Neutral Citation Number: [2020] EWHC 1768 (Comm)

Claim No: E40LS567

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
CIRCUIT COMMERCIAL COURT (QBD)

Leeds Combined Court Centre,
The Courthouse,
1 Oxford Row,
Leeds, LS1 3BG.

Date: 10/07/2020

Before:

HIS HONOUR JUDGE KLEIN SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

JOHN SCOTT UNWIN	**Claimant**
- and -	
CHRISTOPHER LEE BOND	**Defendant**

- -
- -

Hugh Jory QC (instructed by **Chadwick Lawrence Solicitors LLP**) for the **Claimant**
Lisa Linklater (instructed by **Prodicus Legal Ltd.**) for the **Defendant**

Hearing dates: 5, 8-12, 15 June 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HIS HONOUR JUDGE KLEIN

HH Judge Klein:

1. This is the judgment following the trial of a claim by John Unwin that he was compelled to sell his shares in Hensall Group Ltd. ("the parent company"), at a forced sale (and artificially low) price, to Christopher Bond as a result of Mr Bond's bad faith conduct in September 2016 in connection with the termination of Mr Unwin's employment with Hensall Mechanical Services Ltd. ("Mechanical").

Background – corporate documents and how Mr Unwin came to acquire his shares in the parent company

2. The parent company was incorporated on 22 July 2010. By September 2016 Mechanical was a wholly owned subsidiary of the parent company. As I shall explain, until June 2016, Mechanical was only an indirect subsidiary of the parent company, which was the ultimate parent company in a more complex group of companies ("the group").

3. Mechanical's business is principally the provision of heating and ventilation (air-conditioning) systems, although it also offers a broader range of mechanical and electrical services.

4. On 7 September 2009 Mr Unwin began employment with Mechanical in the role of director. Mr Unwin's employment contract provided that, save in those cases where he could be dismissed without notice (for example, if he committed an act of gross misconduct), his employment would continue until terminated by him or Mechanical on 3 months' notice. It also provided, at clause 12.5, that, at the end of Mr Unwin's employment or on being put on garden leave, on being requested to do so he had to resign any directorships he held in Mechanical and the parent company.

5. Mechanical's July 2008 Employee Handbook formed part of Mr Unwin's employment contract. The Employee Handbook provided as follows in the section entitled "Rules and Disciplinary Procedures":

> "In any organisation it is necessary to have rules in the interests of both the employer and employees.
>
> The rules set standards of performance and behaviour whilst the procedures are designed to help promote fairness and order in the treatment of individuals. It is the aim of the rules and procedures to emphasise and encourage improvement in the conduct of individual employees where they are failing to meet the required standards and not as a means of punishment.
>
> Every effort will be made to ensure that any action taken under this procedure will be fair, with the employee concerned being given the opportunity to state their case and appeal against any decision they consider to be unjust.
>
> The following procedure should ensure that:

- All employees are fully aware of the standards of performance, action and behaviour required of them.

- Disciplinary action, where necessary, is taken speedily and in a fair, uniform and consistent manner.

- An employee will only be the subject of disciplinary action after careful investigation of the facts and the opportunity to present his/her side of the case…

DISCIPLINARY PROCEDURE

Other than for gross misconduct, any disciplinary action taken will be based on the following procedure:

1st Occasion	2nd Occasion	3rd Occasion	4th Occasion
Verbal (or informal)	Written warning	Final written warning	Dismissal

Verbal (or informal) warnings will remain on your record for a period of 6 months and Written warnings will normally remain on your record for a period of 12 months.

Notes

The disciplinary and grievance procedures are non-contractual and do not form part of your contract of employment. The Company reserves the right to enter the disciplinary procedure at any stage depending on the circumstances and severity of the offence…

At all stages of the Disciplinary and Appeal Procedures you have the right to be accompanied by a fellow employee of your choice, an official employed by a trade union or an official of a trade union who is certified as a worker's companion at disciplinary or grievance hearings…

DISCIPLINARY APPEAL PROCEDURE

The Disciplinary Rules and Procedures incorporate your right to lodge an appeal in respect of any formal disciplinary action taken against you.

If you wish to exercise this right, you should apply to the Company within two working days of the decision you are complaining against, stating the grounds of your appeal.

The Disciplinary Appeal hearing will be heard by the Managing Director or a nominated deputy, wherever possible within 5 days of your appeal. You will retain the right to be

> accompanied and you will be given a full opportunity to state your case.
>
> The result of the appeal will be made known to you in writing within 5 working days of the hearing…"

6. By September 2011 Mr Bond, who was also a director of the parent company and Mechanical, was the parent company's sole shareholder. Mr Bond and Mr Unwin agreed that Mr Unwin would buy 20% of Mr Bond's shareholding in the parent company (14,200 shares) for £50,000. Mr Unwin paid that price on 14 September 2011 and 14,200 shares in the parent company were transferred to him the same day.

7. The next day, 15 September 2011, Mr Bond and Mr Unwin resolved to re-designate Mr Bond's 56,801 shares in the parent company (his 80% shareholding) as A shares and Mr Unwin's 14,200 shares as B shares and Mr Unwin was appointed as a director of the parent company and of Mechanical.

8. Mr Bond, Mr Unwin and the parent company also entered into a shareholders' agreement ("the shareholders' agreement") on 15 September 2011. The shareholders' agreement provides as follows:

> "…2.1 The business of [Mechanical] is the provision of mechanical and electrical services and packages to its clients who operate across a wide range of sectors (Business).
>
> 2.2 Each Shareholder shall use its reasonable endeavours to promote and develop the Business to the best advantage of [the parent company] and [its] group…
>
> 6.3 Any distribution declared and distributed shall be:
>
> > (a) Subject to the Board recommending payment of the same and subject to Clauses 6.3(b) and Clause 6.3(c) any Available Profits which the Company may determine to distribute in respect of any financial year may be distributed either
> >
> > > (i) amongst the holders of A Shares, the B Shares and the C Shares (pari passu as if the same constituted one class of Share) according to the amount paid up credited as paid up on each such Share or the Company; or
> > >
> > > (ii) amongst the holders of the A Shares only; or
> > >
> > > (iii) any combination of (i) and (ii) above.
> >
> > (b) …no dividend or distribution may be declared without the consent of both the A Shareholders and the B Shareholders.

> (c) …the Shareholders shall procure that the Company and the Directors declared a dividend and/or distribution in accordance with the directions and/or policies given or specified by both the holders of the majority of the A Shares and the holders of majority of B Shares from time to time, to the extent that such dividend and/or distribution may be lawfully distributed and paid and subject to Clause 6.2…
>
> 9.6 No transfer of shares [by a B shareholder] shall be registered unless the transferee of such shares has executed and delivered to the seller a Deed of Adherence in the form provided at Schedule 2 of this agreement agreeing to be bound by the terms of this agreement as if it were a party to it…
>
> 14.1 This agreement, and any documents referred to in it or executed contemporaneously with it, constitute the whole agreement between the shareholders and supersede any previous agreement, understanding or agreement between them relating to the subject matter this agreement covers…
>
> 18 The shareholders to this agreement are not in partnership with each other. There is no relationship of principal and agent between them and neither of them has authority to bind the other…
>
> 19.2 **Each shareholder shall at all times act in good faith towards the others** and shall use all reasonable endeavours to ensure that the provisions of this agreement are observed.
>
> 19.3 **Each shareholder shall do all things necessary and desirable to give effect to the spirit and intention of this agreement**…" (emphasis added).

9. Also on 15 September 2011 Mr Bond and Mr Unwin resolved that the parent company would adopt new articles of association ("the parent articles") (which were referred to in the shareholders' agreement). The parent articles provide as follows:

> "…2.1 …Bad Leaver: a B Shareholder…is a Leaver *(sic)* who is not a Good Leaver or they leave for any reason (including, without limitation, death, bankruptcy, wrongful dismissal, permanent disability or permanent incapacity through ill health) before the sixth anniversary of the Relevant Trigger Date or they leave at any time and have been fraudulent or wilfully negligent…
>
> Good Leaver: any B Shareholder who is a Leaver where

> a) they would otherwise be a Bad Leaver and the Board (with the consent of a majority in voting terms of the holders of the A Shares) resolves that such person is to be categorised as a Good Leaver, or
>
> b) they are a Leaver on or after the sixth anniversary of the Relevant Trigger Date [(that is, on or after 19 April 2017)][1] and have not been fraudulent or wilfully negligent[, or]
>
> c) they are a Leaver on or after the sixth anniversary of the Relevant Trigger Date by reason of dismissal from employment by the Company or by a member of the Company's Group in circumstances determined by court (or an Employment Tribunal) to be or amount to wrongful dismissal (and for the avoidance of doubt this shall exclude any finding of unfair dismissal)…
>
> Leaver: means…any B Shareholder…who is at the date of adoption of these Articles or who later becomes an employee and/or director of the Company or of any member of the Company's Group and who subsequently ceases to be so employed or engaged and does not continue in any such capacity for any reason whatsoever (including death, bankruptcy or as a result of a member of the Company's Group ceasing to be a member of the Company's Group)…
>
> Sale Shares: the Shares specified or deemed to be specified for sale in a Transfer Notice or Deemed Transfer Notice in accordance with…Article 8.1…

7.1 In these Articles an Obligatory Transfer Event shall occur upon a B Shareholder…becoming a Leaver…

8.1 Where an Obligatory Transfer Event happens the B Shareholder…(Seller) shall give written notice of it to the Company as soon as possible and, if it does not, it is regarded as having given a Deemed Transfer Notice of the Obligatory Transfer Event to the Company on the date on which the other Shareholders become aware of the Obligatory Transfer Event (Notice of Obligatory Transfer Event)…

[1] As pleaded, Mr Unwin's claim was that Mr Bond had to act by September 2017 and that that was the relevant anniversary, which Mr Bond admitted. At trial, Mr Jory QC, who appeared for Mr Unwin, pointed out that Mechanical's solicitors, and Mr Bond's former solicitors, had contended that the relevant date was 19 April 2017. Miss Linklater, who appeared for Mr Bond, was "neutral" as to that and Mr Jory said that it made no difference to Mr Unwin's case whether the correct date was the April or the September date.

8.3 As soon as practicable after service, or deemed service, of the Notice of Obligatory Transfer Event, the Shareholders shall procure that the Company appoints an Expert (in accordance with Article 9) to determine the Fair Value of the Sale Shares in accordance with Articles 8.4 to 8.6.

8.4 "Fair Value" of the Sale Shares shall be the value that the Expert certifies to be the fair market value in his opinion based on the following assumptions

> (a) the value of the Sale Shares is that proportion of the fair market value of the entire issued share capital of the Company that the Sale Shares bear to the then total issued share capital of the Company (with no premium or discount for the size of the Seller's shareholding or for the rights or restrictions applying to the Sale Shares under the Articles),
>
> (b) the sale is between a willing buyer and a willing seller on the open market,
>
> (c) the sale is taking place on the date that the Obligatory Transfer Event occurred,
>
> (d) if the Company is then carrying on its business as a going concern, on the assumption that it shall continue to do so,
>
> (e) the Sale Shares are sold free of all Encumbrances, and
>
> (f) to take account of any other factors that the Expert reasonably believes should be taken into account.

8.5 If any problem arises in applying any of the assumptions set out in Article 8.4, the Expert shall resolve the problem in whatever manner he shall, in his absolute discretion, think fit (acting as an expert, not an arbitrator).

8.6 The Expert shall be requested to determine the Fair Value of the Sale Shares within 30 Business Days of his appointment and to notify the Company in writing of his determination (Determination).

8.7 As soon as practicable, or at the latest within 20 Business Days of the Determination, the Board shall offer the Sale Shares for sale to the Shareholders in the manner set out in Articles 6.10 to 6.16 inclusive, except that there shall be no Minimum Transfer Condition in the Transfer Notice.

8.8 Notwithstanding any other provisions of this agreement, the price payable for the Sale Shares of a B Shareholder…comprised in a Transfer Notice or a Deemed Transfer Notice as a result of any Obligatory Transfer Event contained in Article 7.1 (Leaver Price) shall be

> 8.8.1 in the case of a Good Leaver the Leaver Price shall be the Fair Value calculated in accordance with Article 8.4, and
>
> 8.8.2 in the case of a Bad Leaver the Leaver Price shall be the lower of the Issue Price [(that is, £14,200)] and the Fair Value…

14.1 The holder of a majority of the A Shares for the time being shall be entitled to appoint three persons to be A Directors and one person who is neither an A or B director (Other Director) of the Company and the holder of a majority of the B Shares for the time being shall be entitled to appoint one person to be a B Director of the Company.

14.2 The A Director(s) or any Other Director may at any time be removed from office by the holder of a majority of the A Shares and any B Director may at any time be removed from office by the holder of a majority of the B Shares.

14.3 If the A Director or any B Director shall be removed from or vacate office for any cause other than death, the holder of a majority of the A Shares (in the case of an A Director) or the holder of a majority of the B Shares (in the case of a B Director) shall be entitled to appoint in his place another person to be an A Director or a B Director.

14.4 Any appointment or removal of a Director pursuant to this Article shall be in writing and signed by or on behalf of the holder of a majority of the A Shares or B Shares (as the case may be) and served on each of the other Shareholders and the Company at its registered office, marked for the attention of the Directors. Any such appointment or removal of a Director shall take effect when received by the Company or at such later time as shall be specified in such notice.

14.5 The right to appoint and remove the A Director or B Directors under this Article shall be a class right attaching to the A Shares and the B Shares respectively…

16.1 A Director may call a meeting of the Directors…

16.4 The Company shall ensure that at least seven days' notice of a meeting of Directors is given to all Directors entitled to receive notice…

> 17.2 The quorum at any meeting of the Directors (including adjourned meetings) shall be two Directors, of whom at least one shall be an A Director (or his alternate director) and one a B Director (or his alternate Director) No business shall be conducted at any meeting of the Directors unless a quorum is present at the beginning of the meeting and also when that business is voted on. If a quorum is not present within 30 minutes of the time specified for the relevant meeting in the notice of the meeting then the meeting shall be adjourned for 10 Business Days at the same time and place.
>
> 17.3 If a quorum is not present within 30 minutes after the time specified for the adjourned meeting the quorum shall be reduced to one Director appointed by the majority of the holders of A Shares (or his alternate director)…"

10. It is convenient, at this point, to mention Mechanical's articles of association ("Mechanical's articles"), which provide as follows:

> "…6(a) If and for so long as the Company has only one Member and that Member takes any decision which is required to be taken in General Meeting or by means of a written resolution, that decision shall be as valid and effectual as if agreed by the Company in General Meeting save that this paragraph shall not apply to resolutions passed pursuant to Sections 303 and 391 of the Act…
>
> 7(d) No person shall be appointed a Director at any General Meeting unless either:
>
> (i) he is recommended by the Directors; or
>
> (ii) not less than fourteen nor more than thirty-five clear days before the date appointed for the General Meeting, notice signed by a Member qualified to vote at the General Meeting has been given to the Company of the intention to propose that person for appointment, together with notice signed by that person of his willingness to be appointed…"

11. By regulation 89 of Table A (which was incorporated, with amendment, into the subsidiary articles), the quorum for board meetings was two.

Background – the events leading to the termination of Mr Unwin's employment with Mechanical and the disposal of his shares in the parent company

12. As I have already recorded, Mr Unwin began employment with Mechanical in September 2009 in the role of director. He bought 20% of the shareholding in the parent company and became a director of the parent company and of Mechanical two years later in September 2011. Nothing relevant to this case then happened until about July 2014, when Building Information Modelling (Yorkshire) Ltd. ("BIM") was

incorporated. Mr Bond was, in the early years after incorporation, the majority shareholder in BIM and Mark Levenston was the minority shareholder. Mr Bond was BIM's sole director initially but Mr Levenston was appointed a director on 31 July 2015. There is no dispute that BIM was intended to be a venture between Mr Bond and Mr Levenston. BIM's business is the provision of computer aided models and designs for commercial developments. The parties disagree about whether Mr Bond told Mr Unwin about the proposal to incorporate BIM, and that Mr Unwin was going to play no part in the company or its business, before or only after BIM was incorporated. The parties agree that, at least shortly after BIM's incorporation, Mr Unwin was unhappy about the arrangements.[2]

13. On 21 August 2014 Mr Unwin emailed Mr Bond saying that, whilst he had "absolutely no objection to [Mr Bond's] business venture with Mark [Levenston]", he wanted some clarification about the relationship between BIM and the group. He concluded his email:

> "I reiterate that I have absolutely no issues with this on your part and acknowledge your honesty with this which is appreciated."

14. Mr Bond replied the same day, suggesting that one of the group companies would hold a small minority shareholding in BIM "to strengthen the group…for the ultimate sale of topco", and sought Mr Unwin's consent to a number of his proposals, including that BIM would use some of Mechanical's facilities. He also said that he would discuss further with Mr Unwin what he was proposing. Mr Unwin sent a lengthy email reply the next day, not having "slept a wink". He described Mr Bond's proposal as "a slight kick in the nuts if [he was] honest" and that he now felt that he was being "taken for a ride". He suggested that BIM gave rise to conflicts of interest. He said that Mr Bond's intentions concerning BIM were "not just a kick in the teeth but rubbing [his] face in the sand too". Mr Unwin asked: "how can I watch something like that develop under my nose?" He said:

> "…I've work my nuts off for five years for little gain in the knowledge that Stephen [Radcliffe (the former owner of the parent company and of Mechanical)] would be out of the way and the dividends could be reaped. It was encouraging to know that that could be the case in the coming months. We get to that point and you tell me that you have new plans. If that takes off big style what protects me from you not wanting to put the effort in with HMS? I know how you can be when times are not so good. My business partner and an employee are effectively determining what my future could be. I see that 20% of my share in terms of available resources could be used to gain a 1% return from the New Co which doesn't add up in my eyes…"

Mr Bond then proposed a meeting with Mr Unwin. Before the meeting, but as Mr Bond promised he would do, he replied to Mr Unwin's email. He said, amongst other things:

[2] Mr Unwin appears to suggest, in paragraph 27 of his witness statement, that he was always unhappy about the arrangements.

> "…John, please be under no illusions here. I own 80% of HMS Group Ltd. & its companies & have full voting rights. I will use them in what I consider to be the best for both HMS & myself going forward. If that means sharing resource when required with BIM then so be it. It will not be detrimental in any way to HMS & if anything will bring in more business…
>
> I accept that sometimes I am assertive & don't always consult you however you have shown little initiative over the last 5 years to assist me with the development of new business, diversification & leadership of the team. You admit yourself that you don't know all the pipefitters & the feedback from office staff when I was on paternity leave did not instil me with confidence that you would be able to take up the reins should I ever need you to. When I mentioned to you that I wanted you to take more control, I hoped that you would be up the for the challenge whilst I have my doubts as to what would change. Some of the comments you made in your email only supported my concerns in this matter…
>
> I 100% acknowledge that you have worked your nuts off as you say but as project manager & not as a company director/ shareholder/business partner.
>
> So tomorrow we need to chat about how we move forward for this…
>
> Please be aware that I am willing to work through these issues & find a mutually acceptable solution. I suggest we meet tomorrow morning…"

15. Mr Unwin replied that Mr Bond's email was "rude, disrespectful, unjustified, very hurtful and very, very distressing". He asked for the names of staff who had spoken negatively of him. He rejected Mr Bond's criticisms of him. He said that he had wanted to take on a greater business development role but that Mr Bond would not engage with him about that or the business more generally.

16. Mr Unwin and Mr Bond met, as Mr Bond had suggested, on 26 August 2014. Mr Unwin secretly recorded the meeting. The transcript suggests that Mr Bond began the meeting by suggesting that he and Mr Unwin should have a frank conversation, so that they could move "past this". He acknowledged that he was partly to blame for the point their relationship had reached and, according to the transcript, said:

> "…I know I am not a good person to be a business partner with either, because of the way I operate and the way I am pretty much single minded on that, so you know, but I do want to talk about it now and see what we are going to do about it really...
>
> I accept that I am not good to partner with anybody you know because I have to work in a way that I have to work. This is how I operate."

17. He said that, as contracts director, Mr Unwin should know everything that was going on. Mr Unwin accepted that "ideally" that was so. The transcript suggests that Mr Unwin and Mr Bond had different visions about how Mechanical's turnover could be increased. Mr Unwin believed that good quality work would speak for itself and generate repeat and more business. Mr Bond believed that an entrepreneurial spirit was required to drive the company forward. They also had different visions about how to build good relationships with the company's staff and what Mr Unwin's priorities should be. During the course of the meeting Mr Bond suggested that, for the future, he was going to develop business opportunities on his own which he might previously have brought into the group. He suggested that, if Mr Unwin wanted him to buy Mr Unwin's shares, he would try to facilitate that. He then indicated that, in an ideal world, he wanted to be the parent company's sole shareholder but that he did not know if that was possible or whether Mr Unwin would agree to that. He made clear to Mr Unwin that he valued Mr Unwin's work within the business of Mechanical and that Mr Unwin had a significant role in that business as a senior employee of Mechanical. He described Mr Unwin as a "hardworking, really, really good, talented engineer" who "would be a loss to the company from that aspect" and said that he wanted to carry on working with Mr Unwin. The transcript suggests that, during the meeting, Mr Unwin was resentful about the way Mr Bond had treated him and, to a degree, felt that his position within the business was at risk.

18. There any breakdown in relations between Mr Unwin and Mr Bond appears to have rested until the summer of 2016. There is nothing in the evidence I heard or in the material before me to suggest that, until the summer of 2016, Mr Unwin and Mr Bond were not working together perfectly well in the business.

19. As I shall explain, Mr Bond's case is that Mr Unwin performed poorly (or was perceived by Mechanical's customers to have performed poorly) on six projects in which Mechanical was involved in 2015/2016. Those were projects at:

    i) the Virgin Active centre at Tower Bridge in London ("VA Tower Bridge");

    ii) Estiatorio Milos, a restaurant in Regent Street, London ("Milos");

    iii) the basement restaurant at the One Aldwych Hotel in London ("Aldwych");

    iv) the TK Maxx store in Portsmouth ("TKM Portsmouth");

    v) a restaurant at 8-10 Dover Street, London ("Dover Street");

    vi) the TK Maxx store in Edinburgh ("TKM Edinburgh").

    The parties did not clearly explain to me the precise scope of the work Mechanical undertook in relation to some of these projects and the contemporaneous documents do not make the position clearer. The picture is more blurred still because of the complex contractual chain that is such a feature of so many building contracts. Mr Bond's solicitors helpfully provided me with separate files for each of the projects containing the contemporaneous documents relating to those projects which were otherwise located in different places (and not always chronologically) in the trial bundle. I have read those files. They do provide a clearer picture of the issues which Mr Bond claims establish Mr Unwin's poor performance. Having considered those

files carefully (together with the other evidence and the parties' submissions), I am doubtful that some of the complaints put to Mr Unwin in cross-examination can be laid at his (or Mechanical's) feet. It is also clear to me that Mechanical's customers did not blame Mechanical for those issues at the time and, in any event, on any basis those complaints were not raised at the 5 September 2016 meeting which resulted in the termination of Mr Unwin's employment with Mechanical. There appeared to be an assumption, at trial (and probably from mid-September 2016 in some instances at least), that, because Mr Unwin was copied into an email containing a complaint (often along with very many other recipients from different companies involved in a project), a complaint was being levelled at Mr Unwin. It is clear to me, having read the documents carefully, that, in some cases, the sender of the email was doing no more than adopting what has become a common but unhelpful practice; that is, they were copying in a broad range of recipients to whom the email was not really directed, perhaps "for information purposes", so that no-one could say that they had not sent the email to someone who should have received it. For these reasons, and in the light of the conclusions which I have reached which I set out later in this judgment, I do not propose to set out here, in detail or at all in some cases, the scope of the work Mechanical was contracted to do on the projects. Nor do I address in detail or, again, at all in some cases, all the issues relating to the projects raised with Mr Unwin in cross-examination. Rather, I will focus on those project-related issues which are relevant one way or another for the purposes of this judgment.

20. By March 2015 two of projects in which Mechanical was involved were progressing. They were the development of VA Tower Bridge and the development of Milos. In fact, by March 2015 the VA Tower Bridge project was at an advanced stage (if not finished).

21. Mr Unwin's mother became very unwell in November 2015.

22. The following year, on 18 January 2016, Mr Unwin, Mr Bond and Allison Barlow, Mechanical's commercial director, discussed the possibility of Alex Jamieson, one of Mechanical's senior project managers, acquiring shares in one of the group companies.

23. Mr Bond met with John Holroyd, from Mazars LLP ("Mazars"), accountants and business advisors, on 25 January. They apparently discussed the possibility of Mr Bond controlling a new company (described at trial as "Topco") so that "any future businesses that [he] may get involved in are not part owned by [Mr Unwin]".

24. On the same day, Jim Russell, from Mazars, invited Mr Unwin to take a psychometric test, at Mr Bond's request. The test had been taken by Mr Bond and Mr Jamieson. The test was part of a process Mr Bond had initiated to help Mr Bond, Mr Unwin and Mrs Barlow better define their roles in the business. As he had been requested to do, Mr Unwin sent Mr Russell details of his role and responsibilities in the business on 26 February. He described his role as contracts director. His responsibilities included:

    i) the delivery of projects following handover from the estimating team;

    ii) the management of projects engineers;

    iii) project management;

iv) attending pre-start contract meetings.

Mr Unwin described Mr Bond's role as managing director and set out Mr Bond's responsibilities as including:

v) overall management of the group;

vi) project management – although Mr Unwin suggested that Mr Bond should do less of that;

vii) recruitment.

Mr Unwin also suggested that Mr Bond should be "more open and honest with other board members and less critical of the people who do the most for him". Mr Unwin described Mrs Barlow's role as commercial director.

25. On 3 March Mr Bond emailed Mr Holroyd to ask what was the best way to finance the purchase Mechanical's premises from Mr Radcliffe. He said that, ideally, he wanted the premises to be owned by Topco. He later asked whether a bank might support the purchase if one of the group companies acted as guarantor.

26. On 8 March the project manager for the main contractor on the VA Tower Bridge project contacted Rachel Turnock, who worked in Mechanical's finance team, chasing for information which had, in fact, been provided a year before, and asking for her comments about a number of other matters. He also suggested that Mechanical had not remedied a minor defect, despite being chased to do so, and that a deduction would therefore be made from the amount to be paid to Mechanical. Ms Turnock responded the same day, copying in Mr Unwin, providing her comments and pointing out that payment was due to Mechanical. She said that "numerous attempts" had been made to engage with the main contractor about payment but without success.

27. Also in March 2016 (according to his 18 March email to Mr Bond) Mr Unwin arranged for a sub-contractor to visit VA Tower Bridge to investigate relocating an air conditioning unit about which the landlord had complained.

28. On 20 March Clio Tomazos of Milos asked to meet with the principal contractor on the Milos project (WFC Contractors Ltd. ("WFC")) and Mechanical to discuss power outages which were affecting Milos' business.

29. WFC was Mechanical's second most significant customer by June 2016. It provided Mechanical with almost 19% of its turnover.

30. On 21 March Mr Unwin emailed Mr Bond to say that he thought Mechanical was being invited to attend the meeting because "they" (it is not clear if he meant Milos or WFC) wanted something from Mechanical even though the issue was power-related. The contemporaneous correspondence does not suggest that the issue of power outages was not resolved successfully.

31. By 22 March progress had apparently been made on resolving the final sum due to Mechanical in relation to the VA Tower Bridge project, following Mr Bond's "recent discussions" with James Weekes of WFC. In fact, it is not clear to me that any

progress had been made, because WFC's position appeared to be as it had been a year before.

32. Mr Unwin began to look for a care home for his mother in about April 2016.

33. BIM was engaged to prepare designs and models for the Dover Street project. By 26 April Mr Levenston was emailing Mr Bond and Mr Unwin about the pricing of chiller units to be notified to WFC, which was the principal contractor on the Dover Street project. By the same time, it appears that Mr Levenston and Mr Unwin were discussing Dover Street project management issues by email.

34. Mr Jamieson emailed Mr Unwin, Mr Bond and Mrs Barlow on 27 April to inform them that Mechanical had not won the contract for work at four TK Maxx ("TKM") stores (as it had apparently expected to do), but that it had won a contract to work at one other store. He also informed them that Mechanical would be competing with two other companies (including a company trading as Brycol) on the basis of performance. Mr Unwin replied almost immediately:

> "…That's 50% of our expected allocation gone!!"

35. On 13 May Wendy Smith, VA Tower Bridge's project manager, sent Mr Unwin a drawing showing the proposed new location for the air conditioning unit at VA Tower Bridge which needed to be relocated.

36. By 19 May Milos' chief financial officer was complaining that the air conditioning system at the restaurant was not working properly, that it was affecting business significantly and that the suggestion that an engineer (not from Mechanical) could not visit for a month to carry out a repair (to "commission cooling", as it was described in emails) was unacceptable. Although Mr Unwin was copied into this email and earlier emails which raised this issue, it is clear from two earlier emails sent on 17 May 2016 (one from Colin Braham of Keytask Management Ltd., the contract administrator, timed at 09:57 and the second from Ben Church, WFC's project manager), that this issue was not Mechanical's responsibility. (I refer to the point I made earlier. Because Mr Unwin was copied into earlier emails which happened to raise this issue, he continued to be copied into emails relating to this issue, even though it had nothing to do with Mechanical. This may have given the false impression, after 5 September, that somehow Mechanical, and Mr Unwin in particular, were responsible for this issue).

37. On 19 May WFC sent a sub-contract order to Mechanical for the Dover Street project.

38. On 20 May Mr Levenston emailed Mr Bond and Mr Unwin asking them if they wanted him to review "the contract side" of the Dover Street project. Mr Unwin replied that he would deal with it. By reply Mr Levenston asked Mr Unwin, in an email copied to Mr Bond, to agree a price for his project management of the Dover Street project.

39. On 24 May Ms Smith emailed Mr Unwin, informing him that VA Tower Bridge's landlord had approved the drawing and asking Mr Unwin to send her Mechanical's risk assessment and method statement (its "RAMS") and a proposed date for the work to be done.

40. On 1 June Mr Unwin asked Mr Levenston to tell him what had been agreed about the mechanical package relating to the Dover Street project because "the order is only for £542,000". He asked whether the remaining work was a variation, because he thought the contract price was about £820,000.

41. On 3 June Ms Smith chased Mr Unwin for a response to her earlier email for a RAMS and a proposed start date for the work to relocate the air conditioning unit at VA Tower Bridge.

42. Meanwhile, Mr Bond had been giving further thought to the group's structure as well as his plans for Topco. He had been investigating the possibility of making Mechanical a direct subsidiary of the parent company, as happened in fact, rather than an indirect subsidiary, as it had previously been. A group restructure was expected to improve the consolidated balance sheet which, in turn, would make it easier for Mechanical's customers to obtain credit insurance. The group restructure needed to be done by 30 June. Against this background, Mr Bond had also been discussing the possibility of "profit extraction", presumably from the parent company, in order to discharge a £315,000 secured loan on his former matrimonial home.

43. Mr Bond received a purchase order for the TKM Portsmouth project on 10 June. Monaghans were engaged by TKM as its project managers. Mechanical was contracted to supply, install, test and commission mechanical services at TKM Portsmouth.

44. TKM was Mechanical's major customer by June 2016, even taking into account the loss of half of Mechanical's expected allocation of work, providing it with about 27% of its turnover.

45. On 22 June Ms Smith contacted Mr Unwin again, saying that she was "getting a bit worried that [he was not] coming back to [her]" in relation to the relocation of the air conditioning unit at VA Tower Bridge. Mr Unwin replied the same day, saying that he was waiting for the installers to provide him with a date when the work could be done. Ms Smith replied briefly, thanking Mr Unwin. The contemporaneous correspondence suggests that a RAMS had not been prepared nor that the work had started by 22 September.

46. By 27 June Mr Bond's corporate plans had become more structured and were split into two phases. Phase 1 was the proposed restructure of the group to make Mechanical a direct subsidiary of the parent company. Phase 2 involved the disposal of Mr Bond's shareholding in the parent company to Topco in order to allow Mr Bond to carry on business ventures alone, with Topco supported by the group "for which appropriate cross charges and interest charges should be raised". To assist Phase 1, Mr Holroyd sought, and obtained, I understand, a valuation for Mechanical of about £4 million. As Mr Holroyd explained to Paul Davidson of PD Tax Consultants Ltd.:

> "We are looking to carry out some restructuring and to change the ownership of…Mechanical…from its immediate parent…to the ultimate parent…In order to make this worthwhile we are looking for a valuation of £4 million or more if this can be achieved."

47. On 27 June Mr Holroyd emailed Mr Unwin, at Mr Bond's request, a copy of a summary of the two phase plans. He explained that, whilst Phase 1 had to be completed by 30 June, Phase 2 would "only be completed if and when [Mr Unwin was] completely happy with the proposals". Although the proposed group restructure had been in contemplation for some time by Mr Bond and Mazars, Mr Holroyd's email, just three days before the restructure had to be completed, is the earliest contemporaneous document for Mr Unwin's attention which referred to Mr Bond's corporate plans.

48. By 29 June Mr Unwin and Mr Holroyd had met to discuss those plans. Mr Holroyd informed Mr Bond that Mr Unwin was content with Phase 1 but needed "a better understanding of what is proposed [by Phase 2] and its implications". Shortly after being informed of the outcome of the meeting, Mr Bond decided to proceed with Phase 1 as a priority but to put Phase 2 on hold until his former wife and Mr Unwin had had "more time to review".

49. A further issue arose at Milos on 29 June. The air handling unit was reported to be blowing hot then cold, so that the temperature in the restaurant was "all over the place". It appears, from the emails which were then exchanged, that Sovereign Air Movement Ltd. took responsibility for resolving this, which was acceptable to the correspondents. Within a couple of weeks, a representative of Milos reported that the fluctuating temperature had nothing to do with the air handling unit. The following day, Mr Unwin was asked by Mr Braham to arrange for an engineer to visit the restaurant to investigate why the private dining room air conditioning system was not working properly. The engineer who Mr Unwin arranged to visit reported within a couple of days that that system was working properly. Mr Unwin visited the restaurant the next day. Within a few days, Milos reported that the air conditioning system was not operating at all. Mr Unwin arranged for an engineer to visit the restaurant the following day.

50. Part of the Aldwych project involved the installation of a sprinkler system in the restaurant. Mechanical's project manager, who reported to Mr Unwin, was Steven Fletcher. On 5 July Mr Fletcher sent to Mr Bond and to Mechanical's health and safety manager what I am satisfied was a hydrostatic (a water-based) pressure test certificate for the sprinkler system which Mechanical's sub-sub-contractor, Blue Shield Fire Protection Ltd. ("Blue Shield"), had sent to him.

51. Meanwhile, Mr Bond continued to consider his purchase of Mechanical's premises. On 14 July he asked to meet with Mr Holroyd and Mr Radcliffe to discuss the most tax efficient way of purchasing the premises.

52. Mr Unwin was informed, on 15 July, that his mother had end stage cancer and might survive for only a few weeks and, on 18 July, he told Mr Bond and Mrs Barlow that his mother had end stage cancer. They offered him their support and Mr Bond offered to cancel his holiday which had been booked for the end of July/early August.

53. Mr Fletcher knew, by 22 July, that the Aldwych sprinkler system was not "live" because it was reported to him, by David Maynard of Honeywell Building Solutions, Mechanical's sub-contractor, that "all that is left to do is an air test and refill", which could not be done until that company had received a purchase order for "VO1" (which I take to be a reference to a variation instruction or order).

54. The TKM Edinburgh project, on which Mr Fletcher was Mechanical's project manager, had begun by 26 July, when David Turton (Mechanical's health and safety manager) reported that Monaghans, which was TKM's project manager for this project too, had been critical of the health and safety standards observed by Mechanical, its sub-contractors, and the other contractors on site.

55. Russell Heseltine is (and was in 2016) the Assistant Vice-President Construction UK and Ireland for TKM. Mr Heseltine emailed Mr Bond on 28 July. The email was entitled "TKM Edinburgh". Mr Heseltine asked to meet Mr Bond for a coffee. It appears that, at about the same time, he had emailed Mr Turton a photograph "highlighting dangerous practices" (to quote Mr Turton's response). Mr Bond appears to have received Mr Turton's response to Mr Heseltine.

56. On 29 July Mr Unwin was reporting that TKM was "not impressed…at all" with Mechanical's ductwork sub-contractor on the TKM Edinburgh project. It appears that there had been complaints about the attitude of the sub-contractor's employees and that deadlines have been missed and deliveries not made. Mr Unwin's report may have been made because one of those employees had received a deep cut to his leg whilst standing on a closed step ladder on site. The employee accepted responsibility for the accident. He had not been following the RAMS.

57. The TKM Portsmouth project ought to have been close to completion by 29 July. In fact, that was the date fixed for practical completion. However, Mr Unwin emailed Mr Bond and Mrs Barlow that day:

> "Russell H [(Mr Heseltine)] went "mental" yesterday regarding the above.
>
> The whole job is behind so all was not directed just at us...However, we have left ourselves a little exposed. Reasons and actions below:
>
> > - The air handling unit has been delayed and is still not on site. Due on site next week. This has been reported for several weeks but not communicated to [Mr Heseltine] until last week. Will be installed and ducted up by soft handover next Friday.
> >
> > - The over door heater is not on site (due Monday 1 August). There have been design issues with the portal on this one and Diffusion promised a delivery date that they could not meet.
> >
> > - Air conditioning system not complete. Condensers did not arrive on site until 25 July apparently due to the coastal treatment being applied. This in my opinion should have been organised at the front of the project and not left so late.

> - Other than the drum jets we have "forgotten" to order all the other grilles! Due on site today apparently. Not happy with that…
>
> I have told Matt [(Matthew Guest, Mechanical's project manager)] to be on site as much as possible…
>
> The PC date on this has been brought forward to the 29 July [(that is, that day)] from the 5 August with a soft handover scheduled for 5 August and full handover the following Friday.
>
> Reading between the lines, and following a report from a conversation with Phil Pearson/Alex [(Alex Jamieson)], Phil has not put too much urgency on achieving PC today. Discussions at the meeting on Wednesday this week were more focused on having everything ready for soft handover on 5 August.
>
> Everyone is behind on site not just us which tells a story in itself. What information Phil Pearson has relayed to Russell Heseltine is questionable. The air handling unit delivery situation is an issue. What hasn't helped is that Brycol are down the road from Portsmouth doing another site and had all the headline kit on site within three weeks.
>
> To cap it all off Russell Evans was also in attendance too!"

Brycol, which, as I have noted, was a competitor of Mechanical, was working on a nearby TKM project. It had apparently arranged for all the equipment needed for that project to be on site in good time. Mr Evans was Mr Heseltine's line manager and TKM's Director for Europe.

58. On the same day, Mr Jamieson emailed Mr Heseltine with a programme showing when work would be completed. The email was copied to Mr Unwin and Mr Bond and concluded:

> "I will pass on your comments to Chris regarding working for TJX but I can assure you that TJX are a valued client and we certainly don't want to lose your business."

59. On 1 August Mr Bond emailed Mr Heseltine, copying in Mr Unwin:

> "It's unfortunate that I'm on holiday at this time but please rest assured that we will collectively give our full attention to getting this job sorted out in the manner that you are used to. I too am disappointed with our performance on this one.
>
> As I mentioned previously. I am back at work on Friday & can be available to meet you anywhere in the country to discuss these issues to ensure it does not happen again. Please let me know where/when we can meet?"

Mr Bond reported to Mr Unwin on the same day that he had spoken to Mr Heseltine, who was "ok", and that they were meeting for a coffee on 5 August.

60. Also on 1 August Mr Bond emailed Mr Unwin asking for an update on the projects and reported that he understood that Mechanical had "a few issues around" because WFC's managing director had called him to express concern about the Dover Street project. Mr Bond offered to return early from his holiday, in fact as early as that evening, to help Mr Unwin. Mr Unwin replied, asking Mr Bond to provide him with the details of the managing director's concerns, and added that there was no need for Mr Bond to return from his holiday and that he would try to do something about the concerns in Mr Bond's absence. Mr Unwin also provided Mr Bond with an update as Mr Bond had requested. Mr Unwin said:

> "TKM Edinburgh: PC Friday 5 August/Handover 12 August. Meeting on site tomorrow. [Steven Fletcher] said it "should" be ok for Friday. "Should" isn't good enough and he's been reminded that Russell Heseltine will be over this one like a rash no doubt."

61. Although Mr Heseltine had apparently been "ok" on 1 August, on 2 August Mr Heseltine emailed Mr Jamieson and Mr Bond, copying in Mr Unwin:

> "My issue is that you have not achieved set dates within the project POW [(programme of work)].
>
> When I turned up at site 1 day before PC you had only 6 compressors on site sat on the floor with no mechanical fixing. (I was accompanied on site by the European director).
>
> **I want to understand why this is happening.**
>
> You had issues with AHU lead time in Colne.
>
> You have serious H&S issues [(health and safety issues)] with the ducting team in Edinburgh".

62. The TKM Edinburgh project ought to have been completed by 5 August.

63. On 8 August Mr Fletcher reported to the TKM Edinburgh project contracts administrator that the toilet soil pipe would be altered on 10 August. Gavin Pryor of Monaghans then contacted Mr Unwin to say that a two day delay was not acceptable. Mr Heseltine contacted Mr Bond the same evening, saying:

> "Will you please get involved and sort this one out please."

Mr Unwin responded shortly after to say that a plumber would be on site early the next day to make the alteration.

64. By the following day, 9 August, Mr Pryor was pressing Mechanical for an update on the progress of its work. Having considered Mr Unwin's response, Mr Pryor (copying in Mr Heseltine):

i) emailed Mr Unwin a photograph of the TKM Edinburgh plant room fans ("the Fans") and asked: "is this right?" The photograph showed two industrial fans, hanging from ceiling rods, the blades of which were unguarded;

ii) expressed his disappointment that a duct position had not been altered, because that had "been on the correction list for a number of weeks" and apparently he was only being told about this "a little late in the day".

Having seen the photograph Mr Unwin emailed Mechanical's sub-contractor:

> "Are the fans the finished product…risk of hands/arms/head being removed by any chance?!
>
> Guys, this is unacceptable!!"

He also made clear to Mr Fletcher, in an email copied to Mr Heseltine, that the absence of blade guards was not right at all and, to another correspondent, he described the fans as "an accident waiting to happen". Mr Heseltine replied to the email into which he had been copied:

> "John,
>
> Is there anyone actually on site supervising this installation.
>
> Hensall are acting like amateurs."

Mr Bond responded almost immediately that Mechanical was still having major problems with its ductwork sub-contractor, that Mr Unwin would visit TKM Edinburgh the following day and that the Fans installation had been "totally unacceptable".

65. Mr Heseltine also emailed Mr Bond the same day, copying in Mr Unwin, informing Mr Bond that TKM Edinburgh would be cleaned the following day and that the cost of that would be passed on to Mechanical.

66. Mr Unwin and Mrs Barlow also exchanged emails the same day. Mr Unwin confirmed that "things [had] got worse" and that they were past being sorted, so that Mechanical would have to begin a damage limitation exercise.

67. Later that day Mr Unwin emailed Mr Fletcher:

> "To say I'm pissed off would be a major understatement.
>
> We need to fully review this on your return from leave and discuss what follows in more depth.
>
> I have to say the management of this on the run in to the end of the job has been questionable. Without putting too fine a point on it the hint to get your arse up there last week when it was clear that things were not going to plan was ignored and this is where we are now. I would have gone myself but was unable to

> do so. I will be going tomorrow but the damage has already been done.
>
> I have bitten my tongue regrettably up to now but the sight of the fans left like that are disgusting. This is not amateur, it's the lowest of low Sunday league standard!
>
> I am usually reasonably diplomatic under such circumstances and would try and support the team where ever possible. I can't do here...it really is a poor showing and probably the most important client we have is calling us amateur.
>
> I don't want excuses about who should have done what and when and who has let who down. It is way passed that. It is down to Hensalls to manage the job…"

68. Mr Unwin reported, including to Mr Bond, the next day, 10 August, that "the fans are running but sound like a plane ready for take-off. They are moving on the drop rods so may need some more restraint…"

69. Monaghans issued a non-completion certificate to Mechanical in relation to the TKM Edinburgh project on 15 August. The certificate confirmed that Mechanical should have completed its work by 5 August but, having failed to do so, practically completed its work on 12 August.

70. There is no reference in the contemporaneous documentation to the Aldwych sprinkler system being made fully operational before an email, dated 15 August from a building control surveyor, who wrote that he had "been unable to find any reference to the alterations carried out to the sprinkler system". It appears that the next day WFC's project manager asked "Steve" (probably, Mr Fletcher) for documentation relating to the sprinkler system.

71. Mr Unwin's mother died on 19 August.

72. It is Mr Bond's case that he and Mr Heseltine met on 19 August, although Mr Unwin believes that the meeting took place earlier.

73. Also on 19 August Mr Pryor contacted Mr Unwin and Mr Fletcher asking for their urgent help because it was being reported that the TKM Edinburgh store was far too warm and that Mechanical had been approached for help but had not responded. Mr Bond became aware of this email on 24 August.

74. On the same day (19 August) Mr Unwin and Mr Bond received a report which suggested that the Fans installation had been faulty. Mr Unwin later described to Mr Bond the contents of the report as a "big problem brewing up" and asked Mr Bond and his other correspondents if they had any thoughts about how to resolve the problem.

75. Also on 19 August Mr Maynard reported to WFC's project manager that the Aldwych sprinkler certificate was still to be issued "as [Honeywell] is outstanding orders for some VOs" (which I take to refer to variation instructions or orders). He said that he

was "getting the requested information from our sprinkler sub-contractor requested by Steve Fletcher to hopefully allow this matter to be resolved." Mr Fletcher responded to Mr Maynard the same day:

> "When am I going to receive the breakdowns I have requested on various occasions so the account can be agreed?
>
> This in itself is no reason why you can't issue the certification and is simply duress on your part. We have a legitimate query on your variations and have yet to receive your breakdowns.
>
> I will refer the matter to the Loss Prevention Council on my return to work next week as I'm sure they will take a very dim view of you holding us to ransom."

It appears, therefore, that the sprinkler system had not been made fully operational because of a dispute about payment between Mechanical and its sub-contractor. WFC's project manager, to whom this email exchange was copied, responded by email to Mr Maynard and Mr Fletcher the same day (copying in Nick Moffatt, WFC's contract director):

> "May I add the restaurant is open and has been for over a month – how the sprinklers haven't been commissioned as yet is not only very unprofessional but also negligent. Please can we sort this out as a matter of urgency."

Mr Maynard replied that "once the orders are received the system will be filled and commissioned". Mr Fletcher responded:

> "How many times do I have to give you instructions for the variation works?
>
> You have had them numerous times!"

Perhaps somewhat surprisingly, Mr Fletcher then sent a further email that day to Mr Maynard:

> "I have never been advised the system has been left unfilled. In point of fact I have been given test certificates and you have quoted for a drain down in one of your last variations (suitably instructed).
>
> Are you telling me you drained the system completely and then left it that way despite you having worked under an instruction for the variation to drain and refill the system?
>
> You need to issue whatever certification is outstanding and ensure the system is fully operational without any further delay.
>
> I will be back in the office on Monday. I need an urgent meeting with you over this account…"

The dispute between Mr Fletcher and Mr Maynard about whether Mechanical had issued the necessary variation orders then continued by way of email exchanges that day. On the evening of the same day, Mr Moffatt intervened by sending an email to Mr Bond:

> "FYI.
>
> After 5 weeks of trading, the sprinklers are not even filled???
>
> This is frightening!
>
> Can you get this sorted immediately as I can't think what will happen if someone finds out about this."

76. Early the next morning, Mr Bond asked Mr Fletcher to report to him about the state of the sprinkler system. Mr Fletcher reported that the fact that the sprinkler system had not been filled, and so was non-operational, had only come to light the previous day and was "a complete surprise". The following day, a Sunday, Mr Moffatt sent an email to Mr Maynard, which was copied to Mr Fletcher and to Mr Bond, which said:

> "I am astonished you have all chosen to put lives at risk in this way so you can both prove your points.
>
> Possibly the most disgraceful and negligent act I have seen."

On the evening of the same day, Mr Bond emailed Mr Maynard:

> "We must have a full system by close of play Monday [(the next day)].
>
> This situation is…frightening and the consequence of leaving this empty is criminal in my opinion!"

This was the first email into which Mr Unwin was copied.

77. Mr Unwin had been at Mechanical's premises briefly on that Sunday (21 August). Mr Bond texted Mr Unwin that evening asking for a meeting with him the following day. Mr Unwin explained that he could not attend the meeting because he was registering his mother's death the following day.[3]

78. On 22 August one of WFC's quantity surveyors expressed the view that "Honeywell are being totally unreasonable in the way they are conducting themselves and requesting authorisation on extortionate variation costs". On the same day, 22 August, Mr Moffatt wrote to Mr Maynard, Mr Fletcher and Mr Bond:

> "How can we attend to this without exposing ourselves to the fact that the system is not live??"

[3] This was Mr Unwin's evidence. He also gave evidence that he returned to work on 23 August and that he and Mr Bond met on 25 and 31 August. Mr Unwin was not cross-examined about these matters.

Mr Maynard replied suggesting it could be reported that "a return visit is required to carry out witness testing, as this was not possible at the time of project completion works". It is not disputed that that was untrue. On the same day, Mr Moffatt email Gary Lohan of Aldwych to inform him that Mr Maynard had "asked to call into site early tomorrow morning [(23 August)] to carry out witness testing on the recent installation". This was the first email relating to the unfilled sprinkler system which appears to have sent to an Aldwych representative.

79. The meeting between Mr Bond, Mr Holroyd and Mr Radcliffe to discuss Mr Bond's purchase of Mechanical's premises was scheduled for 23 August but was cancelled at short notice, Mr Radcliffe explained in an email, "due to pressing business issues that need attention". When Mr Holroyd asked Mr Bond, on 23 August, if everything was OK, Mr Bond replied:

> "Ok but having problems with Steve Fletcher and John Unwin not performing."

80. Mr Unwin returned to work on 23 August. Mr Bond had been asked the previous day to ensure that a gas solenoid was fitted on an unrelated project, at the Everyman Cinema in Harrogate. Mr Bond asked Mr Unwin whether it was being fitted that day, 23 August. Mr Unwin said that he was trying to arrange that. Mr Bond then sent Mr Unwin an email, in which he asked: "Need me to do anything. I've got an hour before meeting", to which Mr Unwin replied immediately: "No it's ok thanks. On it now".

81. Mrs Barlow had engaged Mechanical's human resources consultant by this time to advise about how Mr Fletcher's employment might be terminated. Having informed Mr Bond by email about what the consultant had advised, she concluded that she would give him a call later that day when Mr Unwin was not around.

82. Some work to the Aldwych sprinkler system was done on 23 August but Blue Shield needed to return the next day.

83. The sprinkler system was eventually filled on 24 August.

84. Mr Fletcher was suspended from work on 24 August with immediate effect, according to Mr Bond on the ground of gross misconduct because the Aldwych sprinkler system was allowed to remain unfilled; although the minutes of the suspension meeting suggest that Mr Bond was concerned about problems on other projects managed by Mr Fletcher which had damaged Mechanical's reputation.

85. At 11:43 the same day, 24 August, Mr Bond emailed Mr Maynard to tell him that the a Blue Shield engineer needed to return to Aldwych because the sprinklers were "dumping water into the restaurant". The discharge of water had occurred because a coupling had failed and so leaked water when the system was filled. Mr Bond also arranged for Mr Levenston to visit Aldwych to investigate and report.

86. Also on 24 August Vijaykumar Shah, from the company which had designed Milos' air conditioning system emailed Mr Braham (copying in a number of recipients, including Mr Unwin):

> "…We have requested AHU control on main BMS via back net over IP which hasn't been done correctly I believe…
>
> The problem need resolving between Hensall sub-contractors Sovereign Air…and main building BMS contractor…"

Mr Unwin replied the same day explaining that Sovereign Air Movement Ltd. was not Mechanical's sub-contractor. Rather, it was employed directly by Milos. Mr Shah appears to have accepted this. Mr Unwin also offered to arrange for the "BMS guys" to visit the restaurant to assist with a number of other issues to which Mr Shah had referred in his email. Mr Shah responded that this would be "useful".

87. On 25 August there was a near miss incident (a recordable health and safety incident) at Dover Street. A unistrut fell through a hatch from 8 metres height narrowly missing an engineer. Mr Levenston investigated and prepared a near miss report, which was forwarded to Mr Bond, Mr Unwin and Mrs Barlow, in which he recorded that there were too many people in the area of the incident "not taking due care and attention".

88. Mr Unwin and Mr Bond met on a site that day. I understand them to have met at Leeds Victoria Casino; another project in which Mechanical was involved.

89. On 28 August Mr Heseltine appears to have been informed that one of the Fans at the TKM Edinburgh store was collapsing. Alex Wileman of TKM emailed Mr Bond the same day, copying in Mr Heseltine:

> "Get someone there urgently please…
>
> This is unacceptable."

90. In fact, it appears that one of the ceiling rods from which one of the Fans hung failed. That may have been because the Fans were moving (perhaps because of a manufacturing fault (which is to what Mr Unwin attributes the incident)) and needed more restraint as Mr Unwin had suggested on 10 August. Mr Unwin contends that the incident could not have been predicted.

91. Mr Bond emailed Mr Wileman on 29 August, copying in Mr Heseltine:

> "I can only apologise for this situation.
>
> We were already in the process of having a third party change the way the fans were installed as I was unhappy with the current setup. They measured up last week and they are manufacturing new ductwork today and tomorrow morning and will be on site tomorrow pm ready to work through the night ready for store opening Wednesday am.
>
> I am having an internal review as to how the ductwork sub-contractor used on Edinburgh has fallen below our acceptable standard of workmanship.

> I am personally embarrassed about this situation and will deal with it swiftly and surely to ensure this or anything like it never happens again."

Mr Unwin emailed Mr Bond the same day, asking: "Can this get any worse?"

92. Mr Fletcher's employment with Mechanical was terminated on 30 August.

93. Mrs Barlow reported to Mr Unwin that she first knew of the proposal to terminate Mr Unwin's employment on 30 August.

94. The Fan was repaired overnight on 30 August.

95. Mr Unwin and Mr Bond met on a site on 31 August.

96. Mr Braham emailed Mr Unwin on 31 August asking when the BMS contractor could visit Milos. Mr Unwin replied the same day that the "controls engineers" would visit the following Monday, 5 September (three weekdays later). There is nothing to suggest that Mr Braham or anyone at WFC was troubled by this.

97. Mr Unwin was on leave on 1 September, to prepare for his mother's funeral the next day. 2 September was a Friday.

98. Mr Bond appointed Mrs Barlow as an A Director of the parent company on 2 September. Mr Unwin first knew of Mrs Barlow's appointment at his meeting with Mr Bond on 5 September.

99. Mr Unwin was called to a meeting with Mr Bond and Mrs Barlow at 8:45 a.m. on 5 September ("the September meeting"). What happened at that meeting is in dispute. It appears that a solicitor at Shulmans LLP ("Shulmans") (Mechanical's solicitors and Mr Bond's former solicitors in this case) had prepared a script ("the Script") for Mr Bond to read to Mr Unwin. There is a dispute about whether Mr Bond read the Script. The Script was in two parts. The first part dealt with why Mr Unwin was being given 3 months' notice of the termination of his employment and why, in the meantime, he was being put on garden leave. The second part dealt, amongst other matters, with the disposal of Mr Unwin's shares in consequence. The Script describes the question of the ownership of Mr Unwin's shares as a separate issue The first part read:

> "Allison is joining me at this meeting as matters have come to light relating to the Company's business which have raised a concern. As a consequence, and to ensure the Company is represented, I exercised my right under the Articles of Association to appoint Allison as an "A" director.
>
> We have discussed the recent challenges the Company has faced.
>
> This includes, in part:
>
> > - Health and Safety issues on site. A recent major breach of health and safety is the sprinkler system at 1 Aldwych.

> - Quality control and inspection processing. A recent example of this is the poor workmanship at TK Maxx Edinburgh which has resulted in a fan falling from its brackets.
>
> - Poor management of project managers leading to above failings.
>
> - Poor working relationships with subordinates.
>
> - Poor working relationships sub-contractor.
>
> According to our customers, this has damaged the Company's reputation. Were matters to continue we would lose revenue.
>
> Unfortunately the conclusion we have come to is that your position is untenable. it is with regret, therefore, that I'm confirming the Company has decided to give you notice to terminate your employment.
>
> Under your contract of employment we are required to give you 3 months' notice of your termination. The Company is exercising its right to put you on garden leave for this period…"

Minutes of the September meeting were produced. Their accuracy is disputed. They do not record that Mr Bond set out any particulars complaints about Mr Unwin's performance. Rather, they record Mr Bond as saying:

> "…there was no easy way of saying this but events had happened over the last few months which was detrimental to the continuation of the business and had no other choice but to make changes within the business otherwise there would be no business left [and] that due to the recent issues within the business HMS' reputation had been damaged and that changes had to happen. Therefore [Mr Unwin's] employment would be terminated with immediate effect."

They record Mrs Barlow as saying that she thought that Mr Unwin had not acted as a contracts director. What is not in dispute is that Mr Unwin was informed at the September meeting that his employment with Mechanical was being terminated.

100. Following the meeting Mr Unwin received a letter, signed by Mr Bond, which said:

> "To confirm our discussion today, the Company have had to take the unfortunate step of giving you 3 months' notice of the termination of your employment under Clause 3.2 of your contract of employment.
>
> The reason for the dismissal is your conduct and poor performance relating to recent projects you were directing. This has resulted in, among other matters, damage to a customer's

> property and the damage to the Company's reputation as demonstrated by concerns raised with the Company by those customers."

The letter ("the termination letter") also informed Mr Unwin that he could appeal the decision within 7 days, but noted that who would hear the appeal would require further consideration because of "the small size and low level of administrative resources in the company". Mr Unwin received a share transfer notice and a form to resign his directorships (which also contained a waiver of liability) at the same time.

101. Mr Bond emailed Mr Heseltine, Mr Wileman and Mr Evans at TKM the same day, informing them that Mr Unwin was no longer "actively engaged in the business". His email continued:

> "I have been personally devastated by some of our recent performances on your projects & I hope that you see from this that I value your business greatly & have acted swiftly & decisively to ensure that my core principals of quality of service & high standards of workmanship are brought back into the business.
>
> I hold myself equally responsible for these failings & will now work hard to win back your trust & hope to continue as one of your preferred contractors for the long term.
>
> Please be reassured that the team I am left with is very capable & experienced. I have however identified that our main failings were:
>
> - A lack of support staff for our Project Managers which results in them being overstretched.
>
> - Slow mobilisation & selection of project labour & sub-contractors due to the above.
>
> - Late procurement of plant items due to the above.
>
> I am in the process of changing the way we operate & will restructure internally to ensure that our Project Managers have more internal support staff & that our delivery team is more robust & efficient."

Mr Bond sent the same email to Mr Howle (WFC's managing director) and Mr Moffatt the following day and to Ms Smith on 12 September.

102. Mr Unwin's solicitors, Chadwick Lawrence LLP ("Chadwick Lawrence"), wrote to Mr Bond on 13 September asking him to provide details of the allegations contained in Mechanical's 5 September letter.

103. On 15 September Ms Smith forwarded her email exchange with Mr Unwin about the relocation of the air conditioning unit at VA Tower Bridge to Mr Bond.

104. On 16 September Chadwick Lawrence put Mr Bond on notice that Mr Unwin had a claim against him for a breach of clause 19 of the shareholders' agreement. They also wrote that Mr Unwin intended to have no further involvement with Mechanical or the business more generally and that he resigned his directorships.

105. On 22 September Shulmans replied to Chadwick Lawrence's letter. They identified Mechanical's complaints as relating to the six projects to which I have already referred. In fact the particular allegations are repeated almost verbatim in the Amended Defence. Shulmans argued that, by stating, through Chadwick Lawrence, that he intended to have no further involvement with Mechanical, Mr Unwin was in repudiatory breach of contract and they accepted (or purported to accept) his repudiation on Mechanical's behalf. They indicated that, as a result, an Obligatory Transfer Event, within the meaning of article 7.1 of the parent articles, had occurred and that Mr Unwin was deemed to have given a Deemed Transfer Notice to Mechanical.

106. It is not disputed that, on 22 November 2016, Mr Unwin's shares were transferred to Mr Bond at their Issue Price.

107. In due course, Mr Unwin began his claim.

Mr Unwin's claim

108. Mr Unwin claims that Mr Bond's decision, on 5 September 2016, to terminate Mr Unwin's employment with Mechanical (or to bring that about) was in breach of clauses 19.2 and 19.3 of the shareholders' agreement; in particular, in breach of Mr Bond's duty of good faith.

109. Mr Unwin claims that, by late August 2016, Mr Bond had decided that he wanted to re-acquire, otherwise than at Fair Value, Mr Unwin's 20% shareholding in the parent company that he had sold to Mr Unwin in September 2011. Mr Unwin claims that Mr Bond knew about the terms of the parent articles and, in particular, that, if he was to re-acquire Mr Unwin's shares otherwise than at Fair Value (and so at the Issue Price or some negotiated price less than Fair Value), he had to act in good time before 19 April 2017 and, in particular, that Mr Unwin's employment had to be terminated in good time before that date.

110. Mr Unwin claims that Mr Bond did not act in good faith (and was in breach of clauses 19.2 and 19.3 of the shareholders' agreement) in four ways;[4] namely:

    i) by using his position to bring about the termination of Mr Unwin's employment in Mechanical not for the stated reasons but for the ulterior purpose of acquiring Mr Unwin's shares otherwise than at Fair Value;

[4] In fact, Mr Jory pleaded a fifth way in the Amended Particulars of Claim (at paragraph 53(vi)); namely, that Mr Bond allowed Shulmans to contend, in a letter dated 22 September 2016, that Mr Unwin was in repudiatory breach of his employment contract. This was not a point which Mr Jory pursued at the trial. So, for example, in his skeleton argument Mr Jory focused on "the consequences of Mr Bond's breach of duty of good faith towards Mr Unwin on 5 September 2016". Mr Jory also accepted, rightly in my view, that it was the events of 5 September 2016 (not Shulman's later letter) which might have caused Mr Unwin a loss (see, for example, paragraph 44(ii) of Mr Jory's skeleton argument, paragraph 60(i)(a) of the Amended Particulars of Claim and the final sentence of paragraph 113 below).

ii) by appointing Mrs Barlow as a statutory director of the parent company "for a collateral purpose as part of the plan…to acquire Mr Unwin's shares at less than…Fair Value";[5]

iii) by terminating (or bringing about the termination of) Mr Unwin's employment:

a) on the first day Mr Unwin returned to work after his mother's funeral;

b) without any prior warning to Mr Unwin;

c) in circumstances where Mr Bond caused (or allowed) Mechanical to act without a board resolution (because, in fact, Mrs Barlow was not a director of Mechanical) when Mechanical could only act by a board resolution;

d) without any prior notice of the matters said to be the basis for the decision to terminate Mr Unwin's employment;

e) without providing details, at the 5 September meeting, of Mr Unwin's conduct and poor performance which were said to merit the termination of his employment;

f) without allowing Mr Unwin a proper opportunity to challenge or otherwise address those matters;

g) at the same time as Mr Bond told Mr Unwin that Mr Unwin had to offer his shares for sale at the Issue Price;

and then publicising the fact that Mr Unwin was "no longer actively engaged within the business", so that Mr Unwin could not, in practice, continue being employed by Mechanical, even if an appeal against the decision might have otherwise been successful, and so embarrassing Mr Unwin and compelling him, in practice, to accept that his employment was terminated;

iv) by providing (or causing Mechanical to provide) the 5 September correspondence to Mr Unwin.

111. Mr Unwin contends that the manner in which his employment was terminated, as set out in sub-paragraph (iii) above, does not only amount to a breach of clauses 19.2 and 19.3 of the shareholders' agreement. The matters set out in that sub-paragraph also help to establish Mr Bond's bad faith motivation, he argues.

112. It is part of Mr Bond's pleaded case[6] that Mrs Barlow was appointed a statutory director of Mechanical on 2 September 2016. Mr Unwin contended that Mrs Barlow was not appointed a statutory director of Mechanical on 2 September. Mr Unwin contended that Mr Bond caused or permitted Companies House to backdate Mrs Barlow's appointment to that date. In support of this contention Mr Unwin relied on a number of matters; namely:

[5] See paragraph 53(ii) of the Amended Particulars of Claim.
[6] See paragraph 8 of the Amended Defence which is supported by a statement of truth signed by Mr Bond.

i) it was not suggested, at the September meeting, that Miss Barlow had been appointed a director of Mechanical;

ii) she was not appointed a director in accordance with Mechanical's articles in particular.

It is Mr Unwin's contention that Mr Bond's false claim that Miss Barlow was appointed a director on 2 September 2016 and the backdating of her appointment were designed to disguise Mr Bond's plan to force Mr Unwin to sell his shares at their Issue Price rather than at Fair Value.

113. Mr Unwin claims that, because of Mr Bond's breach of clauses 19.2 and 19.3 of the shareholders' agreement, he has suffered a loss equivalent to the difference between the Fair Value and the Issue Price of his shares. At trial, it was effectively agreed that, because of the events of 5 September 2016, and having regard to the parent articles, Mr Unwin became compelled to offer his shares for sale at a price of £14,200 (the Issue Price).

114. By the Amended Particulars of Claim, Mr Unwin also claims four months' salary and the loss of entrepreneur's relief. In closing, Mr Jory confirmed that Mr Unwin does not continue to claim the loss of entrepreneur's relief.

Mr Bond's defence

115. Mr Bond contends that he did not act in bad faith (and that he was not in breach of clauses 19.2 or 19.3 of the shareholders' agreement). He claims that what motivated him to terminate Mr Unwin's employment was Mr Unwin's poor performance (or poor performance as perceived by Mechanical's customers) in connection with the six projects to which I have referred and for which Mr Unwin was responsible.

116. Developing this case, Mr Bond complains that:

i) completion of Mechanical's work at TKM Portsmouth was delayed;

ii) completion of Mechanical's work at TKM Edinburgh was delayed;

iii) the Fan fell after Mr Unwin had inspected it;

iv) on 19 August 2016 Mr Heseltine discussed with Mr Bond Mr Unwin's poor performance and made clear if that, if Mechanical did not change the way it managed its projects, it would be removed from TKM's preferred supplier list. In a Part 18 Response, the statement of truth of which was signed by Mr Bond's solicitor, Mr Bond asserted that Mr. Heseltine's comments were reported both to Mr Unwin and, separately, to Mechanical's board (although how that can be, when the board comprised Mr Bond and Mr Unwin, is not clear to me);

v) Mr Unwin negligently allowed Aldwych's sprinkler system to be installed incorrectly and negligently allowed it to remain unfilled for six weeks;

vi) Aldwych's sprinkler system was eventually filled negligently causing a flood;

vii) there were (at the time to Amended Defence was filed) "ongoing problems" at Milos;

viii) Mr Unwin took 12 months to attempt the final account in relation to the VA Tower Bridge project;

ix) a complaint was received, in relation to the VA Tower Bridge project, that Mr Unwin did not respond substantively (to what, is not clear from the Amended Defence);

x) Mr Unwin did not ensure that Mechanical received a confirmed order value in relation to the Dover Street project even though this omission was drawn to his attention on several occasions;

xi) "Mr Unwin appears to have abdicated responsibility for managing [the Dover Street] project to Mark Levenston".

117. Mr Bond claims that his decision to act was also influenced by what happened at the Primark department store in Newcastle and the Southgate Leisure Centre, although quite what is said to have happened was never made clear at the trial and Mr Unwin was not cross-examined on these matters.

118. Broadly, Mr Bond claims to have acted as he did to reverse the reputational damage Mechanical had suffered as a result of problems which had arisen in relation to the six projects I have identified and to prevent a potentially catastrophic loss of the customers' business in circumstances where the customers, in the case of each of those projects, provided Mechanical with a substantial part of its turnover and, indirectly, the parent company with a substantial part of its profit.

119. Mr Bond contends that the termination of Mr Unwin's employment was lawful because he and Miss Barlow had the authority to terminate the employment of Mechanical's employees (whether or not Miss Barlow was a statutory director of the company). As I have noted, Mr Bond pleaded that Mrs Barlow was appointed a statutory director of Mechanical on 2 September 2016. Shortly after the conclusion of the trial, and having taken instructions at my request, Miss Linklater emailed me as follows:

> "On the basis of the minutes of the meeting and the script [to which I make further reference below], [Mr Bond] accepts that there was no attempt to appoint Allison Barlow as a director of Mechanical on 2 September 2016…[E]veryone regarded [Mrs Barlow] as acting as a director at that stage (although not a statutory director)…"

This concession was rightly made.

Witnesses

120. Mr Unwin was the only factual witness in support of his case. Mr Bond gave evidence in support of his case and called, as factual witnesses, Mr Heseltine, Mr Moffatt, Mr

Levenston and Mr Pearson, who was TKM's project manager on the TKM Portsmouth project.

Mr Unwin

121. Mr Unwin described Mr Bond, in his witness statement, as "a controlling character" who "likes to get his own way". Mr Unwin described himself as being "more methodical and structured", which allowed him "to focus on the detail in the delivery of projects". He described a business, which was run informally, in which both he and Mr Bond supervised projects and in which project staff reported to both him and Mr Bond. Mr Unwin said that his relationship with Mr Bond deteriorated in August 2014, when Mr Unwin learned of Mr Bond's proposal in relation to BIM. He summarised the 2014 email correspondence from Mr Bond from which I have quoted as amounting to allegations that he had performed poorly since he was first employed by Mechanical in 2009.

122. Mr Unwin explained, in his witness statement, the toll his mother's illness took on him and on his wife. He said that, following his mother's move to a care home, his wife had to visit her every day to make sure that she ate. He also visited his mother every day. Understandably, Mr Unwin described the time when his mother was ill as a very difficult, upsetting, stressful and painful one. He explained that he carried on working however. He said:

> "It was a busy period for the business and I did not feel that I could afford to take time-off…In the circumstances, I soldiered on…"

He said that, following his mother's death, he had passed "breaking point", as, he suggested, Mr Bond appreciated.

123. Mr Unwin explained that he was only given twenty minutes' notice of Mr Bond's decision to suspend Mr Fletcher. He said that he objected to Mr Bond's decision because it was ill-timed. He did not suggest, at the time or in evidence, that Mr Bond did not have the authority to suspend Mr Fletcher. He accepted that Mr Bond made the decision about whether an employee's employment with Mechanical was terminated.

124. Mr Unwin's recollection of the September meeting was that Mr Bond told him that Mrs Barlow was attending to take notes and that she did not actively participate in the meeting. He said that, during the meeting, Mr Bond confirmed that no customers had expressed any concern about his performance. He said that Mr Bond was unable to give him reasons for the decision to terminate his employment.

125. Mr Unwin's case theory (that is, why Mr Bond terminated his employment) is succinctly set out in paragraph 73 of his witness statement as follows:

> "I believe that I was ambushed by [Mr Bond]. He had not provided me with any prior notice of the [September] meeting and he had not given me the opportunity to address any allegations made against me. I believe that the documents handed to me demonstrated [his] true intentions…, namely that

> he wanted me to transfer my shares to him for £14,200. That was £35,800 less than I had paid for them in 2011. I felt that [he] was picking up from where he left off in 2014 and wanted to take control of the company without being accountable to me."

126. In cross-examination Mr Unwin accepted that he was responsible for the delivery of projects and for the supervision of project managers who reported to him, although he said that he could only know if a project manager was performing poorly if he had information to that effect and that he could only resolve problems which had arisen on projects if project managers reported problems to him.

127. He asserted that he was not "the contracts director" in relation to the TKM Portsmouth project. He said that Mr Bond was responsible for that project, apparently because TKM's purchase order (which is in the papers, unlike the TKM Edinburgh project purchase order) was sent to Mr Bond and because Mr Heseltine tended to contact Mr Bond when he wished to complain about something. He did say that Mr Jamieson should have reported any problems with the project to him.

128. He accepted that he was responsible indirectly for ensuring that the Aldwych sprinkler system was fully operational but added that Mr Bond had the final responsibility for health and safety matters.

129. Even though Mr Unwin accepted that he was responsible for supervising Mechanical's project managers, when he was cross-examined about the TKM Edinburgh project, he contended that he was responsible for only managing, but not supervising, Mr Fletcher. Mr Unwin did not explain what the difference was between management and supervision. He later accepted that, in normal circumstances, he would have been responsible for any delay in the completion of the TKM Edinburgh project for which Mechanical was responsible.

130. He acknowledged that TKM was a particularly valuable client and, he said, WFC was another valuable client.

131. I was struck by Mr Unwin's mastery of the documents during his cross-examination.

132. It is sometimes difficult for witnesses who feel strongly about a case to be dispassionate historians. Having considered all of Mr Unwin's evidence, particularly against the background of the contemporaneous documents, I have concluded that he was not a dispassionate historian who was always recalling rather than reconstructing events.

133. Mr Unwin does feel strongly about the case. He described Mr Bond's conduct as an ambush. For reasons I will explain, I reject Mr Unwin's case theory. However, it is possible that, in some instances, it has influenced how Mr Unwin now perceives and recounts events. It may explain why Mr Unwin suggested that Mr Bond's primary goal in 2014 was to re-acquire the shares in Mechanical which he had sold Mr Unwin. That is not supported by the email exchanges from that period. Nor is it supported by the transcript of the 26 August 2014 meeting which Mr Unwin secretly recorded. Nor, in the light of the same emails and transcript, is it fair or wholly accurate to claim, as Mr Unwin did, that Mr Bond claimed, in 2014, that Mr Unwin had performed poorly

since 2009. If Mr Unwin intended to suggest in his witness statement that he was always unhappy about Mr Bond's intentions in relation to BIM, as it appears to me he intended to do, that too would not be wholly accurate.

134. In other instances, Mr Unwin's clear familiarity with the documents may have influenced his evidence. It does not follow that, because TKM happened to send its purchase order for the TKM Portsmouth project to Mr Bond, that Mr Bond, and not Mr Unwin, was responsible for supervising the project. Nor does it follow that, because Mr Heseltine complained to Mr Bond, Mr Bond was responsible for the TKM Portsmouth project. TKM was Mechanical's largest customer. It is unsurprising that, if Mr Heseltine wished to ensure that TKM projects got the attention he felt they deserved, he complained to Mechanical's managing director. Mr Unwin was Mechanical's contracts director. He acknowledged, during the 26 August 2014 meeting, that he should have oversight of projects. He acknowledged to Mr Russell that he was responsible for delivering projects and for managing project engineers. He accepted in cross-examination that Mechanical's project managers reported to him. He accepted that Mr Jamieson reported to him. Mr Jamieson was heavily involved in the TKM Portsmouth project. Mr Jamieson did report to Mr Unwin about Mr Heseltine's unsatisfactory visit to TKM Portsmouth on 28 July. Mr Jamieson did not report that to Mr Bond (although I accept that that might have been because Mr Bond was on holiday at the time). Considering all the evidence, including that of Mr Pearson, I am satisfied that it was Mr Unwin's responsibility to supervise the TKM Portsmouth project.

135. I also formed the impression that, perhaps influenced by his case theory, in cross-examination Mr Unwin sought to distance himself from any poor work for which Mechanical was responsible. That might be why he claimed that he was managing, rather than supervising, Mr Fletcher, for example. As I have said, Mr Unwin did not explain the difference between management and supervision to me but, if there is a difference, bearing in mind the other evidence, including that to which I have just referred, I am satisfied that part of Mr Unwin's role was to supervise Mr Fletcher on the TKM Edinburgh project.

136. Because Mr Unwin was not a dispassionate historian, I approach his evidence with caution if it is not supported by contemporaneous documents.

Mr Bond

137. Mr Bond described Mr Unwin, in his witness statement, as "a business partner".

138. Mr Bond's witness statement developed his case theory, as pleaded, at some length. For example, he says of Mr Fletcher, in relation to the Aldwych sprinkler system:

> "Steve was criticised by other contractors…Dave Maynard…, Nick Moffatt and Harry Schofield…for failing to provide instructions to allow for the sprinkler system to be filled with water.

> It was [Mr Unwin's] responsibility as contracts director to oversee and supervise Steve's work…"[7]

139. Explaining why he chose to terminate Mr Unwin's employment on the day Mr Unwin returned to work after his mother's funeral, Mr Bond said:

> "Unfortunately the dates on which the issues with all of [the] projects came to a head were all between July and August 2016 and I felt that in order to act in the best interests of [Mechanical], I had no alternative but to meet [Mr Unwin] as a matter of urgency upon his return to work, so I could take the necessary steps to dismiss him immediately…
>
> …I needed to meet with him urgently upon his return to work, given the significant risks that [Mechanical] was left open to as a result of his negligence…
>
> …[Mr Unwin's] errors were endemic and far reaching. I could not see how he could continue in employment with [Mechanical] given his failings and the real risk that [Mechanical] was going to lose its key clients…
>
> I acted in the best interests of the [group] when faced with problem after problem which…were the result of [Mr Unwin's] failings. I firmly believe that if I hadn't made the difficult choices that I did back then, [Mechanical] would have lost its key clients and may well not be in existence today."

140. Mr Bond also explained that TKM has been a particularly valuable customer of Mechanical because it pays, or at least permits Mechanical to invoice, for 50% of the full contract value of a project at its commencement, which is critical to cashflow.

141. He was more qualified in his witness statement than he had been in the Amended Defence, however, about the 19 August 2016 meeting he contends he had with Mr Heseltine. Of that meeting, he said:

> "…Russell warned me that if [Mechanical] did not make major changes, then it would lose the TK Maxx account."

142. He also said that Mr Unwin's dismissal "acknowledged [his] part in the failures at TK Maxx Portsmouth and…Edinburgh, as well as…Aldwych" and, to similar effect, that he, Mr Bond:

> "…had decided to seek advice around 24 August 2016 from the solicitors, due to the events at…Aldwych (and the flooding) and the meeting that I had with Russell Heseltine where I had promised to make significant changes within the business. My

[7] He did suggest elsewhere in his witness statement that the Aldwych sprinkler system was not fully operational because Mr Fletcher was arguing with Blue Shield about money. That is not entirely true, as the contemporaneous documents show. The argument was with Honeywell, to which Blue Shield was sub-contracted.

> decision to dismiss [Mr Unwin] was cemented on 28 August 2016 when the fan fell from the hangars at…Edinburgh."

143. Mr Bond claimed in his witness statement that Mr Fletcher had been dismissed for gross misconduct and he repeated, in his witness statement, at least on a fair reading of it, that Mrs Barlow had been appointed a statutory director of Mechanical in September 2016.

144. Mr Bond made the following points in cross-examination.

145. When he and Mr Heseltine met on 19 August 206, Mr Heseltine was concerned about Mechanical's performance and told Mr Bond that he would have to make significant changes if Mechanical wanted to retain TKM's business. Mr Bond then had in mind that he had to deal with Mr Unwin's employment but he did not share this thought with Mr Heseltine. He accepted that Mr Heseltine did not criticise Mr Unwin and, indeed, that he and Mr Heseltine did not discuss Mr Unwin, and he acknowledged that Mr Heseltine probably did not know who Mr Unwin was.[8] He accepted that he did not report what Mr Heseltine had said to Mr Unwin, contrary to what was said in the Part 18 Response to which I have referred but, he said, that response was not intended to be false.

146. He met with Shulmans and Mr Holroyd before the August bank holiday weekend, which fell on 27-29 August 2016. Early in his cross-examination, Mr Bond said that he had prepared a list of his issues with Mr Unwin for that meeting. On the third day of his cross-examination, Mr Bond said, according to my note, that he had not prepared a list of Mr Unwin's poor performance by the time of the 5 September meeting. He then repeated that he did not have a sheet of paper on which were recorded his complaints about Mr Unwin.

147. He was asked about the termination of Mr Fletcher's employment. He said that he could not remember whether Mr Fletcher had signed a non-disclosure agreement.

148. Mrs Barlow was appointed a statutory director of Mechanical on 2 September 2016. He signed the necessary paperwork for this to happen which Shulmans had given him.[9]

149. He read from the Script at the September meeting. He said that he did not have any duty of good faith in mind at the meeting or at the time he decided that Mr Unwin's employment had to be terminated. However, he did say that he considered the shareholders' agreement with his advisors and that he always expected to do a deal with Mr Unwin.

150. He identified the projects which concerned him on 5 September 2016 as the TKM Portsmouth and Edinburgh projects and the Aldwych project.

151. Mr Bond needed a short, unplanned, break during his cross-examination because he became distressed when discussing his attempts to save the business and the jobs of Mechanical's employees. During that part of his cross-examination he struck me as being genuinely concerned about those employee's jobs and as having felt a real

[8] In fact, as the contemporaneous documents show, Mr Heseltine did email Mr Unwin on 9 August 2016.
[9] Whatever was the paperwork to which Mr Bond was referring was not in the trial bundle.

pressure to stop the business failing; although it was not clear to me whether his distress was more attributable to the damage suffered by the business because of the Covid-19 pandemic than to anything that had happened in 2016.

152. Considering all of Mr Bond's evidence, together with the contemporaneous documents in particular, I have concluded that Mr Bond too was not a dispassionate historian.

153. By way of example, he did not fairly portray, nor did he portray wholly accurately, the payment dispute which resulted in the Aldwych sprinkler system not being made fully operational. The truth of the matter is that Mr Maynard, on one side, had warned Mr Fletcher that the sprinkler system would not be made fully operational until he was satisfied that Mechanical would pay Honeywell for variation orders and, on the other side, Mr Fletcher had not appreciated what Mr Maynard was warning and he was objecting that he had insufficient information from Honeywell to satisfy himself of the amount Mechanical was liable to pay Honeywell. The part of Mr Bond's witness statement on this subject which I have quoted gives the false impression that Mr Maynard was an impartial judge of Mr Fletcher's conduct. It also gives the false impression that Mr Moffatt and Mr Schofield attributed the blame for the failure to make the sprinkler system operational only to Mr Fletcher. The contemporaneous emails establish that they blamed both Mr Maynard and Mr Fletcher for what had happened. Nor does the witness statement acknowledge that WFC's quantity surveyor described Honeywell's variation costs as extortionate.

154. A further example may be Mr Bond's claim that Mr Fletcher was dismissed for gross misconduct. I am satisfied that that Mr Fletcher's employment was suspended but that he then reached a settlement with Mechanical by which his employment was terminated and that he was not dismissed at all. If Mr Fletcher had been dismissed at all, when Mr Bond was asked, in cross-examination, whether Mr Fletcher had signed a non-disclosure agreement, he is likely to have answered that Mr Fletcher had not because he had been dismissed; particularly where, as here, there is no suggestion that Mr Fletcher ever intimated litigation. Mr Bond said, instead, that he could not remember whether Mr Fletcher had signed a non-disclosure agreement, which, in the circumstances of this case, is most consistent with Mechanical and Mr Fletcher having reached a settlement before any dismissal of Mr Fletcher.

155. On further careful reflection, I have also concluded that I should attribute no weight to Mr Bond's evidence unless supported by contemporaneous documents, except where that evidence is contrary to his interest.

156. As I have indicated, I asked Miss Linklater, at the conclusion of the trial, to take instructions about whether it remained part of Mr Bond's case that Mrs Barlow was appointed a statutory director of Mechanical on 2 September 2016. Having taken instructions she confirmed that that was not part of Mr Bond's case. I then asked her to take instructions about whether Mr Bond accepted that Mrs Barlow was not appointed as a statutory director of Mechanical on 2 September 2016 and that no attempt had been made to make that appointment then. I have quoted her email response and I have acknowledged that the concession contained in that email was rightly made.

157. However presented in Miss Linklater's email, Mr Bond's concession is clear. It is that there was no attempt to appoint Mrs Barlow as a statutory director on 2 September. That is contrary to Mr Bond's pleaded case, which is supported by a statement of truth he signed. That is contrary to his witness statement, which also contained a statement of truth and which he confirmed to be accurate in examination in chief. That is contrary to what he said in cross-examination.

158. Mr Bond also asserted, in the Amended Defence, that Mr Heseltine and he discussed Mr Unwin at their 19 August meeting. It was also asserted, in a Part 18 Response (it is reasonable to conclude, as I do, on Mr Bond's instructions) that Mr Bond reported that discussion to Mr Unwin. That is not true, as Mr Bond accepted in cross-examination (and, as it happens, as Mr Heseltine confirmed).

159. In fact, for reasons I shall explain, the outcome of no substantive issue turns on either of the two matters. That does not make Mr Bond's claims, from which he later resiled, any less troubling.

160. Throughout the litigation it ought to have been apparent that there was a significant issue between the parties about whether Mrs Barlow was appointed as a statutory director of Mechanical on 2 September and about whom and what Mr Heseltine complained on 19 August.

161. I acknowledge that, on occasions, a party can make an innocent factual error when pleading a case or making a witness statement which goes uncorrected, and that it does not automatically follow, in those circumstances, that a court must discount that party's evidence. However, Mr Bond's case on these two matters were not complex, was in Mr Bond's knowledge and was clearly set out in the statements of case (which were either supported by his own statement of truth or asserted on his instructions). In fact, Mr Bond was uniquely placed to know whether his case should be made. Mr Bond was the only person who might have attempted to appoint Mrs Barlow as a statutory director of Mechanical on 2 September. He ought to know whether he did make that attempt. Having claimed for so long that he did, he only belatedly accepted that he did not make any such attempt. He knew what Mr Heseltine had said at the 19 August meeting, which, on Mr Bond's account, was a crucial meeting and was, in my view, likely to have been remembered by him.

162. As it happens, the contemporaneous documents clearly establish why Mr Bond terminated Mr Unwin's employment, as I shall explain. As I shall also explain, they establish that none of the VA Tower Bridge, Milos or Dover Street projects weighed in Mr Bond's decision-making when he decided how to proceed in August and September 2016. In fact, the result would be the same even if some weight was attributed to Mr Bond's evidence. However, that Mr Bond nevertheless contended, during the litigation, that the VA Tower Bridge, Milos and Dover Street projects did influence his decision-making merely reinforces my view that the approach I will take to Mr Bond's evidence is the correct one.

Mr Heseltine

163. Mr Heseltine is responsible for overseeing the construction of new TKM stores across the United Kingdom, Northern Ireland, and the Republic of Ireland. There is no dispute that he was influential in deciding whether Mechanical received work from

TKM. He said that he was "very angry and disappointed" and embarrassed to discover the delay in Mechanical's work when he visited the TKM Portsmouth project. He said, in cross-examination, that he was ashamed by what Mr Evans saw when he took Mr Evans to visit the TKM Portsmouth store on 28 July 2016. He explained in his witness statement that the TKM Edinburgh project was a high profile project. He recounted the issues which had arisen on that and the TKM Portsmouth project, which are reflected in the contemporaneous documents. In relation to the TKM Edinburgh project, he expressed concern about the health and safety score, the workplace accident and that the work Mechanical had been contracted to do was delayed (which delayed other contractors completing their work and caused TKM to incur further costs) and caused the practical completion date to be missed. He said that, on projects in which he is involved, missing the practical completion date is rare. He expressed concern that the Fans were not initially fitted with guards and, in that context, described Mechanical as being "a complete shambles" and expressed concern about the "collapse" of one of the Fans.

164. Mr Heseltine said that poor performance by contractors reflected badly on his longstanding good reputation. A fair reading of his witness statement suggests that, in the summer of 2016, he was considering removing Mechanical from the list of TKM's approved suppliers. He also said that he told Mr Bond, at their 19 August 2016 meeting, which was to discuss the TKM Edinburgh project, that Mr Bond had to make changes because, if Mechanical continued to perform at a sub-standard level, it would no longer receive work from TKM.

165. He explained in cross-examination that he viewed Mechanical as Mr Bond's company and that, whenever he had a very serious issue with the company, he would raise it with Mr Bond, because Mr Bond owned Mechanical and was "the boss".

166. He said in cross-examination that, when he received Mr Bond's 5 September 2016 email informing him that Mr Unwin was no longer actively involved in the business, he attached no importance specifically to the termination of Mr Unwin's employment. He was happy, however, that Mr Bond appeared to be taking on board his concerns and taking steps to ensure that project managers were supported.

167. Mr Heseltine gave his evidence fairly. He did not present as someone whose aim was to advocate for a particular party. He did however present as someone who would have made it very clear to Mr Bond any dissatisfaction he felt about Mechanical's performance.

Mr Moffatt

168. Mr Moffatt dealt with the Milos project and the Aldwych project in his witness statement.

169. He suggested that Mechanical was late in engaging Honeywell as a sub-contractor for the installation of the Aldwych sprinkler system. There is no evidence to support this. In fact, it is not disputed by the parties that Honeywell's sub-contract was novated, from WFC, to Mechanical by agreement between WFC and Mr Bond.

170. Mr Moffatt was cross-examined at some length about his 22 August 2016 emails (i) to Mr Maynard, Mr Fletcher and Mr Bond in which he asked how they could "attend to

this without exposing [themselves] to the fact that the system [was] not live" and (ii) to Gary Lohan of Aldwych to inform him that Mr Maynard had "asked to call into site early tomorrow morning [(23 August)] to carry out witness testing on the recent installation".

171. Unfortunately, I had to adjourn the hearing shortly after Mr Jory began his cross-examination on the emails because it was clear that Mr Moffatt had difficulties connecting to the trial remotely, did not have access to the relevant part of the trial bundle (neither of which were his fault) and because he was not giving his evidence from a suitably quiet location.

172. When Mr Moffatt was first cross-examined about the first email, he effectively accepted that he wanted to conceal from the customer (Aldwych) that the sprinkler system had not been fully operational when the restaurant had been operating. It was not clear to me whether, on the following day, when his cross-examination continued, he was saying the same thing. I asked him some questions about the emails. He accepted, in response, that the first email read as a request for advice about how the cover up that the Aldwych sprinkler system had not been fully operational when the restaurant was open. He also accepted that Mr Maynard's response (which was to suggest that Mr Moffatt should say that a further site attendance was required for witness testing) was a suggestion about how to cover up the truth. He acknowledged that he then communicated that suggestion to Mr Lohan of Aldwych, but he suggested that Mr Lohan already knew the truth and the purpose of his email to Mr Lohan was not to cover up the truth from Mr Lohan.

173. Mr Moffatt said that he did not regard as significant that Mr Unwin had left Mechanical's employment. That particular fact did not affect whether WFC continued to contract with Mechanical. He did say, however, that the next project on which Mechanical worked after 5 September 2016, which he described as "Blackfriars", went well and was a very different experience to the Milos and Aldwych projects.

174. As Mr Moffatt acknowledged, a fair reading of his first 22 August 2016 email suggests that he was asking for advice about how to hide the truth about the Aldwych sprinkler system. Mr Maynard provided that advice by devising a lie (or at least a partial truth designed not to reveal that the sprinkler system was not fully operational and, in fact, was not filled with water) for Mr Moffatt to use, as Mr Moffatt effectively acknowledged. Mr Moffatt then deployed Mr Maynard's suggestion in an email to Mr Lohan. Had Mr Lohan already known the truth, as Mr Moffatt suggested, there would have been no need for Mr Moffatt to email him in the terms he did. Indeed, had Mr Lohan known the truth, he is likely to have been very perplexed when he received Mr Moffatt's email. There is no earlier email at all from Mr Moffatt to Mr Lohan. Most probably, Mr Moffatt sent his second email to Mr Lohan in order to hide from Mr Lohan the fact that Blue Shield had to return to Aldwych to fill the sprinkler system and to make it fully operational even though the restaurant had already been open for five weeks. What Mr Moffatt said to Mr Lohan was not the truth (or not the whole truth at least). Nor is Mr Moffatt's claim in cross-examination that Mr Lohan already knew the truth credible.

175. I recognise that it does not follow from the fact that Mr Moffatt was not wholly truthful to Mr Lohan that he was not giving truthful evidence. However, I do not accept that he told me the truth when he claimed that Mr Lohan already knew that the

sprinkler system had not been fully operational. In those circumstances I attach no weight to Mr Moffatt's evidence except where it is contrary to Mr Bond's interest.

Mr Pearson

176. Mr Pearson explained that he was told by Mr Bond that Mr Jamieson and Mr Guest were the points of contact for Mechanical on the TKM Portsmouth project. He was critical of Mechanical for not having ordered plant and equipment in good time, which delayed the project. He gave evidence about Mr Heseltine's visit to TKM Portsmouth on 28 July 2016. He said that Mr Heseltine "had a fit and proceeded to shout very angrily at everybody" (although, in Mr Pearson's case, this appears to have been after the visit, because Mr Pearson was not on site at the time). Mr Pearson said that Mr Heseltine described Mechanical's performance as bad and said that there were issues with Mechanical's performance on other sites. He confirmed that it was unusual for a practical completion date to be missed on a TKM project. He said that the TKM Portsmouth project was the only time he had had a serious problem with a sub-contractor. He added that the delay on the project, which he attributed to Mechanical, were the most serious he had experienced. He described the delay as "a big issue".

177. Mr Pearson gave his evidence fairly. He did not present as someone whose aim was to advocate for a particular party.

Mr Levenston

178. Mr Levenston described the Dover Street project customer as being demanding and said that that project was the second worst job he had been involved in. He said that he spoke regularly with Mr Unwin about the project, including about design, how to solve problems, procurement and sub-contractors, from March until August.

179. He was critical of Mr Unwin for allowing the plumbers who were Mechanical's sub-contractors on the Dover Street project to charge day rates. He explained that good project managers tend to agree a clear schedule of rates with sub-contractors because, if sub-contractors work on day rates, there is no incentive for them to work efficiently. He said that Mr Unwin promised to attend meetings but did not in the end, leaving him to represent Mechanical. He understood, however, that Mr Unwin's mother was ill at the time. He was critical of Mr Unwin for leaving him to address the workplace accident at Dover Street (when a unistrut fell). He said that Mr Unwin should have visited the site or sent someone senior to the site following the incident. Instead, Mr Unwin left him to deal with it, he said. He acknowledged, however, that Mr Unwin worked hard and was not entirely to blame for the problems encountered on the Dover Street project.

180. Mr Levenston had read his witness statement carefully; as he demonstrated when he asked to correct it. He gave his oral evidence thoughtfully. He acknowledged that he was very indebted to Mr Bond for supporting him in the development of his business. He reflected on questions before answering them. He did not pause before answering questions in order to formulate responses most favourable to Mr Bond. Rather, on many occasions, he paused before answering so that he could formulate an answer which was clearly very balanced. So, for example, he was critical of Mr Bond for not apparently noticing and acting on the fact that the Blue Shield hydrostatic test

certificate relating to the Aldwych sprinkler system was not witnessed. He repeatedly told me about what he perceived to be his own failings as a project manager, even though no-one, I understood, suggested that he performed that role particularly poorly. He clearly had given considerable thought to the qualities which a good project manager should have and he spoke enthusiastically of his work as a designer.

How come Mr Unwin's employment with Mechanical was terminated?

181. I have considered all the evidence to which I was referred and all the submissions made on behalf of the parties, in answering this question and in determining the other issues which need to be resolved. In the light of the conclusions I have already reached about the witness evidence, the contemporaneous documents are central to answering the question: how did Mr Unwin's employment with Mechanical come to be terminated? As it happens, and as I have already noted, the contemporaneous documents provide a clear answer, when considered uninfluenced by either party's case theory.

182. It was Mechanical's established and accepted practice that Mr Bond decided whether an employee's employment should be terminated, as in the case of Mr Fletcher, which Mr Unwin accepted. Further, when Mr Unwin defined Mechanical's senior managers' roles for Mr Holroyd in January 2016, he acknowledged that Mr Bond was responsible for recruitment. Whilst Mr Unwin objected to the decision to terminate Mr Fletcher's employment on the ground of bad timing, he did not suggest that Mr Bond did not have the authority to make that decision. I am satisfied, therefore, that Mr Bond did have the authority to decide whether Mr Unwin's employment should be terminated. I have to say that, although Mr Jory made submissions about the authority of an individual director in this case, the foundation of Mr Unwin's case is that the decision on 5 September 2016 to terminate his employment (that is, to give him three months' notice and to put him on garden leave in the meantime) had the effect of compelling him to transfer his shares. If Mr Bond had no authority to make the decision, I struggle to see how the decision could have had any effect. As it happens, because I have decided that Mr Bond did have sufficient authority, I do not need to consider the point any further.

183. To be clear, although Mr Bond had authority to terminate Mr Unwin's employment, it is a quite separate question whether Mr Bond had a good faith obligation in relation to that decision and, if he did, whether he acted in good faith.

184. It is not disputed in this case that Mr Bond made the decision that Mr Unwin's employment would be terminated. I am also satisfied that he persuaded Mrs Barlow to support that decision and that, by 5 September 2016, she had concluded that Mr Unwin's employment should be terminated. After all, she told Mr Unwin that he had not been acting as a contracts director, and there is no suggestion that she objected to the termination of his employment.

185. So why did Mr Bond decide to terminate Mr Unwin's employment?

186. Mr Bond had ceased to see Mr Unwin as a business partner by August 2014 (and suggested as much at the August 2014 meeting). Rather, he saw him as a senior employee who had performed well, so far, in the delivery of projects. Mr Bond saw himself, on the other hand, as the owner of the business and as the person who,

ultimately, made the decisions. He was driven by an entrepreneurial desire to be a successful businessman. His wish and plans to explore other business opportunities, to incorporate Topco, to buy Mechanical's premises and his wish to pursue Phase 2 of his corporate plans are consistent with that.

187. On 27 April 2016 Mr Bond learned that 50% of Mechanical's expected work for TKM had been lost and that Mechanical was in competition with Brycol for future work.

188. By 28 July Mr Heseltine was complaining to Mr Bond about the dangerous practices of Mechanical's sub-contractors on the TKM Edinburgh project and, by the following day, Mr Bond had learned from Mr Unwin that TKM's dissatisfaction with the sub-contractor was more wide ranging.

189. By the same time Mr Bond knew that Mr Heseltine, who could determine whether Mechanical got further TKM work, was furious about Mechanical's performance on the TKM Portsmouth project and that he had been embarrassed in front of Mr Evans. He also knew that Mechanical's competitor, Brycol, was performing considerably better. He understood, from Mr Jamieson's email of 29 July to Mr Heseltine, that Mr Heseltine had threatened that Mechanical would lose TKM's business (and, if that was not clear then to Mr Bond, Mr Heseltine made that point clearly at their 19 August meeting).

190. Within a few days, on 8 August, Mr Heseltine felt compelled to contact Mr Bond again because Mechanical's sub-contractor had delayed the TKM Edinburgh project.

191. The next day, Mr Bond learned that the Fans were dangerous and that Mr Heseltine had learned that too and was describing Mechanical as amateurs.

192. On 10 August Mr Bond learned that Mr Unwin had discovered that the Fans were moving and that, potentially, further work was required to the ceiling rods to which the Fans were attached. There is nothing to suggest that Mr Bond was informed that any remedial work to those rods had been completed before one of the Fans fell on 28 August. When this happened, Mr Bond reasonably concluded, as the Script supports, that this was because no (or only insufficient) action had been taken between Mr Unwin's discovery and 28 August.

193. On 19 August Mr Bond learned the "frightening" information that the Aldwych sprinkler system had not been made fully operational and he learned, soon after, that that was because there was a payment dispute between Mechanical and Honeywell. On the same day, Mr Heseltine told him that, if Mechanical did not make changes, it would no longer receive TKM's business.

194. By 24 August Mr Bond knew that there were unresolved air-conditioning problems at TKM Edinburgh and that the Aldwych sprinkler system failed on that day.

195. Finally, on 28 August, after what is likely to have been a difficult meeting with Mr Heseltine, one of the Fans apparently collapsed.

196. TKM and WFC provided Mechanical with almost 50% of its turnover by June 2016. By 23 August Mr Bond saw a project management team which Mr Unwin supervised

performing poorly and in a state of disorder, with problems developing in quick succession, and what happened thereafter merely reinforced this view. He believed that there was a real risk that, unless he took action to replace Mr Unwin as the team's supervisor, and unless he was seen to be taking drastic action, TKM's business might be lost. He believed that, unless he took that action and was seen to be taking that action, there was a possibility that WFC's business might be lost too. That is why he decided that Mr Unwin's employment had to be terminated.

197. The VA Tower Bridge, Milos and Dover Street projects were not taken into account by Mr Bond when he decided to terminate Mr Unwin's employment.

198. None of these projects are referred to in the Script or in the termination letter. Taking into account the available evidence, it is clear that the projects referred to in those documents are the TKM projects and the Aldwych project, that the subordinates referred to were Mr Guest and Mr Fletcher, who had been the project managers on those three projects, and that the sub-contractor referred to was Honeywell and, possibly, the TKM Edinburgh project ductwork sub-contractor. This is hardly surprising, because the TKM projects and the Aldwych project were the projects which had suffered from serious problems and been the subject of significant complaints to Mr Bond in August 2016.

199. Parts of Mr Bond's evidence are consistent with his focus, on 5 September 2016, being the TKM projects and the Aldwych project.

200. Mr Unwin did not take twelve months to attempt the final account in relation to the VA Tower Bridge project. Rather, the main contractor's project manager had not dealt with the application which had been made. If chasing was required over the twelve month period, that was a matter for Mechanical's finance department and, as Ms Turnock noted, the finance department had made many attempts to progress payment.

201. In any event, there is no contemporaneous evidence that Mr Bond was aware, by 5 September 2016, of any problems with the VA Tower Bridge project final account.

202. Nor is there any contemporaneous evidence that Mr Bond was then aware that the relocation of an air conditioning unit at VA Tower Bridge was still required. Ms Smith sent Mr Bond her email exchange with Mr Unwin on the subject two days after Chadwick Lawrence had asked for particulars of the allegations against Mr Unwin. Taking into account the absence of any reference to the VA Tower Bridge project in the Script or the termination letter, I have concluded that Mr Bond only became aware of the outstanding work after 5 September 2016 because he made enquiries to compile a more comprehensive list of complaints against Mr Unwin than he had in mind on 5 September.

203. The contemporaneous documents do not establish that Mechanical was to blame for any of the problems which occurred at Milos, save perhaps the problem which required a BMS contractor to visit Milos at the end of August 2016. However, there is nothing to suggest that Mr Unwin's solution, that the contractor would visit on 5 September, was seen to be unsatisfactory or that anyone complained to Mr Bond about that solution.

204. Although Mr Levenston continued to be critical of Mr Unwin's performance in relation to the Dover Street project, the picture which emerges is that Mr Bond and Mr Levenston were close, as Mr Unwin knew, that Mechanical was managed informally and that Mr Levenston enthusiastically involved himself in the project. There are no contemporaneous complaints that Mr Unwin abdicated responsibility for managing the Dover Street project. Rather, the evidence shows that he and Mr Levenston were working on the project together informally, without any objection from anyone, including Mr Bond.

205. Nor, before 5 September 2016, does anyone appear to have complained to Mr Bond, nor did Mr Bond apparently complain, that a confirmed order value for the project was not received.

206. I am afraid that the most likely scenario, on the contemporaneous material, is that Mr Bond's complaints about Milos and Dover Street projects too came to mind only after the September meeting.

207. It may be thought that it was harsh to terminate Mr Unwin's employment so soon after his mother had died, when he was devastated by her death and in circumstances where the problems with the TKM projects and the Aldwych project had occurred whilst Mr Unwin was under real pressure supporting his mother. Mr Bond was focused on trying to stop Mechanical losing its two most significant clients. On the information then available to Mr Bond I do not think it was unreasonable for him to give little weight to Mr Unwin's personal circumstances when making his decision. From the information then available to Mr Bond, Mr Unwin presented as someone who was not overwhelmed by his mother's illness or the tragedy of her death. I am not satisfied that Mr Unwin did tell Mr Bond about the pressure he was under. Mr Bond offered to cancel his holiday at the end of July, and he offered to help Mr Unwin on 1 August 2016, by returning early from his holiday, and on 23 August 2016, but Mr Unwin did not take up any of the offers of help. Instead, he "soldiered on" and presented as being able to cope and as having matters under control. Had Mr Bond explored with Mr Unwin why Mechanical's project management team was in a state of disorder, the picture which may have emerged may have been very different to the picture that Mr Bond saw.

208. If one starts from the premise that Mr Unwin's case theory is right, some of the contemporaneous documents are, and some of Mr Bond's conduct is, consistent with it; that is, with the proposition that Mr Bond was motivated by a desire to compel Mr Unwin to transfer his shares to Mr Bond at their Issue Price. So, for example, only telling Mr Unwin of Phase 1 and Phase 2 of Mr Bond's corporate plans three days before Phase 1 had to be completed and then not pursuing Phase 2, is capable of being consistent with Mr Unwin's case theory. (It is also consistent, though, as I have said, with a situation in which Mr Bond saw himself as the owner of the business and did not see Mr Unwin as anything other than a senior employee whose shareholding in the parent company had to be accommodated but who did not need to be heavily involved in strategic decisions.)

209. However, it is the wrong way to determine how come Mr Unwin's employment was terminated to start from the premise that Mr Unwin's case theory is right and then consider the contemporaneous documents; which was, in effect, what Mr Jory invited me to do.

210. Considering the contemporaneous documents and Mr Bond's conduct uninfluenced by either party's case theory, which is the correct way to analyse the evidence and as I have done, I reject the claim that Mr Bond's motivation in deciding that Mr Unwin's employment had to be terminated was to acquire his shares at their Issue Price.

211. As I have said, Mr Unwin feels passionately about this case. I am satisfied that, since August 2014, he has held firmly and unflinchingly to the view that Mr Bond sought to take advantage of him. His summary, to Mr Holroyd, in January 2016 of Mr Bond's failings, when considered with the events of August 2014, shows that Mr Unwin had a deep-seated conviction that he had been treated shabbily by Mr Bond, but the contemporaneous documents simply do not establish that Mr Bond was seeking to take advantage of Mr Unwin (or, more specifically to acquire his shares at their Issue Price).

212. More than that there is contemporaneous evidence which is inconsistent with Mr Unwin's case theory. Mr Bond and Mr Radcliffe were supposed to meet with Mr Holroyd on 23 August to discuss the purchase of Mechanical's premises. That meeting was cancelled at short notice. Mr Bond explained that the meeting had to be cancelled because Mr Fletcher and Mr Unwin were not performing. Had Mr Bond's motivation in terminating Mr Unwin's employment been to acquire Mr Unwin's shares he would not have suggested to Mr Holroyd that Mr Unwin was not performing. Nor would he have cancelled the meeting at short notice on that ground. Instead, he associated the problems he was experiencing with Mr Unwin with those which he was experiencing with Mr Fletcher which were indisputably performance related.

213. It is inherently improbable, if Mr Bond was motivated by a wish to acquire Mr Unwin's shares, that he would have left it until the end of August 2016 to consult solicitors or would have acted so quickly thereafter. If Mr Unwin's case theory was right Mr Bond would have been much more likely to have had long term discussions with his advisors, of which there is no evidence.

214. As I have already indicated, I also reject Mr Bond's case theory that his decision to terminate Mr Unwin's employment was influenced by the VA Tower Bridge, the Milos or the Dover Street projects.

Contractual duty of good faith

215. Counsel took me to a number of cases where the courts have considered the duty of good faith in different contexts. It may be that the judgments in those cases are not entirely consistent with one another; probably because they are fact-specific. Nevertheless, there are a number of principles which emerge from the judgments some of which I set out below. Although it is often not helpful to cite at length from authorities, because of the possible inconsistency in some of the judgments, and in order to see the basis for the principles which have emerged from them, I do think that, unusually, there is a benefit to the reader if I cite what I regard to be the most significant parts of the judgments.

216. In *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.* [1989] 1 QB 433, the claimants brought an action to recover £3,783.50 which they claimed the defendants were liable to pay for photographs which the defendants had borrowed

from the claimants. The Court of Appeal held that the contractual provision on which the claimants relied was not sufficiently brought to the defendants' attention, so that the claimants could not rely on it. In introductory remarks in his judgment, Bingham LJ said, at page 439D-F, H:

> "In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as "playing fair," "coming clean" or "putting one's cards face upwards on the table." It is in essence a principle of fair and open dealing. In such a forum it might, I think, be held on the facts of this case that the plaintiffs were under a duty in all fairness to draw the defendants' attention specifically to the high price payable if the transparencies were not returned in time and, when the 14 days had expired, to point out to the defendants the high cost of continued failure to return them.
>
> English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness…
>
> The well known cases on sufficiency of notice are in my view properly to be read in this context. At one level they are concerned with a question of pure contractual analysis, whether one party has done enough to give the other notice of the incorporation of a term in the contract. At another level they are concerned with a somewhat different question, whether it would in all the circumstances be fair (or reasonable) to hold a party bound by any conditions or by a particular condition of an unusual and stringent nature."

217. At page 445H, Bingham LJ held that the claimants could not rely on the contractual provision in issue and that "in my judgment [the defendants] are to be relieved because the Plaintiffs did not do what was necessary to draw this unreasonable and extortionate clause fairly to their attention."

218. In *Mullins v. Laughton* [2002] EWHC 2761 (Ch), the claimant entered into partnership with a number of other insolvency practitioners. Clause 27.1 of the partnership agreement required the partners to be "just and faithful to the other partners in all…matters relating to the partnership". In June 2002 the claimant met with three senior partners when, according to the defendants (the remaining partners), the claimant agreed to leave the partnership with immediate effect. The claimant contended that, in fact, no such agreement was made and that, in repudiatory breach of the partnership agreement, he had been forced out of the partnership with immediate effect. It was not disputed that one of the senior partners with whom the claimant met had long held the view that the offices which the claimant managed

were not performing well and, on investigation, became concerned about a number of insolvencies of which the claimant was the office-holder. Those concerns increased and, in due course, the other partners were invited to support the claimant's removal from the partnership. The claimant was then given short notice of the June 2002 meeting, at which his liability to the firm, following his removal, was also discussed. Neuberger J found that the three senior partners had planned to "bounce" the claimant into leaving the partnership (including by giving him only short notice of the meeting) and then to "hit" him with his liability to the partnership and that the claimant had not agreed to leave the partnership. Although Neuberger J concluded that a partnership could not be dissolved by the acceptance of a repudiatory breach, the judge held that, if he was wrong, the partnership had been so dissolved. The judge said, at [95]-[96], [100]:

> "In this connection, I begin by observing that clause 27.1 of the Partnership Agreement required each of the partners to be "just and faithful to the other partners in all…matters relating to the partnership". This enshrines what Lindley & Banks (at paragraph 16-01) describes as "perhaps the most fundamental obligation which the law imposes on a partner", namely "the duty to display complete good faith towards his co-partners in all partnership dealings and transactions". The interrelationship of the duty of good faith and the exercise of a power of expulsion has attracted particular consideration: see again Lindley & Banks, at paragraphs 10-120 to 10-129. I think three points are worth bearing in mind in this connection. First, **the mere fact that the co-partners had been looking for grounds to expel a partner, and have been keen to do so, does not call the exercise of the power of expulsion into question of itself**: see *Kelly v. Denman*, discussed at [1996] 11 Comm. Lawyer 74. Secondly, at least in general, **a partner need not be given an opportunity to explain his conduct or to argue his corner, before he is expelled**: see *Green v. Howell* [1910] 1 Ch. 495. Thirdly, **the mere fact that the power of expulsion is in some way wrongly exercised does not by any means necessarily justify a dissolution**: see Lindley & Banks, paragraphs 10-126 and 10-128.
>
> In the present case, I do not consider that it could fairly be said, at least on the basis of the evidence I have heard, that a properly constituted meeting of the partners could not have resolved to serve a Retirement Notice on Mr Mullins pursuant to clause 21.1 of the Partnership Agreement. First, I am dubious whether Mr Mullins could have objected to the defendants seeking his removal simply on the general basis that he was not perceived to be performing as well as he should have been in the Bristol and Exeter offices. Secondly, the various complaints about Mr Mullins' performance seem to me to have been genuinely believed in by Messrs. Laughton, Travers and Clements, and accepted by the other partners. Further, there does not appear to have been any inappropriate

> ulterior motive, such as would run counter to the duty of good faith, for removing Mr Mullins…
>
> …[However,] the conduct of the Meeting by Messrs. Laughton, Travers and Clements did not, to my mind, comply with the duty of good faith to Mr Mullins. I accept that one must avoid the danger of being unrealistic, and that one must judge the behaviour of Messrs. Laughton, Travers and Clements by reference to the relatively tough, and abrasive regime which prevailed at BKR. However, even taking that into account, **I consider that the way in which Mr Mullins was "bounced", both into and at the Meeting, was outside the comparatively wide range of acceptable behaviour, which accords with the duty of good faith between partners. He was not only set up in terms of attending the Meeting without any significant warning, but the conduct of the Meeting similarly involved a set up. I think that the Meeting was arranged with a view to shocking or surprising Mr Mullins into agreeing to resign (which I accept he got near to doing), and then, while he was still in a state of shock, telling him the financial consequences, by the exercise of the Defendants purported rights under clause 7 of the Protocol**. That is not the way in which partners should behave to each other. **Bullying, seeking to trap, and intentionally taking by surprise with a view to shock, in hope of obtaining an advantage for the co-partners and a disadvantage for the partner concerned, must, in my view, amount to a breach of good faith**" (emphasis added).

219. *F & C Alternative Investments (Holdings) Ltd. v. Barthelemy (No.2)* [2012] Ch 613 was a complex case (which resulted in a 95 day trial) involving the breakdown of relations between members of a limited liability partnership which carried on business as a hedge fund manager. It was an express term of the partnership agreement in that case that the members would "show utmost good faith to the LLP". Of that term, Sales J said at [255]-[258]:

> "…the precise content of the duty of utmost good faith which Holdings [(the corporate member)] owed to the LLP under clause 13.6 of the agreement is informed by **the particular factual and contractual context in which it is located**. The decision of the New South Wales Court of Appeal in *Macquarie International Health Clinic Pty. Ltd. v. Sydney South West Area Health Service* [2010] NSWCA 268 provides helpful guidance as to the approach to be adopted. The case concerned the operation of heads of agreement ("HOA") between Macquarie and its holding company ("MHC") and the respondent ("Area Health") which related to the development of a private hospital on land owned by Area Health. The HOA contained contractual obligations for the parties to act with utmost good faith in their dealings with each other. Regarding

the content of those obligations, Hodgson JA said, at paragraphs 146-148:

> "146. Writing extra-curially, Sir Anthony Mason has argued that a contractual obligation of good faith embraces no less than three related notions: **(1) An obligation on the parties to co-operate in achieving the contractual objects; (2) Compliance with honest standards of conduct; and (3) Compliance with standards of conduct that are reasonable having regard to the interests of the parties**. See A. F. Mason "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000) 116 LQR 66, 69. That the obligation has these three elements is consistent with Australian authority: *Alcatel Australia Ltd. v. Scarcella* (1998) 44 NSWLR 349, 369 (Sheller JA, with Powell and Beazley JJA agreeing), *Burger King Corpn. v. Hungry Jack's Pty. Ltd.* [2001] NSWCA 187; 69 NSWLR 558, paragraph 171 (Sheller, Beazley and Stein JJA).
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> "147. However, **a contractual obligation of good faith does not require a party to act in the interests of the other party or to subordinate its own legitimate interest to the interests of the other party; although it does require it to have due regard to the legitimate interests of both parties**: cf *Overlook v. Foxtel* [2002] NSWSC 17 at [65]-[67] (Barrett J).
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> "148. Applying that approach to the HOA, in my opinion the obligation of utmost good faith did not go so far as to require Area Health to defer to the interests of MHC and/or Macquarie in developing its own plans for [the hospital], or to include MHC and/or Macquarie in its own planning processes. But in my opinion, **when Area Health's planning processes would make a substantial difference to what MHC and/or Macquarie could reasonably expect concerning the flow of persons between the hospitals or the creation of a campus concept, the obligation of utmost good faith would require that MHC and/or Macquarie be informed of this**, at least to enable them to take account of it in the design and construction of the works contemplated by the HOA." (See also the concurring judgment of Allsop P, at paragraphs 12–14.)

Other formulations in the cases of the content of such an obligation are in line with this guidance. For example, in *Berkeley Community Villages Ltd. v. Pullen* [2007] 3 EGLR

> 101, paragraphs 86–97, Morgan J construed a contractual obligation on the parties to "act with the utmost good faith towards one another"…as "imposing on the defendants a contractual obligation to observe **reasonable commercial standards of fair dealing in accordance with their actions which related to the agreement and also requiring faithfulness to the agreed common purpose and consistency with the justified expectations of the first claimant**": paragraph 97.
>
> The balance of interests established by a contractual duty of utmost good faith in the context of a commercial joint venture, which permits Holdings to have regard to F & C's own commercial interests **while also imposing an obligation upon it to have due regard to the legitimate interests of the other parties to the agreement**, represented the parties' considered reconciliation of the interests of F & C and the LLP and the defendants under the agreement. This was the essence of the bargain which they made...The adoption of such a standard of conduct made sense in the context of an arrangement which sought to marry together the disparate strengths of the defendants and F & C through the vehicle of the LLP in a relationship intended to last a long time (and which therefore required considerable flexibility of application to cope with the wide range of unforeseeable business challenges which might arise), where they were each required to have regard to the legitimate interests of the other parties to the agreement while at the same time being entitled to take into account their own self-interest.
>
> The dividing line set out in the *Macquarie International Health Clinic* case, at paragraph 148, as regards the extent of the obligation of disclosure inherent in the obligation of utmost good faith provides broad support for the dividing line which I find applies in the present case, between information relating to the routine marketing operations of F & C and information about the decision in relation to marketing strategy taken on 20 August 2008: see paragraphs 251ff above. **The decision of 20 August 2008 was a major strategic decision which had the potential to make a substantial difference to what the LLP could reasonably expect concerning the flow of business to it, and so fell into a category of information which ought to have been disclosed by Holdings under clause 13.6 of the** agreement…" (emphasis added).

220. In *Compass Group UK and Ireland Ltd. v. Mid-Essex Hospital Services NHS Trust* [2013] BLR 200, the contract was for the provision by the claimant of catering and cleaning services to two of the defendant's hospitals. By the contract the parties were obliged to "co-operate with each other in good faith and…take all reasonable action **as is necessary for the efficient transmission of information and instructions and**

to enable the Trust…to derive the full benefit of the Contract" (emphasis added). Cranston J found that the defendant had breached that obligation. The Court of Appeal allowed the defendant's appeal and concluded that there had not been a breach of the obligation. In doing so, Jackson LJ said at [106]-[112]:

> "I turn now to the construction of clause 3.5 of the conditions in the present case. Both parties have advanced powerful arguments. Nevertheless, after weighing up the competing submissions of counsel, I have come to the conclusion that the Trust's reading of clause 3.5 is correct. The obligation to co-operate in good faith is not a general one which qualifies or reinforces all of the obligations on the parties in all situations where they interact. The obligation to co-operate in good faith is specifically focused upon the two purposes stated in the second half of that sentence.
>
> Those purposes are:
>
> > i) the efficient transmission of information and instructions;
> >
> > ii) enabling the Trust…to derive the full benefit of the contract…
>
> I turn next to the content of the duty to co-operate in good faith, limited as it is by the two stated purposes. **It is clear from the authorities that the content of a duty of good faith is heavily conditioned by its context**. In *Manifest Shipping Co Ltd. v. Uni-Polaris Insurance Co Ltd.* [2001] UKHL 1, [2003] 1 AC 469 insurers alleged that shipowners had failed to observe "utmost good faith" (as required by section 17 of the Marine Insurance Act 1906) in the presentation of a claim. The Commercial Court judge, the Court of Appeal and the House of Lords all rejected that defence. Lord Scott, with whom Lord Steyn and Lord Hoffmann agreed, held that in the particular context the duty of utmost good faith required no more than that the insured should act honestly and not in bad faith: see paragraph 111.
>
> In *Street v. Derbyshire Unemployed Workers' Centre* [2004] EWCA Civ 964, [2005] ICR 97 the appellant was dismissed for making allegations of misconduct against her senior manager. The allegations were unfounded, but the appellant relied upon section 43G of the Employment Rights Act 1996, which provided protection for whistleblowers. The employment tribunal rejected the claim for unfair dismissal, as did the Employment Appeal Tribunal and the Court of Appeal. It was held that, although the appellant reasonably believed in the substantial truth of her allegations, she had not acted "in good faith" as required by s. 43G (1) (a) . Auld LJ, with whom Jacob

and Wall LJJ agreed, explained the meaning of "good faith" as follows at paragraph 41:

> "**Shorn of context, the words "in good faith" have a core meaning of honesty. Introduce context, and it calls for further elaboration**. Thus in the context of a claim or representation, the sole issue as to honesty may just turn on its truth. But even where the content of the statement is true or reasonably believed by its maker to be true, an issue of honesty may still creep in according to whether it made with sincerity of intention for which the Act provides protection or for an ulterior and, say, malicious, purpose. **The term is to be found in many statutory and common-law contexts, and because they are necessarily conditioned by their context, it is dangerous to apply judicial attempts at definition in one context to that of another**."

There is a helpful illustration of these principles in *CPC Group Ltd. v. Qatari Diar Real Estate Investment Co.* [2010] EWHC 1535 (Ch). In that case the parties entered into a joint venture agreement to acquire Chelsea Barracks with a view to its development. A sale and purchase agreement between the parties imposed an obligation upon both of them to act "in utmost good faith". Vos J held at paragraph 246 that, **having regard to the context**, the content of this obligation was:

> "to adhere to the spirit of the contract, which was to seek to obtain planning consent for the maximum Developable Area in the shortest possible time, and to observe reasonable commercial standards of fair dealing, and to be faithful to the agreed common purpose, and to act consistently with the justified expectations of the parties. "

In the context of clause 3.5 of the conditions the obligation to co-operate in good faith in my view means the following. The parties will work together honestly endeavouring to achieve the two stated purposes" (emphasis added).

221. In the same case, Beatson LJ said at [150]-[151], [154]:

> "The recent decision in *Yam Seng Pte Ltd. v International Trade Corporation Ltd.* [2013] EWHC 111 (QB), decided since the judge's decision, was relied on by Mr Howe QC. In that case, Leggatt J gave extensive consideration to the question of implying a duty of good faith into a contract. His discussion emphasised that "what good faith requires is sensitive to context", **that the test of good faith is objective in the sense that it depends on whether, in the particular context, the**

> **conduct would be regarded as commercially unacceptable by reasonable and honest people, and that its content "is established through a process of construction of the contract"**: see paragraphs [141], [144] and [147]. See also paragraph [154]. Those considerations are also relevant to the interpretation of an express obligation to act in good faith.
>
> The scope of the obligation to co-operate in good faith in clause 3.5 must be assessed in the light of the provisions of that clause, the other provisions of the contract, and its overall context…
>
> The contract in the present case is a detailed one which makes specific provision for a number of particular eventualities. The specific provisions include clauses 5.8, 6.3 and 6.5. In a situation where a contract makes such specific provision, in my judgment care must be taken not to construe a general and potentially open-ended obligation such as an obligation to "co-operate" or "to act in good faith" as covering the same ground as other, more specific, provisions, lest it cut across those more specific provisions and any limitations in them" (emphasis added).

222. *Re Coroin Ltd.* [2014] BCC 14 was an appeal to the Court of Appeal from the dismissal, by David Richards J, of an unfair prejudice petition. The claimant contended that he had been unfairly prejudiced in respect of the disposal of an interest in shares. The shareholders' agreement contained pre-emption provisions in favour of the claimant. What happened was permitted by the pre-emption provisions (as the Court of Appeal had decided earlier in the litigation). However, the shareholders' agreement included an obligation of good faith on the part of the parties to it in the following terms:

> "Each of the shareholders agrees that:
>
> > 8.5.1 during the continuance of this Agreement all transactions entered into between any of them or any company controlled by them on the one hand and the Group on the other shall be conducted in good faith and on the basis set out or referred to in this Agreement or, if not provided for in this Agreement as may be agreed by the parties and in the absence of such agreement on an arm's length basis;
> >
> > 8.5.2 each of them shall at all times act in good faith towards the others and shall use all reasonable endeavours to ensure the observance of the terms of this Agreement;
> >
> > 8.5.3 no party will seek to increase its profit or reduce its loss at the expense of another; and

> 8.5.4 each of them will do all things [necessary] or desirable to give effect to the spirit and intention of this Agreement."

The claimant contended that he had been unfairly prejudiced because, although the transfer was permitted under the pre-emption provisions, it was nevertheless a breach of the good faith obligation. Arden LJ said at [46]-[54]:

> "The good faith clause seems to me to contain two relevant groups of provisions. **The first group (clause 8.5.1-8.5.3) imposes some limited restrictions on a party by requiring him to exercise his contractual rights whilst taking account of the interests of other parties**. This is an agreed departure from the normal principle that a party is free to exercise his contractual rights as he thinks fit.
>
> The first group also contain some limited express references to filling gaps. For instance, clause 8.5.1 requires parties to enter into transactions with the Coroin group on an arm's length basis if there is no agreement as to the basis upon which they engage. However, that provision is not directly relevant because it applies only to transactions between the respondents and the Coroin group, with which we are not concerned. Neither are we concerned with clause 8.5.3, which is very general and on which no counsel has relied.
>
> That leaves cl.8.5.2 in the first group. Any suggestion that cl.8.5.2 applies to fill gaps in the parties' agreement would have to rest on the words "in good faith". Neither party has suggested that those words lack legal content in this agreement. **Lord Goldsmith [for the claimant] argues for a meaning for this expression that was really the same as the meaning of clause 8.5.4, namely, that it required the court to enforce the spirit of the agreement and not just "its black letter"** (relying on *CPC Group Ltd. v. Qatari Diar Real Estate Investment Company* [2010] EWHC 1535 (Ch) at [238]–[246] per Vos J). That argument in my judgment properly belongs under cl.8.5.4 and I will address it at that point. **The respondents proceed on the basis that "good faith" in the context of cl.8.5.2 imposes a duty simply to act honestly**. (They did not need to refine the meaning of honesty further than to say that it was a subjective test.)
>
> **I consider that the respondents are right to submit that the requirement to act in good faith in cl.8.5 involves an obligation to act honestly in a subjective sense as this is its natural meaning** and the context does not suggest some other meaning. As it was not put to Mr Quinlan in cross-examination that he had not acted honestly in this sense, then, for that reason alone, Mr McKillen cannot now assert that he did not do so…

> I do not consider that the obligation to act in good faith can impose a binding general obligation to act in a manner outside the terms of the shareholders' agreement because there is no indication of the circumstances in which the obligation to act in good faith obliges the parties to go beyond the obligations in the shareholders' agreement. There is, therefore, no benchmark against which the court could enforce the obligation.
>
> The second group of provisions in the good faith clause is composed solely of clause 8.5.4. The parties agreed to do all things necessary or desirable to give effect to the spirit and intention of the shareholders' agreement. Again, this clause prescribes no basis for determining the "spirit and intention". The "spirit" is by implication an animating principle, which, like the smile on the Cheshire cat (see [23] above), may exist in a state that is detached from the express terms of the shareholders' agreement.
>
> In my judgment, the only way in which the court can give effect to the obligation in clause 8.5.4 is to treat the reference to the "spirit and intention" of the shareholders' agreement as a reference to the shared aims of the parties in entering into the agreement. Those aims would have to be ascertained in the way in which the court ascertains the background to an agreement as part of the process of interpretation. On this basis, clause 8.5.4 has content, but it is merely a mirror image of the process of interpreting an agreement or implying terms into it. I shall refer in more detail to the implication of terms below.
>
> In short, the good faith clause, while it may be an additional weapon in Mr McKillen's armoury, gives no additional support to his case. This unsurprisingly accords with the conclusion of this court on different facts in *Re Coroin (No.1).* I have not gone quite as far as Rimer LJ in *Re Coroin (No.1)* in denying any utility to the good faith clause as that was not the way this case was argued and in any event there may, for instance, be circumstances in which a gap can be filled by purposive interpretation" (emphasis added).

223. In the same case Moore-Bick LJ said at [145]:

> "Mr McKillen's alternative argument is that the informal transfer of control by Mr Quinlan to the Barclay interests constituted a breach of clause 8.5 of the shareholders' agreement, in particular clause 8.5.2 and 8.5.4. In the light of the modern approach to construction exemplified in *Attorney General of Belize v. Belize Telecom Ltd.* [2009] UKPC 10; [2009] 1 WLR 1988; [2009] BCC 433, I doubt whether in this case either of these clauses has any practical significance beyond providing part, albeit perhaps an important part, of the context in which the substantive terms of the agreement are to

> be construed. The intention of the parties has to be derived from the agreement as a whole, including clause 8.5, and if, as I think, the pre-emption provisions were intended to apply only to the transfer or creation of proprietary interests in the shares, arrangements falling short of that do not involve any breach of the shareholders' agreement or the company's articles. In any event, I do not think that the argument is capable of advancing Mr McKillen's case. If there had been any want of good faith on the part of Mr Quinlan and other shareholders that was capable of amounting to a breach of clause 8.5, that might give rise to a personal claim against them, but it would not constitute an act or omission of the company within the meaning of s.994(1)(b)."

224. Before turning to the last of the authorities, I need to explain why I derive little assistance from *Coroin*. A superficial reading of Arden LJ's judgment might suggest that the Judge concluded that a duty of good faith is complied with when, looked at subjectively, the party bound acts honestly. Arden LJ's judgment is much more nuanced than that. As I read the judgment:

i) the Judge decided that, in the particular circumstances of that case, the duty of good faith did not cover the activity complained of. The Judge decided that, as a matter of construction, the good faith obligation did not indirectly prevent what a different provision of the contract allowed;

ii) the Judge did not intend to set out what, as a matter of principle, a duty of good faith comprises. Rather, she decided which of the two competing arguments advanced by counsel was right in the circumstances of that case.

225. In *Re Audas Group Ltd.* [2019] EWHC 2304 (Ch), HH Judge Halliwell determined an unfair prejudice petition, brought by the claimant minority (effectively, equal one-third) shareholder in a parent company. After a number of years in business together, the priorities of the claimant and the first and second defendants (effectively, the other equal one-third shareholders in the parent company) diverged. At a meeting in November 2015, at least one of the defendant shareholders had concluded that he and the claimant could no longer work in the business together. There then followed a discussion about how either the claimant or the first and second defendants might be bought out which, in due course, led to negotiations for buying out the claimant, which broke down. Thereafter, the shareholders continued to work together but in rather strained circumstances. Shortly after a monthly finance meeting in August 2017 and on the evening before the claimant was due to take annual leave, the first defendant sent the claimant a letter calling the claimant to a disciplinary meeting, purportedly on behalf of the subsidiary company which employed him, on the claimant's return from leave. The letter set out, in a rather generalised way, complaints against the claimant. There was no proper investigation, at the disciplinary meeting, of the complaints against the claimant. Later the same day, the claimant was summarily dismissed as an employee. He was also advised of his right to appeal. He was later informed that he could not communicate with clients. An appeal hearing took place a couple of days later, when the defendants read from a pre-prepared statement and, in due course, the appeal was rejected.

226. In the course of his judgment, the Judge had to consider the circumstances of the claimant's dismissal. The Judge said this at [86]-[87]:

> "Although Mr Bray [(the First Defendant)] sought to give the impression, at the end of the letter, that APML [(the subsidiary company)] remained open minded on the basis that it "may decide to dismiss" [the claimant], Mr Harper [(counsel for the claimant)] submitted that, by then, the decision to dismiss him had already been made and the disciplinary process was invoked for the purpose of attending to legal formalities rather than investigating the allegations against him, providing him with an opportunity to state his case and, at the end of the process considering whether Mr Brown [(the claimant)] ought to be dismissed or subject to some other form of disciplinary sanction. In my judgment, it is an inescapable inference that this is so and it does Messrs Bray and Sharp no credit that they sought, in evidence, to maintain otherwise. It is also overwhelmingly likely that they colluded with one another to dismiss Mr Brown and did so under the guise of the disciplinary procedure following advice from their solicitors about the legal formalities in the period between 7 and 24 August 2017. In doing so, they were not open with Mr Brown about their intentions. Before invoking the procedure, they did not canvass with Mr Brown the allegations on which their decision was to be based, they did not give him any warning and they did not discuss the range of options that were available.
>
> The decision of Messrs Bray and Sharp to dismiss Mr Brown was made out of their increasing sense of antipathy towards him and with a view to advancing their own sectional interests rather than for the purpose of advancing the interests of the companies…[W]hen viewed in its overall context, their decision was not made for the purpose of advancing the interests of APML and AGL or promoting the business."

227. In that case, the shareholders' agreement contained terms identical to clauses 19.2 and 19.3 of the shareholders' agreement in this case, save that the parent company in that case was also required to comply with the relevant provisions. The Judge referred to *Interfoto* and *Pullen* and said at [108]:

> "In the analogous context of partnership law, partners owe one another a duty to act in the interests of the partnership and not in the sectional interest of a particular partner or partners. Consistently with this duty, they must not procure the exercise of a power of expulsion against one partner without first notifying him and providing him with a proper opportunity to explain his case, *Blisset v. Daniel* (1853) 10 Hare 493."

The Judge then continued, at [109], [120]:

> "**At all material times, the parties and AGL thus owed one another a duty to act openly and fairly to one another, to ensure that the views of each Party are fully canvassed on important matters relating to the company, to avoid acting in the sectional interests of any particular shareholder or for an improper or collateral purpose, to use reasonable endeavours to ensure the Shareholders Agreement was observed and to act consistently with the objects of the parties in entering into same.** The objects of the parties can be discerned from the Shareholders Agreement together with the factual matrix at the time it was made. It included a scheme for regulating the affairs of AGL and enabling the Parties to participate in decision-making…
>
> In my judgment, Messrs Bray and Sharp committed and caused AGL to commit serious breaches of their contractual good faith obligations, under Clauses 18.1-18.3 of the Shareholders Agreement, in dismissing Mr Brown as an employee. This is on the basis that the decision was made covertly before initiating the "disciplinary" process against him and without first clarifying and investigating with Mr Brown the substance of their concerns, exploring the range of options that might be available and providing him with at least some form of warning. No doubt, Messrs Bray and Sharp were by then exasperated with Mr Brown and the stance he had taken in the negotiations for the sale of his shares. In all likelihood, they believed he was no longer fully pulling his weight in the business and they perceived he was demanding too high a price for his shares. **However, it was a breach of their duties of good faith, for them to peremptorily dismiss Mr Brown when they did. Their decision was disproportionate to the matters furnishing them with a sense of grievance. Moreover, in view of the context in which the disciplinary process was initiated following the discussions at APML's monthly finance meeting on 7 August 2017, it is plain their decision was taken for the purposes of advancing their own sectional interests**. In this respect, it is significant the decision was taken shortly after they declined to appoint, at Mr Brown's suggestion, a professional valuer to value his shares" (emphasis added).

228. Following that lengthy tour of the authorities, I need to set out some of the principles which emerge from them in relation to express contractual good faith obligations.

229. First, the context in which the good faith obligation was entered into is everything, or at least a great deal. That is hardly surprising, because the extent of the obligation, that is, what prospective acts of a defendant may be subject to a duty of good faith, is a matter of the construction of the contract which contains the obligation.

230. Secondly, once it is established that a prospective act of a defendant is subject to a duty of good faith, the defendant is bound to observe the following minimum standards:

i) they must act honestly;

ii) they must be faithful to the parties' agreed common purpose as derived from their agreement;

iii) they must not use their powers for an ulterior purpose;

iv) when acting they must deal fairly and openly with the claimant;

v) they can consider and take into account their own interests but they must also have regard to the claimant's interest.

These minimum standards are not entirely distinct from one another. Rather, they tend to overlap.

231. Fair and open dealing is a broad concept and what it means in practice in any case will again depend on context. It is likely that, in many cases, the claimant is entitled to have fair warning of what the defendant proposes. In those cases where the defendant is contemplating taking a decision which will affect the claimant, fair and open dealing is likely to require that the claimant is given an opportunity to put their case before the defendant makes the decision and the defendant is likely to be required to consider the claimant's case with an open mind.

232. Thirdly, and very much linked to the second point, the fact that a defendant could have achieved the same result in a procedurally compliant way does not amount to a defence where the approach they adopt does not meet the minimum standards I have set out.

Liability – discussion

233. When the parties entered into the shareholders' agreement they saw themselves as business partners and business owners with a common goal of promoting and developing Mechanical's business including for the benefit of the parent company and therefore themselves as shareholders (as clauses 2.1 and 2.2 of the shareholders' agreement suggest and as the parties' evidence supports). I am satisfied that the good faith obligation in clause 19.2 of the shareholders' agreement extended to all significant decisions about the business generally and Mechanical in particular. It is difficult to think of a more momentous decision than to remove a business partner or owner from that business.

234. Miss Linklater argued that, in the case of a decision about the termination of Mr Unwin's employment, Mr Bond's good faith obligation did not extend beyond an obligation to act honestly and not for an ulterior purpose. She argued, I understood, that the parent articles specifically provide that an employee who is unfairly dismissed is to be treated as a bad leaver and that, because the parent articles are part and parcel of, or at least part of the context of, the shareholders' agreement, on its proper construction the procedural aspects of the good faith obligation, such as the need to

deal fairly and openly with Mr Unwin, did not extend to the termination of Mr Unwin's employment.

235. I am doubtful that the premise of Miss Linklater's argument is correct. An employee who is unfairly dismissed after 17 April 2017 (the sixth anniversary of the trigger date) is not a bad leaver because they have been unfairly dismissed. There is a strong argument that they are not a bad leaver at all if they have left and have not been fraudulent or wilfully negligent. If, though, they might be a bad leaver, that is because they are not deemed to be a good leaver, as an employee who is found to have been wrongfully dismissed would be.

236. There is nothing in the shareholders' agreement or the parent articles which permits an unfair dismissal and so this case is very different from *Coroin*, which Miss Linklater may have had in mind as the legal basis for her submission.

237. It would be wholly unbusinesslike if the good faith obligation applied with full force to less momentous matters than the termination of Mr Unwin's employment, or decisions about Mr Unwin's employment which were less momentous than that his employment should be terminated, but not to the termination of Mr Unwin's employment.

238. I therefore reject Miss Linklater's argument.

239. For all these reasons I have concluded that, on its proper construction, the good faith obligation applied with full force to the decision to terminate Mr Unwin's employment and required that, in terminating Mr Unwin's employment, Mr Bond had, amongst other obligations, to be faithful to the parties' common purpose, had to deal fairly and openly with Mr Unwin and had to have regard to Mr Unwin's interests.

240. This conclusion is not affected by the fact that Mr Bond was the majority shareholder or that the corporate documents established an imbalance of power in Mr Bond's favour. As I have said, the parties saw themselves as partners with a common goal and ambition.

241. It follows, from the conclusions that I have already reached, that:

    i) Mr Bond did not act dishonestly;

    ii) Mr Bond did not act with an ulterior motive or exercise any power for an ulterior purpose;

    iii) in particular, Mr Bond did not act as he did to acquire Mr Unwin's shares and so did not appoint Mrs Barlow as an "A" director of the parent company as part of a plan to acquire Mr Unwin's shares;

    iv) Mr Bond was authorised to terminate Mr Unwin's employment.

242. It follows from those conclusions, in turn, that there was nothing objectionable in Mr Bond telling Mr Unwin about the parent articles share transfer provisions or giving Mr Unwin the 5 September correspondence. Those matters were merely consequences of the fact that Mr Unwin had been given notice of the termination of his employment which Mr Bond was authorised to give.

243. So far, I have treated Mr Unwin's complaint about Mr Bond's decision to write to Mechanical's customers and suppliers to inform them that Mr Unwin was "no longer actively engaged within the business" as part and parcel of the termination of Mr Unwin's employment. I have only done so to make this judgment less cumbersome. The decision to write to customers and suppliers was, however, a separate decision and, in the present context, has to be considered as such.

244. The decision to write to customers and suppliers was not taken by Mr Bond to damage Mr Unwin's reputation, contrary to Mr Unwin's pleaded allegation. The foundation for that allegation is Mr Unwin's case theory, which I have rejected, and is a product of Mr Unwin's fixed belief that Mr Bond had long actively sought to take advantage of Mr Unwin, which I have also rejected.

245. I do agree on the evidence that, when he decided to write (and send) the letters, Mr Bond did not have in mind Mr Unwin's interests, because the letters did not take into account the possibility of a successful appeal by Mr Unwin against the termination of his employment. This takes Mr Unwin's claim nowhere, however. The letters did not cause him to suffer any loss for which he makes a claim.

246. Having said all of this, Mr Jory persuaded me in closing that Mr Bond did breach his duty of good faith when he terminated Mr Unwin's employment; in particular because did not deal fairly and openly with Mr Unwin and because he did not have regard to Mr Unwin's interests.

247. It is not disputed that Mr Unwin was given no notice of the possibility that his employment might be terminated. There was no or no proper investigation into how come the project management team was in a state of disorder or into the extent of Mr Unwin's role in its poor performance. Mr Unwin was given no, or no real, opportunity, before his employment was terminated, to respond to Mr Bond's complaints about him in relation to the TKM projects or the Aldwych project. Mr Unwin had no opportunity to reveal that his poor performance, if any, was due to the pressure of his mother's illness or the tragedy of her death. Mr Bond did not consider or explore with Mr Unwin whether any steps could be taken to improve Mr Unwin's performance, if necessary, or the project management team's performance, short of the replacement of Mr Unwin. As the Employee Handbook makes clear, that was something junior employees could expect and so, even more so in Mr Unwin's case, fairness required that there be a proper investigation and a consideration of remedial action.

248. The truth of the matter is that Mr Bond did not consider his decision from Mr Unwin's perspective. Mr Bond's sole focus was on what he perceived to be the real risk that a substantial portion of Mechanical's business might be lost if he did not take drastic action.

249. The termination of Mr Unwin's employment was not so urgent that it had to take place without informing Mr Unwin of the complaints against him, without carrying out a proper investigation into those complaints, without giving Mr Unwin an opportunity to participate in the investigation and without exploring the possibility of remedial action. Neither TKM nor WFC had complained about Mr Unwin. Neither Mr Heseltine nor Mr Moffatt suggested that Mr Bond had to act immediately, rather than say, in a matter of a few weeks. Dealing fairly with Mr Unwin did not require a

lengthy or formal investigation. I am doubtful that more than two weeks at most was needed from the time Mr Unwin was notified of the complaints against him for a proper investigation to be concluded and for an open-minded consideration of its conclusions to take place. Indeed, I can see no reason why Mr Unwin was not notified of the complaints against him from when Mr Bond first visited Shulmans until 5 September 2016.

250. Nor does the possibility of an appeal somehow relieve Mr Bond of liability. The only people within Mechanical who knew enough about the business and who were sufficiently senior to conduct an appeal were Mr Bond and Mrs Barlow. Mr Bond had already decided that Mr Unwin's employment had to be terminated. Mrs Barlow had already decided that Mr Unwin had not performed as a contracts director. Mrs Barlow did not object to the termination of Mr Unwin's employment. There is nothing to suggest that her mind might have been changed. There was no realistic possibility that any appeal might have succeeded.

251. On this limited basis, Mr Unwin succeeds on liability.

252. I do not propose to consider separately clause 19.3 of the shareholders' agreement, because, in the light of the conclusions I have already reached, it adds nothing to Mr Unwin's claim.

Quantum - introduction

253. I deal separately and briefly with Mr Unwin's claim for salary at the end of the judgment. In the next sections of the judgment, I consider only Mr Unwin's principal claim relating to the forced disposal of his shares at their Issue Price.

254. I have found the determination of quantum particularly difficult. As I have already noted, the parties effectively agreed that the date of breach was 5 September 2016 and, by the conclusion of the trial, I understood that it is not disputed that the quantum of Mr Unwin's claim (his loss) is the difference between (i) what his shares would have been worth in his hands on 5 September had Mr Bond not breached the duty of good faith ("the No Breach value") and (ii) £14,200. Mr Jory says in paragraph 67 of his skeleton argument that "from 5 September 2016…Mr Unwin lost the difference between [the] nominal value [of his shares] (£14,200) and their actual value in his hands" (although he does argue that the actual value of Mr Unwin's shares in his hands on 5 September 2016, but for Mr Bond's breach, would have equated to Fair Value).

255. Establishing the No Breach value is made more difficult in this case than it might otherwise have been because, before trial, the experts only considered (i) Fair Value and (ii) the value of Mr Unwin's shares on 5 September 2016 on the assumption that Mr Unwin had a settled wish to sell his shares. That is an assumption for which there is no justification. Mr Unwin never wished to sell his shares.

256. Although cited by Mr Jory for a slightly different purpose, the judgment of Lord Reed in *Morris-Garner v. One Step (Support) Ltd.* [2019] AC 649 helpfully sets out a number of principles applicable to the quantification of loss arising from breach of contract which are or may be relevant in this case. The Judge said at [36]-[38]:

> "…What is crucial is first to identify the loss: the difference between the claimant's actual situation and the situation in which he would have been if the primary contractual obligation had been performed. Once the loss has been identified, the court then has to quantify it in monetary terms.
>
> The quantification of economic loss is often relatively straightforward. There are, however, cases in which its precise measurement is inherently impossible. As Toulson LJ observed in *Parabola Investments Ltd. v. Browallia Cal Ltd. (formerly Union Cal Ltd.)* [2010] EWCA Civ 486; [2011] QB 477, paragraph 22:
>
> > "Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss."
>
> An example relevant to the present case is the situation where a breach of contract affects the operation of a business. The court will have to select the method of measuring the loss which is the most apt in the circumstances to secure that the claimant is compensated for the loss which it has sustained. It may, for example, estimate the effect of the breach on the value of the business, or the effect on its profits, or the resultant management costs, or the loss of goodwill: see Chitty on Contracts, 32nd ed (2015), paragraphs 26-172-26-174. The assessment of damages in such circumstances often involves what Lord Shaw described in *Watson, Laidlaw* at pages 29-30 as "the exercise of a sound imagination and the practice of the broad axe".
>
> Evidential difficulties in establishing the measure of loss are reflected in the degree of certainty with which the law requires damages to be proved. As is stated in Chitty, paragraph 26-015, "[w]here it is clear that the claimant has suffered substantial loss, but the evidence does not enable it to be precisely quantified, the court will assess damages as best it can on the available evidence"…."

257. This is very much a case which calls for the exercise of sound imagination and the practice of the broad axe to determine Mr Unwin's loss. Both these points need to be borne in mind at all times; the former for the reasons I set out now, and the latter

because, as I have already suggested, the available evidence is very limited. It is also important to keep in mind that this is a claim for common law damages. Mr Unwin has not brought an unfair prejudice petition, in which the remedies available to the court are somewhat broader than in a damages claim.

258. As the experts accepted, the No Breach value is the sum which a prospective purchaser would have paid Mr Unwin and which he would have accepted for his shares on 5 September 2016 on the assumption that he did not have a settled wish to sell them but would sell them for the right price. This assumes a hypothetical negotiation, on 5 September, between the prospective purchaser and Mr Unwin.

259. To be clear, contrary to Mr Jory's suggestion that, determining the No Breach value on this basis, is to (wrongly) approach Mr Unwin's claim as one for negotiating damages, by considering the hypothetical negotiation I am merely trying to do the best I can on the very limited available evidence to quantify Mr Unwin's common law damages because, bluntly put, Mr Unwin's shares, in the no breach counterfactual world, were worth what someone would pay for them.

260. In the circumstances of this case the parties to the hypothetical negotiation would have been Mr Bond and Mr Unwin.[10] It is merely speculation that any third party unconnected with Mr Bond (and I exclude Mr Jamieson from that category) would have had any interest in acquiring a 20% shareholding in the parent company. There was apparently no established market for Mr Unwin's shares. On the available evidence, the person most likely to have been interested in acquiring Mr Unwin's shares would have been Mr Bond (although, if Mr Jamieson was interested in acquiring Mr Unwin's shareholding on 5 September 2016 and if Mr Bond was content for Mr Jamieson to be a shareholder on that date and if Mr Jamieson would have paid more for Mr Unwin's shares than Mr Bond, then Mr Jamieson would have been a competitor for Mr Unwin's shares).

261. It is reasonable to proceed on the basis that:

    i) the negotiation would have been successful, because there would have been a price which Mr Bond was prepared to pay and which Mr Unwin was prepared to accept;

    ii) they would not have acted uncommercially out of spite, nor would they otherwise have acted unreasonably.

262. It has not been suggested that Mr Unwin could have negotiated for more than the Fair Value for his shares (which equates to their full undiscounted value) and it is reasonable to suppose that Mr Unwin would never have accepted less than the Issue Price for his shares because that sum is so far below Fair Value as at 5 September 2016 on any basis and is the minimum price at which he could have been compelled to sell his shares. Indeed, it was not suggested that Mr Unwin might have accepted a sum lower than the Issue Price.

[10] Miss Linklater accepted in closing, rightly in my view, that the quantum of Mr Unwin's claim is established by reference to a hypothetical negotiation between Mr Unwin and Mr Bond.

263. Doing the best I can, it seems to me that the No Breach value of Mr Unwin's shares is therefore established by:

    i) determining their Fair Value on 5 September 2016;

    ii) determining how a hypothetical negotiation on that date between Mr Unwin and Mr Bond would have successfully concluded on the assumption that the price they would have agreed is somewhere between the shares' Issue Price and their Fair Value.

264. The experts gave their opinions of the Fair Value of the shares and about the hypothetical negotiation, and it is to their evidence I now turn.

The experts – introduction

265. I received expert evidence from two forensic accountants; Mr Anthony Flint, for Mr Unwin, and Mr Richard Pughe, for Mr Bond.

266. They agreed that the Fair Value of Mr Unwin's shares is established by (i) determining the sum that 100% of the shares in the parent company would have sold for on the open market free from encumbrances and restrictions and (ii) then calculating 20% of that sum to reflect Mr Unwin's 20% shareholding in the parent company. They agreed that the most appropriate way of establishing the sale price of the whole shareholding of the parent company is the earnings method of valuation. They agreed that that method of valuation requires a valuer to (i) estimate the maintainable EBITDA figure, (EBITDA referring to Earnings before interest, tax, depreciation and amortisation) and (ii) then apply to the maintainable EBITDA figure an appropriate multiple. They agreed that the product of that calculation gives the Enterprise Value of a business. Importantly, they also agreed that such adjustment "as required" then needs to be made to the Enterprise Value to give the Equity Value of a business, which is the amount that the shareholders would receive on a sale of the business. They agreed that the maintainable EBITDA figure for the parent company is £389,250 pa.

267. The experts also agreed that no rational investor would pay Mr Unwin the Fair Value of his shares (if they were not being offered for sale at the same time as the remainder of the shareholding in the parent company).

268. The only two disagreements between the experts which prevented them agreeing the full undiscounted value of the totality of the shareholding in the parent company (that is, the parent company shares' sale price on the open market free from encumbrances and restrictions) were:

    i) the appropriate multiple;

    ii) whether any adjustment to the Enterprise Value of the parent company should be made in this case to determine the Equity Value.

    Mr Flint contended for an EBITDA multiple of 5.5 and Mr Pughe contended for an EBITDA multiple of 4. Mr Flint contended that there should be no adjustment to the Enterprise Value. Mr Pughe contended that there should be a deduction of £1 million

to reflect the parent company's net current liabilities of about that amount and an addition of £41,884 for cash generated from the parent company's last relevant balance sheet date. I therefore propose to focus on these two issues in this judgment.

269. Mr Flint agreed this about the appropriate EBITDA multiple in the joint statement:

> "AF [(Mr Flint)] considers numerous relevant reference documents which set out P/E ratios and EBITDA multiples. These include FTSE Index, PCPI of BDO, BVB Insights and Small & Medium Enterprises Valuation Index. AF refers to all of these and then using these arrives at a multiple of 5.5."

He agreed this about whether a deduction to the Enterprise Value is appropriate:

> "[RP (Mr Pughe) said] – if a purchaser is faced with 2 companies with identical profit and therefore Enterprise Value, but one with £1m liability and one with none, would the purchaser pay the same amount for the two? Clearly not. Hence the excess liability (effectively borrowed from the creditors rather than a bank) has to be deducted from the Enterprise Value.
>
> After discussions with RP, AF would agree the principle of what RP is saying above. AF notes, however, that the net liability figure is due in large part to the WIP [(work in progress)] accrual of £1,444,713 (RP's report para 6.28) which, as noted above, he does not have details of.
>
> AF further notes, as above, that the company was not seemingly having cash flow difficulties, and was able to meet its invoiced debts, hence has not applied a deduction in this respect."

270. The joint statement also records:

> "RP and AF both stated their surprise that the business was able to "stretch" its creditors to carry on trading year on year."

Mr Flint

271. Mr Flint explained that, to establish the EBITDA, he had to consider first the parent company's trading performance for the years ending June 2012-2016, which required a consideration of Mechanical's trading performance; it being the group's trading company and the source of the parent company's profit. Based on Mechanical's trading performance for July – September 2016, he concluded that sales in the year ending June 2017 would have been at least consistent with the 2014 and 2016 years. Mr Flint's analysis of the consolidated profit and loss accounts effectively showed that for the years ending in June 2012 to June 2016:

i) turnover was steady, except in the year ending in June 2015, when it increased by about 50% from the previous year. However, in the following year it returned to established levels;

ii) gross profit was steady in the years ending in June 2012 to June 2014. It rose to almost £2 million in the year ending in June 2015 and was about £1.8 million in the year ending in June 2016;

iii) the gross profit margin was steady, although it increased from 10.76% in the year ending in June 2012 to 13.28% in the year ending in June 2016;

iv) except in the year ending in June 2015, net profit before tax ranged from £145,446 to £296,772 and was £228,813 in the year ending in June 2016.

272. On the issue of the appropriate EBITDA multiple:

i) Mr Flint explained that it is often derived by considering the multiples for quoted companies trading in the same area and then adjusting to reflect the lack of marketability, levels of gearing, risk and other limiting factors relating to a private company;

ii) he attached to his report a Financial Times extract from which he said it could be seen that P/E ratios (the price to earnings ratios) for support services and industrial engineering plcs were 22.51 and 29.12 respectively. He noted, however, that those multiples are far in excess of what is appropriate in this case;

iii) he considered the Private Company Price Index published by BDO LLP ("the PCPI") for Quarter 3 and Quarter 4 of 2016. He noted that the multiples in the case of private companies were about a half of the Financial Times multiples in cases where the transactions were for up to hundreds of millions of pounds. He noted that, because the parent company was much smaller than the companies referred to, the multiple in this case would be lower;

iv) he considered the Business Valuation Benchmark Ltd. Data and Analysis on UK Private Company Multiples, 2017 edition ("the BVB analysis") which took into account deal sizes closer to the notional transaction (the sale of the parent company shares) which he was considering. He considered the average of EBITDA multiples for the sale of construction and engineering companies, which he said was 5.7, and for industrial products and services companies, which he said was 8.0, as shown in Exhibit 10 to the analysis. He noted that the BVB analysis anticipated increased demand for heating, plumbing and air conditioning systems;

v) he considered the UK Group 200's Small and Medium Enterprise Valuation Index ("the UK Group Index") dated November 2017. He noted that the average deal size was £5.7 million in the year to November 2016 and, according to his answers to questions from Mr Bond's solicitors, that the median EBITDA multiple was 4.8 and the mean EBITDA multiple was 5.6. He had noted the equivalent P/E ratios in his report, which were higher. The mean P/E ratio was 8.1;

vi) having set out this information he then concluded that an EBITDA multiple of 5.5 would not be unreasonable in this case. He took into account that considerable reductions had to be made to the Financial Times and PCPI data and he was influenced by the BVB analysis' positivity about the heating, plumbing and air conditioning sector.

273. In cross-examination, Mr Flint acknowledged that there is a difference between P/E ratios and EBITDA multiples.[11] He said that he would not normally apply a non-EBITDA multiple to the EBITDA but, in this case, it was appropriate to consider P/E ratios to see how they compared in different publications. He said that he had disregarded the Financial Times information but took the PCPI into account. He noted that the PCPI and the UK Group Index were not sector or turnover specific.

274. Mr Pughe relied on the BVB analysis. He only considered sales of construction and engineering companies. He did not consider sales of industrial products and services companies. Mr Flint said, in cross-examination, that this category should not be excluded from the information considered because Mechanical does provide services in the industrial sector. Mr Pughe's focus was not on Exhibit 10 of the BVB analysis. Rather, he focused on Exhibit 33, which contained transaction data on which, I understand, the part of Exhibit 10 which relates to construction and engineering companies is based. Mr Flint said that he was unable to say whether any of the transactions referred to in Exhibit 33 were comparable transactions. In fact, he contended that none of the transactions referred to in Exhibit 33 were truly or directly comparable transactions.

275. During her careful and forensic cross-examination of Mr Flint, Miss Linklater was able to establish that Mr Flint accepted that he now had sufficient details of the WIP accruals and that the information he had been given had been carefully prepared. Nevertheless, he was not prepared to make any adjustment to the Enterprise Value of the parent company for net current liabilities to determine the Equity Value.

276. He explained that he was not prepared to make any adjustment because the BVB analysis already took such liabilities into account in calculating the Enterprise Value for the purposes of the analysis and so such liabilities were already taken into account in its multiples. The BVB analysis explains Enterprise Value thus:

> "Enterprise value (EV) represents the value of a business independent of its financing structure. Transactions to acquire a company's business (or the shares of the company that operates the business) may be structured differently depending on circumstances. The level and characteristics of debt, the existence of contingent liabilities and tax considerations are some of the issues that will influence whether an acquisition is structured as an asset or share purchase. In concentrating on EV, we exclude consideration specific to the way each transaction is structured and focus on the value of the business…

[11] I understand that P/E ratios are higher than EBITDA multiples because they are post-tax, unlike EBITDA multiples.

> **The calculation of EV for each individual transaction has been carefully researched to ensure it reflects the value paid for the business**. The EV for each transaction is based on sourcing the most reliable evidence of the price paid and, where possible, cross-checking against other sources of information such as press releases and annual accounts of both the target and the acquirer" (emphasis added).

Mr Flint relied on the part of the explanation I have highlighted, as support for his contention that net current (and similar) liabilities were taken into account in the BVB analysis in determining the Enterprise Value of the companies which were analysed.

277. He accepted that customer relationships were important to Mechanical's business.

Mr Pughe

278. As I have said, Mr Pughe relied only on the BVB analysis to determine the EBITDA multiple. As I have also said, he relied only on the analysis of sales of construction and engineering companies. Unlike Mr Flint, he did not rely on the analysis of sales of industrial products and service companies. He did not explain, in his report, why he relied solely on the one category he relied on; save to say that it was the most relevant category. Nor did he explain why only the BVB analysis was suitable as a basis for his conclusions.

279. Having considered only sales of construction and engineering companies, Mr Pughe then excluded from consideration those sales of companies with a turnover of £20 million or more. Of the sales referred to in the BVB analysis, he was left with the sales of Vista Panels Ltd., Spokemeade Maintenance Ltd., DCB Kent Ltd., Signature Ltd. and Hughes Marine Ltd. Spokemeade Maintenance Ltd. only had a £4.8 million turnover, about 30% of the parent company's turnover, and the lowest multiple of all the companies in the category. Mr Pughe's approach also excluded the sale of a company referred to in the analysis, Giffen Holdings Ltd., which had a turnover of £22 million, the lowest EBITDA in the category (£900,000) and an EBITDA multiple of 8.1.

280. Mr Pughe then calculated the average EBITDA multiple for the five companies on his list as 4.28.

281. It is convenient to note here that, of the companies in the construction and engineering category in the BVB analysis, three are very different propositions to the parent company. Integral UK Holdings Ltd.'s turnover was about £376 million, its EBITDA was about £15.2 million and it had an EBITDA multiple of 17.8. Stormking Plastics Ltd.'s turnover was about £229 million, its EBITDA was £3 million and it had an EBITDA multiple was 9.5. Hope Construction Materials Ltd.'s turnover was almost £295 million, its EBITDA was about £36 million and it had an EBITDA multiple was 8.7. If these companies and Spokemeade Maintenance Ltd. are excluded from the calculation of the EBITDA multiple, the multiple, calculated by reference to the remaining companies in the construction and engineering category in the BVB analysis, happens to calculate as 5.55. The multiple calculated only by reference to Vista Panels Ltd., DCB (Kent) Ltd., Signature Ltd., Hughes Marine Engineering Ltd. and Giffen Holdings Ltd. happens to calculate as 5.3. This shows the sensitivity of the

calculation of the EBITDA multiple in the BVB analysis, because of the few sales of construction and engineering companies on which the calculation has been based.

282. Having calculated an EBITDA multiple of 4.28, Mr Pughe then made a deduction for the following factors:

i) the five companies he focused on had EBITDA margins of about six and half times the parent company's margin;

ii) the parent company had about £1 million net current liabilities;

iii) the parent company relied on a handful of clients;

iv) the sector was saturated with competitors.

He therefore concluded that the appropriate EBITDA multiple is 4.

283. In cross-examination, Mr Pughe accepted the following propositions:

i) there is no realistic prospect, in practice, of a purchaser paying Fair Value for the parent company shares, unless they are purchasing 100% of the shareholding;

ii) a majority shareholder is likely to be attracted to the removal of a minority shareholder with whom they are not on good terms.

284. He explained that although the BVB analysis showed an Enterprise Value for Giffen Holdings Ltd. of £6.9 million, the owners of the business were paid £5 million (the Equity Value) on the sale of the company. A further payment was made to the debt holders. He explained that it is necessary to deduct a company's debt from its Enterprise Value because a purchaser has to pay off that debt as well as pay the company's shareholders.

285. He explained that he excluded Stormking Plastics Ltd., Hope Construction Materials Ltd. and Integral UK Holdings Ltd. from his analysis because their turnover was so much greater than the parent company. He excluded Rosimian Ltd. (another company in the relevant category in the BVB analysis) because it had a healthy balance sheet. He said that the weaker a company's balance sheet, the lower the appropriate multiple. He said that, even if the parent company's net current liabilities are deducted from the Enterprise Value, it is appropriate to make a small deduction to the EBITDA multiple because a potential purchaser could conclude that those liabilities indicated financial mismanagement.

286. Mr Pughe said, in re-examination, that, if he had been aware of Mr Heseltine's evidence, which indicated a risk of the loss by Mechanical of TKM as a client, he would have been concerned, because such a loss could have had a fairly catastrophic effect on the business. He said that the risk of the loss of TKM as a client would justify a reduction in the EBITDA multiple, if the lost TKM work was not replaced by equally profitable work.

287. He told me, in answer to a question I asked, that, if Mechanical's customers were loyal national retailers he might increase the multiple but, if their business was at risk, he might reduce the multiple.

The No Breach value

288. Although I have not set out the experts' evidence in detail, I have carefully considered all their evidence, as well as counsels' submissions on that evidence.

289. I turn to consider the issue of the EBITDA multiple first.

290. I prefer, but do not wholly accept, Mr Flint's evidence on this issue. To be clear, I do so having taken into account that I prefer Mr Pughe's approach to the issue of whether any deduction or addition should be made to the Enterprise Value in this case to establish the Equity Value of the parent company.

291. It was not disputed that valuation is not a science. It is an art. That means, generally, that it is likely to be a more helpful approach to review a broader range of evidence, some of which can be discounted with the rest weighted as necessary depending on its relevance, than to limit the range of evidence reviewed.

292. Mr Flint considered a broad range of information to which he attributed more or less weight depending on how relevant it was to the present case. Mr Pughe focused narrowly on the BVB analysis only for sales of construction and engineering companies. Mr Flint considered the same analysis for the sale of industrial products and services companies in addition. Having considered the description in the BVB analysis of industrial products and services companies, I agree with Mr Flint that that category ought to be considered and given some weight, because there is, in that category, at least one sale of a company which provides electronic systems to large commercial enterprises and, on the other hand, in the construction and engineering sector, one of the sales reported is of a company (Hope Construction Materials Ltd.) which is a producer of cement, concrete and aggregate; a very different enterprise to Mechanical. I do not accept that it is appropriate to wholly discount the industrial products and services companies category because it might not have been the most relevant category, as Mr Pughe suggested. Discounting that category drives down the EBITDA multiple. The multiple for industrial products and services companies in the BVB analysis is 8; considerably higher than the multiple for construction and engineering companies.

293. Having discounted the sales of large companies in the construction and engineering sector which drove up the BVB analysis of the EBITDA multiple, Mr Pughe nevertheless continued to take into account the sale of Spokemeade Maintenance Ltd., an apparently very different company to the parent company; with a very low multiple, which drove down the mean EBITDA multiple for construction and engineering companies. He also discounted the data for the sale of Giffen Holdings Ltd. Its revenue was only about £6 million more than that of the parent company. Spokemeade Maintenance Ltd.'s revenue was £12 million less than that of the parent company.

294. Mr Flint also took into account, appropriately in my view, the prospects for companies providing mechanical services at the time of the BVB analysis. Mr Pughe did not appear to do so.

295. Mr Flint also took into account the UK Group Index. Mr Pughe did not explain why this is information which ought to be discounted.

296. Mr Pughe also assumed, in his report, that Mechanical's reliance on a handful of companies was a factor which inevitably lowered the EBITDA multiple. Whilst the circumstances as they in fact existed does justify that, as I explain, historically in this case, as the evidence shows, Mechanical has benefited from working for TKM on preferential terms and has enjoyed a close relationship with WFC. Mr Pughe also reduced the EBITDA multiple for the parent company's net current liabilities on the basis that they might indicate to a potential purchaser financial mismanagement. There is no evidence of financial mismanagement in this case. In fact, both experts were struck by the very good relations the group had with its creditors which allowed it to "stretch" its creditors.

297. However, there are a number of matters which cause me to depart from Mr Flint's opinion about the appropriate EBITDA multiple.

298. Mr Flint's justification for considering P/E ratios (that is, so that he could see how they compared in different publications) was not convincing. The document on which Mr Flint relied which contained P/E ratios was the UK Group Index. That document contained EBITDA multiples too, on which Mr Flint also relied. P/E ratios, at least in this case, are higher than EBITDA multiples and I am concerned that those higher ratios may have driven Mr Flint to increase the multiple he contended for.

299. Although Mr Flint did not dispute that none of the construction and engineering companies analysed in the BVB analysis were truly or directly comparable to Mechanical, he did not consider whether differential weight should be attributed by him to the each of the sales in that analysis (all of which he took into account). I have already commented on how different three of the companies, Stormking Plastics Ltd., Hope Construction Materials Ltd. and Integral UK Holdings Ltd. were. They drove up the mean EBITDA multiple in the BVB analysis.

300. Nor did Mr Flint consider the following matters:

    i) Mr Flint accepted that customer relations were important in Mechanical's business. Mechanical's relations with TKM were precarious as at 5 September 2016. The delay in making the Aldwych sprinkler system fully operational is also likely to have damaged relations with WFC. Mechanical had previously been a company which benefited from a small but loyal national client base. On 5 September 2016, there was a risk that it might lose up to almost 50% of its turnover;

    ii) Brycol, a significant competitor for TKM's work, had performed conspicuously well at the same time as Mechanical had performed poorly on the TKM Portsmouth project.

301. Mr Pughe reduced the EBITDA multiple in this case by 0.28 for these and other factors. I see the force in his opinion that a further reduction would have been appropriate in the light of the precariousness of the TKM work.

302. Doing the best I can, I have concluded that the appropriate EBITDA multiple in this case is 5.

303. I turn now to consider whether an adjustment should be made to the Enterprise Value in this case to establish the Equity Value. As I have already indicated, on this issue I prefer the opinion of Mr Pughe that a £1 million deduction and £41,884 addition need to be made to the Enterprise Value to establish the Equity Value.

304. Mr Flint agreed that a company's Enterprise Value does not automatically equate to its Equity Value. Indeed, Mr Flint accepted Mr Pughe's contention that a purchaser would pay less for a company with a particular Enterprise Value and a £1m liability than for a company with the same Enterprise Value but no such liability. Mr Flint also accepted that what is effectively borrowing from creditors does amount to such a liability which is required to be deducted. It seems to me that the parent company's net current liabilities do represent borrowing from creditors. Mr Flint and Mr Pughe agreed that creditors had been "stretched" which allowed continued trading. Creditors were effectively funding the working capital shortfall. They were effectively providing short-term finance and, in principle, the deduction contended for by Mr Pughe ought to be made, because that is what the experts agreed.

305. Before he was cross-examined, the bases on which Mr Flint objected to the deduction contended for by Mr Pughe were that:

    i) he did not have sufficient details of the WIP accrual. By the trial, he did have sufficient details and, I understood, was content with the sum for those accruals;

    ii) Mechanical did not apparently have cash flow difficulties. However, that is only because Mechanical had "stretched" its creditors and because those creditors were effectively providing short-term finance. The fact that there were no cash flow difficulties does not mean that the finance in place to overcome those difficulties should not be taken into account in the valuation of a company.

306. Mr Flint's justification, at trial, for not making a deduction for net current liabilities was that the BVB analysis already took financing into account in its calculation of Enterprise Values. I do not follow Mr Flint's logic. Even if Mr Flint was right, that might affect the calculation of the EBITDA multiples in the BVB analysis, because the EBITDA multiples were effectively calculated, in that analysis, by dividing the already-established Enterprise Values by the already-established EBITDAs. I can understand why, if Mr Flint was right, he might, as a result, want to adjust upwards the EBITDA multiple he proposed, but I do not understand why the fact that the BVB analysis of Enterprise Values took into account financing, if it did, justifies a departure from the principle Mr Flint agreed.

307. Mr Flint's justification is not based on firm foundations. I have already quoted the one sentence of text in the BVB analysis on which Mr Flint relied in support of his

contention. However, that sentence is not clear. All the sentence says is that, in each case, the Enterprise Value reflect the value paid for a business, but it does not say to whom that value was paid or if only part of it was paid to the sale company's shareholders. Earlier in the same section, the authors of the analysis note that the Enterprise Value is the value of a business independent of its financing structure. On one reading, that statement supports Mr Flint's view. On another reading, it supports Mr Pughe's view. A little later in the same section, the authors say that they focus on the value of the business, which is again somewhat ambiguous.

308. Mr Pughe pointed out that, although the Enterprise Value for Giffen Holdings Ltd. was shown in the BVB analysis as £6.9 million, the owners of the business were paid £5 million on the sale. That is evidence which undermines Mr Flint's contention that, in the BVB analysis, Enterprise Values themselves made provision for financing. Mr Jory objected that the underlying document to support Mr Pughe's contention was not in evidence and might have showed a different debt structure to the one in the present case. The document should have been in evidence but there can hardly be a complaint that it was not when Mr Flint's point first emerged in his cross-examination. Mr Jory's point is not a good one in any event. Whatever Giffen Holdings Ltd.'s debt structure, unless Mr Pughe's analysis of the document was wrong, and it has not been established that it was, any support that Mr Flint could otherwise derive from the text on which he relies is further undermined.

309. Mr Flint having accepted the principle which justifies a deduction in this case of £1 million from the parent company's Enterprise Value, he has not satisfied me that no such deduction should be made in this case.

310. By my calculation, the Fair Value of Mr Unwin's shares on 5 September 2016 was therefore £197,626.80; calculated as follows:

> EBITDA (£389,250) x EBITDA multiple (5) - £1 million + £41,884 x 20%.

<u>The hypothetical negotiation</u>

311. I turn finally to consider the hypothetical negotiation. Mr Jory and Miss Linklater helpfully explored with the experts in cross-examination a great many factors which might be taken into account in the negotiation. They also considered some of those factors in their closing submissions. I have carefully considered all the factors they identified. I have already said something about the parameters of the negotiation. In addition, based on the evidence before me and the submissions I heard, the following key facts and matters would be taken into account in the negotiation:

    i) Mr Unwin had no settled intention to sell his shares. His intention, rather, was to retain his shares to realise his investment, both by way of a sale in due course and dividends in the meantime;

    ii) if Mr Unwin remained employed by Mechanical for probably 7 months more, and then left, it would be likely that any share sale offer to Mr Bond would be at Fair Value. In that scenario, Mr Bond was not obliged to buy Mr Unwin's shares at Fair Value. If Mr Bond did not buy Mr Unwin's shares at Fair Value, Mr Unwin could offer them on the open market but no rational third party

purchaser would buy them at that price. In that case, Mr Unwin would not have been able to then realise the capital value of his shares by a sale. He would continue to benefit though from any dividend declaration;

iii) a rational third party purchaser would offer Fair Value for Mr Unwin's shares if they were offered for sale at the same time as the remaining shares in the parent company;

iv) Mr Bond could not realise the full undiscounted value of his shareholding in the parent company without Mr Unwin's co-operation so long as Mr Unwin remained a shareholder in the parent company;

v) just as Mr Unwin wanted to receive dividend payments, Mr Bond wished to do so. He was keen to receive dividend payments because he was the majority shareholder in the parent company and because he needed to discharge a significant liability relating to his former matrimonial home;

vi) both parties, whilst they were shareholders, could frustrate the declaration of dividends but they would not have perceived that as being in their personal interests and to do so would have been uncommercial and perceived by them to be uncommercial. They would both recognise that the non-declaration of dividends creates the risk that shareholder-managers are disincentivised to work to the disadvantage of all shareholders;

vii) the Fair Value of Mr Unwin's shares. It is reasonable to assume that both parties would receive advice about the Fair Value of Mr Unwin's shares before they negotiated;

viii) the financial health of the business. Both parties would perceive that the business had maintained a steady financial course at least until June 2016, with an abnormally good year, in some respects, in the year ending in June 2015. They would appreciate that certain measures of profit improved in the year ending in June 2016. They would know that the prospects for mechanical services companies were good in 2016. Importantly, they would also know that Mechanical's performance on the TKM Edinburgh and Portsmouth projects and the Aldwych project had been very poor and that there was a real risk that, if changes were not made, up to almost 50% of Mechanical's turnover might be lost. They would know as well that Mechanical's poor performance was as a result of poor project management and that Mr Unwin supervised the company's project management team;

ix) since at least 2014, it would have been convenient and desirable for Mr Bond if he was the sole shareholder in the parent company;

x) Mr Bond would have a real desire to remove Mr Unwin from the business, not only because of his long-term corporate plans and ambitions but because he saw Mr Unwin as a risk to the business. Mr Bond had been keen, or at least content, to retain Mr Unwin in the business before the summer of 2016 because he had been a good engineer and key employee;

xi) so long as Mr Unwin remained in the business as an employee but not a shareholder, his remuneration package would be broadly the same as it was in September 2016 but he would not receive part of his remuneration as dividend payments;

xii) Mr Bond was interested in Alex Jamieson becoming a shareholder. If Mr Bond had Mr Unwin's shares available to sell to Mr Jamieson, Mr Bond's shareholding in the parent company would not be diluted in reality and he could recover some of the purchase price for Mr Unwin's shares from Mr Jamieson if Mr Jamieson bought those shares;

xiii) Mr Unwin would perceive, wrongly in my view for the reasons I have explained, that Mr Bond had a history of taking advantage of him. Even if to terminate Mr Unwin's employment would not have been lawful, Mr Unwin would think that there was a risk that his employment might be terminated and that he might be compelled to offer up his shares to Mr Bond at their Issue Price;

xiv) if Mr Unwin was paid the Fair Value for his shares, he would quadruple his investment made only 5 years before and, if he received 75% of the Fair Value, he would triple his investment made only 5 years before, even though the financial circumstances of the parent company had not markedly improved in the previous four years and the company was now facing significant financial risks;

xv) the sum available to distribute as profit share dividends in the year ending in June 2016 was £253,474 (according to both experts). For the years ending in June 2012 to June 2014, the sum available had apparently been about £150,000 less.

312. Taking into account these facts and matters in particular, again doing the best I can I have concluded that:

i) Mr Unwin was in a better negotiating position than Mr Bond;

ii) Mr Bond would have been prepared to pay Mr Unwin £150,000 for his shareholding, representing about 75% of the Fair Value of Mr Unwin's shares;

iii) Mr Unwin would have been prepared to accept that sum;

iv) the negotiation would have successfully concluded with an agreement for the payment of that sum for the purchase of Mr Unwin's shares.

313. It follows that Mr Unwin's loss is £135,800 (that is, £150,000 - £14,200).

Salary

314. Mr Jory did not pursue Mr Unwin's claim for salary vigorously. He was right not to do so. I struggle to see the sufficient causative link between Mr Bond's breach of the duty of good faith and the separate decision, taken by Mechanical on 22 September 2016, to accept Mr Unwin's purported repudiatory breach of his employment contract. In any event, I do not see how Mr Unwin has suffered a loss as a result of

the non-payment of 4 months' salary. He retains a damages claim against Mechanical to the same value if it wrongly failed to pay him that salary. It follows that I reject this part of Mr Unwin's claim.

Disposal

315. For all the reasons I have given, I will enter judgment for Mr Unwin in the principal sum of £135,800. I will hear further from counsel on all consequential matters.

Postscript

316. The trial in this case was conducted remotely over 7 full days. Because the trial was conducted remotely, all the participants faced technical and practical issues which do not arise in a face to face hearing. That the trial ran so smoothly, efficiently and, most importantly, fairly, is a testament to the active co-operation of counsel and their instructing solicitors, which was obviously in their clients' best interests. I am sincerely grateful to Mr Jory, Miss Linklater, Mr Hirst and Ms Clague of Chadwick Lawrence, and Mr Wood and Mr Kilroy of Prodicus Legal for all their help when they were facing the significant obstacles presented by the Covid-19 pandemic.