Neutral Citation Number: [2016] EWHC 3084 (Ch)

Case No: 4827 of 2015

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT
IN THE MATTER OF QUANTUM SURVEY MANAGEMENT LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

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

Date: 29/11/2016

Before:

MR. REGISTRAR BRIGGS

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Between:

JOHN CUSACK — **Petitioner**

- and -

(1) JAMES HOLDSWORTH
(2) QUANTUM SURVEY MANAGEMENT LIMITED

Respondents

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Mr Alexander Brown (instructed by **Birketts LLP**) for the **Petitioner**
Mr Newington Bridges (instructed by **Porter Dodson**) for the **Respondents**

Hearing dates: 7-11 November 2016

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Approved Judgment

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

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MR. REGISTRAR BRIGGS

Mr. Registrar Briggs:

Introduction

1. Quantum Survey Management Limited ("Quantum" or the "Company") is a small company limited by shares. It provides design, project and management services to the construction industry generally, but specialises within the insurance reinstatement market. Mr Cusack and Mr Holdsworth are co-directors and equal shareholders.

2. Mr Cusack presents a petition for relief from unfair prejudice under s 994 of the Companies Act 2006. He asks for an order that he buy out Mr Holdsworth's 50% shareholding and that Mr Holdsworth pay compensation or damages to Quantum for alleged wrongdoing. The Court is asked to determine whether or not the activities of Mr Holdsworth are unfair and prejudicial and if so to make appropriate orders.

Background facts

3. Mr Cusack and Mr Holdsworth met in 2010. At that time Mr Cusack was the Managing Director of Nationwide Surveying Services Limited based in Doncaster, South Yorkshire. Mr Holdsworth was the managing director of a company known as Property Consortium Limited and a consultant to Nationwide Surveying Services. They had a common desire to control their work-life destiny through their own business, and set about forming, promoting and incorporating Quantum on 16 August 2011. Some staff from Nationwide Surveying Services joined the new enterprise. Mr Cusack's role was to manage staff, develop the business, control the finances, provide technical support and act as a key client contact. Mr Holdsworth was appointed as Commercial Director and his primary functions were client development, marketing, sales and business development.

4. Initially the Company had three shareholders: David Hargreaves held 10% of the share capital and the remainder was divided equally between Mr Holdsworth and Mr Cusack. In

October 2011 the shareholders engaged Mr Phillips of Dixon Phillips Solicitors to produce a shareholder agreement ("SHA") to regulate the relationship of members. The significance of SHA is an issue between the parties.

5. Mr Cusack and Mr Holdsworth each purchased 5% of Mr Hargreaves shares in June 2014 following a dispute in 2012. Mr Hargreaves plays no part in these proceedings.

6. The business operation of Quantum is common ground. A property owner will have the benefit of an insurance policy. The insurer indemnifies the property owner for works that need to be undertaken as a result of an insurable event. Quantum invoices the property owner for the time spent or on the basis of a percentage of the contract value. As is usual in the trade there is a defect liability period following practical completion during which a retention is held. That sum is paid to the contractor at the end of the period. The invoices raised by Quantum are paid indirectly by the insurance company.

7. The business grew fast. In the first seven-month accounting period it had a turnover of £168,166 and by the year ending 31 March 2014 it had reached £884,027. Profits before tax climbed from £30,000 to £420,000. The parties had a different view as to how or whether to reduce corporation tax. This difference was a trigger to a complete break-down in their relationship.

8. Quantum started trading from its registered office in Sheffield, but by the end of 2013 it had developed a client base in the South-West of England. The Sheffield office is run by Mr Cusack. To assist with serving the client base in the South-West, Mr Holdsworth ran an office from his home near Bridgewater in Somerset. If an employee of Quantum worked on a job in the South-West they would, more often than not, stay at Mr Holdsworth's home. Mr Holdsworth said in evidence that this arrangement saved money. Mr Cusack would also travel to Bridgewater for meetings and to attend functions. Again

he would stay with Mr Holdsworth and his partner Ms Daisy Cheng. Ms Cheng worked as Quantum's book keeper. More staff were required as the business grew. Mr Matthew Dearing joined the Company and was assigned to the South-West in 2014. He was a trainee surveyor and Mr Holdsworth says that the Company offered to pay his university fees to undertake a part time masters degree in building surveying. Mr Cusack challenges the agreement that Quantum would pay the university fees and in particular challenges the payment of fees paid by Quantum on behalf of Mr Holdsworth. He classifies the payments as unauthorised.

9. Although little evidence was given on the issue, the Company made a successful take-over of another surveying practice, Surveying Management Services Limited ("SMS"). The client base and work of SMS was quickly absorbed by Quantum following which SMS was placed into liquidation. The financial statements (but not the filed accounts) show an investment of £200,000 in the year ending 2014, but the sum was later written-off. The only expert called to give evidence, Ms Fiona Hotston Moore, explained the write off as representing the cost of investing in the take-over of SMS and its subsequent liquidation.

Disputes and division

10. Mr Cusack gave evidence that his engagement with Mr Holdsworth decreased as the business grew. This was mostly due to their different working locations. Mr Cusack complains that "recording of work to the Company and within the designated Company systems became less frequent until, by December 2014, James had stopped accounting to the Company for his time and work. From December 2014 onwards, he did not report to the Company for the work he was carrying out." Mr Holdsworth does not disagree but explains that the claim volume of new instructions received by Quantum was reducing in

Sheffield but increasing in the South-West during 2014. His unchallenged evidence on this point is that in the period March 2014 to April 2015, 75% of all new instructions related to business in the South-West.

11. Mr Holdsworth's evidence is that the work differential between the two geographical locations forced the directors to consider staffing levels: to increase staff in the South-West and possible redundancies in Sheffield. This was an issue over which the directors disagreed. Mr Cusack's oral evidence was that there was never any need for redundancies in Sheffield. As it happens two members of staff resigned reducing the overheads of the Company in the Northern office.

12. Mr Holdsworth and Mr Cusack met in January 2015 for the purpose of discussing targets for fee income in the Sheffield office. Mr Holdsworth says they agreed that the office should have a target for new work. In February 2015 he became concerned about the viability of the Company as no new work had been procured by the Sheffield office. It is common ground that on 26 February 2015 Mr Holdsworth incorporated a new company with a similar name: Quantum Survey and Project Management Limited ("Project"). Project's registered address at that time was the home of Mr Holdsworth and Ms Cheng. It is agreed between the parties that the incorporation of Project was done without the prior approval or knowledge of Mr Cusack.

13. Mr Holdsworth met with Mr Cusack the next day. Mr Holdsworth says that this was the occasion when they first discussed dividing the Company: one in each of the existing geographical locations. Mr Cusack says that "there has never been any suggestion by me of creating two companies based on the "North and South Offices". Mr Holdsworth says that the meeting was strained, they discussed targets and he suggested that he should purchase an office in the Bridgewater area with funds provided through his pension.

14. Ms Cheng instructed an ex colleague, Mr Lewis, who worked at accountants Dixon Walsh to advise on various issues including pension contributions. Mr Lewis was provided with the sage accounts, filed Company accounts and he asked for further information regarding the current level of pension payments. In an e-mail dated 17 March 2015 Ms Cheng wrote "[b]oth John [Cusack] and James [Holdsworth] are looking to pay £120,000 each into their pension". On 18 March Mr Cusack responded to Mr Holdsworth to say that he had taken tax advice from "a very senior Tax partner from Deloitte and explained the situation and our current predicament". Mr Cusack advised Mr Holdsworth that "based on recent events and the state of the business I think the proposal to pay £120k into each of our pensions and then loan money back to the business is reckless and short sighted. Therefore, I do not agree to any payments to our pensions unless agreed in writing…". On 20 March Mr Holdsworth and Mr Cusack attended a meeting with Mr Lewis to discuss further the benefits of making such a large payments by way of pension contributions.

15. Mr Lewis gave evidence about the meeting. He recalled it was a Friday afternoon, and he gave free advice for an hour. He remembers feeling a tension between the two, that they discussed how to mitigate the tax exposure of Quantum, extending the accounting period by three months and how to divide the Company on the basis that they were going to go their separate ways. He advised that tax contributions would be a tax efficient method of reducing corporation tax.

16. Mr Lewis says "at the meeting they mentioned that they may well be going their separate ways. I advised that the easiest and cheapest way to do so would be to liquidate Quantum and to claim Entrepreneurs Relief at an effective rate of tax at 10% on the cash and assets in Quantum at that time. They could then set up new companies and introduce the monies

they took from Quantum into the new companies." Mr Holdsworth claims that shortly after, he and Mr Cusack reached an agreement or understanding to follow the advice given by Mr Lewis. First they spoke in the car park. They then travelled separately to Mr Holdsworth's home, got changed and went to a business conference dinner in Bristol. Mr Holdsworth said under cross-examination:

> "That evening we were on separate tables [at the conference dinner] and we spoke a couple of times during the course of the evening. We discussed the split. John bought me a bloody mary and said down the line perhaps we will have more to celebrate. At that point it seemed the split was amicable"

17. In evidence Mr Holdsworth accepted that there was no handshake agreement but that they discussed and agreed that they should go their separate ways at the end of the financial year (whether that be extended or not). He said that as a result of these discussions he wrote and sent an e-mail dated 29 March 2015 to Mr Cusack:

> "Extending the year we need to have a target of 3 additional months. From this we have a definite time line to plan to separate our business involvement together. ….The only real way of reducing our corporation tax liability is through the company paying into our pension. My previous e-mail of taking £120k and providing a loan of £40k I have undertaken. This will provide a reduction of corporation of tax over £40k. If you do not wish to reinvest in the company with a bridging loan of 3 months of £40k I would suggest you invest in your pension £80k before 31 March and you take the remaining £40k in the extended 3 months of the accounting period….we need to look at the company assets and agree to divide these including office equipment

> company vehicles…..there are a lot of things to consider and manage over the next 3 months prior to the separation."

18. The response to the e-mail of 29 March 2015 came the next day from Mr Cusack:

> "I am frankly appalled that you think it is OK to transfer £120k of Company funds to your personal pension, not just without my prior approval, but as you are fully aware, with my explicit disapproval….To be clear, the £120k is Company money and its transfer to your personal pension was unauthorised and is therefore unlawful. You must take immediate steps to transfer the funds back to the Company in full……Your actions beggar belief and highlight the need for us to demerge the business as quickly and as cleanly as possible and, to this end, I suggest that we arrange a meeting with professional advisors present at a mutually convenient location as soon as possible…"

19. During the course of May 2015 Mr Cusack changed the locks on the Sheffield office but did not inform Mr Holdsworth or send a key. Mr Cusack claims that the change of locks arose out of a need for maintenance. Mr Holdsworth says that Mr Cusack sought to sabotage his reputation by telling clients of the Company that he had acted inappropriately and "was subject to serious and potentially criminal action." Both accept that the relationship had broken down irretrievably. The break-down of the relationship manifested itself in many ways including Mr Cusack monitoring the activities of Mr Holdsworth, Ms Cheng and Matthew Dearing via the e-mail server. Surveillance of the server led to the discovery of Project in early June. Soon after, in or around 9 June 2015, Mr Cusack informed the Company's bank that a large sum of money had left the account without authorisation: the pension contribution in favour of Mr Holdsworth. The bank

altered the client mandate, permitting payments into the account and any standing orders or direct debits, but requiring approval from both directors to any other payments over £1.

20. Mr Cusack claims that during the period end of March 2015 to July 2015 Mr Holdsworth downloaded information about the Company's clients for his own and Project's interests. He says that this may be substantiated by reason of an admission by Mr Holdsworth that work started by Quantum jobs was completed by Project. This allegation of wrongdoing appeared to diminish as the trial proceeded and was taken no further.

21. On 12 June 2015 two of the Company's employees, Matthew Dearing and Ms Cheng, resigned from the Company and became employees of Project.

Identifiable issues

22. The issues that require determination are as follows:

    22.1. Was the SHA agreed by members?

    22.2. Were the university fees authorised by the Company?

    22.3. Did Quantum authorise the pension payment made in favour of Mr Holdsworth (towards the end of March 2015?

    22.4. Did the directors and members agree that the Company would be divided into the "North" and "South"?

    22.5. Did Mr Holdsworth divert Quantum work, opportunities and employees to Project? If so, over what period and does the answer to 22.4 make a difference to a finding of wrongdoing?

    22.6. Has Mr Cusack been prejudiced unfairly by the events of 2015?

Evidence

23. Mr Cusack provides three witness statements and gave evidence on the first and second day of the trial. In support of his case Fiona Hotston Moore gave expert evidence in accordance with CPR Part 35. Mr Holdsworth provided three witness statements and gave evidence on the second and third day of trial. His case was not supported by expert evidence but he called Ms Cheng and Mr Lewis who both gave evidence on the fourth day. In addition, the court has been provided with 17 bundles of documents, two skeleton arguments from each counsel running to approximately 35-40 pages each and three lever arch files of authorities.

24. In order to determine the matters, set out above it is necessary to consider the evidence given for each issue. At times the evidence overlaps. There are no discreet pockets of evidence dealing with each issue. As an example the meeting with Mr Lewis forms part of the factual matrix regarding the pension payment and division of Quantum.

25. In this reserved judgment I have had time to review and reflect on the oral evidence given during the course of the trial. I make clear that I do not regard the evidence I heard from Ms Cheng, Mr Holdsworth or Mr Cusack as dishonest. I do regard their evidence as unreliable in large part, due to their individual reconstruction of events being tainted by bias arising from their prospective positions. Further the fallibility of the memory has to be taken into account when determining issues of fact. Memory is an active process, subject to individual interpretation or construction. Each witness will have produced their witness statements many months ago, will have been asked to read or re-read their statement and review documents before giving evidence in court. There is high level commentary that reveals that this process reinforces a memory, even if the memory was false to begin with, and may cause a witness's memory to be based not on the original

experience of events but on the material which has been read and re-read. This is supported by the recent research undertaken by Elizabeth Loftus, professor of law and cognitive science at the University of California which reveals the malleability of memory by showing that witness testimony can, after the fact, be shaped and altered.

26. That is not to say that all the oral evidence given was unreliable. The Court has previously explained that it is safer to base factual findings in commercial cases on inferences drawn from the documentary evidence, common ground and known or probable facts. I have undertaken the fact finding exercise with these guidelines in mind.

(i) Was there an agreement in respect of the SHA?

27. The points of claim provide that the SHA was entered into in or around October 2012. It is accepted that it was not signed by the members but said that it was agreed orally or by conduct. Mr Holdsworth argues that there is a good reason why the SHA bears no signature. Some terms had not been agreed. In closing Mr Brown accepted that there was no agreement as pleaded in October 2012. An error had crept into the pleaded case, and the witness statement of Mr Cusack. No 'pleading point' was taken by Mr Newington Bridges.

28. Mr Hargreaves, Mr Cusack and Mr Holdsworth met on 31 January 2012 to consider the draft SHA sent by the solicitor engaged to produce the agreement, Mr Phillips. In oral evidence Mr Holdsworth said he could not recall the meeting, but did not deny it took place. The fact of the meeting is evidenced by a note of the meeting taken by Mr Cusack, and supported by manuscript annotations to the SHA. There is no disagreement that after the meeting Mr Cusack sent an e-mail to Mr Phillips attaching the annotated SHA, copying-in the other members. The e-mail represented that the members had been through all the points and "agreed where required". Mr Holdsworth does not advance a case that

he read the e-mail and objected to its content. I find on the balance of probabilities the e-mail was sent and the content of the e-mail correctly represented the position of the Company's members. In the e-mail he sought confirmation from Mr Phillips as to whether they could now "print [it] out & sign".

29. It is common ground that Mr Phillips returned an updated SHA on 9 February 2012 and raised a few more questions. Mr Cusack argues that these questions were not relevant and, the fact that further questions were raised does not by itself undo an agreement if an agreement had previously been concluded.

30. There is no evidence that the members considered the queries raised as relevant at the time, or fed back further information to Mr Phillips. That may not be surprising if the members considered that an agreement had already been reached. At the same time Mr Phillips had been asked to draft and provide service contracts. After the fact evidence lends support to the argument that an agreement had been concluded in respect of the SHA. When a dispute arose with another member, Mr Hargreaves, Mr Phillips was asked if a shareholder agreement existed by a solicitor acting for Mr Cusack and Mr Holdsworth. In response Mr Phillips forwarded Mr Cusack's e-mail of 7 February commenting that the e-mail had informed him that the SHA "had been agreed by all 3 shareholders." Mr Holdsworth was copied-in to the response from Mr Phillips. He did not, in terms or at all, object to the SHA being relied upon, or object that an agreement had been reached.

31. In *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 the court was asked to decide whether the claimant and the defendant had made a contract. The claimant was a trading house carrying on business in Padua and the defendant an American trading group. On appeal to the Court of Appeal Lloyd LJ summarised the relevant principles

concerning the formation of a contract in correspondence or where not all the terms have been concluded:

31.1. In order to determine whether a contract has been concluded in the course of correspondence one must look to the correspondence as a whole;

31.2. The parties may intend that the contract shall not become binding until some further term or terms have been agreed or they may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled;

31.3. If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.

32. Mr Holdsworth claims that no agreement was reached as Mr Phillips submitted an invoice on 7 March 2013 for work done. That stalled progress. There is nothing in this point. The invoice was rendered after the event and ignores the e-mail sent in 2012 which he set out his understanding that an agreement had been reached.

33. In any event Mr Phillips was not a party to the SHA and was not present on 31 January 2012. Mr Holdsworth says that at the time he sent the invoice Mr Phillips acknowledged that no agreement had been reached. There is no documentary evidence to support this and Mr Phillips was not called to give evidence. I find this evidence unreliable. But in any event Mr Phillips could not have known if an agreement had been reached on 31 January 2012 as he was not present.

34. When taken as a whole the documentary evidence firmly points in the direction of an agreement having been reached at the meeting on 31 January 2012. In my judgment there was a concluded SHA which is supported by the following facts:

    34.1. The members jointly instructed a solicitor to draft a SHA. I infer they all intended that their relationship as members be regulated by an agreement;

    34.2. There was a meeting at which all members attended and actively discussed the terms of the agreement;

    34.3. Mr Cusack kept a note of the meeting and annotated the SHA with amendments;

    34.4. The amendments were agreed by all members and sent back to Mr Phillips;

    34.5. Mr Phillips was asked if they could print and sign. I infer from this that the reason why the question was asked was as a result of agreement between members as to the terms of the SHA;

    34.6. The response from the solicitor was to ask whether the members wanted to better define the methodology for share valuation, whether a transfer to spouses could take place without a formal valuation and whether the shareholders wanted a restriction on withdrawing funds from Quantum;

    34.7. The solicitor advised that the SHA be entered into at the same time as the consultancy agreement. There was no response to the invitation to let him know what the members wanted to do;

    34.8. The next e-mail communication to the solicitor came from Mr Holdsworth who produced detail about the service contracts;

34.9. Nothing further was spoken about the SHA save when it may have been needed for the purpose of dealing with Mr Hargreaves's exit;

34.10. There is no communication at that time (when it was more likely that the SHA would have been challenged if it had not been agreed) to an e-mail sent from the solicitor referring to the record of an agreement at the 31 January 2012 meeting.

34.11. The queries raised were not, in my judgment, essential terms. The queries were advisory only.

35. In my judgment even if, by omission or mistake all the terms had not been agreed, the SHA does not fail for uncertainty. It does not fail for want of a signature. It is a workable document. I infer that the parties moved on to consider the consultancy agreements because they thought the issue of the SHA closed. If I am wrong about this, I find that the members shared an understanding that the terms of the SHA would regulate their conduct. This is evidenced by their reaching for the SHA at the time when it may have been needed (but was not), to deal with the departure of Mr Hargreaves.

(ii) Were the university fees authorised by the Company?

36. I shall deal with this point shortly. Mr Cusack complains that the Company had not authorised payment of the university fees. In my judgment there was agreement between the directors that the Company would pay for the University fees for Mr Dearing and Mr Holdsworth. Mr Holdsworth and Mr Cusack were both interested and considered going to university on a part time basis. Neither complained that the time at university would be time wasted in terms of billing and making the Company profitable. I infer that both

directors considered that obtaining the further university qualifications would be a benefit to the Company. Mr Cusack accepted that it was in Quantum's interests to have skilled and qualified staff. Mr Cusack accepted that there had been discussions about the university fees in or about August 2013. He wrote a reference for Mr Holdsworth stating that he is 'very hardworking, tenacious and likeable' as well as 'an asset to any team…with an impressive work ethic'. On 5 September 2013, Mr Cusack was asked by Mr Holdsworth if he had secured a place at Sheffield University.

37. The Company paid for the courses in late 2013. One of Mr Cusack's roles in the management of Quantum was and is to act as financial controller. A financial controller knows or should know enough of the financial information to control a company's finances: what was or is being paid and when. Mr Cusack accepts that he had access to records such as bank statements and invoices. In cross-examination he was asked about his knowledge of the Company's financial affairs. He said "I was aware of cash flows on a management level" and "occasionally I would check the bank accounts for my own benefit". I find his contention that he did not approve the payment of University fees or question at the time why the Company had made the payments, at odds with his role in the Company.

38. Mr Cusack had no contemporaneous document or note to refresh his memory before making his witness statement, signing the points of claim or giving oral evidence. I do not consider the oral evidence he gave on this issue to be reliable. This finding is borne out by some of the answers given to Mr Newington Bridges under cross-examination. Mr Cusack was asked why he had not complained about the fee payments until this dispute arose. Mr Cusack was hesitant and then said he thought he may have raised the issue before, but couldn't recall the occasion (despite Mr Cusack giving evidence that the fee

payment is "a major point of dispute between me and James"). Mr Newington Bridges suggested to him that the reason why he did not complain or raise the issue in any meaningful way, or at all, was because it had been agreed that the Company would pay the fees. Mr Cusack agreed. The question was direct and the response given straightforward. I find that admission compelling, but in any event would have found on the balance of probabilities that the Company authorised the payment of the University fees.

(iii) Was the pension payment made towards the end of March 2015 authorised by Quantum?

39. The points of claim concisely set out the issue in respect of the pension payment: "The First Respondent removed approximately £121,500 from the Company's bank account…….These payments were not authorised by the Company or the Petitioner. Despite requests to do so by the Petitioner, the first Respondent has refused to repay these monies to the Company."

40. Mr Holdsworth accepts that he did make the withdrawal and did pay the money into a self-invested personal pension ("SIPP"). That enabled him to make a loan back to Quantum for £40,000. He says, and I accept having considered the accounts, that £1,500 of the £121,500 represented an agreed monthly payment. Accordingly, the disputed sum is £120,000. His argument is that although there may not have been an agreement in writing or an oral agreement, there was an understanding between the members that they would each take £120,000 and pay it into their respective SIPPs.

41. Mr Brown for Mr Cusack says the evidence does not support Mr Holdsworth's version of events. He relies on the e-mail exchange commencing 18 March 2015 in which Mr Cusack stated that he did not agree to the payment being made. Mr Cusack and Mr

Holdsworth have a different version of events regarding the meeting with Mr Lewis on 20 March 2015 and the events shortly after.

42. It is unfortunate that there are no notes of the meeting or documents to assist. The evidence provided by Mr Lewis (an impartial witness) does not assist on this question of fact, as he merely gave advice as to what could be done to mitigate corporation tax, demerging the Company and extending the accounting period. He did not witness any conversations after they had left his office.

43. The following is common ground or known fact:

    43.1. Mr Cusack e-mailed Mr Holdsworth voicing a strong view that a large pension payment should not be made: "Based on recent events and the state of the business I think the proposal to pay £120k into each of our pensions and then loan money back to the business is reckless and short sighted. Therefore, I do not agree to any payments to our pensions unless agreed in writing….".

    43.2. after the sending of the e-mail they met with Mr Lewis in order to receive advice as to the commercial sense and viability of making a large pension payment (among other things).

    43.3. At the meeting Mr Lewis reviewed the financial position of the Company and confirmed that a payment of £120,000 to each member would not endanger the business.

    43.4. Mr Lewis confirmed Mr Holdsworth's understanding that a lump sum payment into a SIPP would provide tax advantages for Quantum.

    43.5. the payment into Mr Holdsworth SIPP was made in or around 27 March 2015.

43.6. Mr Cusack first heard that the payment of £120,000 had been made to Mr Holdsworth on 29 March 2015.

43.7. Mr Cusack replied by e-mail on 30 March 2015, "I am frankly appalled that you think it is OK to transfer £120k of Company funds to your personal pension, not just without my prior approval but, as you are fully aware, with my explicit disapproval." He went on to state that the payment was "unauthorised and is therefore unlawful".

43.8. Mr Holdsworth accepts that he did not respond to the e-mail.

44. These known facts are to be contrasted by Mr Holdsworth's oral testimony. He said that after the meeting with Mr Lewis, but before 29 March, he had discussed the pension payment with Mr Cusack during a telephone conversation. They spoke about several matters but there had been agreement between them during that call that a payment of £120,000 could and should be paid into their respective SIPPs. This is new evidence. It is evidence that is not contained in any of the witness statements. Although the defence pleads an agreement to the payment the particulars of a telephone call are conspicuously missing. Based on the common ground existing between them and the known facts I have little hesitation in finding that on the balance of probabilities there was no agreement that £120,000 could or should be paid into their respective SIPPs. The e-mail sent by Mr Cusack on 30 March is at odds with any agreement having been reached and there is no reason to believe that Mr Cusack sent the e-mail for any other reason than to express his strong disapproval. I find Mr Holdsworth's memory of this event unreliable and without support from any documentary or other evidence. The pension payment constitutes an unauthorised disposition of the Company's property.

(iv) agreement to demerge the Company, diversion of business and loss of employees

45. Mr Cusack looks back at events and pieces together what he sees as a planned exit by Mr Holdsworth. To his mind the planned exit began with the incorporation of Project in February 2015. The next step was to take out of the Company as much of the liquid assets as he could reasonably take: £120,000. He then took two employees and diverted business away from Quantum to Project.

46. Mr Holdsworth holds a different view. He incorporated Project following difficult conversations with Mr Cusack about the performance of the Sheffield office. Targets were set and not achieved, redundancies were discussed, and an outsourced HR firm consulted. He saw the trust and confidence between him and Mr Cusack slipping away; and at the same time he was working hard in the South-West of England building the business. He felt he had no control or little influence over the business in the North of England. The incorporation of Project was to provide a vehicle for his business in the event of Quantum's failure. He says he had no intention of undermining the business of Quantum. He supports this assertion by pointing to the fact that Project was dormant until after the end of June 2015. That is an important date. It is important as it is the date when he contends that he and Mr Cusack agreed to divide the Company. He says that Project did not have a bank account or raise an invoice until after 1 July 2015. Acting on the agreed position between the parties any on-going contracts of Quantum (in the South-West) were to be continued by Project. He also says he felt a sense of obligation and duty to clients. Mr Dearing and Ms Cheng left Quantum of their own volition.

47. Mr Cusack's says there was no agreement to divide the business: Mr Holdsworth did not tell him about Project; he did not consent to, and therefore the Company did not consent to Project completing contracts that had started with Quantum. Further he was not informed by Mr Holdsworth that two employees had left Quantum to work for Project.

48. The only impartial witness in these proceedings (the only witness without any interest in the outcome) is Mr Lewis. His evidence is that there was no division agreement during the course of his meeting on 20 March 2015. He recalls the issue arising and giving advice as to the best way to "demerge". The issue of demerger was raised by both parties and they "listened intently to my advice". He advised that there was no real difficulty with splitting the business as it operated in different locations. He had the feeling that Mr Cusack had consulted "everyone". In his oral evidence Mr Cusack accepted that "I took advice from someone at Deloitte prior to that meeting" although this was in part or mostly about tax (no record of the advice exists), and he "took the view that it was better to separate the company". Mr Cusack accepted in cross-examination that the meeting with Mr Lewis was helpful as "I wanted to deal with it properly." I infer from the advice provided by Mr Lewis that they considered a split of the business inevitable. I have little doubt that by the time of the meeting with Mr Lewis on 20 March 2015 both parties were intent on demerger (as it was referred to), although they may not have reached terms by that time.

49. There is nothing in Mr Holdsworth's witness evidence that expresses a memory of a formulated agreement. In this respect he and Mr Cusack are on common ground. The fact of no formulated agreement gives rise to the main challenge by Mr Cuasack. He contends that during their conversations about the topic they did not exchange words to the effect "I agree you should now set up an office in the South-West, I will take the Sheffield office and we will divide the assets of Quantum equally". He accepted, in my view properly, that they both wanted to demerge.

50. In the course of cross-examination Mr Holdsworth explained that because they "formulated an agreement … I sent the email on 29 March. I think we had an

understanding and agreement in principle and that is why I sought to formalise it on 29 March."

51. In his e-mail he asks Mr Cusack to agree how to divide the assets of Quantum "including office equipment company vehicles." He asked Mr Cusack to think about what staff he wanted to retain and "I would suggest that we look to withdraw from this company and whether we look to extend the trading period for another 3 months or not? There will be the run off work to consider for this company and options need consideration." (sic) He continued:

> "At the end of the 3 months extended period, the WIP allocated to each shareholder can then be taken away and managed going forward with our respective companies. I would suggest that the same goes with the staff and if we wish to employ them across on a Tupe agreement…. If you wish to continue to service the client base you have in the North I will continue to service the client base in the SW." (sic)

52. The response from Mr Cusack on 30 March related mostly to the unauthorised pension payment but he added "Your actions beggar belief and highlights the need for us to demerge the business as quickly and as cleanly as possible and, to this end, I suggest that we arrange a meeting with professional advisors present at a mutually convenient location as soon as possible." There was no joint meeting with professional advisors after 30 March. Advice had in any event already been taken. It is unclear what a meeting with professional advisors was intended to achieve. Mr Cusack did not expand.

53. Mr Holdsworth accepted he did not respond to Mr Cusack's e-mail. He appeared to have been stunned by its strong terms, and acted on the assumption that they had already agreed to demerge, and that the e-mail confirmed his understanding.

54. A few days later Ms Cheng wrote to Mr Lewis:

> "I apologise for not telling you John and James are parting company, I was waiting for the pair of them to discuss/confirm before we announce the split. John still hasn't speak with James privately to discuss the separation (however he told you at the meeting and the staff up north)..Really not sure what his problems are, apart from he is bone idle and simply tagging along to get the benefit from James' hard work…..we will extend the accounting period by 3 months (to 30/06/2015) this should give us time to sort out the split of company (hopefully). So I will be sending over the final account in August/September the latest." (sic)

55. These are the only documents that have been brought to the attention of the Court in respect of this aspect of the dispute. An understanding that the parties would demerge may readily be inferred from the circumstances but in any event Mr Cusack accepted in cross-examination that "there was an understanding that we would split". This evidence contradicts his written evidence, although curiously he states that "My true intention at that time was probably to buy him out….". Mr Brown agreed that Mr Cusack held this understanding when closing the case for the petitioner.

56. Mr Holdsworth's written evidence is that there was a telephone conversation between him and Mr Cusack on 16 March. He says that during that telephone conversation Mr Cusack said that he wanted to split up. Mr Holdsworth said he was not disappointed although surprised when he learned that Mr Cusack had told the staff in the Sheffield office. From this he concluded an agreement. Ms Cheng said that there was an agreement in principle or an understanding prior to the meeting with Mr Lewis. One of the main purposes of meeting with Mr Lewis was to discuss the mechanics of division. Mr Cusack's evidence

about whether or not he had informed the staff at the Sheffield office was not given with conviction. I find that the e-mail sent by Ms Cheng on 31 March 2015 is the best evidence on this point and reflects the most probable truth. She wrote to Mr Lewis to inform him of what had transpired, to explain the need to extend the accounting period and ask for some help. There has been no suggestion by Mr Brown that it was written with an intention to gain a litigation advantage.

57. On the basis that it was conceded by Mr Cusack that there was such an understanding, and taking account of the e-mail sent by Ms Cheng on 31 March 2015, in which she states that they had not had a private discussion, it would appear that the understanding was reached on or before 20 March 2015 and Mr Cusack had subsequently informed the Sheffield staff that the Company would demerge.

58. In cross-examination Mr Cusack was asked if there was an agreement that the Company would be divided so that he would take the Sheffield Quantum operation, and Mr Holdsworth the South and South-West. Mr Cusack did not want to concede. He insisted that no details had been agreed and repeated that he was appalled that Mr Holdsworth had taken the pension payment and lent the Company money in the circumstances I have described.

59. It is known that Mr Holdsworth and Mr Cusack acted on some of the advice provided by Mr Lewis. The financial year end for Quantum was extended by three months to the end of June. In cross-examination Mr Newington Bridges focussed on the reasons for the extension of time. Mr Cusack was asked if the extension of the accounting period was made for the purpose of permitting the pension payments to be staggered. After pausing for thought and taking into account the previous questions regarding demerging, he

responded with care. He said the extension "to the accounting year was to permit us to sort out splitting up." That was not challenged further.

60. I find the answer reliable. It is consistent with the content of the e-mail dated 31 March sent by Ms Cheng which I have found is more likely than not to reflect the true position. I find the answer given by Mr Cusack is also consistent with the conversations between the parties prior to and shortly after 20 March: the disagreement about how the business should be run, and Mr Cusack's initiation of the idea that they should go their separate ways. The evidence about the extended accounting period is also consistent with the e-mail sent by Mr Holdsworth on 29 March and, his evidence given during cross-examination. He said that it was "obvious" that any separation would take place during the extended accounting period.

61. Mr Cusack lives and works in Sheffield. Mr Holdsworth lives and works in the South-West of England. I infer that the understanding between Mr Holdsworth and Mr Cusack was that the business would be divided so that Mr Cusack would take the business generated and undertaken from Sheffield, and Mr Holdsworth the South-West. Such a division would assist Mr Cusack's aim of achieving a quick clean break. It would enable Mr Cusack to retain the staff he wanted to keep in Sheffield without interference from Mr Holdsworth. This was important to Mr Cusack as he recalled during cross examination that he had disagreed with Mr Holdsworth's evaluation of the Sheffield office, and stated that it was a busy office. Mr Holdsworth was keen to reduce overheads and make redundancies. Mr Cusack was rightly proud of the fact that the staff under consideration for redundancy in March 2015 remain employed by Quantum today. The understanding of the division also permitted Mr Holdsworth to hire staff that he needed: he wanted to hire a salesman but Mr Cusack resisted.

62. I accept Mr Cusack's evidence that a 'buy-out' option had not been discussed even though he had considered it. I also accept that Mr Cusack did not want to place Quantum into liquidation. Liquidation was first suggested by Mr Lewis as a way of claiming Entrepreneurs relief, but it was not a necessary ingredient of their common understanding. It is probable that Mr Holdsworth will have been satisfied with setting up a new company and permitting Mr Cusack to trade from Quantum albeit subject to a division of clients, staff and other assets. It is probable because Mr Holdsworth had already incorporated Project and set out the division of assets in his e-mail dated 29 March.

63. In closing Mr Brown argued that an understanding had not been pleaded and in any event a letter before action was sent to Mr Holdsworth in late June 2015. The letter, he says, demonstrates no common understanding. These submissions fail on the basis of the admission made by Mr Cusack while giving evidence. The letter sets out directors' statutory duties and some of the obligations contained in the SHA. It considers the strict legal rights arising from statute, the Company's constitution and the SHA. The letter details the alleged breaches, but in a factual vacuum. It fails to deal with the reality of what was happening at the time. The relationship had broken down and the parties had all but gone their separate ways by the time the letter was written. I infer that the purpose of the letter was to set Mr Cusack up for a claim, and not to resolve the issues that had arisen between them.

64. As regards the pleaded case there is no doubt that it is important to set out the parameters of a case so that the other party may prepare for and argue the case it has to answer. Nevertheless, the Court will want to decide the real points in issue between the parties if it can be done without prejudice to one or the other of them. The Court will be slow to permit one party to take a stand on a "pleading point" in respect of a point that that has

arisen in circumstances where the other party has had fair notice and a fair opportunity to address: *Brooks & Willetts v Armstrong* [2016] EWHC 2893.

65. Following the evidence, the parties enjoyed a gap in the trial timetable in order to formulate closing arguments. Mr Brown has not only dealt well with the evidence that emerged during the course of the trial but thoroughly in relation to this issue. There is in my view no justification in these circumstances for standing on a "pleading point". The Court should not shut its eyes to the evidence and reality.

66. As regards employees, I only heard from Ms Cheng. Mr Cusack's enjoys the luxury of a simple argument. While Mr Holdsworth was a director and shareholder of Quantum and Project, Mr Dearing and Ms Cheng left the employ of the Company to join Project.

67. Ms Cheng gave careful evidence listening intently to the questions asked. She asked Mr Holdsworth if she could join Projects during the extended accounting period. She said that she had heard from an employee of the Sheffield office that the Company would demerge and complained that Mr Holdsworth had not notified all those working in the South-West. She explained that she had spoken to Mr Holdsworth about a fear of not being paid at the end of June. Her salary was paid in arrears. She said that Mr Dearing is a family friend.

68. It was highly improbable that Ms Cheng would leave her partner and her home to work with Mr Cusack in Sheffield. Her future employment with Project or another company based in the South-West was inevitable. I did not hear from Mr Dearing, however as he is a family friend, and lives in the South-West of England, it was inevitable that he too would work with Mr Holdsworth rather than transfer to Sheffield. In my judgment in light of their common understanding as to the demerger and the geographical division, the parties will have objectively regarded the employment by Project of Mr Dearing and Ms

Cheng as acceptable between themselves. In any event the loss of Ms Cheng and Mr Dearing has not been shown to have seriously diminished or at least jeopardised Mr Cusack as a member, by reason of the complained conduct.

Unfair Prejudice

69. A petition for unfair prejudice petition pursuant to ss994(1) and 995(2) Companies Act 2006 may be made where:

> "the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of members generally or some part of its members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial"

70. The test of prejudicial conduct that is unfair is objective. The motive of the parties is not relevant. The Court is concerned to find the effect the conduct has on the complaining member. This was expressly stated by Jonathan Parker J in *Re Guidezone Limited* [2000] 2 BCLC 321 where he said:

> ""Unfairness" For the purposes of s 459 is not to be judged by reference to the subjective notions of fairness, but rather by testing whether, applying established equitable principles, the majority has acted, or is proposing to act, in a manner which equity would regard as contrary to good faith."

71. In the same case the Court explained that unfairness may be tested by using equitable principles and establishing the actions of the majority were such as to be contrary to good faith. The process will usually involve needing to prove the existence of agreements,

promises or undertakings reached among shareholders at the outset of the company's existence or later and that there was reliance on those understandings.

72. The same ground is covered by David Richards J (as he was) in *Re Coroin Limited* [2012] EWHC 2344:

> "Prejudice will certainly encompass damage to the financial position of a member. The prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is bound up with his position as a member…The prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to damage to the value of his shareholding. Moreover, prejudice need not be financial in character. A disregard of the rights of a member as such, without any financial consequences, may amount to prejudice falling within the section. Where the acts complained of have no adverse financial consequences, it may be more difficult to establish relevant prejudice. This may particularly be the case where the acts or omissions are breaches of duty owed to the company rather than to shareholders individually. If it is said that the directors of some of them had been in breach of duty to the company but not loss to the company has resulted, the company would not have a claim against those directors. It may therefore be difficult for a shareholder to show that nonetheless as a member he has suffered prejudice…."

73. A petitioner has to show that the conduct complained of is both unfair and prejudicial: *Re Saul D Harrison & Sons Plc* [1995] 1 BCLC 14. *Rock Nominees v RCO Holdings* [2004] 1 BCLC 439 provides a good example of where the conduct was found to be unfair but not prejudicial. A company acquired assets where the directors were in a position of

conflict of interest. It was found that the petitioners had suffered no prejudice as the price paid for the assets was the price that would have been paid had no conflict existed.

74. A breach of a directors' duties is a prima facie ground for relief: *Re Saul D Harrison & Sons Plc* [1995] 1 BCLC 14 at 17-18. So, unauthorised payments made by a company to a director will amount to unfair conduct which is prejudicial to the members: *Re Halt Garages Ltd* [1982] 3 All ER 106. Similarly, the Courts have found that diversion of corporate assets or business opportunities will be capable of conduct that is unfairly prejudicial: *Re London School of Electronics Limited* [1986] Ch 211. A breach of shareholders' agreement is also likely to be a ground for relief: *O'Neill v Phillips* [1999] 2 BCLC 1.

75. The case *O'Neill v Phillips* is the only unfair prejudice case to have reached the House of Lords. Lord Hoffman considered the equitable principles applicable to the jurisdiction:

> "The Court of Appeal found that by 1991 the company had the characteristics identified by Lord Wilberforce in Ebrahimi v Westbourne Galleries Ltd [1973] AC 360, [1972] 2 All ER 492 as commonly giving rise to equitable restraints upon the exercise of powers under the articles. They were (1) an association formed or continued on the basis of a personal relationship involving mutual confidence, (2) an understanding that all, or some, of the shareholders shall participate in the conduct of the business, and (3) restrictions on the transfer of shares, so that a member cannot take out his stake and go elsewhere. I agree. It follows that it would have been unfair of Mr Phillips to use his voting powers under the articles to remove Mr O'Neill from participation in the conduct of the business without giving him the opportunity to sell his interest in the company at a fair price."

Lord Hoffmann explained the phrase "legitimate expectation":

> "It was probably a mistake to use this term, as it usually is when one introduces a new label to describe a concept which is already sufficiently defined in other terms. In saying that it was "correlative" to the equitable restraint, I meant that it could exist only when equitable principles of the kind I have been describing would make it unfair for a party to exercise rights under the articles. It is a consequence, not a cause, of the equitable restraint. The concept of a legitimate expectation should not be allowed to live a life of its own, capable of giving rise to equitable restraints in circumstances to which the traditional equitable principles have not application."

76. I noted in *Re Smart Diner Group Limited* that the equitable constraints under consideration by Lord Hoffmann are constraints affecting the otherwise legally valid exercise of a power under the articles, or constitution of a company. In my view that includes a shareholder agreement. This observation is not new. In *Grace v Biagioli* [2006] 2 BCLC 70 Patten J (as he was) helpfully made clear how equitable constraints operated in this jurisdiction:

> "The concept of unfairness, although objective in focus, is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. This will usually take the form of the articles of association and any collateral agreements between shareholders which identify their rights and obligations as members of the company. Both are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable."

77. I mention the judgment of *Fisher v Cadman* [2006] 1 BCLC 499 not because Mr Philip Sales QC (as he was) says anything different about the nature of the equitable considerations in this jurisdiction, but because he provides a useful and pithy summary (para 90):

> "…In considering whether the conduct of the controllers amounts to conduct unfairly prejudicial to the interests of a member, it is also relevant to take into account any agreement, understanding or clearly established pattern of acquiescence on the part of that member which may have let the controllers to act or continue to act in a particular way, even if their action may have involved a departure from a strict adherence to the terms of the articles. In such a case, in light of their common understanding as to what conduct will be regarded as acceptable between themselves despite the terms of the articles of association, it would not be correct to characterise the action of the controllers as unfair within the context of the whole relationship between them and the member. In my view, this is a corollary of the approach to the test of unfairness adopted in the authorities to which I have referred above, whereby the agreement between the members as set out in the articles of association may be subject to equitable considerations and obligations arising out of the particular circumstances of the relationship overall. There is no good reason why such equitable considerations should not qualify, as well as add to, the expectations about how the controllers of the company ought to behave to be derived from a simple reading of the articles of association."

78. The Court has a very wide discretion to order appropriate relief: *Gamlestaden v Baltic Partners [2007] BCC 272*; *Re Smart Diner Group Limited* [2016] EWHC 2802 (Ch).

The Court may order a director who has breached his duties to pay compensation to the company and order compensation in favour of the petitioner directly where this would be appropriate: *Re: Brightview Ltd* [2004] 2 BCLC 191.

79. Mr Brown argues that there has been a breach of directors' duties by reason of the diversion of Quantum's contracts. He argues that unless there is some express modification to the SHA or a qualification in respect of statutory duties or Mr Cusack expressly authorised a breach, the rule against self-dealing and acting in conflict of interest is inflexible as no fiduciary may, directly or indirectly, accept or exploit for himself the benefit of an opportunity which might have been exploited by the company to which he owes his duty. He argues that the duties of a company director are now transparent in that they have been codified in sections 171-177 of the Companies Act 2006. A director must obtain proper authorisation for any payments made to himself (such as the pension payment) and if he fails to do so and an unauthorised payment is made to him, this will amount to a breach of his directors' duties, including the s.171 duty to act within his powers, the s.172 duty to promote the success of the company and the s.174 duty to exercise reasonable care, skill and diligence.

80. He argues, with force, that a breach of duty of this nature and diversion of business away from a company are classic grounds for unfair prejudice.

Conclusions on liability

81. For the reasons I have given above I conclude that there was an agreement or an understanding between members that the SHA would regulate their relationship. I find that that the university fees were correctly paid by the Company. The parties agreed or acquiesced in or there was an understanding that the Company would make these

payments and that a university course would not only benefit the Company (including its members) but its employees.

82. In my Judgment there was a common understanding reached by Mr Cusack and Mr Holdsworth in respect of a demerger. The understanding was that the demerger would be finalised during the extended accounting period, and at the end of the period the parties would be free to go their own way, without breaching their duties to the Company, obligations under the SHA or its constitution. Mr Cusack would take the business and operation based in Sheffield and Mr Holdsworth the South and South-West.

83. As a result of the common understanding I find that equitable considerations constrain Mr Cusack from relying upon strict legal rights. The behaviour of Mr Holdsworth, save for the issue I shall turn to next, was objectively acceptable to the members and the Company as a whole. The actions arising out of the demerger were not unfair to Mr Cusack as a member.

84. Mr Cusack has a legitimate complaint that Mr Holdsworth jumped the gun or failed to secure agreement before the end of the extended accounting period (the "Relevant Period"). Mr Holdsworth candidly accepts that before the end of the Relevant Period he caused contracts, the property of Quantum, to be diverted to Project. Mr Holdsworth was (and remains) a director of Quantum bound by the terms of the SHA and obliged to act in accordance with the duties owed to the Company. His action breached the SHA, breached the duty to act in its best interests of Quantum and he failed to refrain from acting where there was a conflict between his personal interests and those of the Company. Mr Holdsworth has rightly not attempted to argue that the diversion of contracts during the Relevant Period was in the best interests of Quantum or that there was no conflict of

interest. He accepts that Project must account the breaches falling into this category. His breach of the SHA gives rise to a ground for unfair prejudice.

85. I find that the diversion of contracts prior to the end of the Relevant Period constituted unfair conduct as there was no agreement or understanding that Project or Mr Holdsworth could benefit from Quantum's clients during that time.

86. It is not clear from the evidence before the court whether the consequences of the breaches during the Relevant Period are serious enough to be categorised as prejudicial. The written evidence suggests not. I will hear further submissions on the point.

87. As regards the pension payment, there was no prior authorisation given by the Company. The disposition of company property without prior authorisation is unquestionably a breach of duty. The causing or allowing of the payment is unfair conduct. The payment was prejudicial as it has been demonstrated to have seriously diminished the value of the shareholding of Mr Cusack. The payment amounted to a breach of duty causing loss to the Company. The sum (subject to what is said below) should be repaid with simple interest.

88. In my judgment the departure of Ms Cheng and Mr Dearing after it was understood that the Company would demerge was inevitable. There is no evidence that the sole cause for their leaving Quantum was Mr Holdsworth. It can safely be inferred that once the employees understood that the directors and members were about to go their separate ways, they were put to an election as to which camp they wanted to be in. I find on the balance of probabilities, the staff in the Sheffield office had already been informed of the split-up. Due to their living and social arrangements it was improbable that Mr Dearing and Ms Cheng would elect to go to Sheffield.

89. Mr Cusack has not put his case on the basis that the loss of these employees caused loss to the Company. If there was a loss to the Company Mr Cusack has failed to show that the loss has seriously diminished or at least jeopardised him as a member, by reason of the complained conduct. The departure of the employees does not amount to conduct that can be described as unfair or prejudicial in the context of this case.

Valuation and remedy

90. Mr Cusack relies on the expert report of Ms Fiona Hotston Moore who has attempted a business valuation derived from the application of valuation metrics that are regarded as likely to be adopted by purchasers (such as price earnings ratios), and values the Company as a going concern, using a calculated maintainable earning figures, and multiplying by an appropriate ratio. She has valued Quantum as at 30 June 2016 for £135,105. An alternative valuation has been calculated on the basis that there was no demerger in July 2015. This is calculated by projecting a turnover, and weighting the EBITDA to reach a figure that represents maintainable earnings. This figure is multiplied by a ratio. After taking into account some further matters this produces an enterprise value of between £1,812,524 and £2,039,090, and an equity value of between £2,339,470 and £2,566,036.

91. In my judgment the expert report does not provide an appropriate basis of valuation as the expert was not able to take account of my findings of fact and deal with the directions I now intend to make. This is not a criticism. She was not equipped with all the necessary information. I decline the invitation "to do the best I can". The findings of fact play a crucial role in the valuation exercise and it would be unsafe to reach a conclusion on the current state of the expert evidence.

92. As regards the business of the Company it has now, as I understand it, effectively demerged. Mr Holdsworth runs the same business as Quantum once did in the South-West, and Quantum continues to trade the business it always enjoyed in the North of England. Mr Cusack has no appetite for incorporating a different company and placing Quantum into liquidation as advised by Mr Lewis. The tax advantages of this course may no longer exist. His initial desire, stretching back to March 2015, was to remain a shareholder and director of Quantum and purchase Mr Holdsworth's 50% shareholding. That desire remains.

93. The Court has wide powers to provide a remedy suitable to the facts of the particular case: section 996 Companies Act 2006. The Court usually makes an order for the purchase of shares. Such an order is undoubtedly appropriate at a time when a quasi-partnership relationship breaks down, and one of the parties is either ousted or leaves the business of his or her own volition. However, as pointed out by Briggs J in *Sikorski v Sikorski* [2012] EWHC 2802, it is not the only relief available. The court must be open to make directions and orders that provide an objectively fair solution to the particular form of unfair prejudice. In this case as a result of the break down in relations, the start of a new business by Mr Holdsworth, the continuing of the Company's business by Mr Cusack, and the effective division of clients, staff and territory of the two businesses, I shall make a series of directions aimed at providing an objectively fair solution, that will take account of the pension payment and diversion of work that gave rise to the unfair prejudice.

94. There are generally three applicable types of share valuation in a company such as this. First, to value the shares rateably without discount for a minority shareholding; second with a discount for minority shareholding; and thirdly a rateable proportion of the net

assets at the date of the break up or liquidation of the company in question: see *CVC Opportunity Equity Partners Limited v Demarco Almeida* [2002] BCLC 108. There is no minority in this case. The appropriate valuation should be conducted without discount for a minority shareholding.

95. I have found that the pension payment was made in breach of duty, and triggers relief for unfair prejudice. Ordinarily I would order that the payment be repaid to the Company. The court must be astute to ensure that compensation is not recovered in the same hands more than once. As the main aim of this petition is unfair prejudice I shall direct that the payment plus simple interest be deducted from the valuation (thereby reducing the value of shares) as I require Mr Holdsworth to sell his shares to Mr Cusack. Once this figure is arrived at there should be a set off in respect of the loan of £40,000 made to the Company as Mr Holdsworth has said that the loan is to be treated as irrecoverable. The set off will take account of the fact that the loan does not attract interest.

96. There should be a *prima facie* adjustment in relation to any sums due in respect of the work carried out by Project in the Relevant Period (but not after).

97. As regards the valuation date I accept the submission from Mr Brown that the usual date is the date on which the order for purchase is made. Such an order has been described as a starting point: *Profinance Trust SA v Gladstone* [2002] 1 BCLC 141. In my view if a valuation were to be carried out as at the date of the order it would (i) not reflect the value of the Company at the date of the division of the business and (ii) be subject to projections based on guess work from the date of division to the date of the order. This, in my view is unsatisfactory, as it runs the risk of creating an unnecessary fiction which may lead to an injustice to one or other of the parties. For these reasons I direct that the valuation date should be the last day of the Relevant Period.

98. The valuation has to ensure that the Court can take account of the value of the business each party has taken at the end of the Relevant Period. This may result in a simple transfer of shares from Mr Holdsworth to Mr Cusack for a *deminimis* amount.

99. If the parties are unable to agree a value on the basis of my directions I will consider the appointment of a single joint expert.

100. I will hear submissions as to the precise terms of an appropriate order (unless it is agreed) and any necessary further case management directions.