2024 suggested that Queenwood members "will be" beneficiaries of the Queenwood Trust.

i) On 14 July 2024 the Company provided the Deloitte Report which states (among other things):

   i) In September 2013 payments of management fees to Mr Green were "partially replaced and recharacterised as deed payments", and in December 2014 were "entirely replaced and recharacterised as deed payments" (deed payments being made for the A shares).

   ii) The payment to Mr Green in early 2016 was an "Accelerated Deed Payment" to "compress [the Company's] future deed payments to the Greens, resulting in the [Company] paying a one-off amount of $3,822,127 (£2,594,116) in lieu of all future deed payments beyond 31 December 2024".

   iii) The basis for this "Accelerated Deed Payment" was to "secure an earlier termination of the ongoing liability to the Greens, to gain greater certainty of the overall amount of its liability for future payments to the Greens and to bring forward the transfer of control of the Club to its board of directors".

   iv) Provision for any change in relation to the beneficial ownership of the A Shares was made on 6 May 2024 when the Greens signed a "Third Amendment to the Trust Agreement which amended the terms of the Trust such that the members of the Club shall become the sole beneficiary of the Trust by 1 January 2025". The applicants say this contrasts to earlier statements which suggested that the change had already been made years earlier.

25. The applicants' position is therefore that:

   i) The Company has through its Board and Mr Green put forward various high level descriptions of transactions involving large payments to Mr Green apparently at least in part in return for transfer of control of the A Shares (and also payments to Mrs Green).

   ii) Those have however involved somewhat vague and inconsistent descriptions of the arrangements for the future ownership and control over the A Shares. Even now, there is some uncertainty as to the effect of the arrangements purportedly in place and what is meant by the A Shares being held "for the benefit of members of the Club" (e.g. who exactly the beneficiaries under the trust are).

   iii) Such arrangements were, moreover, only put into effect in May 2024, despite having been described as having been made before 2016 and having formed the apparent justification for large payments to Mr Green over many years.

   iv) There is some lack of clarity over the supposed "recharacterisation" of payments for future management services as "deed payments". It is also unclear how a large lump sum payment to Mr Green could be justified as compensation for management services which he was not obliged to provide and might never provide.

v) It is not clear which payments, and in what sums, have been made to Mr Green as consideration for any transfer of ownership and control of the A Shares rather than as purported consideration for services.

26. The Deloitte Report was sent to all Members on 14 July 2024. The Company has relied upon the Deloitte Report as evidence that there was no "fraud or financial wrongdoing" in the payments made to Mr Green. It also stated that the Deloitte Report had been produced to provide information to members and to "put all of the allegations and threats behind us."

27. The concluding paragraph of the Executive Summary in the Deloitte Report stated:

> "Except as otherwise described in our report, the management fee and deed payments made by the Club to the Greens have been accurately disclosed in the Club's financial statements and are consistent with the terms of the relevant contractual agreements signed on behalf of the Club. Based on the work performed, we have seen no evidence of fraud or financial wrongdoing in relation to the transfer of the A Share, the recharacterisation of management fees as deed payments between 2009 and 2016 or the accelerated payment made in 2016 to ensure all contracted payments to the Greens ceased at the end of 2024 (as well as their involvement with the Club) rather than continuing for their lifetimes."

28. The applicants say that the Deloitte Report has not satisfied their concerns. They say that its contents cast yet further doubt over some of the information which had previously been given to members. This complaint is set out in some detail in Watts 1 [73] - [78], and [99] – [120] in relation to the allegations concerning the A Shares. In summary the applicants contend that there are gaps in the information contained in the Report and that it contains some potential inconsistencies with the other information provided to the applicants (as explained above). They say that without the underlying documents a reader cannot fully understand the Report or the explanation given for the various events described in it.

29. The applicants also say that the Deloitte Report was subject to serious and significant limitations. Most significantly, they say, Deloitte did not consider the nature and extent of any services provided by Mr Green in return for the payments made, and no opinion is offered on any matters of law.

The applicants' allegations of unfair prejudice

30. The allegations of unfair prejudice are identified in Watts 1 at [89]–[178]. They may be summarised as follows (using the terms deployed in the argument before me).

31. First, "the A Shares Complaint". The applicants allege that the Company has, through a series of transactions, over many years culminating in May 2024, paid approximately £6.2 million to Mr and Mrs Green on terms which have not been fully disclosed by the Company, although the Company says the payments to Mr Green were made (i) in part for purported services (the nature and extent of which are unclear) and (ii) in part for

some form of transfer of control and/or ownership of the A Shares, involving giving the directors control over them.

32. The applicants say that these matters give rise to at least a prima facie case of breach of duty by the Board. They say that it is hard to see how paying large sums of Company money in order to pass control of the Company's general meeting to its directors could have been both genuinely thought to promote the success of the Company for the benefit of its members as a whole, and in any event that cannot have been a proper corporate purpose.

33. Second, "the Disguised Distribution Complaint". The applicants allege that payments made to Mr Green purportedly as remuneration were (it appears from the Deloitte Report) in fact not conditional on the provision of services to the Company, and so were potentially in law disguised distributions, as Deloitte acknowledge. There were no corresponding distributions made pro-rata or at all to other Members and the Board did not declare a dividend only on the A Shares as a class of shares, in breach of the Articles and the Board's fiduciary duties.

34. Third, "the Undisclosed Benefits Complaint". The applicants allege that Mr Green has admitted in a letter of 5 April 2024 that the Company has paid benefits to at least one director (Mr Haythe) without disclosure to members, by waiving his annual dues since 2017. The Company has not explained the rationale for that decision or who took it.

35. Fourth, "the Article 26 Complaint". The applicants allege that the Board has used or threatened to use Article 26 of the Company's articles of association to remove Members, apparently for the purpose of trying to silence dissent, which is an improper purpose, putting them in breach of fiduciary duty.

36. Fifth, "the Change in Auditors Complaint". The applicants allege that the Company removed its auditors without proper explanation. Under s. 994 (1A) of the 2006 Act removal of an auditor on grounds of divergence of opinions on treatments or audit procedures or on "any other improper grounds" is deemed to be unfairly prejudicial. The Company has not explained why they were removed but what it has said about their removal is wrong.

The documents sought in the application notice and in Watts 2

37. The original application notice sought many categories of documents. Watts 1 supported this application.

38. These requests were significantly narrowed in Appendix 2 to Watts 2, in response to the evidence served by the Company. At the start of the hearing before me the applicants were seeking all of the documents in Appendix 2. These were divided into three categories:

    i) The "Category A" requests are essentially for the specific documents which have already been provided to Deloitte for the purpose of producing their Report.

ii) The "Category B" requests are for categories of the Company's own formal documents (namely, board minutes, resolutions and board papers) concerning various transactions.

iii) The "Category C" requests are for documents to be gathered through searches of the documents of Mr Green. The proposed searches include date ranges and search terms.

39. During and after the hearing before me, the applicants further narrowed their requests. They are no longer seeking Category C at all or Request 13 in Category B. They have also further narrowed the terms of requests 10, 11, 12 and 14.

40. The remaining requests are now worded as follows:

Category A

Request	Document
1.	The trust agreement effective 1 June 2009, dated 3 June 2009, by which the Queenwood Trust was established ("Trust Agreement").
2.	The documents effecting amendments to the Trust Agreement dated 17 September 2009, 24 September 2014, and 6 May 2024.
3.	The deed agreement dated 21 September 2013 between the Queenwood Golf Club Limited, Mr Frederick Green, and Mrs Lurana Green ("2013 Deed Agreement").
4.	The deeds of variation dated 1 December 2014 and 1 October 2015 to the 2013 Deed Agreement.
5.	The operating agreement dated 1 June 2009 ("2009 Operating Agreement")
6.	The amendments to the Operating Agreement dated 1 November 2016 and 13 September 2021.
7.	The club management agreement dated 1 October 2001 ("2001 Management Agreement").
8.	The club management agreements dated 1 June 2009 and 21 August 2011.
9.	The consulting agreement dated 21 September 2013 and the deed of variation to that consulting agreement dated 1 December 2014.
10.	Any document provided to Deloitte LLP for the purposes of producing their report dated 12 July 2024 ("Deloitte Report") other than (i) those contained in Requests 1 – 9 above and (ii) the communications by which those documents were provided and any instructions given to Deloitte in relation to the Deloitte Report.

Category B

Request	Document
11.	All papers (provided to the Company's board of directors ("Board") for the purposes of any meeting of the Board), minutes and resolutions of the Board referring to the documents set out in Requests 1 – 9 above or the transactions or arrangements set out in those documents (including the rationale for the Company's entry into or execution of those documents) and any Board resolutions approving those documents or the arrangements set out in them.
12.	All papers (provided to the Board for the purposes of any meeting of the Board), minutes and resolutions in the period 2009 - 2016 explaining or referring to the rationale for the Company's decision not to require Mr Frederick Green to provide services to the Company in exchange for remuneration.
13.	[Deliberately left blank]
14.	All papers (provided to the Board for the purposes of any meeting of the Board), minutes or resolutions, in the period 1 January 2021 to 1 January 2022 explaining or referring to the reasons why SH Landes LLP was replaced as auditor of the Company.

41. These requests are far narrower than those originally made. It is worth noting that the original Category B and C requests would have required the Company to harvest and upload documents onto a searchable electronic platform.

Summary of the parties' positions on the application

42. The applicants submitted in outline as follows:

i) Without the disclosure sought, particularly Categories A and B (the most basic transactional documents), the applicants would be forced to plead a case at only the most broad and general level, with no detailed allegations and no particulars.

ii) They would also not be able to identify the relief they should seek or the parties they should join. The primary form of relief would be a reverse buyout order against Queenwood Development requiring it to sell the A Shares at a fair price, with a change to the Articles of the Company in a form directed by the Court so as to give voting rights to the members generally. It is, however, unclear whether other claims or relief might be sought.

iii) Requiring the applicants to plead without sight of these basic documents, gives rise to the risk of serious case management problems. The pleadings would not define the true issues. The court at the first CMC could not give proper directions concerning disclosure, the likely length of trial, or expert evidence that would be required. The claim would have to be re-pleaded after disclosure, causing delay and wasted costs and the duplication of effort.

iv) Counsel said at the hearing that any pleading would be at so high a level as to be dysfunctional and that case management would be a shambles.

v) The pre-action disclosure sought would also allow an effective pre-action process involving the actual respondents, including at least Queenwood Development and possibly Mr and/or Mrs Green. That would at the very least assist the effective identification of the true issues and effective pleading of the case. It might well also facilitate a settlement of the dispute, which is inevitably promoted by both sides having at least the basic information about the transactions in issue.

vi) The jurisdictional criteria under CPR 31.16 are satisfied.

vii) The court should make the order sought in the exercise of its discretion:

(a) the documents requested are highly relevant, indeed are basic;

(b) the document requests are specific and highly targeted, seeking either specific documents or narrow and specific classes; there is no other practicable way to obtain the documents. The applicants have tried seeking these documents consensually since 26 February 2024. The Company is the most obvious (and perhaps only) source of those documents, yet it will not provide them. The only other clear respondent to the claim, Queenwood Development, is unlikely to have at least most of them and would have to get them from the Company;

(c) for the reasons summarised in (i) to (v) above, there are clear case management benefits from the proposed pre-action disclosure;

(d) provision of these documents might indeed avoid a claim altogether; and

(e) the anticipated claim has at least a real prospect of success: there is at least a good arguable case under s. 994.

viii) The application is outside the normal run of cases:

(a) there has been a complete failure by the Company to provide any documents in response to reasonable requests, even where the Company has itself recognised the importance of those documents to the complaints made by providing at least some of them to Deloitte. The Company has also said that the Deloitte Report should be sufficient to put the concerns of Members to rest;

(b) the applicants seek only tight, narrowly focused disclosure;

(c) the applicants have enough information to understand that there appears to have been unfairly prejudicial conduct, but do not have enough information to plead their case properly and effectively, including by identifying the necessary relief and all the proper substantive respondents; and

(d) the asymmetry in the availability of documents is complete.

ix) Counsel accepted that the documents in Categories A and B were more important for the applicants than those originally sought in Category C. Category A in particular is very basic material and it has already been compiled for provision to Deloitte. The Category B documents are also narrowly defined and are basic. The burden on the Company of providing them will be minimal. The applicants have agreed to pay the costs of compliance (and are not seeking an order against the Company for the costs of the application).

x) Under the General Protocol there is no need to serve a letter before claim before seeking documents in an application of this kind. In any event, adopting *Carillion* at [102], this is a case "where a claimant knows that something has gone wrong very badly, but has little idea as to why, and needs documents in order to formulate a Letter of Claim". There is no justification for requiring the applicant to write separately to Queenwood Development, since the Company has the documents.

xi) While in some cases it would be necessary to join the substantive anticipated defendants as parties to an application of this kind, the facts of this case are unusual. The voting rights here are wholly controlled by Mr Green and his interests. They of course know about the application. The Board commissioned the Deloitte Report and said that it should put the concerns of the applicants to rest. Had they wished to make submissions at the hearing Queenwood Development and the Greens could have done so. They know all about this hearing. Joining them as parties would simply have amplified the costs.

43. The Company submitted in outline as follows:

i) The Articles do not permit the Members access to documents of the kind sought.

ii) There have been no previous cases where documents have been sought from a company under CPR 31.16 in anticipation of a claim under s. 994. This may be because the Company is not a real protagonist in the case. Moreover the Company is shackled in what it can say in opposition to the application because of its obligation to maintain neutrality in the dispute.

iii) There has been no letter before claim to the substantive protagonists (Queenwood Development or the Greens). Rather the applicants have insisted in pursuing a CPR 31.16 application against the company, against which no relief is being sought (other than disclosure).

iv) Counsel for the applicants has significantly overstated the difficulties of pleading a case and, at the hearing, went well beyond the evidence. At [7] of his first statement, Mr Watts said that the documents were sought in order to allow the applicants to formulate "the precise scope and basis for the claim; and … the precise relief to be sought". He said that if early disclosure is not given "it is inevitable that the claim will be necessarily relatively unfocussed and the complaints will have to be formulated only in broad terms". He then said,

> "[f]urther, in that event, the claim is also likely to raise matters and make allegations which, following disclosure:

> i) may be narrowed substantially; or, ii) may not even be properly the subject of a claim at all; or iii) (more likely) may have to be significantly reformulated; or iv) (perhaps most likely) may have to be formulated more fully and precisely."

This evidence does not justify the suggestion of counsel for the applicants that there would be a case management disaster or a shambles. The concern expressed in the evidence is far more modest.

v) Mr Watts has therefore accepted that the applicants can plead a non-strikable case. It is quite normal for pleadings to be reformulated after disclosure and the costs of any amendment will be relatively trivial. This factor is not determinative but it is an important one.

vi) The document requests now made are much narrower than the original application. The initial requests were in the nature of a full disclosure exercise. But even for the narrower requests the burden is on the applicants to justify the need for the documents.

vii) The requests have been narrowed in response to the evidence of Mr Vaghela. This shows that proper engagement (which should have been with the principal protagonists) can be productive.

viii) This case is not unusual or outside the norm. It is commonplace for parties to have to amend after disclosure. Nor is the asymmetry of information unusual in commercial disputes.

ix) There is no proper basis for failing to write a letter before claim against the substantive respondents and seeking information and documents in that context. This is not a case "where a claimant knows that something has gone wrong very badly, but has little idea as to why, and needs documents in order to formulate a Letter of Claim".

x) The Company has provided the applicants with the Deloitte Report and the applicants can rely on its contents to identify the various transactions about which they appear to complain. They do not require the underlying documents. The Report is more than 40 pages long and it contains a great deal of information. The applicants have explained their concerns in the light of it and could bring a claim if they so chose. Or, if they are unable to do so, they could and should have raised those concerns with Queenwood Development, the Greens and the other directors through the General Protocol process. Under [6] of the General Protocol the parties may seek the disclosure of key documents "relevant to the issues in dispute". The process of identifying the issues and the key documents should have been discussed between the substantive parties through requests under the Protocol, not by an application against the Company.

xi) The absence of a draft petition here makes the exercise for the court more difficult. The caselaw shows that, while not requiring it as a precondition, the court will often be assisted by a draft pleading which brings some clarity to the

likely issues in the case: see *Assetco v Grant Thornton* [2013] EWHC 1215 (Comm) at [23].

xii) There is unlikely to be any significant saving of costs if the documents are provided now. Amending after disclosure in the usual way is unlikely to cost more than a small fraction of the costs of bringing the claim at all.

xiii) There is also the question of the burden of costs on the Company (and therefore the other shareholders) if disclosure is ordered. The applicants have agreed to pay the costs of compliance and not to seek an order for costs against the Company. But that would still leave the Company's own costs of the application to fall on the shareholders as a whole. While the costs of complying with the narrower categories now sought will be less than for the original requests, there will still be an uncompensated management burden on the Company of compliance.

xiv) As to the specific requests:

(a) Request 10 would require the identification and collection of documents.

(b) Request 11 would require an exercise in reviewing documents over a period from 2009 to 2024. It would require a search for references to a large number of transactions and the "rationale for the transactions".

(c) Request 12 requires a search from 2009 to 2016 explaining or referring to the rationale for certain decisions about remuneration.

(d) Request 14 requires a search and review of documents from 1 January 2021 to 1 January 2022 for documents explaining or referring to the reasons for replacing the auditor. These all require work to be undertaken by the Company and the Category B requests require the exercise of review and judgment. This is not a conclusive reason for refusing to require disclosure but it is relevant to the exercise of discretion.

Analysis and decision

44. I start with the jurisdictional requirements. As explained, these are not exacting.

45. I am satisfied that the applicants (as petitioners) and the Company will be parties to any proceedings. The jurisdictional criteria in CPR 31.16(3)(a) and (b) are therefore met.

46. The next question is whether the documents sought would, if proceedings were commenced, fall within the Company's standard disclosure obligations under CPR r. 31.6. The Chancery Guide at [7.31]-[7.35] recognises that the court should "take into account" the fact that PD57AD would apply to proceedings actually commenced.

47. I am satisfied that the documents sought would fall within the standard disclosure obligations of the parties. The documents sought would be central in any claim. So the requirement in CPR 31.16(3)(c) is met.

48. I am also satisfied that early disclosure of the documents sought would be desirable to dispose fairly of the anticipated proceedings, assist the dispute to be resolved without proceedings, or save costs.

49. First, while I consider that counsel for the applicants overstated the difficulties faced by the applicants in pleading their case, I accept the applicants' argument that it is likely that (if they had to plead on the basis of their existing knowledge) they would have to amend their case reasonably substantially to cater for the documents once disclosed. I do not think it likely that the amendments would be limited to merely particularising the existing case. It is likely that they would have to recast at least some of the factual substratum of the case. I accept their submissions that the information so far provided by the Company contains gaps and potential inconsistencies. This is the case despite the provision of the Deloitte Report. I accept the applicants' case that the contents of that report leave unanswered some questions about the nature, terms and rationale of some of the underlying transactions. In this regard I consider that there is substance in the applicants' concerns set out in [25] above. The Company has declined to answer the applicants' questions about the Report. In my judgment, significant costs would probably be saved if the applicants were able to frame their petition with access to the documents sought. I am also satisfied that the improved formulation of a petition would improve early and effective case management by facilitating the earlier formulation of the real issues in the case, which will assist with the identification of issues for disclosure, and other procedural steps.

50. Second, in my judgment, provision of these documents will assist the dispute to be resolved without proceedings. Settlement processes, including mediation, are generally more productive where the parties have a reasonable amount of information, so that there is less room for suspicion that something is being hidden. In the present case the Deloitte Report was produced after the applicants and others had raised concerns about the financial transactions involving the Greens (as summarised above). This led the Board to send the letter of 14 July 2024 enclosing the report. The letter referred to the serious allegations concerning the affairs of the Club over the last 6 months. The Board explained that it had given Deloitte full access to the relevant documentation reaching back to 2009.

51. As recorded above, the letter stated that the Board hoped that "this forensic report by Deloitte will put all of the allegations and threats behind us". Hence the Board regarded the Report as an important step in bringing to an end any disputes or complaints, including those raised by the applicants.

52. I consider that there is real force in the applicants' argument that the there are arguable inconsistences in the explanations that have been given to Members and that the Deloitte Report does not answer all of their concerns. It seems to me that disclosure of the underlying transactional documents is likely to enhance the prospects of the complaints raised by the applicants being resolved.

53. I am therefore satisfied that the requirements of CPR 31.16(3)(d) are met.

54. I turn to the exercise of the court's discretion. I shall address the categories of documents in turn.

55. I am satisfied that it would be appropriate to order the production of the documents in Category A. My reasons follow.

56. First, the requests for documents are limited and compliance will not be particularly burdensome. Requests 1 to 9 are for specific documents referred to in the Deloitte Report. Request 10 is for other documents provided to Deloitte. The Company did not seriously contend that it would be hard to identify and provide them. Nor will identifying them require any exercise of judgment. They are also likely to be limited in number.

57. Second, for the reasons given in [50] to [52] above, in my judgment there are unusually powerful grounds on the facts of this case for thinking that the provision of the documents will assist the parties in resolving their differences otherwise than through proceedings. The Board commissioned the Deloitte Report in light of the complaints that had been raised. They asked Deloitte to review the series of transactions that had resulted in payments to the Greens. The Board hoped that the Deloitte Report would satisfy the applicants. That did not happen. I consider there is force in the applicants' arguments that without the underlying documents the Deloitte Report has potential gaps and throws up potential inconsistencies with other explanations that have been given for the transactions (see [49] above). In my judgment there is a real likelihood that, once they have seen the transactional documents analysed by Deloitte, the applicants will be in a position to entertain serious negotiations with a view to resolving the disputes.

58. Third, on the perhaps unusual facts of this case, I do not think that the absence of the real protagonists from the hearing has had any real bearing. It seems to me that in many (if not most) cases of this kind it would not be appropriate to bring an application under CPR 31.16 against a company in anticipation of s. 994 proceedings – at least without joining the anticipated substantive defendants. In my view, in an application of this kind it would usually be helpful to the court to hear from the real protagonists when considering the jurisdictional and discretionary factors. However in the present case there are three specific factors which have led me to discount this concern. The first is that there was considerable correspondence between the applicants and the Board (which includes Mr and Mrs Green) before the application was made. It is clear that the controllers of the Company are intimately aware of the concerns (and therefore the potential allegations) raised by the applicants. The second is that the unusual allocation of voting rights under the Articles mean that the Greens fully control the Company. They could, had they chosen to do so, have appeared and made submissions. Third, I accept the submission of the Applicants that to have joined them formally would have increased the costs to no real purpose. I wish to emphasise, however, that this is an exceptional case, and a court considering another application of this kind in anticipation of s. 994 proceedings may well insist on the joinder of the intended real respondents.

59. Fourth, while I consider that the applicants have again overstated the difficulties they face in formulating their case, it nonetheless seems to me that the documents in Category A would clearly count as "key documents" for the purposes of paragraph 6 of the General Protocol. The documents are, as counsel for the applicants said, absolutely basic. I do not therefore think that the absence of a prior letter before claim is material on these particular facts. It seems to me that to require the applicants to send such a letter before seeking the documents would be an exercise in slavish formalism. I also think there is force in the applicants' submission that they are likely to be able to produce a considerably more informative (and therefore useful) letter before claim if

they have the documents before putting pen to paper. Again I wish to emphasise that this conclusion turns entirely on the facts of this case and that in many other cases it may well be right to require a letter before claim to be written before an application under CPR 31.16 is made. These cases turn on their facts.

60. Fifth, in light of the particular history, involving the production and circulation of the Deloitte Report as part of an attempt by the Board of the Company to resolve the dispute, I am satisfied that this case falls sufficiently outside the norm to justify an order limited to the documents provided to Deloitte. In my judgment, this factor distinguishes the case from the ordinary run of commercial litigation. I emphasise that this feature relates specifically to the documents in Category A, which is specifically limited to the documents provided by the Company to Deloitte. It is therefore specifically tied to the Deloitte Report (which was commissioned, using Company funds, in response to the complaints articulated by the applicants); disclosure is justified to enable the applicants properly to understand the contents of the Report.

61. Sixth, I do not consider that the limited rights of Members to obtain information under the Articles point either way. The application is made under the court's litigation powers, not under the contract between the Company and its members.

62. I turn to the Category B requests. I am not satisfied, in the exercise of my discretion, that an order should be made in these respects.

63. First, the requests are not confined to specific documents. This is not determinative, as the rule and the cases shows that the court may make an order for classes of documents. However the definition of the class is an important factor as explained above.

64. Taking the requests in turn:

    i) Request 11 would require the Company to review board papers, minutes and resolutions between 2009 and 2024 "referring to" the transactions in requests 1 to 9 or the transactions or arrangements referred to in them. It would also cover references to the rationale for entering into the arrangements. As well as covering documents produced before or at the same time as the relevant transactions, it would cover documents which subsequently referred to an earlier transaction. It would also require documents referring to the "rationale" for the transactions. So it goes beyond references to the transactions themselves. The exercise is potentially burdensome and requires the exercise of judgments based on subject-matter.

    ii) Request 12 covers a five year period. It requires documents "explaining or referring" to "the rationale" for the Company's decision not to require Mr Green to provide services in return for remuneration. It is not restricted to documents referring to transactions, but includes documents explaining or referring to the reasoning for a decision. The exercise is potentially burdensome and requires judgments.

    iii) Request 14 covers a short period, of one year. However it will require a review of papers for that period to find documents explaining or referring to the reasons why the auditors were replaced. While this is likely to be less burdensome it still requires some judgment.

65. Hence Requests 11 and 12 are potentially burdensome and they require the exercise of judgment by a reviewer. These are not decisive factors but I am not persuaded that an order for their production would lead to a preponderance of benefit over costs. Unlike the requests in Category A, the costs of compliance are likely to be reasonably substantial as they will require significant legal input. There is also likely to be management time and disruption in searching for them. They lack the particular feature I have identified for requests 1 to 10 in relation to the Deloitte Report. There could also be some duplication of the costs of complying (if proceedings are brought) as the searches and issues of judgment required to answer them are likely to have to be deployed again in the full disclosure exercise in such proceedings. Request 14 is narrower but compliance still involves an element of judgment. However the request relates to an issue which the applicants accepted was comparatively peripheral to their complaints.

66. Second, I am not persuaded that the applicants require these documents in Category B if they obtain those in Category A. It appears to me that the Category A documents will give the applicants sufficient information to formulate an intelligible and helpful letter before claim pursuant to the General Protocol. I do not think that these documents are needed to enable such a letter to be produced.

67. Third, in contrast to the position under requests 1 to 10 explained above, I do not think that there is anything in the circumstances to justify accelerating the requested disclosure under requests 11 to 14 outside the normal processes of Commercial and Chancery litigation.

Conclusion

68. I shall make an order under CPR 31.16 in respect of Category A, but not otherwise.