Neutral Citation Number: [2020] EWHC 1000 (Comm)

Case No: C31MA037

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN MANCHESTER

BUSINESS LIST (ChD)

Date: 27/04/2020

Before:

HIS HONOUR JUDGE PEARCE

- -

Between:

VINCENT MAHER **Claimant**

- and -

(1) BRENDAN MAHER
(2) GERARD MAHER

Defendants

- -
- -

Mark Harper QC (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimants**
Tom Weisselberg QC (instructed by **DAC Beachcroft LLP)** for the **Defendants**

Hearing dates: 13th, 14th, 15th, 16, 17th, 20th and 21st January 2020

- -

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.

Notes:

1. This judgment has been handed down in private because of the consequences of the COVID-19 pandemic. However the judgment is publicly available.

2. In the judgment, page references to the trial bundle appear with the relevant bundle name or number separated by a stroke from the page number.

Introduction

1. The Claimant and Defendants are brothers[1]. Together with their sisters, Siobhan Maher and Mary Mills, they are the children of the late William Maher and his widow, Monica Maher[2].

2. During his lifetime, William built up a successful group of companies whose business lay in the demolition of buildings and land remediation, with associated excavation, haulage, waste disposal and waste recovery. The central company in the group was W Maher and Sons Ltd ("WMS") but over the years several other companies and subsidiaries have been formed. William, as well as in due course Vincent, Brendan and Gerard, were shareholders in WMS.

3. In June 1997, William executed a settlement trust. The entirety of the shares in WMS were transferred to the trust. Since then, the trust has acquired a residential property at 36 Albert Road, Hale ("the house"), which is occupied by Siobhan. The shares in WMS and the house are the trust's only assets.

4. The original trustees of the settlement trust were William and Monica. On William's death, Monica became the sole trustee for a while, but subsequently appointed her three sons, Vincent, Brendan and Gerard in her place.

5. The dispute between the Claimant on the one hand and the Defendants on the other that has formed the subject matter of this litigation commenced as an argument about whether the trust should sell the shares in WMS. It has developed into a more general dispute about which of the three of them (if any) should be allowed to continue to act as trustees and whether further independent trustees should be appointed.

The relevant history

6. There is a great deal of material before the court. Some of it is of limited, if any, relevance to the issues before the court. Much of the material about the day to day operation of WMS and indeed other companies in the group does not assist the court on

[1] When referring to all three of them in this judgment, they are at times called "the brothers".
[2] To avoid repeated repetition of the same surname in this judgment, members of the Maher family, after first being introduced, will be called by the first name. No disrespect is intended by this.

the high level of issue as to whether the parties before the court are fit to be allowed to continue as trustees.

7. Further, issues are raised as to the conduct of the parties in terms of the pension fund. In short, the Claimant applied to release his lump sum entitlement from the pension trust in September 2014, but this has still not occurred because of disputes relating to the valuation of pension trust assets. The Claimant suggests that this is a result of WMS, through Defendants as its directors, failing to honour its obligations to the pension trust. Whilst clear cut evidence of the maladministration of a pension trust by trustees might be highly relevant to their fitness to act as trustees of the settlement trust, the evidence here is not at all clear cut. I agree with the submission of Mr Weisselberg QC on behalf of the Defendants that the pension complaints are matters for the pension ombudsman that I cannot properly investigate in this litigation.

8. I therefore limit this summary of the evidence to the broad history of WMS and the trust, before summarising the core issues and analysing the factual issues that are important to deciding the issues before the court.

9. WMS was established by William and was incorporated on 25 July 1974. Vincent, Brendan and Gerrard all worked in the company and over time became directors and acquired a shareholding. At varying times, other members of the Maher family had been employed (and in some cases continue to be employed) by WMS, including: Matthew (son of Brendan) - he has been a director of WMS since December 2016; Callum (son of Gerard) - similarly a director of WMS since December 2016; Siobhan (one of the sisters); Dominic (son of Brendan); Joseph (son of Brendan); Joshua (one of William's grandchildren[3]); Laura (daughter of Vincent); Paul (son[4] of Vincent); Mary Mills (the other sister); and (probably[5]) Loretta Mills (Mary's daughter).

10. Over time, the business developed in different directions such that:

    a) WMS established and owned several other companies.

    b) Vincent, Brendan and Gerard jointly or separately owned shares in other companies that had no formal connections with WMS. Of note amongst these

[3] A nephew of Brendan therefore not his son - see paragraph 17 of Brendan's statement.
[4] Although other witnesses described Paul as being Vincent's stepson (Paul being the natural son of Vincent's second wife), I have no hesitation in accepting Vincent's evidence that Paul was his adopted son. Adoption in such circumstances is perfectly common and there is no reason that Vincent should have shared the fact of adoption with others in the family.
[5] The evidence is not entirely clear on this, but nothing in relation to resolving the dispute before the court turns on this.

are Green Remediation Ltd (owned initially by the brothers in equal share, for a while by the brothers in equal shares with one Adam Matthews, and latterly in whole or large part by the Claimant) and Green Demolition and Remediation Limited, a company formed by Vincent in 2014. These companies are collectively called "Greens".

11. The structure of the companies as at June 2014 is shown in the table at **2B/1587**. This identifies which were owned by WMS and which were owned by other family members.

12. On 24 June 1997, a meeting took place at which William, Monica, Vincent and Brendan were present from the Maher family, as well as (probably) Barbara Chadwick and Brian Cripps[6]. A proposal to create a discretionary trust was discussed and agreed upon. It was intended that William[7], Brendan and Gerard should transfer their shares in WMS to the trust. The trust was established by deed of settlement executed by William on 30 June 1997. The entirety of the shares in WMS were duly transferred to the trust.

13. The deed of settlement identifies William's five children identified at paragraph 1 above. Of particular relevance within the deed are the following clauses:

    a) Clause 1(5): "*'The accumulation period' means the period of 21 years beginning with the date of this settlement."*

    b) Clause 1(6): "*'The beneficiaries' means (i) the widow of the settlor; (ii) the children and remoter descendants of the settlor; (iii) any person or class of persons nominated to the trustees by (a) the settlor, or (b) two beneficiaries (after the death of the settlor) and whose nomination is accepted in writing by the trustees."*

    c) Clause 3: "*Trust income. Subject to the overriding powers below: (1) the trustees may accumulate the whole or part of the income of the Trust Fund during the Accumulation period. That income shall be added to the Trust Fund. (2) The trustees shall pay or apply the remainder of the income to or for the benefit of any beneficiaries, as the Trustees think fit, during the Trust Period."*

[6] Ms Chadwick was described in evidence as an internal bookkeeper and accountant with WMS. She is probably the person identified as "BC". Mr Cripps, an accountant and partner in McKellen and Co, a firm of Chartered Accounts who advised William, is probably the person identified as "BEC."
[7] It seems that Vincent had earlier transferred his shares in WMS back to William, on account of a pending issue in his divorce.

d) Clause 4(3): "*Power of advancement. The trustees may pay or apply any trust property for the advancement or benefit of any beneficiary."*

e) Clause 5: "*Default trusts. Subject to the above, the trust fund shall be held on trust for the beneficiaries in equal shares absolutely."*

14. Further, paragraph 12 of the Second Schedule provides, "*The trustees shall not be bound to inquire into or be involved in the management of any company in which the Trust Fund is invested unless they have knowledge of circumstances which call for inquiry."*

15. William died on 3 April 2006. His widow, Monica, continued as sole trustee until 10 February 2011 when she retired from the role and was replaced by Vincent, Brendan and Gerard.

16. From around 2011, it seems that there was a gradual parting of the ways between Vincent on the one hand and Brendan and Gerard on the other. Brendan and Gerard continued in the active management of WMS, whereas Vincent was less involved in the management of the company, albeit that he continued to attend board and other meetings until 2014.

17. It is common ground between the Claimant and the Defendants that, by 2014, Vincent was suggesting that the trust sell the shares in WMS. The detail of the discussions and the extent to which agreement was reached on the way forward is a matter of dispute between the parties as identified below, but it is Vincent's pleaded case that the agreement was reached on or shortly before 29 January 2014 and that the agreement was confirmed on 10 July 2014.

18. In February 2014, Vincent contacted Hornblower, a business brokerage company, to investigate the sale of WMS. The exact circumstances of his doing so are in dispute, Gerard and Brendan stating that they were unaware of this until October 2014 or at least July 2014.

19. On 10 July 2014, a board meeting of WMS took place. This was the last board meeting that Vincent attended. It was one of several meetings and conversations that Vincent covertly recorded.

20. On 3 September 2014, Vincent resigned from his employment with the company.

21. On 22 September 2014, Vincent met with Brian Cripps and Chris Booth. This was another of the meetings that Vincent recorded and of which a transcript is therefore available. Amongst other thing they talked about Vincent's resignation from the company and the operation of the trust. Whilst considering potential ways out of the impasse that was developing, Vincent said, *"So at the end of the day, I don't have to put up with them two, let them two run it whatever way they see fit, and I don't want to be arguing with 'em and I don't want to argue with 'em full stop. I just want what I think is right and proper and hopefully if they can get round the table, maybe so, but if it goes the other way, then I'm just gonna block 'em forever more, you know. And that, like you say, it just ends up in a stalemate and it just gets bitter."*

22. On 17 November 2014, Ms Chadwick emailed Mr Booth stating, "*Brendan and Gerard have asked me to email to confirm that after having a meeting, they have made the decision that the company is not for sale. Under these circumstances, please do not pass any details whatsoever on to third parties."* (**2B/1930**).

23. On 9 March 2015, Vincent, by his solicitors, sent a letter of claim to Brendan and Gerard. The letter raised a number of complaints about how Brendan and Gerard were running WMS and threatened action to enforce the alleged agreement to sell WMS, to remove Brendan and Gerard as trustees, to seek orders for the proper regulation of the affairs of the company and trust, and/or for compensation for breaches of duty by Brendan and Gerard.

24. On 11 May 2016, a board meeting took place at which Brendan, Gerard and Roy Taylor, who had been brought in to deal with Vincent's concerns about governance[8], were present. It was noted that the outstanding sums due on the directors' loan account were £828,918.87 in respect of Gerard, £1,926,454.17 in respect of Vincent. There was no outstanding sum due in respect of Brendan. The board resolved that it was in the best interests of the company to seek to recovery of the outstanding sums as soon as possible and requested that directors with outstanding sums on their account should provide a statement of assets and liabilities, together with proposals for repayment and/or security.

25. On 7 July 2016, WMS wrote to Vincent requiring that he pay £125,000 towards his directors' loan account within 28 days and make proposals for the repayment of the balance.

[8] See paragraph 162 of Brendan's witness statement.

26. On 24 August 2016 at a board meeting, WMS resolved to accept Gerard's offer to repay his director's loan account at the rate of £50,000 per month.

27. On 6 September 2016, solicitors for the company sent a letter to Vincent requiring repayment of the full amount outstanding on the director's loan account, £1,926,454.17 within 14 days.

28. On 19 September 2016, Vincent, issued this claim. On the same day he sent a solicitors' letter to Gerard and Brendan, accepting that he owed about £1.63 million on the director's loan account and proposing that his brothers agree to stand down as trustees and agree to the appointment of independent trustees, in which event Vincent too would agree to stand down as a trustee.

29. On 11 November 2016, WMS issued a claim against Vincent in respect of the sum of £1,926,454.17 said to be outstanding on his director's loan account. In his defence in those proceedings, Vincent contended that the claim should be struck out (the decision to commence proceedings having been taken by majority, rather than, as Vincent contended was necessary, unanimously) or alternately stayed pending determination of this claim. Various other defences were raised, including the assertion that the amount claimed was inconsistent with previous statements as to the amount due and owing. In July 2017, HHJ Moulder (as she then was) ordered the provision of a Scott Schedule in which Vincent set out his case on each of the items contended by WMS to be properly chargeable to his account. In that document, which appears at **4A/6238,** a small number of the items were accepted without qualification. Some were accepted "*subject to verification"*. A significant number were either rejected altogether or subject to the statement that, *"The Defendant is unable to comment given the lack of detail provided."*

30. By letter dated 3 March 2017, WMS stated that it was treating Vincent as removed from office as a director due to non-attendance at meetings. The result is that his only involvement in the company since then has been indirectly as one of the trustees of the settlement trust.

31. On 1 June 2017, a general meeting of WMS took place. This was one of the meetings that Vincent recorded. By that time, the true nature of the beneficial interest in the trust was understood (see transcript of the meeting at **2F/5114**). Brendan and Gerard jointly proposed the payment of a dividend of £250,000 which would of course have accrued to the benefit of the trust. Vincent said that he would think about the proposal but did not subsequently approve the payment of such a dividend.

32. The trial of the claim by WMS on the directors' loan account was listed to commence on 13 November 2017. However, on 6 November 2017, Vincent accepted a Part 36 offer made by the company in the total sum of £1,896,454.17[9].

33. On 5 June 2018, District Judge Matharu gave direction in these proceedings including for the filing and service of statements of case.

34. On 7 September 2018, Roy Taylor emailed Vincent about the impending general meeting of the company expressing concern that, at the previous year's meeting, Vincent had been provided with far more information than he was entitled to as one trustee of the shareholder in the company and that Gerard and Brendan did not intend to provide the material that he was requesting in advance of the 2018 meeting. On 11 September 2018, Vincent replied, stating that there was disagreement about what he was entitled to and suggesting that an independent law firm be instructed to advise on what he was entitled to. Mr Taylor replied, declining to take up the offer.

35. On 14 September 2018, a general meeting of WMS took place. Again, Gerard and Brendan proposed the payment of a dividend of £250,000. Again, Vincent declined to agree such a payment. He is minuted as having stated, "*he could not make such discussions with the financial information he had requested."*

36. This matter came on for trial before me on 13 January 2020.

The Issues

37. The parties have defined the core issues in the case as follows:

    a) Issue 1 - sale of the company:

        (i) Did the Trustees decide to sell the company?

        (ii) Was any such decision a valid decision which bound the trustees?

        (iii) Does any such decision remain binding on the trustees?

        (iv) What order should the court make (if any) in relation to the sale of the company?

[9] That is £30,000 less than the amount claimed; put another way, the offer represented just under 98.5% of the original amount claimed.

b) Issue 2 – identity of the trustees

(i) Is the conduct of the Defendants or either of them such that they should be removed or substituted as trustees?

(ii) Is the conduct of the Claimant such that he should be removed or substituted as trustee?

c) Issue 3 - future management of the trust

(i) What order should the court make (if any) in relation to the future decision-making of the trustees?

The Claimant's case

38. The Claimant's case on issue 1 is as follows:

a) Whilst he maintains that the trustees agreed to try to sell the company, he conceded in evidence that such an agreement did not amount to a binding agreement to sell. The concession was maintained during closing submissions.

b) An unanimous agreement to sell trust property by trustees would, he contends, have been "binding" in the sense that the trustees would have been bound to give effect to that agreement unless and until the court gave relief from such obligation. During the trial, I expressed some doubt about this proposition of law, and I remain doubtful that it is correct. However, given the concession referred to in the previous sub-paragraph, it is not necessary to give this issue further consideration.

c) He further conceded in cross examination that it was not in the best interest of the beneficiaries that the company be sold. It was not therefore necessary to hear submission on whether the court ought to make an order that the company be sold even if there was no binding agreement.

d) However, he maintains that the Defendants did initially agree to market the company and that their subsequent denial of such a meeting reflect adversely on their credibility in general as well as their capacity to act in the best interest of the beneficiaries.

39. On issue 2, he says:

a) It is desirable that there be at least one family member acting as a trustee. This would reflect the wishes of William as settlor and would be of value to any

other trustees bringing a working knowledge of the operation of WHS to the board.

b) The history of this case shows that the Defendants are not able to act in the best interests of the beneficiaries of the trust. Accordingly they should be removed as trustees. In this regard, the Claimant relies in particular on the following matters:

(i) Each of the brothers believed that the three of them were beneficiaries in equal share of the trust. This has infected their management of the company and caused them to see it as an asset that they were entitled to divide equally between themselves. Whilst the Claimant contends that he has changed his approach to the management of the trust since becoming aware of the true nature of the beneficial interests in the trust, the same is not true of the Defendants who, he says, continue to treat the company as though it is their asset to do with as they choose.

(ii) The Defendants' approach to the directors' loan accounts show that they seek to treat trust assets as their own. Whilst they have aggressively pursued the Claimant for repayment of his loan account, they have repeatedly indulged the one of their own number, Gerard, who was not able to repay the monies.

(iii) In further support of the contention that the Defendants see the company as an asset to do with as they please, they have increased their own remuneration as directors and have paid bonuses and mileage claims to themselves.

(iv) Whilst historically, the company operated on the basis that decisions were taken unanimously, the Defendants have now taken to outvoting the Claimant when it suits them. Again, this shows their tendency to run the company for their own perianal benefit.

(v) The Defendants have been unwilling to provide appropriate information to the Claimant to assist in discharging his duties as a director of the company or a trustee.

(vi) The Defendants have engaged in bullying behaviour towards the Claimant.

(vii) If the directors of the company are also the trustees of the trust, there is a lack of proper oversight of the running of the company.

(viii) By the letter dated 19 September 2016, the Claimant offered to break the impasse that had developed in the company by the replacement of all three of them by a professional trustee. Given the impasse between the brothers, the Defendants' failure to agree to this demonstrates their unsuitability to continue to act as trustees.

c) On the other hand, the Claimant contends that he is willing and able to act as a trustee, looking to the best interests of all of the beneficiaries of the trust. He asserted during cross examination that he would be better placed than an independent trustee to represent the interests of all beneficiaries (both those who worked in the company and those who did not).

d) Thus, he concludes:

(i) The Defendants should be removed as trustees;

(ii) He should remain a trustee.

40. On issue 3, the Claimant does not identify any need for consequential directions or any further relief.

The Defendants' case

41. The Defendants' case on issue 1 is that, since the Claimant does not now seek any relief is required in this respect, the court does not formally need to consider the issue. However, they contend that the manner in which the Claimant has pursued the issue is relevant to consideration of issue 2.

42. On issue 2, the Defendants' position is as follows:

a) They agree that it would be valuable to have at least one family member on the trust. Indeed, Mr Weisselberg QC, on behalf of the Defendants, put the desirability of this as being rather higher than did Mr Harper QC for the Claimant.

b) They deny that they are incapable of continuing to act as trustees whether because of impropriety on their part or, more generally, an inability to ensure that the interests of beneficiaries are furthered.

c) They further state that the Claimant is unsuitable to act as trustee for the following reasons:

(i) He has a fixed desire to sell the company without the agreement of the Defendants and contrary to the best interest of the trust.

(ii) He has operated Greens in competition with WMS, the main asset of the trust.

(iii) He has acted in a manner detrimental to the interests both of the company and the trust by refusing to agree a proper level of remuneration for the directors of the company, refusing to agree the declaration of a divided by the company, and inappropriately and aggressively defending the company's claim on his director's loan account. Such conduct has often been under cover of requesting more information or documents from the company.

(iv) He has misconducted himself as a director of WMS.

(v) He has shown himself to be unfit to act as trustee by forging signatures on cheques and/or by stealing cheques from the company.

The Law

43. There is no dispute on the applicable law, which can so far as relevant be summarised as follows:

a) It is the Court's duty to see that trusts are properly carried out;

b) That duty includes the jurisdiction to remove and/or replace trustees;

c) However the removal of trustees is a drastic step that should only be taken in a clear case;

d) The guiding principle in exercising the jurisdiction is ensuring the welfare of beneficiaries and the competent administration of the trust in their favour;

e) Proof of actual misconduct, such as acts or omissions that endanger trust property, show a want of honesty, fidelity or capacity are likely to lead to a trustee being removed;

f) A trustee may be removed to facilitate the performance of the trust;

g) Friction or indeed outright hostility between trustees and beneficiaries are not of themselves reasons to replace trustees, unless they impede the due administration of the trust;

h) The court should bear in mind the cost of removing and replacing trustees;

The evidence - introduction

44. The Claimant relies upon his own statements dated 16 August 2016, 20 December 2016 (largely dealing with procedural issues), 23 February 2018 and 26 February 2019. The first three of these statements preceded the Particulars of Claim.

45. The Defendants rely on the following witness statements:

a) The statement of the First Defendant dated 26 February 2019[10];

b) The statement of the Second Defendant dated 26 February 2019[11];

c) The statement of their sister, Siobhan Francis Maher, dated 21 November 2016 and 21 February 2019;

d) The statement of Mr Christopher Booth, Chartered Accountant and Director of the auditors of W Maher & Sons Limited, dated 26 February 2019;

e) The statement of Mr Alastair Kirk, quantity surveyor employed by W Maher & Sons Ltd, dated 25 February 2019;

f) The statement of their mother, Mrs Monica Maher, dated 9 January 2017.

46. All these witnesses, save Monica, gave oral evidence over 6 days of the trial.

47. The parties jointly instructed a handwriting expert, Ms Ellen Radley of the Radley Forensics Document Laboratory. Her report is dated 11 January 2019. It was admitted in writing.

48. In order to assess the parties' cases on the core issues, it is appropriate to consider in particular the following aspects of the evidence:

A. Covert recordings of meetings by Vincent.
B. The parties' understanding as to beneficial shares in the company;
C. Why the parties' relationship broke down;

[10] In fact his third statement in the litigation.
[11] His second statement in the litigation.

D. The alleged agreement to sell the company;

E. The current views of the Claimant and Defendants as to the sale of the company;

F. Payment of directors' remuneration and dividends by the company;

G. The parties' treatment of the directors' loan accounts;

H. The use of company cheques by the Claimant;

I. The conduct of the Claimant and Defendants as directors;

J. The views of other beneficiaries.

A. Covert recordings of meetings by Vincent

49. The Claimant covertly recorded several discussions and meetings between himself and the Defendants and/or other people who were acting on behalf of the company, as follows:

a) A meeting with Mr Chris Booth on 29 January 2014;

b) A meeting with Mr Chris Booth, Miss Barbara Chadwick, Mr David Proctor, Gerard and Brendan on 3 February 2014;

c) A meeting with the Defendants on 3 February 2014. (This followed shortly after the meeting referred to in the previous sub-paragraph.)

d) A meeting with the Defendants on 10 July 2014.

e) A meeting with Mr Chris Booth and Mr Brian Cripps on 7 October 2014.

f) A meeting with Ms Barbara Chadwick on 12 November 2014.

g) A meeting with Mr Chris Booth on 13 February 2015.

h) A meeting with Mr Chris Booth on 30 April 2015.

i) A general meeting of WMS on 1 June 2017.

j) A general meeting of WMS on 4 September 2018.

50. It has been said that covert recordings of discussions generally say more about the person recording the conversation than they do about those who are covertly recorded (see Peter Jackson J, as he then was, in M v F [2016] EWFC 29). Of course the value of a recording will depend on its contents and its circumstances, but in the context of this (and most other) cases, the following points are obvious.

a) In so far as someone who is alleged to have said something against their interest did not know they are being recorded, this may be persuasive evidence but the

court should have in mind the possibility that they were tricked or goaded into saying that by the person who is aware of the recording;

b) In so far as someone who knew they were being recorded is alleged to have said something against their interest (or failed to mention something that one would have expected them to mention), the statement against interest (or omission to mention something) is likely to be particularly compelling because of the obvious expectation that a person seeking to record matters will use the recording to advance their own case;

c) In so far as someone said something that was in their interest, then the recording may be of assistance, especially if the person did not know they were being recorded, but a person who does this knowing they are being recorded may simply be using the opportunity to get their case on record.

51. A further feature of the covert recordings is that Vincent admitted that he had lied about the recording of meetings. For example, during the meeting on 1 June 2017, Vincent was asked if he was recording the meeting. He said that he was not (see **2F/5088**) though in fact he was. Indeed, he said of this meeting in his third witness statement at paragraph 173 **(Core/173)**, that he had (in advance of the meeting) suggested that a note be taken by a third party and/or the meeting be recorded and that his brothers were not prepared to agree to this. He goes on in that statement to dispute the minute of the meeting and to say at paragraph 16(ii), "*It is disappointing that there is any dispute at all as to what was said – if a third party had taken the notes, for example, no such dispute would have existed at all."* Yet Vincent does not mention that he had in fact covertly recorded the meeting himself. Had he referred to that recording in this witness statement, there would have been little if any ground to dispute what had been said in the meeting. Whilst this statement may be "*the truth"*, in that it was disappointing that there was a dispute about what had been said that could have been avoided if a third party had taken notes, it could not be said to be "*the whole truth"*, where any dispute could equally have been avoided by Vincent disclosing the fact that he had recorded the meeting. His witness statement is clearly intended to bolster his assertion in the meeting itself that he was not recording it.

52. When Vincent was cross examined about paragraph 16(ii) of the third witness statement, he said that he did not trust his brothers and that the company secretary who was present, Mr Taylor, was acting on behalf of WMS and/or his brothers. He recorded the meeting to see how truthful or dishonest his brothers might be in the meeting. He did not mention the recording in his third witness statement because he wanted to see

what notes Brendan and Gerard had. As to why he had recorded this and other meetings at all, Vincent's explanation was that they showed how he was being bullied by his brothers.

53. I find Vincent's approach to this issue to be troubling. He has showed a willingness to lie to his brothers and Mr Taylor about whether the meeting was being recorded, but further to maintain that lie in a witness statement to the court to further his ends. This causes me concern about his honesty and reliability as a witness.

54. A further concern raised on behalf of the Defendants was that, whilst Vincent had produced recordings of some meetings, there were others, for example the meeting on 3 September 2014 when he announced that he was ceasing working for the WMS, in respect of which had had not produced recordings. If he had felt the need to record some meetings, it is very surprising that he did not record all of them. He was understandably asked whether he had destroyed any recordings of meeting to which his answer was "*Not that I know of, no."* One might have expected Vincent to know the answer to this question, and his equivocation suggests that he might not be telling the truth. It is of course possible that there was a good reason for not recording the meeting, such as his suggestion that he may not have had his mobile phone to hand in order to record the meeting. There is insufficiently clear material for me to hold that Vincent was lying (or indeed was mistaken) when he said that other meetings were not recorded.

55. As to what the covert recordings in fact show, I have listened to several of the recordings as requested by the parties in order to consider the context of what was said and Vincent's repeated assertion that he was being bullied.

56. It is certainly the case that, during the various recordings to which I have listened, each of the brothers shows himself able to expressly himself forcefully. Some of the language used is offensive and at times each of them is confrontational. Further, comments are made which, in the context of two brothers outvoting a third might be said to be derogatory. An example is the assertion by Brendan during the second recorded meeting on 3 February 2014 that Vincent suffered "*older brother syndrome."*

57. But if bullying is meant to mean the use of intimidating behaviour to get one's own way, I see no pattern of this in the manner asserted by Vincent. The recordings show that Brendan and Gerard largely agreed on the way forward, but they disagreed with Vincent. This is most obvious on the issue of sale of the WMS shares. It was put to Vincent in cross examination that he was not being bullied but rather was frustrated at

being outvoted. Whilst Vincent did not accept this, overall it is the impression that audio recordings give. I do not see that the evidence shows that Vincent was being bullied – rather they show that he was unhappy with being outvoted.

58. It is correct that Vincent's allegation of bullying is not new. He complained of being *"overruled and bullied"* by his brothers in the first recorded meeting, that with Mr Booth on 29 January 2014. From the context of that comment, the impression I gain is not that Vincent was trying to get the complaint of bullying on record but rather that he genuinely believed that his brothers were combining against him. To that extent, I do not consider his evidence on this issue to be tainted by dishonesty.

59. Further, I accept Vincent's evidence that, prior to the period of increasing distance between the brothers from 2011, decisions within the company had tended to be taken unanimously. I see no evidence from which to conclude that there was any obligation on the brothers, as directors of the company, to reach unanimous decisions but it is perfectly understandable that, as a relatively small family business employing various members of the Maher family, there should be a desire for unanimity where possible. Given the increasing dispute between the brothers about the sale of WMS in 2014, it was perhaps inevitable that the custom of making unanimous decision (including, as tends to be the case with such decision-making processes, the need sometimes for the majority to back down in the face of strong minority objection) should be replaced by the desire (at least in the majority) for majority decision making. I can well see that this would cause resentment in the mind of the other director, where he was repeatedly in the minority. But on the evidence before me, Vincent's perception that he was being bullied arose from his being in the minority and outvoted by the others in circumstances where previously they may have deferred to his views. Objectively viewed, this does not amount to what could properly be called bullying behaviour

B. The parties' understanding as to beneficial shares in the company

60. A feature of this case is that, notwithstanding the terms of the settlement trust, the Claimant and the Defendants have until recently all believed that the three of them were the equal beneficiaries in the trust. Somewhat frustratingly this issue was not dealt with by any of the three of them in their witness statements, though it must have been obvious to someone with the most minimal understanding of the case that it was a highly relevant issue. In any event, they each accepted in cross examination that they had believed it to be the case until recently that the three of them were the equal beneficiaries of the trust. Further, there are numerous points in the covert recordings

where one or other talks in terms of the three of them owning the business in equal shares. For example, Vincent refers to the three of them each being entitled to a third share at **2F/4921**; Gerard does so at **2F/4962**; Brendan is rather less clear in this regard, but the conversation at **2F/4930** is only consistent with that being his assumption.

61. Given the clear terms of the trust deed, this is striking. One might have thought that they would have considered it unlikely that their father would have created a trust to benefit them and not their sisters. Further, even if they had believed themselves to be the equal beneficiaries of the trust when they were not trustees, one would have expected that even a minimal level of enquiry on becoming trustees would have led them at least to read the trust deed, if not to take advice on it. Each of the brothers said in the witness box that he had not had advice on the true meaning and effect of the settlement.

62. It is of note to see what the brothers thought their father's intention was in establishing the beneficial interest in these shares:

a) Vincent agreed in cross examination with the proposition that his father "*wanted to keep control within the family"*.

b) Brendan said at paragraph 25 of his statement that, "*My father always envisaged that he would pass the company to his sons…It was certainly not my father's wish that the business could be brought to an end by one individual; it was there for the family as a whole."* During cross examination, he stated, that his father "*would want all the beneficiaries looked after. He would also be pragmatic about it. He would want them working for the firm as well. He would want them earning a living. It is not a charity*."

c) Gerard recounted his father saying that it was necessary to "*protect the business"* in the context of a family member getting divorced.

63. There was some dispute between the brothers as to whether William's concern arose from instability in Vincent's previous marriage or in Gerard's current one. It is unnecessary to decide this matter since either (or indeed both) would be capable of explaining why William had concerns about keeping the share in the family. It is notable in passing though how vehement each of the brother's evidence was on this issue, despite it being peripheral to the issues before the court. This shows the severity of their fallout.

64. A statement from Mr Cripps, the accountant at McKellen's who advised William, appears at **2A/1247**. He describes his knowledge of the settlement in broad terms and adds that "*Mr (sc. William) Maher told me on at least one occasion that his intention in setting up the Settlement was to protect the Shares in the event of one or more of his sons getting divorced and this his intention as settlor was that, notwithstanding that the shares would continue to be held in trust, the beneficial and eventual legal owners of the shares would be his three sons in equal shares."*

65. Mr Cripps was not called to give evidence and therefore it was not possible to explore the reliability of this statement. On its face, it shows that, at the very least, he, as the accountant advising William, believed the brothers to be beneficiaries in equal share and, at its highest, that William himself believed this. It is simply not possible to explore how this belief on the part of either of them could have come into existence.

66. I conclude from this evidence that, however surprising it may be that this misunderstanding came about, each of the brothers did indeed believe that he was entitled to one third of the beneficial interest of the trust in the shares of WMS.

67. There is some dispute as to timing of when they came to realise that they were wrong. The Defendants argue that the Claimant must have been aware that he was not entitled to a one third share in the company by February/March 2014 or May 2014 (when he appears to have had discussions with a lawyer about how the trust worked) and in any event in September 2014 (having discussed the terms of the trust in a recorded meeting with Mr Cripps on 22 September 2014), that is to say far earlier than Vincent's own evidence that he first discovered that he was not entitled to a one third share in the trust in late 2015 or 2016. The Defendants point out that Vincent continued to assert an entitlement to one third of the value of the company in October 2014, and that this shows him acting in a manner inconsistent with his duty to further the interest of the beneficiaries.

68. However, I am not convinced that it can be said that Vincent asserted an entitlement to one third of the value of the company in the clear knowledge that he was not entitled to this. The transcript of the discussion with Mr Cripps on 22 September 2014 shows that Vincent was not being clearly told what his settlement was. Notwithstanding the discretionary nature of the trust, the history of the parties' understanding of the effect of the trust would make it understandable that the brothers might continue to be unsure about their entitlements. Whilst it seems somewhat strange that Vincent should repeatedly criticise his brothers for treating the company as theirs to control regardless

of the terms of the trust, whilst he was asserting a right to a third of the company at a time when (at least following the discussion with Mr Cripps on 22 September 2014) he knew that the terms of the trust did not clearly entitle him to that, I cannot draw any more serious adverse criticism of Vincent than that he has been somewhat hypocritical on this issue. That is not a ground for removing him as a trustee.

C. Why the parties' relationship broke down

69. Vincent's account of how and why the relationship broke down is unclear. He identifies a breakdown of trust at paragraph 36 of his witness statement of 26 February 2019 and, in the following paragraph, attributes that breakdown to three factors all of which arose in or after 2014, namely:

a) The alleged reversal by Brendan and Gerard of a unanimous decision to sell the company;

b) The use by Brendan and Gerard of the company to pursue Vincent for the repayment of his directors' loan; and

c) The conflict of interest between Brendan and Gerard's roles as directors of the company and trustees of the settlement trust.

70. On the other hand, Vincent said in evidence that, by February 2014, he had so little trust in them that he felt it necessary to record a series of meetings and conversations with his brothers and other involved with the operation of WMS[12]. It seems unlikely that the factors of which he complains in paragraph 37 of that statement would have caused so serious a breakdown so quickly.

71. Indeed, in the meeting on 29 January 2014, Vincent had said to Mr Booth that the situation between his brothers and he was "*getting untenable."* At that time, Vincent's concern seems to have been largely about the amount of money that WMS was spending on the instruction of his brothers. That is entirely different than the three reasons given by Vincent in his witness statement for the breakdown of the relationship.

72. Brendan, in contrast, speaks of growing concern from 2011 on his and Gerard's part that Vincent was focussing his work on Greens, which were beginning to work in competition with WMS. This seems more plausible in so far as it is consistent with a

[12] As noted above, the very first recording took place 29 January 2014; the first involving the Claimant and both Defendants was on 3 February 2014.

breakdown in the relationship of the brothers that had become so serious by February 2014 that Vincent felt it necessary to record conversations that he was having with them.

73. It is no doubt the case that Brendan's account of the breakdown in the relationship reflects his perception of events. It is probably influenced by the belief that he and Gerard have acted in accordance with their perception of their father's wish that the company remain in the family, whereas Vincent wanted to sell the company. But in considering the reliability of the witness evidence, it is striking that Brendan is able to give a coherent account of the breakdown of the relationship, whereas Vincent is not.

D. The alleged agreement to sell the company

74. Vincent's first recorded account of the decision to sell the company appears in the letter of claim dated 9 March 2015 (**3A/5164**). Paragraph 30.1 of the letter states, "*In or around March 2014, a unanimous decision as taken by* [Vincent] *and* [Brendan and Gerard] *to sell the company and (its related businesses/group companies) with any such sale being subject to an acceptable price being offered."* This agreement is said to have been "*confirmed"* in a meeting which took place on 10 July 2014. Towards the conclusion of the letter of claim at paragraph 37.1, the agreement is said to have been reached in June 2014.

75. Vincent's pleaded case at paragraph 8 of the Particulars of Claim is that "*on or around* 29 *January 2014 the Claimant and the Defendants, as Trustees of the Trust and therefore as sole shareholder in the Company, took the unanimous decision to sell the Company together with its related and connected business/'group' companies …subject to an acceptable price being agreed."* The particulars of the decision-making process are stated to be set out at paragraph 17 to 19 of Vincent's first witness statement (which of course had been served before the Particulars of Claim), including that "*a unanimous decision was made by me and my brothers as trustees of the trust to sell the company."*

76. In his first witness statement, Vincent says the following of the decision/agreement to sell:

    a) That it was taken "*in* (sic) *or around 29 January 2014"*

    b) That it was taken in a meeting in the company's board room at which only the brothers were present.

c) That, following a discussion about selling some company assets, Vincent said that at least £30 million could be released on sale of the company;

d) That, "*at this point, Brendan confirmed that if we could achieve that price, he was happy to sell the company and so Gerard was asked if he would also agree to putting the company up for sale to try and get at least £30 million for it. Gerard agreed with both of us that we should put the company up for sale."*

77. In cross examination, the Claimant was asked about this inconsistency of dates. He said that the meeting where the agreement was reached was in January 2014 but variously said that it had taken place "*on or before 29th*", "*before the 29th*" and "*could have been on 27th or 28th*." He stated that his brothers kept changing their minds.

78. His explanation for the date in the letter of claim was simply that it was wrong. He said that his brothers kept changing their minds, that "*they change with the wind."* He went on to say, "*If we got a price for it of excess of 30 million pound and sat down, then we would have to make another decision as trustees whether we sell the company."*

79. When Mr Weisselberg QC for the Defendants pushed Vincent about the agreement, the following exchange took:

"*Q: You never agreed whether Brendan or Gerard would continue to work in the business after the sale?*

A: We did not know what we were going to do with the sale of the business. We wanted to get it out there, put it out, advertise it through Hornblower's and let us just see what goes with it. That is where we took it."

80. These exchanges led me to comment that I was not sure whether it was Vincent's case that an agreement had been reached. But shortly after this, Vincent seemed to change his position by reverting to the position that there was a fixed agreement at least at some point:

a) He stated: *"Some of us disagreed to sell it; some of us agreed to sell it, but there was different times when we all agreed and when one did not want to sell it, then the other one wanted to sell it. As I say, it is like blowing in the wind with* [my] *two brothers*."

b) He was asked about his meeting with Mr Booth on 29 January 2014. If Vincent's case pleaded case were correct, this would have been very shortly

after the agreement to sell was reached. Vincent is recorded in the meeting as saying of the position of his brothers and himself that "*we either sell the company or … they buy me out."* He specifically asked Mr Booth "*can I make them sell the company … or can I make them buy me out?"* In both respects, it was put to Vincent that his questions were inconsistent with the brothers having agreed to sell the shares. Notwithstanding his earlier comments, he asserted that there was an agreement to sell.

c) In the meeting on 3 February 2014, when Vincent said "*just put the fucking lot up for sale and let's do it",* it was suggested that Vincent was trying to get his brothers to agree to sell and that this was inconsistent with a concluded agreement already being in place. Vincent replied that he "*already had the agreement."*

d) He continued to maintain that he and his brothers had reached "*a binding agreement to sell."*

81. Vincent was asked about his evidence that the agreement to sell was confirmed in a meeting on 10 July 2014. In fact, it is clear from the transcript of a meeting on that day that his brothers were not agreeing to sale. Vincent's response to this was to assert that "*the transcript itself is only a certain portion of what went on that day*." He thought he recalled that there was a conversation agreeing to sell the company when the three brothers were "*passing each other in the office"*. The Defendants' point out that this description of the circumstances is very different to the description of agreement being "*confirmed"* in "*a meeting which took place on 10 July 2014"* (as referred to at paragraph 23 of Mr Maher's first witness statement), which gives the impression of formality in the discussions rather than a conversation in a corridor.

82. In a meeting on 22 September 2014 with Brian Cripps and Chris Booth, Vincent had this to say about the sale of the business: "*Well Brian, let me just go back probably six weeks. Eight weeks/two months ago. The two of them were adamant they were not selling. That is where it was. They were adamant they won't sell."* Vincent's explanation of this was that his brothers were repeatedly changing their minds. However, it is difficult to square this with his evidence that in July his brothers were agreeing to sell.

83. Vincent's attention was drawn to an email of 28 September 2014 that he had sent to Mark Sykes and Chris Booth saying, "*As for the brothers trying to sell the business,*

they are in agreement as long as the price is right" (**2B/1777**). In cross examination, Vincent stated that, by this time, he and his brother "*were getting to the stage where we weren't talking."* He accepted at one point in this evidence that, as at the time of this email, he did not know whether his brothers supported the idea of a sale. Shortly after this he asserted that he believed that his brothers did support his efforts to sell the company, then when asked by me what they had actually done to support his efforts, he said, "*They wanted to know where I was up to with it. That is where that one ended*."

84. Vincent was asked about a meeting with Mr Booth on 7 October 2014 (**2F/5023**), in which he is recorded as saying, "*I don't want to go down the legal route, but if I have got to do it, I will do, and I know it's in the trust and all the rest, but I don't think they know their, how can I put it? They do -, they don't understand the trust, they know a certain amount of it but they don't understand it all, and I think if Brian and yourself were to tell them, 'Look, it's going to end up in court, it'll probably end up in the papers, blah blah de blah.' It could end up as though it's like egg on everybody's faces*." Vincent did not accept that this was inconsistent with a belief that he and his brothers had a concluded agreement. He maintained that a unanimous decision had previously been taken.

85. Vincent was asked about a letter from his solicitor to Brendan dated 13 November 2014 (**3A/5142**). That letter complains about Brendan's conduct in respect of the provision of information to Vincent as well as matters relating to the bank mandate for the company. It is however silent on the existence of an agreement to sell. It was put to Vincent that this silence was inconsistent with a concluded agreement to sell having been reached. Vincent was unable to proffer any explanation for why the letter did not mention the agreement.

86. However, in fairness to Vincent, it should be noted that, on 19 November 2014, he emailed Mr Sykes at Hornblower stating, "*The brothers are now saying they don't want to sell…"* This is consistent with a belief on his part that Brendan and Gerard previously having been agreeable to a sale.

87. At the conclusion of re-examination, in response to questioning from me, Vincent said as follows:

"The agreement was to sell the company initially. That is where we – you know – made the decision to sell the company or find a prospective buyer. And that is – you know –

when someone is telling you 'we will sell it'. 'See what we can get for it.' 'Are you up for that?' "Yes, I am.' 'Are you?' 'Yes, I am up for that.' And that is how it happened.

Q. So would there need to be a further decision – a decision as trustees as to whether to sell the company if an offer were made?

A. Yes, there would be. Yes."

88. Brendan's evidence as to the alleged agreement was that, in early 2014, he was aware that Vincent was saying "*that we weren't getting on and he wanted out*," meaning that he wanted the brothers to sell WMS. Brendan said that his response was in essence that he did not want to sell, but that he said something like, "*Just go and do what you want to do, Vincent. Look, I'm sick of it, I've had enough of the aggravation of it."* His recollection was that Gerard was "*even keeled"* on the issue and was "*the peace maker.*"

89. Brendan said that he understood Vincent's intention was to get a valuation. He was asked about his question to Vincent in the meeting of 10 July 2014, "*What have you done with the firm then? Have you put that up for sale?"* Brendan did not accept that this showed that he already knew that Vincent was taking steps to market the company. *"I wanted just to know what he was up to and what he was doing. He was just carrying on as he pleased. There was no coming back towards him asking for our opinions, it was just, 'I am going to sell it and I am going to do as I want'.*"

90. Brendan was asked about an email from Mr Sykes (of Hornblower) to Mr Booth dated 25 September 2014 (**2B/1775**). Based on a conversation with Vincent, Mr Sykes asserted that "*there clearly has been some positive developments at his end in terms of the brothers full agreement to try and sell the business…"* Brendan said that he was never "*open to persuasion"* on whether the business should be sold. He was simply indulging Vincent who was "*on a mission."*

91. Gerard's evidence was that he had understood, following the meeting on 10 July 2014, that Vincent was trying to sell WMS but that he did not agree with this course of action. He said that he had told Vincent "*until I was blue in the face"* that the company was not for sale and that it was meant for future generations.

92. The Defendants' pleaded defence at paragraph 9.4 was that they first became aware on or about 1 October 2014 that the Claimant had engaged Hornblower with a view to selling the company. It was put to Brendan that Hornblower was in fact mentioned in the meeting on 10 July 2014. From the transcript, that is incontrovertible, although the

company name is only mentioned once and if this was the only time that the company name was mentioned, it is not surprising that, at the time of signing the defence (before disclosure of the transcripts), Brendan said that he did not recall this.

93. Brendan did not accept that the email of 17 November 2014, which referred to Gerard and he having had a meeting at which they "*made the decision that the company is not for sale",* supposed that previously the company had been for sale.

94. In his witness statement, Mr Booth referred at paragraphs 47 and 48 to events on 10 November 2014, when Brendan had spoken angrily to him about disclosing information to Hornblower. In cross examination, Mr Booth was asked why in his witness statement he had not explained why the information had been disclosed, this being that he understood that the information had been disclosed with the consent of all 3 directors, as set out in the email of 10 November 2014 at **2B/1872.** It was suggested that Mr Booth's failure to deal with this in the witness statement was because the explanation in the email was critical of Brendan. Mr Harper QC put to Mr Booth that he had, *"excluded something from the witness statement which potentially could be viewed as contrary to Brendan and Gerard's case*" and asked whether this was deliberate or by oversight – Mr Booth responded that it was an oversight and denied that he was simply acting as "*a voice piece for others."* It was further put to Mr Booth that Brendan and Gerard were aware from the outset of the involvement of Hornblower, as evidenced by his comment to that effect in the conversation recorded on 13 February 2018 (see **2F/5057**).

95. My conclusions on the issue of the agreement to sell are set out under the heading "Discussion - Issue 1" below.

E. The current views of the Claimant and Defendants as to the sale of the company.

96. In advance of the trial, Vincent's position was that the company should be sold. For example, it is stated in his Skeleton Argument that, because the Claimant and the Defendants had unanimously agreed to sell, the company should be sold unless they unanimously agree not to sell. It is striking that, at no point in any of his witness statements or in the skeleton argument, does the Claimant assert that it is in the best interests of the beneficiaries that the company be sold. Therefore perhaps I should have been less surprised than I in fact was when he said in evidence that he did not (at least at the time of giving evidence) believe that it was in the best interests of the beneficiaries to sell the company.

97. Brendan's opinion as to the ownership of the company was expressed in the following exchange:

"Q. Is it your view and Ged's view that the company should not be sold?

A. Yes.

Q. Never?

A. You can never say never, but my view is that I am going to finish working and leave it to the next generation. I will walk away from it, hopefully."

98. When asked why it was in the best interests of the trust for his and Gerard's sons to carry on running the company in the future, he said, *"Well the company is doing well, as in the best interests of the trust. So hopefully, they can carry that on."*

99. On this issue, Gerard said in cross examination,

"Q. Are you opposed to a sale of the company?

I have always been opposed to the sale of the company.

Q. Would you ever consider a sale of the company?

A. No, because my father never wanted to sell the company. He always wanted to keep it in the family."

100. Gerard also said in evidence*, "It is a valuable company. It is making good profits. It has got good assets. Why would you want to sell it?"*

F. Payment of directors' remuneration and dividends by the company

101. Since 2014, Vincent has declined to agree the payment of bonus to the Defendants as the directors who continue to work in the company. His attitude to the payment of directors was explored in the following exchange during cross examination:

"Q. Assuming that the finances of the company are appropriate, Mr Maher, are you able to say what amount you think Gerard and Brendan should be paid?

A. It is what they are proposing. That is what I wanted to see, what they were proposing, instead of being shouted at and being told "what we are telling you, what we want."

Q. Well, Mr Maher, you know what they were proposing. They were proposing for 2016 £170,000 plus the £500 a week that they had already been paid. So roughly £200,000. Would you say that is a reasonable amount of money for directors in the position of Gerard and Brendan to be paid?

A. I still needed the paperwork to cancel that out, to say that. Yes. Not a problem. It would have been OK.

Q. Are you able to express any view as to what amount of money you consider they should be paid?

A. I think a reasonable amount of money.

Q. And I am suggesting to you £200,000. Would you say that is a reasonable amount of money to be paid?

A. It is a little bit excessive.

Q. How much do you think they should be paid?

A. 80. 70/80 thousand pounds.

Q. How much were you paid when you were a director of the company?

A. Well, we would have to go back through the records there on that.

Q. Substantially in excess of £80,000 a year.

A. But the three of us were at it that time.

Q. So now there are two of them, surely they should be paid more, Mr Maher?

A. Well, why did they not produce the stuff? There is not a problem. I can pay, but I have also got the beneficiaries to consider as well.

Q. Mr Maher, what I suggest to you is that you were adamant that you would not approve any money above the £500 a week because you wanted to put pressure on Ged and Brendan so that they would make you a proposal.

A. That is not right."

102. As Brendan points out at paragraph 209 of his witness statement, the average remuneration from salary and bonuses for directors for the last 10 years prior to 2015 when Vincent being a director, was £170,000 net. In the period from 2014, Brendan and Gerard have been paid about £500 per week each. Brendan suggests that that means that he and Gerard are each owed about £900,000.

103. Brendan was asked about the basis of recommending directors' bonuses of £170,000 in the accounts meeting of 10 March 2016. The minute records Brendan and Gerard saying that they had reviewed the bonuses over the last 10 years and that this figure was the average of directors' bonuses paid in that period. It was suggested that this was inconsistent with Brendan's evidence that the bonuses were based on what the company could afford to pay. He replied, "*I thought that, with the turnover being up so much and the profit being up so much, it would have been – the previous 10 years included a bad recession. I thought that it couldn't be questioned whether an average of 10 years would be acceptable going forward."*

104. In his evidence, Mr Booth said the considered that the company could have paid dividends of £250,000 in 2017 and again in 2018, as had been recommended in the general meetings of those years.

105. The Defendants also note that Vincent was asked to approve dividends that they recommended of £250,000 in 2017 and again in 2018. He declined to so. When asked why this was, Vincent said that he would have been questioned by the beneficiaries if he had agreed the figure. He stated that he did not have the necessary material to justify the dividend. But of course the Defendants point out that the result of this was that no dividend at all was paid to the trust. Vincent said that his reason for not approving any dividend was that he wanted to know that the company could afford to pay that money. But even if one accepts that Vincent may not have had the material to judge whether the dividend was sufficient, it is difficult to see how Vincent can have thought that he was better placed than the remaining directors to judge the appropriate dividend or how it cannot have been in the best interests of the beneficiaries for no dividend at all to be approved.

G. The parties' treatment of the directors' loan accounts

106. It was common ground between the brothers that it had been the custom for them to draw down on their directors' loan accounts and reduce that indebtedness to the

company by the voting of directors' bonuses. It was however in the company's interest for loans to be repaid so that it could reclaim tax.

107. On 30 October 2013, a meeting had taken place following a review of the amounts due on directors' loans between 2011 and 2013 and the respective balances were agreed.

108. At the time that Vincent retired from WMS there was a significant loan outstanding on his directors' loan account. He agreed in cross examination that there was no good reason for him to continue to enjoy the loan thereafter, since he would not be receiving further bonuses to repay the account.

109. Vincent accepted that WMS required repayment of £125,000 together with a proposal relating to the repayment of the balance in its letter of 7 July 2016. He stated that he was not able to repay that money at the time. He said that he was trying to sell his house (though accepted that it had been on the market for 4½ years).

110. It was put to Vincent that the instant proceedings, which were issued on 19 September 2016, one day before the expiry of the period given by WMS to make proposals for repayment of the directors' loan account, were timed in an attempt to avoid the repayment of the loan. Vincent denied that this was a tactic. Rather, he said that he was "*being attacked"*, was "*under severe pressure"* and was "*being bullied."*

111. The company brought proceedings against Vincent for repayment of the loan account. Those proceedings were defended by Vincent, including defending a summary judgment application on the basis that there was no present liability to pay the sums claimed. As indicated above, Vincent prepared a Scott Schedule which either required WMS to prove, or positively disputed, large numbers of the items that were attributed to his loan account, only for the claim to be settled 7 days before trial by Vincent accepting a Part 36 offer that represented over 98% of the claim as put by WMS.

112. It was put to Brendan in cross examination that a letter had been sent to Vincent on 9 February 2015 seeking repayment of his director's loan account (**2B/2079**) yet no similar letters were produced in respect of Brendan and Gerard. Brendan thought that he had repaid his loan account by then and that Gerard had made a proposal to repay what he could and was still working at WMS as a very important part of the business whereas Vincent was no longer working for the company. In so far as this demand was made without a board meeting, Brendan said that he was "*not sure proper governance was being done at that time*." However he denied that the request of Vincent was a tactic to place Vincent under financial pressure. Later in his evidence (after a short

break), Brendan said that he and Gerard had received such letters, this being apparent from it being "*written on the bottom*[13]*".*

113. As to the board meeting on 11 May 2016 and the subsequent claim against Vincent for the balance due on his director's loan account, Brendan said that he and Gerard were concerned that issues as to repayment of the account had been going on for 7 years and were still unresolved. In contrast to Vincent, Gerard admitted that he owed the money on his account, had made substantial repayments on the account, was doing the best to repay the loan and was a working director bringing in the contracts that made the company profitable. He denied that the claim on the loan account against Vincent was a sham.

H. The use of company cheques by the Claimant

114. The Defendants case was that Vincent had forged Brendan's signature on two WMS cheques dated 12 January 2006 and 28 April 2006 (**core/410 and 411**). On both, the payee is "cash." The signatures on the cheques were considered by Ellen Radley in her report of 11 January 2019. She concluded that there was "*strong*" evidence that the signature on these cheques was not that of Brendan and "*moderate*" evidence that the signature was in fact written by Vincent. In this context, "*strong*" is said to equate to the proposition that "*it is unlikely that an alternative explanation represents the truth of the matter*" and "*moderate*" that it is *"more likely than any converse possibility, i.e….it is over the balance of probability*."

115. Brendan's account of how he found out that Vincent had (allegedly) forged the cheques is somewhat puzzling. In his witness statement he speaks of the seriousness of Vincent's conduct being that of someone who "*effectively writing [himself] a cheque on behalf of WMS when [he has] no authority to do so at all*." He does not explain how the evidence of the (alleged) forgery came to light.

116. In the witness box, he said that the issue of the alleged forgery of cheques had come to light when *"I went through the cheques because I had a memory of Vincent signing my name on cheques and when it came up about Vincent accusing me of signing the accounts, that is when I thought it was relevant…The way it worked was Vincent would go into Barbara where the chequebook was, write himself a cheque for however how much it was and ask Barbara to add it to his loan account. So he would tell me, 'I've*

[13] This may be a reference to the line "*Directors Loans – Brendan Maher – Gerard Maher – Vincent Maher."* This in fact appears fairly high up on the letter.

taken some money and I've added to my loan account'." Brendan confirmed that he knew that this was happening at the time. He acknowledged that there was no disclosure of the relevant loan accounts to show that the payments on the allegedly forged cheques had been added to Vincent's loan account.

117. The Defendants point to the fact that the evidence before the court shows Vincent to have been on the bank mandate for WMS from May 2007 to September 2014 (see **2F/4789**). If Vincent were not in the mandate in 2006, this would explain why he wrote the cheques.

118. Vincent in contrast said that he "*thought*" he had been on the mandate earlier than May 2007. However, in the absence of more compelling evidence to counter the letter at **2F/4789**, the overwhelming inference is that Vincent was not in fact on the mandate at the time of writing these cheques.

119. Vincent accepted that, when he stopped working for WMS in September 2014, he took two cheques from the middle of the WMS chequebook. He said that he was angry when he took the cheques and it was his "*initial thought"* to use them take money out of WMS. However, he calmed down and did not do so. He accepted that it was inaccurate to say (as his solicitors had in a letter dated 11 August 2015) that he "*never had any intention of cashing those cheques."* Rather, he took them intending to cash them but quickly changed his mind. Thus, Vincent's admitted intention in respect of the cheques taken in September 2014 is consistent with his having signed cheques to cash when not on the mandate in 2006.

120. Ms Radley also reported on accounts for Green Remediation Ltd signed in Brendan's name apparently in 2010 (**Core/409**). Again she found "*strong*" evidence that the signature was not that of Brendan. She found the evidence to be "*inconclusive*" as to whether, taken on its own, the accounts were signed by Vincent, but she found "*moderate*" evidence to support the proposition that the accounts were signed by the same person as signed the cheques dated 12 January 2006 and 28 April 2006.

121. The final piece of the jigsaw on the issue of signatures is Brendan's admission that he signed the 2010 accounts on Vincent's behalf, using the latter's name. Whilst Brendan said that Vincent had authorised him to sign the accounts in this way, Vincent denied this.

122. The significance of the 2010 accounts was that they contained a figure relating to restoration costs at Thelwall which Vincent has challenged and used as a criticism of

the accounts approved by Brendan and Gerard, as noted below. If in fact he had approved the accounts at the time, there would be a strong inference that this complaint is something thought up in retrospect as a means of criticising his brothers rather than a genuine concern about how WMS has been run.

123. During his evidence, Mr Booth said that he recalled that Vincent was present at the account meeting in 2011 when the 2010 accounts were agreed. At no point had he objected to them. It is to be noted also that the same figure for restoration costs at Thelwall had appeared in the later accounts.

124. For reasons identified above under the headings "A - Covert recordings of meetings by Vincent" and "C - Why the parties' relationship broke down", I have considerable concerns about Vincent's credibility. These concerns are heightened by my findings in respect of the alleged agreement to sell the company, dealt with under the heading "Discussion - Issue 1" below. Having regard to those concerns, the admitted removal of two cheques with the intention of taking money from the company in September 2014 and the evidence of Ms Radley, I conclude that it is significantly more probable than not that Vincent signed the cheques dated 12 January 2006 and 28 April 2006. Given that this behaviour was historic and took place in circumstances where at least one of his fellow directors was aware of the conduct and did not take issue with it. I do not consider that this of itself renders Vincent unfit to be a trustee.

125. However, it has a bearing on the issue of his signature on the accounts of 2010. If Vincent was willing to forge signatures on cheques taken from the company, it seems to me equally likely that he would have tolerated his brother forging his signature on the company accounts - indeed that would seem to be less culpable conduct if Vincent was aware of and approved the accounts. Given the evidence of Mr Booth, it is in my judgment more likely than not that Vincent did indeed approve those accounts. It follows from this that his conduct in seeking to query the Thelwall restoration costs is unjustified, since he approved them at the time.

126. My finding on the issue as to the signature on cheques also justifies the decision by Brendan and Gerard to remove Vincent from the bank mandate on 12 September 2014. As Brendan puts it, "*We were wary that Vincent might write himself cheques for large amounts, or cash the cheques for large amounts, which he would keep himself."* Given that Vincent no longer worked for the company from September 2014, had removed company cheques then with the intent of using them for his own benefit and had

previously forged signatures on cheques to pay himself, it is difficult to criticise this decision.

I. The conduct of the Claimant and Defendants as directors/trustees

127. Several attacks were made by the Defendants on Vincent's conduct as a director/trustee apart from the matters referred to above relating to Vincent not agreeing the payment of dividends and/or bonuses to the directors.

a) It is contended that Vincent deliberately avoided attending meetings then blamed his non-attendance on the conduct of the Claimants or other people at WMS. For example, following a dispute as to whether it was appropriate for Vincent's solicitor to attend a directors meeting which was intended to agree the accounts on 17 March 2015. Vincent and Mr Booth exchanged emails in which Mr Booth stated that it was not appropriate for any of the directors to attend with solicitors. Vincent responded in an email sent at 11.56 on the day of the meeting by stating that, in that event, he would not attend the meeting (**2C/2200)**. At 13.14, Mr Booth emailed Vincent to say that the location of the meeting had changed **(2C/2204).** Vincent responded by email timed at 13.17 saying "*its bit late in day to rearrange."* On 17 March 2015, Vincent emailed Mr Booth further about this issue, saying, *"I was very disappointed to find out that the location for the meeting on Tuesday was moved at the very last minute, and was done so without me being told in good time. This means I could not be there."* But, as Mr Weisselberg QC pointed out in cross examination, less than an hour and a half before complaining that he could not attend the rearranged meeting, Vincent had stated in the first email referred to above that he was not intending to attend in any event. Vincent maintained that he had in fact intended to attend the meeting and was unable to explain this inconsistency, stating that his memory was "*a bit hazy."* The Defendant's point to this as an example of Vincent deliberately misrepresenting events so as to favour the interpretation that he was being reasonable, and his brothers were being unreasonable.

b) In March 2015, Vincent was invited to attend WMS' offices to approve the accounts. Vincent responded in a terse email (**2C/2354**) stating, "*I'm not available."* The accounts were signed by his brothers and filed at Companies House. Vincent thereafter complained that he did not see the accounts as filed. It was suggested to him that he was seeking to thwart the finalisation of the accounts. Vincent denied this.

c) The following year, in March 2016, Vincent was given 9 days' notice of a meeting to approve the accounts in an email dated 1 March 2016 (**2C/2899).** On 3 March, he responded to that email stating, "*I am not able to attend a meeting on 10 March 2016 at this short notice*" (**2C/2903**). In cross examination, Vincent that this was because he was out of the country on a skiing holiday. He accepted that, at this time, he was asking another accountant, Mr Cobb of ECC Ltd to assist him in reviewing WMS' accounts and raising queries about them. In the event, a board meeting was arranged on 30 March to consider the accounts. Vincent objected to that date as well (**2D/3123**), which he explained as being because he was still out of the country. However Mr Cobb emailed Mr Booth on 30 March 2016 raising queries that had arisen from a "*further meeting with Vincent Maher"* (**2D/3125**). Vincent accepted that any such meeting would have taken place in the United Kingdom. This suggests that he was in fact in the United Kingdom at around the time of the board meeting on 30 March. When this was put to Vincent, he said that he could not remember where he was on 30 March 2016.

d) Vincent accepted that he had not attend the directors' meeting to consider the accounts for the year ending in 2016, which took place in January 2017. During cross examination, he could not recall why he had not attended. In re-examination, he said, "*I think it would have got physical. It was very heated discussions, I think it just would not have worked. I don't think we would have got far. I felt as though I was being bullied with them. It was just overpowering basically*."

e) One of Vincent's complaints about the accounts was that figures for rectification work were "*inflated."* Mr Cobb asserted this on Vincent's behalf in a note dated 30 March 2016 (**2D/3129**), adding "*In particular, VM was not aware of the Thelwall Restoration site cost…"* In fact, the Thelwall restoration costs had been stated in the accounts for year end 30 June 2010 and had not been previously challenged by Vincent. Vincent's purported signature appears on the accounts for 2010, although it is common ground that Brendan wrote the signature as noted above. The same figure for the Thelwall restoration costs appears in the accounts for 2011, which Vincent accepts that he did see. He raised no issue about the figure in those accounts. The Defendants argue that this is an indication that Vincent had no objection to these costs until the dispute between him and they blew up, following which he was seeking to find any

possible grounds to criticise his brothers. When asked in cross examination why he had not raised an issue as to these costs earlier, Vincent said "*probably at the time I did not think anything of it."*

f) Another feature of Vincent's behaviour about which the Defendants express concern is Vincent's position on the proposal to sell the shares in WMS. Until the trial itself, he maintained that the shares in WMS should be sold by the trust. During his evidence he retreated from the pleaded position as maintained in his witness statements that there was a concluded agreement, as I have summarised above. But it was only on the second day of the trial that he said anything about what was in the best interest of the beneficiaries. Mr Weisselberg QC then asked whether Vincent "*still"* said it was in the best interests of the trust to sell the company. He said it was not and asked why, to which he replied:

"I would have thought, for the beneficiaries, I think if there was a right figure for the company to be bought out and every one of us agreed; beneficiaries agreed and the trustees agreed, then it maybe an option that we could take. But right at the moment, I would like to see the beneficiaries benefit. Not only the families that are in the company at the moment, or working in the company at the moment, but all the beneficiaries."

He gave the payment of a dividend to the trust to be an example of such a benefit for the beneficiaries generally.

g) The Defendants claim that Vincent has acted to the detriment of WMS by seeking to compete with this business through Greens. The similarity between the business of WMS and that of Greens can be seen by comparing their websites. Gerard stated that Greens and WMS had become competitors in the business of onsite remediation. Whilst he accepted that WMS did not engage in bioremediation, most of the activities of Greens could either have been done by WMS or by sub-contractors on its behalf. This evidence was supported by that of Mr Alastair Kirk, a quantity surveyor employed by WMS, who stood by the assertion at paragraph 5 to 8 of his witness statement that Greens were competing with WMS in the same marketplace. Vincent maintained that Greens was a more specialist company than WMS and that though WMS might act as a sub-contractor for Greens, this was not a true case of competition. WMS' specialism was in bulk excavation, waste disposal and haulage, with the emphasis in taking waste off site, whereas that of Greens was in land

remediation, that is to say recycling material and using them onsite with the appropriate management structure and accreditation for such work. They might work together on projects but were not truly competitors. However, he accepted in cross examination that WMS and Greens both engaged in a tender for the XYZ Building in Manchester describing the Quantity Surveyors for the companies as "*competing with each other"*. Mr Kirk's evidence was that Vincent had caused the WMS bid to be inflated, presumably so that Greens got the contract. Vincent denied this and, in the absence of more detailed direct evidence on the point, I am not persuaded that Vincent deliberately sought to manipulate the WMS bid so that Greens would win the contract. Nevertheless, on Vincent's own account there is at least some degree of competition between the WMS and Greens.

h) Vincent was alleged to have breached the undertaking given to the court on 14 August 2017 that, "*pending the final determination of the proceedings...in respect of the property at 7 Broadway, Hale… the Defendant will not dispose of, deal with or diminish the value of that property without 14 days' notice to the Claimants",* by obtaining a mortgage over 7 Broadway in early November 2017. Vincent denies any breach of the undertaking and asserts that the proceedings were finally disposed of by acceptance of the Part 36 offer before the mortgage was taken out[14]. Whilst I have some concern that this amounts to a breach of the undertaking, the explanation given by Vincent is not wholly fanciful. It is not necessary to decide this issue in order to resolve the application before me.

128. Vincent criticised his brothers in particular in the following respects:

a) Brendan was asked in cross examination about Paul's entitlement as a beneficiary. He said that he had understood Paul to be Vincent's stepson, not his adopted son, but in any event that, as he understood beneficial entitlement was limited to blood relations of the Maher family. When pressed on why he had not thought it appropriate to take legal advice on this issue, Brendan responded, *"I would have thought it would have been for Vincent to do that, to look after his son, it wouldn't be my job to make sure he got his son included in*

[14] See paragraph 67 of his fourth statement.

it." He denied that this showed that he was only concerned to protect his own children's interest in the trust.

b) Brendan and Gerard had failed to ensure that the other beneficiaries were kept fully informed as to what was going on, in particular Vincent's proposal that all 3 brothers resign as trustees and be replaced by an independent trustee. Whilst Brendan said that most communications were copied to Siobhan, he could not confirm that this one had been.

c) Brendan had failed to distinguish between his role as trustee and that as director. He accepted in cross examination that no distinction had been made between the two roles prior to this litigation. Of course this would be broadly consistent with the understanding that each of the 3 brothers had that they were the joint equal beneficiaries in the trust.

d) Whilst Brendan accepted that, at least from January 2014, the arrangement was that none of the brothers should take money out of the company unless all agreed, he also accepted in cross examination that in October 2014, he and Gerard had each borrowed £200,000 from the company, with further loans of £100,000 in November 2014, even though Vincent had not consented to this. He was unable to give a clear explanation for this in cross examination, though it appears from the general tenor of his evidence that it was a combination of the fact that Vincent had by then resigned from his employment with WMS and that he was working for what Brendan viewed to be a competitor. Gerard could not recall these loans.

e) Whilst Article 76 of the Articles of Association of the Company based on Table A to the Companies Act 1948 provided for the remuneration of directors to be determined in general meeting, it has in fact been set without reference to a general meeting. Mr Harper QC pointed out in cross examination of Brendan that, according to the accounts, total director's remuneration was £96,985 as at 30 June 2015, £108,623 in 2016, £136,079 as at 30 June 2017 and £230,717 as at 30 June 2018. Brendan thought this was because Matthew and Callum had been made directors, but conceded that their remuneration had not been approved in general meeting.

f) Brendan was challenged on the mileage claims for Gerard and himself in the year end 30 June 2015 (**2D/3090**). These were identical. It was suggested that

this was implausible Brendan responded that the mileage for the two of them would have been added up then the figure split equally and that there was nothing improper in it. It was then put to Brendan that this explanation was inconsistent with a passage in the meeting of 1 June 2017 at **2F/5098-5099**, where it was suggested that Brendan was saying to Vincent that he should not claim about the accuracy of his and Gerard's mileage claims because, if he did, they could raise a similar issue about his claims. However, the uncontradicted evidence of Mr Booth was that the figures for mileage claims were debited to Brendan and Gerard's loan accounts, thereby increasing the amount that they owed to the company. It follows then that the money they were paid for mileage reduced by the same figure the amounts they were otherwise able to draw from the company and the company cannot have been said to have made wrongful payments even if the mileage amounts were not accurate.

g) It was suggested that Brendan and Gerard had treated Vincent differently than Gerard on the issue of repayment of directors' loans. At the board meeting on 11 May 2016, it had been agreed to seek recovery of outstanding sums from both Gerard and Vincent, with the provision of statements of assets and liabilities and proposals for repayment and/or security. However, security had not been required from Gerard and the company had been happy to accept an offer for repayment by instalments; on the other hand, Vincent's offer in a letter dated 19 September 2016 to provide security for his loan was not taken up and instead WMS brought proceedings for repayment of the account. Brendan asserted that Gerard's long and continuing service at the company was taken into account in accepting his offer but denied that Vincent's long past service was ignored in the decision to bring proceedings for repayment. Whilst Gerard made a payment of £250,000 and two monthly instalment payments in accordance with the agreement accepted by WMS at the board meeting on 24 August 2016, he had not continued to repay the loan. Gerard's evidence was that he had told Brendan about his assets and liabilities in a conversation. However he did not think it would be fair to expect him to repay his loan account when he was not being properly remunerated for his work. He had agreed to repay £50,000 per month but that was not practicable with the costs of litigation as well as other living expenses. Brendan said that he accepted this because Gerard said he could not repay the loan due to the lack of payment for his work for the company and the legal fees that he was incurring. Brendan considered Gerard to be central to the operation of the company and he did not

want to risk him leaving. However, Brendan was unable to identify a minute of a board meeting or any other document where a decision to allow Gerard to defer repayments and/or the reasoning for this were recorded. The Claimant argues that this is evidence of a continuing lax approach to the operation of the company and infects the Defendants' suitability to act as trustees.

h) Brendan and Gerard had agreed to the payment of bonuses to family members, who worked for WHS, including their sons, Callum and Matthew, and Siobhan, but had not declared similar benefits to the trust to benefit other family members. Brendan stated that WMS operated by paying low wages and high bonuses.

i) It was suggested that Brendan and Gerard had failed during the various meetings to provide to Vincent the material that he reasonably required to assess the financial performance of the company to resolve issues such as directors' bonuses. Mr Harper QC put to Brendan that he never provided the material requested at the meeting on 1 June 2017:

"Q…You never provided to Mr Vincent Maher the information he requested, did you?

A. My advice was we provided way more information, including P60s, P45s and company statements, and every time we provided something, we were asked for something else. At that stage, it was just getting to a ridiculous point where it was going around in circles.

Q. So you do not believe that the representative of a trustee at a general meeting is not entitled to be provided with information that addressed queries that he has in relation to the financial performance of the company?

A. That is not what I said. I said I had given him every information that I thought he was entitled to, and more besides, and I just thought it was just a time wasting exercise that he was carrying on. It was going on for ages. The year before was exactly the same."

Brendan described Vincent as "*playing games"* rather than acting in the best interests of the beneficiaries of the trust. Vincent on the other hand contends that the conduct of his brothers shows their inability to separate their personal interests from their fiduciary responsibilities.

j) Brendan and Gerard had declined to take up the offer in the email of 11 September 2018 to instruct an independent law firm to advise on what information Vincent was entitled to see as a trustee of the shareholder in WMS. Vincent contends that this conduct is of a piece with the earlier failure of all the brothers to take advice on their legal duties as trustees. When asked why the proposal of taking independent advice had not been taken up, Brendan said, *"Because by 2018 it was getting to the stage where we were going to have more lawyers and solicitors in the office than we did employees. It was just ridiculous. Every time we give him something, he wanted something else. It was just a continuing saga. And that was just another way of just trying to not move things on."*

k) Vincent complains that he was removed from the bank mandate.

l) Brendan and Gerard, with their sons, had established new companies called W Maher & Sons (Excavations) Limited ("Excavations") and Paston Road Properties Limited ("Paston Road"). In each case the trust (or more specifically, Vincent, as the trustee not involved in the new companies) was not consulted in their formation. It was suggested that the formation of Excavations was a misuse of the WMS' goodwill; and that Paston Road was established with the intention of using a loan from WMS to finance the purchase of land in Wythenshawe, which was a development opportunity that it should have been available to WMS not a new company of which the trust was not a shareholder. In each case it was suggested that Gerard and Brendan's actions were contrary to the interests of the beneficiaries. Gerard accepted in cross examination that it was a mistake not to have taken legal advice on the formation of the new companies, but he maintained that the land investment opportunity of Paston Road could have been highly beneficial to the trust.

m) Brendan and Gerard were asserted to have a fixed intent that the company not be sold.

n) It is further suggested by the Claimant that the Defendants may have used company assets to fund litigation. This is denied by the Defendants and, as the Claimant concedes, there is no positive evidence that this has occurred. The Claimant therefore resorts to arguing that the Defendants have failed to give adequate disclosure on the issue by showing how they have funded the proceedings, despite the allegation having been raised against them. However,

> I do not see that I can draw an inference from the failure to give disclosure that company money has been used to find the litigation.

129. I should note that in written closing submissions, the Claimant raises a question as to whether I have erred in my approach to the issue of the use of company funds to fund the litigation, had there been evidence of that occurring. The Claimant contends that the use of company funds to fund the litigation would be a misuse of trust property and breach of trust, even if the Defendants persuaded the court that the reason they resorted to this method of funding was the failure of the trustees to agree proper remuneration for their services. Without hearing full argument on the issue, my initial view is to agree with that proposition. The situation that I was considering was one where directors who could not otherwise fund litigation, advanced money to themselves by way of directors' loans for that purpose. In my judgment, that would not necessarily amount to the misuse of trust property or a breach of trust if the directors had a reasonable expectation that the monies that were advanced were in fact due to them for services rendered in any event.

130. The Claimant's position is summarised thus in written closing submissions:

> "*The Claimant and the Defendants have all behaved wrongly when ignorant of the true position as regards the beneficial ownership under the trust…There is a marked change in the Claimant's approach once lawyers are instructed on his part. He discovers what his obligations are, changes his approach and tries to instil independence and oversight into his dealings. The evidence shows that the Defendants have not however changed. They continue to want 'control', continue to pay remuneration to themselves and their sons without reference to the trust, continue to refuse to provide information/seek advice on information to be provided and establish new companies in the same as before, despite now knowing (or saying that they know) how to behave.*

J. The opinions of other beneficiaries

131. I have received evidence from only two other beneficiaries, Monica and Siobhan.

132. I have also noted the comment of Monica in her statement that, when William set up the trust, "*it was not his intention that the family business would be sold."*

133. Siobhan's was in the unenviable position of giving evidence in a dispute between her brothers. She said four things of significance:

a) She had not appreciated prior to this litigation that trust could receive dividends from the company to be distributed to the beneficiaries.

b) She thought that control of the business should remain in the family because that was what her father would have wanted.

c) She did not want Brendan and Gerard to be removed as trustees because that would cause the family to lose control of the company.

d) She said that she was willing to be a trustee but was not keen on being a trustee on her own.

134. I saw no reason to think that Siobhan was giving anything other than her genuine opinion as a beneficiary and a member of the family. I did not see any evidence that she had been misled by Brendan and Gerard though it is by no mean unusual that, when arguments happen within families, people take one side or the other in the dispute without full knowledge of the background.

Discussion – Issue 1 – was there an agreement to sell the company?

135. The Claimant's pleaded factual case on whether an agreement was reached on or around 29 January 2014 is unsustainable for numerous reasons.

136. First, the Claimant has never been clearly able to identify when this meeting took place. He has, at various times, indicated the following date of the discussion:

a) The letter of claim (**3A/5172**) states that the agreement was reached in March 2014 or (at a later point in the letter) June 2014.

b) In his first witness statement he asserts the date to have been "in or around" 29 January 2014 (see paragraph 17).

c) This becomes "*on or around 29 January 2014*" in the Particulars of Claim;

d) In cross examination, the Claimant was pushed on this inconsistency of dates. He variously said that the meeting was "*on or before 29th*", was "*before the 29th*" and "*could have been on 27th or 28th*." He stated that his brothers kept changing their minds.

137. Second, the circumstances of the meeting are unclear. The meeting is described in the Claimant's first witness statement as having taken place in the company's board room

(see para 18). Yet, if he cannot recall when the meeting took place, it is perhaps unlikely that he can recall where it took place.

138. Third, it is not even clear whether the Claimant is saying that an agreement was reached at the meeting. At one point in his evidence he stated, "*The 3 of us were in agreement to see if we could sell the company for in excess of £30 million….if we got a price in excess of £30 million, we would have to sit down as trustees and decide whether we sold the company."*

139. Fourth, the meeting was not referred to in subsequent discussions.

a) On 29 January 2014, the Claimant met Mr Christopher Booth. The conversation was recorded and is transcribed at **2F/4846**. At no point in that meeting did the Claimant mention there being a concluded agreement to sell the shares in the company. Indeed, he mentioned several possible outcomes (see **2F/4852**, mid page). It is highly unlikely that he would have spoken in this way if the parties had reached a fixed agreement to sell.

b) On 3 February 2014, the Claimant had a discussion with his brothers (following what would seem to have been a rather more formal meeting involving others). Again the discussion is one of those that was recorded and of which a transcript is available. On the Claimant's case, his brothers had agreed within the preceding week to sell the company. From reading the transcript one sees that they do not agree to the company being sold. If the Claimant's version is correct, one can understand how frustrating he would have found this. Yet there is not a single mention of a concluded agreement (or even an agreement in principle) to sell the company. It is close to inconceivable that, if the Defendants had acted in the inconsistent fashion suggested by the Claimant, he would not have mentioned this in the meeting. In cross examination he made the fair point that emotions were riding high during the meeting but if anything that would have been a stronger reason to mention the agreement.

140. The Claimant's account that such an agreement was confirmed later, whether specifically at a meeting on 10 July 2014, or otherwise more generally, is equally difficult:

a) The record of the meeting on 10 July 2014 shows no such agreement.

b) When challenged on that record, Vincent suggested that the agreement was confirmed in some other discussion, such as a "meeting" of the brothers as they

passed through the office of WMS. It is hard to see that this is consistent with the description of the meeting at paragraph 10 of the Particulars of Claim, which gives the clear impression of a formal meeting (such as that recorded on 10 July 2014).

c) None of the other records of discussions refers to such an agreement having been reached. The sense I get is quite the opposite – that Brendan and Gerard were tolerating Vincent exploring the possibility of sale of WMS but were not supportive of the idea.

d) When asked to identify acts in which his brothers had "supported" his attempt to sell the company, Vincent was not able to identify anything beyond the fact that they had asked him what steps he was taking to market the company.

141. The Claimant makes the fair point that, following mention of the instruction of Hornblower to market the company in July 2014 and consideration as to what material was being provided to potential purchasers during the next 4 months, it is somewhat surprising that Gerard and Brendan did not seek to put a stop to Vincent's marketing efforts until the letter of 17 November 2014. It may be that the explanation is that they were rather more willing to contemplate the sale of the company at this time than they now acknowledge. That would be consistent with there being a serious break down in the relationship between the brothers and a consequent benefit in a way being found for them to go their separate ways, though neither Brendan nor Gerard accepted that they considered it a viable way forward. It would equally be consistent with Brendan and Gerard thinking that a buyer would never be bought for WMS at the price that Vincent was seeking, but that it might mollify him to be allowed to investigate a sale.

142. But either way, the evidence is not consistent with their being a concluded agreement to sell WMS. On this material, I am driven to the conclusion that Vincent's reference to their being an agreement is no more than wishful thinking. Whilst he would have liked them to agree to sell, no such agreement was ever reached. Vincent has taken the fact that his brothers did not emphatically say "no" as evidence of them agreeing to such a sale. In fact, the contents of the recorded discussions clearly show their reluctance to agree.

Discussion – Issue 2 – should the Claimant and/or either or both Defendants be removed as trustees and substituted

143. The position within this trust is one of serious impasse. The history and evidence as summarised as above show that this is a clear case of conflict between trustees that has seriously impaired the operation of the trust. The trustees have been unable either to agree remuneration for directors of the company (which in the long-term risks damaging the performance of the company through deterring directors from spending the proper time on company business) or the payment of dividends to the trust. Neither of these are situations that can be allowed to continue.

144. Further, I see no likelihood that this situation will improve. Despite my having pointed out more than once during the trial that the parties could if they wished to explore an amicable resolution by all three continuing as trustees, the suggestion was not taken up. I take this, together with the manner of their giving evidence, that there is no realistic possibility of the brothers working together.

145. It is obvious that there is potential benefit to having one or more trustees who understand the workings of the company, so long as they are capable of acting in the best interests of the beneficiaries.

146. I have considered whether the addition or substitution of a trustee by the appointment of another family member would be a solution. Siobhan is the only candidate who has been considered seriously. Her evidence was of considerable reluctance unless she was the trustee with the Defendants. However if the Defendants (with or without the Claimant) are to remain trustees, I see little benefit in adding her as a trustee. She would doubtless only find herself in the middle of a continuing dispute between her brothers.

147. Further, I do not consider that the addition of a professional trustee to the existing group of trustees would improve matters. The independent trustee would find themself in the middle of disputes. No doubt much time and therefore money would be taken up in dealing with disputes between the brothers.

148. That leads me to consider the removal of some or all the existing trustees, with the possibility of the appointment of a new professional trustee. In order to consider the removal of existing trustees, I need to look at their conduct and the extent to which it has contributed to the current impasse.

149. In respect of Vincent, the following issues stand out:

a) There is an obvious benefit in having a trustee who is a family member but is not intimately involved in the running of the company and he is the only viable candidate. It helps ensure that the trust does not simply act in the interests of the current employees of the company. On the other hand, it brings the risk that a trustee who is not committed to the future of the company as an asset of the trust will cause difficulties in the trust administration.

b) His position on the sale of the company is difficult to comprehend. These proceedings were brought on the basis that there was a legal obligation on the trustees to sell the shares. He disavowed that position in the witness box as well as stating that it was not in the best interests of the beneficiaries to sell. The latter appears to be an attempt to portray himself as a reasonable trustee, bearing in mind that the company had prospered over the years since 2014. But if he did not in fact consider there to be a binding agreement to sell and did not think it was in the best interests of the trust that the company be sold, it is difficult to see why he has argued that the alleged decision from 2014 should be implemented, as is asserted for example at paragraph 39(a) of his skeleton argument. The most obvious reason, as the Defendants assert, is that Vincent is determined to try to realise what he can from the company regardless of the effect on the trust.

c) Vincent's conduct in respect of the sale issue is not dissimilar to his conduct in respect of the directors' loan litigation. In pursuing an argument to trial (in this case) or to the week before trial (in the loan litigation) only to abandon his position. In each case his position has caused considerable expense (in this case to the Defendants; in the loan litigation, to the company) in maintaining a position which is not in the interests of the beneficiaries (in this case, on his own admission as to their best interest; in the loan litigation, through causing the company to incur expense by forcing it to pursue the litigation).

d) This willingness on Vincent's part to pursue issues about governance of the company to the bitter end can also be seen in his attitude towards the running of the company. Examples include the issue over the restoration costs at Thelwall, which Vincent has pursued doggedly in spite of previously taking no issue in respect of those costs

e) The timing of the issue of these proceedings, the day before the expiry of the deadline to repay the directors loan, together with his conduct in the director's loan litigation, is consistent with an intention to do what he could to avoid

repaying the director's loan. I am unconvinced by Vincent's complaint that he and Gerard were being treated differently for the simple reason that Gerard continued to work for the company, whilst not receiving the directors' bonuses that had customarily been paid. Put simply, Gerard was working for the company with very little reward; in the context of the repayment of a director's loan that obviously put him in a different position than Vincent, who had chosen to leave the company and therefore was not entitled to receipt of the bonuses that could be used to repay the loans.

f) Vincent has repeatedly failed to attend board meetings, despite receiving adequate notice and requesting substantial amounts of information from WMS. He attended no meetings at all after 10 July 2014. His complaints of the failure to give adequate notice and/or failure to provide enough information are unpersuasive. A good example is the meeting proposed on 10 March 2016 to finalise the accounts for the year end 30 June 2015. Vincent was given notice of the meeting by Mr Booth on 1 March 2016 and replied on 3 March 2016 replied that he could not attend at what he described as "*short notice"*. However, when Mr Booth then asked what would be a convenient date, Vincent failed to reply. Following the accounts meeting for the next year on 10 March 2016, Vincent had an independent firm of chartered accountants review the company accounts and to raise questions of the company. There is no clear explanation of why he thought this was necessary. The impression given is that he was seeking to obstruct the efficient running of the company.

g) Vincent has failed to agree the payment of a dividend, notwithstanding that this would benefit the trust. A dividend of £250,000 was proposed on 1 June 2017 and again on 14 September 2018. He however has not proposed any other sum by way of dividend.

h) He has also failed to agree bonus payments to directors, notwithstanding the historic payment of such sums when he was a director. It is striking that he has done this, notwithstanding that he accepts that the value of the directors' services is significantly more than they are being paid – if his figures are accepted, about three times as much.

i) Vincent's comments in the meeting of 22 September 2014 are particularly striking. He stated an intention to cause a stalemate. That is exactly what has come to pass. Whilst Vincent asserts that the stalemate is not his fault, the clear evidence is that he has put obstructions in the way of the trustees agreeing either

proper directors' remuneration or the payment of a dividend to the trust. Given what he said in the meeting on 22 September 2014, it is overwhelmingly likely that his motive for doing this was to attempt to achieve the result he wanted (namely payment of what he perceived to be his share of the value of the company).

j) Meanwhile, Vincent has, through Greens, acted in competition with WMS. I am not persuaded that this is the grossest case of a trustee carrying out business in competition with a business owned by the trust, but there is certainly some element of this taking place.

k) Overall, Vincent has repeatedly acted so as to obstruct the proper running of WMS in an attempt to secure payment out of what he believes he is entitled to. This has harmed the interests of the beneficiaries of the trust.

l) I am not persuaded that Vincent's recent behaviour is, as presented in closing submission, that of a person who has mended his ways. To the contrary, his behaviour is that of someone who will use any means that come his way to try to achieve his ends.

150. In Brendan's case:

a) Brendan has not always been able to distinguish his own interest from those of the trust. This is to some extent understandable when he believed that he and his brothers were each entitled to one third of trust assets and they were working together in the company. But there are more recent examples such as the proposal to purchase the Wythenshawe land in the name of Paston Road. There is an obvious disadvantage to WMS (and therefore to the trust) in the property being purchased in the name of another company using WMS' money. Whilst this did not in fact come to pass, the reason why it was even contemplated is unexplained. On the other hand, the Defendants make the valid point that this issue is unpleaded. The failure to raise the argument earlier makes it hard to criticise the Defendants for not having a ready answer to it in the witness box.

b) Brendan signed accounts in Vincent's name. Whilst this should not have occurred, since a forgery always gives a misleading impression, the important issue in this case is whether Vincent in fact approved those accounts so that the signature appended by Brendan reflected Vincent's opinion.

c) There have been failures of governance within WMS in terms of the recording of important decision relating to the directors' loan accounts, as well as in the failure to obtain proper authority for the payment of directors, albeit that in in each case the decision themselves are unimpeachable.

d) On the other hand, Brendan has stayed loyal to the company and therefore to the trust assets by continuing to work for the company (despite the non-payment of bonuses).

e) It is said that he has acted in a partisan way, favouring Gerard over Vincent in respect of the repayment of directors' loans. But as I have identified above, there was good reason not to pursue Gerard aggressively for the repayment of the director's loan account when he continued to work in the company and was on any account entitled to the payment of some bonus[15].

f) I do not consider that any criticism has been made out of Brendan in respect of the payment of business expenses, including mileage expenses or the funding of litigation. The Claimant has simply failed to prove any improper actions by him.

g) I further do not accept that Brendan has been obstructive to Vincent in terms of the provision of information necessary for the discharge of Vincent's duties as a trustee. Vincent has requested large quantities of information. The company has shown itself willing to provide much of what was requested. But it is not the role of the trustees to review the operation of the company generally, as is apparent from paragraph 12 of the second schedule to the trust deed.

h) Further, I have above rejected the contention that Brendan or Gerard are guilty of bullying Vincent.

i) Whilst it may be said of Brendan that he shows a degree of intransigence in not contemplating the sale of the company in any circumstances, it is not disputed that he and Gerard have shown good business acumen in building up the company during a period when Vincent thought that the company was better sold. I have no reason to think that, if circumstances were to change to the company's disadvantage, he would not reconsider the position.

[15] I remind myself that Vincent himself accepted that a reasonable figure for one of the directors was £70-£80,000. Given that the company is more successful now than when Vincent was involved yet the directors were paying themselves more at that time, this may seem a less than generous suggestion on Vincent's part.

151. It is suggested that Brendan has shown himself unwilling to compromise, by for example agreeing to Vincent's proposals to instruct an independent law firm in September 2018 to advise on what Vincent was entitled to see; and in failing to agree the proposal that all 3 brothers stand down as directors. In the former case, I have considerable sympathy with Brendan's concern that more time was being spent on legal issues than on the core business of the company. He cannot be criticised for failing to agree to the proposal. In the latter case, whilst the failure to take up the offer may have been born to some extent out of stubbornness on Brendan's part, I do not consider that he had behaved in a way that mandated his stepping down.

152. In this litigation, Brendan has tended to take a lead over Gerard in matters relating both to the administration of the company and the running of the trust. Everything said about Brendan (both positive and negative) applies with approximately equal force to Gerard.

153. From the above analysis, I draw the following conclusions:

a) Vincent has misconducted himself as a trustee. He is not fit to continue to act as a trustee.

b) The conduct of neither Brendan nor Gerard has been sufficiently improper to justify their removal as trustees.

154. In the light of my conclusion about the removal of trustees, the position will be that the two continuing trustees will be the brothers who have stated the view that the trust should not sell its shares in WMS. For the moment, Vincent agrees that that is the right course of action. However, there may come a time at which he or other beneficiaries wish the trustees to consider selling the shares. Given the strongly polarised position taken by the parties in this case, it is important to consider whether the Defendants will properly consider the issue as and when the question of the sale of the shares arise.

155. In principle they have a duty to consider any such proposal fairly and in the light of the interests of all beneficiaries. In practice, I fear that there will be continuing distrust between the brothers that may lead to further litigation over this issue. Whilst the appointment of an independent trustee is not necessary so long as the Defendants act in the interest of the beneficiaries generally, and I have no firm basis for thinking that they will not do this, further dispute may be avoided if all of the beneficiaries including Vincent can be confident that matters have been looked at dispassionately.

156. Further, I have expressed some concern about the governance of WMS. It is important that this trust is properly administered to allow all beneficiaries to have confidence in the decisions that are taken.

157. To this end, and notwithstanding the cost implication of the employment of a professional trustee, there is in my judgment good sense in the employment of a professional trustee. I have considered the firm of Smith and Williamson, nominated by the Defendants' solicitors in their letter of 17 December 2019 at **3B/6145a.** In principle, they appear to me to be a suitable firm, but I need to be satisfied that they have no connection with the Maher family, given the issues that have arisen in this case and the names of the contacts that appears at **3B/6145i**. I will hear further submissions on this issue if necessary.

Discussion – Issue 3 – consequential directions

158. It was common ground between the parties that no further consequential directions were required. If any party considers they are necessary or desirable, I will hear further submissions. I would however point out that this will have costs consequences in litigation in which already a large amount of costs will no doubt have been incurred.

Terms of order

159. The parties have agreed the terms of an order giving effect to this judgment on the identity of the trustees. It leaves over certain issues, in particular relating to costs, to be determined at a further hearing.