Neutral Citation Number: [2024] EWHC 330 (Ch)

Case No: CR-2019-LDS-000783

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT IN LEEDS
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF TRANSWASTE RECYCLING AND AGGREGATES LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Leeds Combined Court Centre
1 Oxford Row, Leeds, LS1 3BG

Date: 19/02/2024

Before :

MR JUSTICE ADAM JOHNSON

- -

Between :

STUART WELLS

Petitioner

- and –

(1) PAUL HORNSHAW
(2) MARK HORNSHAW
(3) TRANSWASTE RECYCLING AND AGGREGATES LIMITED

Respondents

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Paul Chaisty KC (instructed by **Ward Hadaway LLP**) for the **Petitioner**
Thomas Grant KC and Gabriella McNicholas (instructed by **Milners Solicitors**) for the **Respondents**

Hearing dates: 18, 19, 20, 21, 22, 25, 26, 27, 28, 29 September,
02, 03, 04, 05, 09 and 10 October 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Monday 19 February by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Adam Johnson:

I. Introduction & Background

1. The is an unfair prejudice Petition brought under s. 994 of the Companies Act 2006 ("*CA 2006*").

2. The Petitioner is Mr Stuart Wells. The company in question is Transwaste Recycling and Aggregates Limited ("*TRAL*"), a waste management business based in Hull.

3. Mr Wells is the registered holder of 14.3% of the issued shares in TRAL. The remaining shares are held by two brothers, Paul and Mark Hornshaw: they each hold 42.85% of TRAL's issued share capital.

4. Mr Wells was a statutory director of TRAL between 2003 and 2022. Paul and Mark Hornshaw were directors during the same period, and remain in post.

5. Events in September 2015 caused Mr Wells to wish to part company with TRAL, and specifically to relinquish his shareholding. What happened was that on Wednesday 23 September 2015, TRAL's premises in Melton, Hull were raided by HMRC and the police. HMRC suspected a fraud involving the non-payment of landfill tax. Paul and Mark Hornshaw were arrested. In the end, no charges were brought and the matter was dropped; but it took until 2019 for it to be sorted out.

6. In the immediate aftermath of the raid, on Saturday 26 September 2015, Mr Wells sent an email saying that after thinking long and hard about it, he had decided to leave TRAL. His email gave the impression that his involvement would terminate at the end of November 2015, following a notice or handover period. Mr Wells indeed ceased working for TRAL after the end of November 2015 and ceased to be paid his salary as an employee. He remained a statutory director, however, having received advice that it would be more tax efficient for him to relinquish his directorship only once the question of his shareholding was sorted out. The Hornshaws agreed.

7. The shareholders in TRAL had signed a Shareholders' Agreement (the "*SHA*") in 2005. This contained a provision, in cl. 7, dealing with what was to happen if one of the shareholders wished to cease being an employee of the company or wished to sell his shares. Cl. 7 requires the departing shareholder to make an offer to sell his shares to the remaining shareholders (referred to as a "*Sale Offer*"), at a price (referred to as the "*sale price*"), to be calculated by an accountant, "*by reference to the standard and historical accounting practices of the Company*."

8. There is a dispute about what, precisely, was done as regards compliance with cl. 7, but one thing that is clear is that Mr Stuart Clark, TRAL's auditor, conducted a valuation exercise, with a view to valuing Mr Wells' shareholding as at 30 September 2015. As I will explain further below, one complication he encountered is that TRAL's business model involved it contracting with other companies associated with the Hornshaw brothers. Mr Clark's work included considering such related party transactions and requiring to be satisfied that they were on commercial terms. In many instances he thought they were, but in some others he was not persuaded, and made adjustments accordingly.

9. There was some delay in Mr Clark completing his valuation, caused in part by complications arising from the HMRC raid and investigation into TRAL. In the end, however, Mr Clark produced a Report dated 24 June 2016, based on figures up to 31 December 2014.

10. Mr Clark came to an overall value for TRAL of £15,389,964. On the face of it, 14.3% of that overall figure would have resulted in a value for Mr Wells' shareholding of £2,200,335.85. But Mr Clark also applied a discount to reflect the fact that Mr Wells had only a minority stake in TRAL: his discount was 75%, giving a figure for Mr Wells' shareholding of £550,191.

11. Mr Wells was unhappy with this valuation and made a number of complaints about it via a valuation expert he had engaged, a Mr Neil Jenneson. A principal complaint was that no discount should have been applied to reach a value for Mr Wells' shareholding, because TRAL was a *quasi-partnership* company, and so a discount was inappropriate. Another complaint was that Mr Clark had not properly completed the job he had been given, because TRAL's audited accounts for the 18 month period to 30 June 2015 were available by June 2016, but Mr Clark's valuation had not taken account of them: as noted, he had used figures only up to December 2014. As it happened, Mr Clark agreed with the latter point and said in an email that "*[t]he delays in producing this report are such that the figures are out of date*." He proposed that a new valuation be prepared, "*by an independent expert to be jointly funded and agreed by both parties…*".

12. This proposal was not taken up. Instead the parties' positions hardened and eventually, in January 2017, Rollits solicitors, acting on behalf of Mr Wells, sent a letter before claim, attributing a value of £7m to Mr Wells's shareholding. This letter also made the complaint that Mr Wells had effectively been misled in 2008 into agreeing a reduction of his then shareholding in TRAL, and said that in consequence he should be regarded as holding not 14.3% of TRAL's issued shares, but instead 24.9%.

13. Unfortunately matters were left to drift, and the parties continued in a state of limbo. Although he had stopped working for TRAL and was no longer receiving a salary, Mr Wells remained a shareholder and was listed as a director at Companies House. The Hornshaws meanwhile continued to manage TRAL, in certain respects in a manner which Mr Wells would later come to complain about. For one thing, although Mr Wells had received modest dividends of £14,000 per year in the calendar years 2012 and 2013, thereafter TRAL declared no dividends. At the same time, the Hornshaw brothers began to borrow substantial sums from TRAL, without paying interest. As at June 2015, their directors' loan accounts showed the two of them owing a total of about £500,000 to TRAL; but by June 2016, this amount had risen to about £2m.

14. This unfortunate state of limbo became a problem in 2018, when the Hornshaws had discussions with a company called Attero, in respect of a proposed transaction under which Attero would take over TRAL's business and lease many of its assets. The Hornshaws' solicitors, Milners, wrote to Mr Wells with details of the proposed transaction on 2 March 2018, and also threatened an injunction to compel Mr Wells to make a Sale Offer to sell his shareholding to the Hornshaws at what they said was the contractually determined *sale price* of £550,191. In the event, Mr Wells did not make any offer, but neither did the Hornshaws apply for an injunction. Instead, the proposed transaction was approved at a board meeting on 22 May 2018 which Mr Wells did not attend. Although it was implemented provisionally in about June 2018 when Attero

began trading from the Melton site, in the end the transaction did not in fact proceed. TRAL continued its operations more or less as before.

15. It is against that background that the present Petition was issued by Mr Wells' then solicitors, Rollits, on 10 July 2019. I will say more below about the precise forms of unfair prejudice alleged, but they include a complaint about the circumstances which led to an adjustment in the size of Mr Wells' shareholding in 2008; complaints about the making of "*excessive and uncommercial payments*" to companies associated with the Hornshaws and others; and complaints about the failure to declare dividends and about the Hornshaws having borrowed substantial sums from TRAL via their directors' loan accounts without any obligation to pay interest.

16. The basic form of relief sought is an Order for the Hornshaws to acquire Mr Wells' shareholding at a fair value to be determined by the Court or by an independent valuer, without any minority discount, and "*[w]ith a premium to reflect the loss suffered by the Company as a result of the matters of unfair prejudice pleaded herein*."

17. The Petition placed no reliance on Mr Clark's valuation from June 2016, and indeed did not mention it at all. Mr Clark's valuation was, though, relied on in the Hornshaws' Defence and Counterclaim, but in Mr Wells' Reply he took the position that it was not binding on him. Amongst other points, he said that the figure put forward by Mr Clark had really been part of a process of negotiation rather than by way of a binding expert determination, and (para. 28(i) and (k)) said the negotiation had never been completed and "*[n]o final figure has ever been agreed*."

18. Mr Wells was eventually removed as a director of TRAL by majority vote of the shareholders (i.e., the Hornshaw brothers voting together) in July 2022. Mr Wells makes no complaint as such about this, and it is not relied on as a ground of unfair prejudice.

II. Some Initial Points

19. This is an unusual case in a number of respects. Among them is the fact that the unfair prejudice jurisdiction under s.994 CA 2006 is perhaps most often invoked by the minority shareholder who, without relief from the Court, has no means of exiting a company which is being managed in a manner which is unfairly prejudicial to his interests. He is therefore left marooned as a shareholder in a company which is poorly managed by someone else with no available means of escape.

20. That is not the position here, however, because Mr Wells did have an exit route available to him in 2015, namely the mechanism in cl. 7 of the SHA, which required him to offer to sell, and (in effect) required the other shareholders to buy, his shareholding at the sale price to be fixed by the appointed valuer. Mr Wells, though, never did make an offer to sell his shares. To begin with, this seems to have been because he gave no consideration to cl. 7. Later, it seems to have been because he thought he was involved in a process of negotiation, and/or because he was not happy with the way the process was conducted and did not agree with its outcome.

21. One important question in the case is therefore how the contractual exit mechanism in cl. 7 of the SHA dovetails with the statutory relief under s.994 CA 2006, and whether the availability of the former (as the Hornshaw brothers argue) precludes the making of

any Order by the Court pursuant to the latter. This line of analysis includes the issue whether Mr Clark's valuation is binding on Mr Wells or not.

22. I will come back to the Petition later, but I think it helpful to emphasise the following points at this stage:

i) To start with, there is the dispute about the size of Mr Wells' shareholding, which was not an issue at the time of the valuation exercise in 2015, but which developed in correspondence in 2017 and was then reflected in the Petition. This is material to value because there is a significant difference between a 14.3% shareholding and a 24.9% shareholding.

ii) One feature of the case is that, although many of the complaints in the Petition relate to the time period between 2012 and 2015, and thus cover the same matters considered by Mr Clark in performing his valuation (which valued TRAL as at 30 September 2015), other complaints made by Mr Wells (given the delays and the fact that matters were left in limbo for so long) now drift into later periods, in particular his argument that he was deprived of dividends after the calendar year 2014. In my opinion, however, Mr Wells' decision to leave TRAL in September 2015 is a natural break point in the chronology, and the periods pre- and post-September 2015 need to be looked at differently in determining whether there was unfair prejudice.

iii) There is the related question of what the valuation date should be for any sale of Mr Wells' shares to the Hornshaws. In closing the case, the submission of Mr Chaisty KC for Mr Wells (who had been instructed mid-way through the proceedings, when Ward Hadaway assumed conduct in place of Rollits) was that the shares should be given their current value – i.e., they should be valued as at the date of sale.

iv) An issue developed during trial about its scope. The trial was not necessarily intended to come to a final figure for the price to be paid for Mr Wells' shareholding, assuming unfair prejudice to be made out. It was always anticipated that there might need to be a separate valuation stage. At the same time, however, at a Costs and Case Management Conference in August 2021, DJ Jackson made an Order stipulating that *within* scope for the present trial was the following question (see para. 2(3)):

> "*Insofar as any unfair prejudice is established and found to be appropriate to take into account when determining what (if any) relief the Petitioner is entitled to, the extent of any financial prejudice caused thereby*."

For reasons which will became clear below, this gave rise to an argument about whether, if Mr Wells was able in principle to show breaches of fiduciary duty by the Hornshaw brothers arising from their being in positions of conflict, it would be open to Mr Wells in a later phase of the proceedings to seek to quantify any resultant claims for an account of profits by TRAL, to be taken into account in valuing his shareholding; or whether (in effect) it was now simply too late for Mr Wells to seek to rely on any such claims.

v) There is the question whether Mr Wells' shareholding should be valued subject to a discount given its minority status. On this point, it is relevant that in a detailed and careful Judgment handed down on 28 September 2020, DJ Jackson entered summary judgment for the Respondents on certain aspects of the Petition which sought to rely on unwritten agreements or understandings, said to have pre-dated the SHA, as the basis for a submission that TRAL should be treated as a quasi-partnership company (see the Judgment of DJ Jackson at [78]-[121]). As noted, this was one of the key points made by Mr Jenneson (see above at [11]). There having been no appeal, Mr Chaisty KC rightly proceeded at trial on the basis that TRAL was not to be treated as a quasi-partnership company, but he argued that the valuation of Mr Wells's shareholding should nonetheless be without any discount to reflect its minority status.

III. The Trial and the Witnesses

23. I heard evidence at trial from a large number of factual witnesses.

24. For the Petitioner: Mr Wells himself gave evidence orally, as did his wife Katrina Wells, and a Mr Charles Petrie (on the topic of the use of vans for advertising purposes). Witness statements were also served by Mr Mike Wakefield (mainly on the topic of the work Mr Wells did for his firm, Mike Wakefield Tippers, and how that interlinked with the work he did for TRAL), and by Mr Raymond Stannard (on his relationship with Mr Wells, although this was mainly focused on the period before 2008). The contents of both these latter statements were accepted without Mr Wakefield or Mr Stannard being called for cross-examination.

25. For the Respondents: The main witnesses were –

i) Paul and Mark Hornshaw, and in particular Paul Hornshaw, who it was clear was the main force presently behind the TRAL business;

ii) Mr Robert Thompson. Mr Thompson is an accountant, now retired, but who provided accounting services to TRAL and had a long association with a number of the individuals central to the present case, including the Hornshaw brothers, Mr Derek Taylor and Mr Wells; and

iii) Mr Stuart Clark. Mr Clark was TRAL's auditor who produced the June 2016 Report valuing Mr Wells' shareholding.

26. Other witnesses for the Respondents who gave evidence orally were Ms Katie Noble (Paul Hornshaw's ex-wife); Mr Mark Betts (a director of Seneca Investments Ltd, which I will mention further below); Ms Claire Hannan (Accounts Administrator at TRAL): Ms Christine Berry (who worked as an accountant at TRAL until 2014); Mr Edward Woollen (who worked in sales at TRAL between 2011 and 2016); Mr Bruce Pritchard (who both works for TRAL and is in the business of hiring heavy equipment to TRAL such as shredders); Mr Vernon Philips (manager of TRAL's depot at Foster Street in Hull); Mr Jonny Bryant (who gave evidence about, *inter alia*, the supply of trucks for use by TRAL's business); and Mr Patrick Cooney (a former TRAL employee).

27. A number of comments should be made about the evidence.

28. To start with, it is correct to note that the course of Mr Wells' cross-examination was interrupted by illness. I need not give details in this public Judgment, but suffice it to say that Mr Wells had to break off his evidence on Day 4 of the trial and other of the Petitioner's witnesses were interposed; and then although Mr Wells started giving evidence again on Day 5, he was able to do so only for a short period and then had to break off again and was taken to hospital. In the event, he did not return again until Day 11, when he felt sufficiently well after a period of rest to continue (a number of the Respondents' witnesses having given evidence in the meantime). In his oral closing submissions, Mr Chaisty KC said that in light of this, one should treat Mr Wells' evidence during the first period of his cross-examination with care because he was not well and it was clear he was not focusing properly. Two points arise:

    i) In the circumstances I think it correct to treat the evidence given by Mr Wells with some care, but I was inclined to do that anyway, given that this was evidence about events a long while ago (many before 2015). Where relevant, therefore, I think it right to cross-check that evidence against the available documents and the inherent probabilities.

    ii) I did not understand it to be suggested by Mr Chaisty KC that Mr Wells' health condition made it impossible for him to give his evidence fairly or that he was in any way unfairly pressurised during his cross-examination. It was not suggested that Mr Wells was so incapacitated during the first phase of his evidence and indeed he appeared keen to have the case resolved. When he did run into difficulty on Day 4 the suggestion that he take a break in his evidence was readily supported by Mr Grant KC, counsel for the Respondents; and when Mr Wells then broke off again on Day 5, in the event for a much longer period, it was a result of a suggestion made originally by Mr Grant. In such circumstances, I am entirely satisfied that everything practicable was done to accommodate Mr Wells and specifically to allow him time to recuperate when it did become clear that he could not properly continue.

29. The next comment is a general one, which is that I am satisfied that all the witnesses were basically honest and were doing their best to assist the Court. Mr Grant KC in his closing submissions was critical of Mr Wells and said it was a matter for censure that certain parts of his case had been persisted in despite the lack of any evidence to support them. It is true that certain parts of the Petitioner's case can fairly be described in that way, as I will explain below. I do not, however, think that means that Mr Wells was dishonest or maliciously obstructive. Much more likely in my judgment, having observed Mr Wells over a number of days, it was the product of a certain naivety on his part, which in turn reflected both a conviction in his view that he had been treated unfairly, combined with a lack of appreciation of the seriousness of some of the allegations made on his behalf.

30. For Mr Wells himself, Mr Chaisty KC had only muted criticism of Paul and Mark Hornshaw – rather, his point was that their evidence, including in particular that concerned with the non-payment of dividends (see [192] below), supported Mr Wells' own case. Mr Chaisty KC was more directly critical of aspects of Mr Thompson's and Mr Clark's evidence, but I disagree with any suggestion that they were anything other than straightforward and honest. I will say more about certain parts of their evidence below (see for example at [106], [123] and [197]).

IV. The History in More Detail

31. In order to understand what follows, it is necessary to cover the background in more detail. This will involve looking at TRAL's history and operations, including in particular the manner in which its operations intersect with those of other companies in which the Hornshaw brothers are interested. It will also involve looking, against that background, at the valuation exercise conducted by Mr Clark.

TRAL's Business Model

32. TRAL's business is in the large-scale processing and management of waste. The basic business model is simple. It involves collecting waste from customers (some of whom are very large, such as county councils), and then sorting it. Some of the waste is recycled and sold for further use (for example as aggregates in building works). The remainder has to be disposed of, usually by way of landfill. Disposing of waste by way of landfill comes at a cost, so the more TRAL can recycle and sell, the better off it is.

Derek Taylor

33. When it originally began trading, TRAL's shareholders were the two Hornshaw brothers and a Mr Derek Taylor. Mr Taylor was the more senior of the three, and the more experienced. Paul Hornshaw described him affectionately. He seems to have been a somewhat idiosyncratic, but successful and well-respected, businessman in the area around Hull.

Transwaste Services Limited

34. Before TRAL commenced operations, the Hornshaws already had a business called Transwaste Services Limited ("*TWS*"), which was involved in skip hire. They were, and are, the shareholders in, and directors of, TWS. Over time, TWS developed beyond skip hire. It came to own or lease other vehicles as well, and in effect became a haulage firm, providing haulage services principally if not solely to TRAL. Thus, the practice developed of TRAL paying fees for haulage services to TWS. That continues today.

The 2003 Shareholdings

35. Mr Wells came into TRAL slightly later than the others. Before joining TRAL, Mr Wells worked for the industrials company, Lafarge. He held certain regulatory licences which made him valuable in a new business like TRAL, involved in waste management and processing.

36. At the beginning of TRAL's life, Mr Taylor and the Hornshaws each held 30 £1 shares in TRAL, and thus were equal shareholders. There was an adjustment in the shareholdings after Mr Wells joined the business. Mr Wells' evidence was that he expected to be made an equal (25%) shareholder with the others, but in the event he accepted a lower shareholding. By August 2003, TRAL had 1,000 issued shares and the shareholdings were as follows:

Shareholder	No. of shares	% shareholding
Derek Taylor	273	27.3%
Paul Hornshaw	273	27.3%
Mark Hornshaw	273	27.3%
Stuart Wells	181	18.1%

37. All the shareholders were also directors of TRAL. In 2005, as mentioned already above, they signed the SHA.

Management Fees

38. As TRAL grew, the shareholders came to draw remuneration by means of management fees. In the case of the Hornshaws, the fees were payable to TWS. Mr Wells received a fee payable to his company, Yorkshire Commercial Services Limited ("*YCS*"), but in order to provide a steady income was also paid a modest salary as employee (which by 2015 was £33,400 per annum).

Humber Properties Limited

39. Initially, TRAL operated from premises known as Hessle Dock in East Yorkshire. At the time, Hessle Dock was owned by a Mr Richard Briggs and leased by TRAL, but in 2003 the opportunity arose to acquire the Hessle site and it was sold to a company called Humber Properties Limited ("*HPL*"). Mr Taylor and the Hornshaw brothers (but not Mr Wells) were both owners of, and directors of, HPL. TRAL remained at the Hessle site as a tenant of HPL, and paid rent to HPL.

40. As TRAL's business expanded, more space was needed. In 2006, 2007 and 2008, HPL acquired a number of parcels of land at a new site now known as Melton Waste Park, also in East Yorkshire. TRAL moved into the Melton site in 2008, again as a tenant of HPL, paying rent to HPL.

The Move to Melton

41. The move to Melton in 2008 was a major event in the history of TRAL, and required considerable investment, both immediately and on an ongoing basis. In addition to HPL's acquisition of the Melton site, TRAL itself incurred expenditure both in making the site fit for its operations (for example, by constructing sheds for the processing of waste), and in acquiring (usually under finance arrangements) the necessary static plant and machinery used in waste processing. Based on TRAL's published accounts, the Petition shows expenditure of the former type totalling approximately £3m in the period 2009-2017, and expenditure of the latter type totalling approximately £14.5m.

The 2008 Shareholdings

42. The move to Melton, and the costs and financial commitments associated with it, also prompted a further rebalancing of the shareholding interests in TRAL. The relevant events gave rise to the now disputed reduction in the amount of Mr Wells' shareholding, and I will need to deal with them in more detail below. For now I will simply point out that, following a meeting attended by Mr Taylor, Mr Wells and Mr Thompson on 20 June 2008, 1,000 new shares were issued by TRAL and allotted to the shareholders at

par value (£1 per share), thus giving a total of 2,000 issued shares and resulting in the following shareholdings:

Shareholder	**No. of shares**	**% shareholding**
Derek Taylor	600	30%
Paul Hornshaw	600	30%
Mark Hornshaw	600	30%
Stuart Wells	200	10%

Mr Taylor Retires

43. Mr Taylor decided to retire from TRAL in 2010, and in 2011 his shareholding was purchased by TRAL and then redistributed to the other three shareholders, pro-rata to their existing shareholdings. This is how, on the face of it, Mr Wells comes to have a 14.3% shareholding in TRAL. The position can be summarised as follows:

Shareholder	**No. of shares**	**% shareholding**
Paul Hornshaw	857	42.85%
Mark Hornshaw	857	42.85%
Stuart Wells	286	14.3%

44. Following his retirement, Mr Taylor sadly died. His shares in HPL were transferred to the Hornshaw brothers.

Wauldby Associates Limited

45. From about 2012, the Hornshaw brothers began to trade via another company, in addition to TWS. This was Wauldby Associates Limited ("*Wauldby*"). Initially their shareholdings were held indirectly via a nominee company, but were later transferred to them personally. The sole director of Wauldby until his retirement in 2017 was Mr Thompson – that is, the same Mr Thompson who acted as TRAL's accountant. The directors are now Paul Hornshaw and a Mr Michael Kemish.

46. Like TWS, Wauldby has a dual function. One is as the owner of items of movable plant and machinery used in the business of waste management. These include items such as shredders and trommels. Such items are expensive and are subject to heavy wear and tear in the course of business. According to Paul and Mark Hornshaw's evidence, they decided to engage in the business of plant hire via Wauldby because it was clear that such plant would be needed by TRAL, but acquiring it through Wauldby would give the option of hiring it out to other users as well. TRAL was intended to be a waste processing business, not a plant hire business. However that may be, the upshot is that another part of TRAL's cost of doing business (in addition to rent payable to HPL and haulage charges payable to TWS) is made up of plant hire charges paid to Wauldby.

47. Wauldby's second function, just as with TWS, has been the levying of management fees on TRAL, as compensation for the time spent by Paul and Mark Hornshaw in conducting TRAL's business.

Seneca Global Limited/Caird Peckfield Limited

48. I need to mention another entity associated with the Hornshaw brothers. This is Seneca Global Limited ("*Seneca Global*").

49. Seneca Global is a joint venture company. It fits into the overall picture in a slightly different way. The shareholders in Seneca Global are Wauldby, the Hornshaws' company mentioned immediately above, and another company called Seneca Investments Limited ("*Seneca Investments*"). Seneca Investments is owned by two brothers, Neil and Nick Elliott, who are also involved in the waste management sector, and who have their own waste management business in Hartlepool, like TRAL.

50. In 2013, Seneca Global, the joint venture company, acquired a company then called Caird Bardon Limited, which owned a landfill site in a place called Peckfield. The company later changed its name and became known as Caird Peckfield Limited ("*Caird Peckfield*"). TRAL, whose business involves disposing of waste as landfill, became a customer of Caird Peckfield, and thus made payments to Caird Peckfield for waste processing services.

The Elliotts: Seneca Investments Limited

51. In the period up to September 2015, TRAL also had other, direct relationships with the Elliotts' company, Seneca Investments:

    i) TRAL made payments to Seneca Investments ostensibly for the provision of advertising services. This was a controversial topic at trial: there was a dispute about what advertising services Seneca Investments had in fact provided, and about the level of payments made by TRAL.

    ii) TRAL also made payments to Seneca Investments described in its accounts as "*consultancy fees*" or "*commission*". Mr Paul Hornshaw explained in his evidence that these payments were related to a particular contract which TRAL took on, as part of the arrangements for the acquisition of the Caird Peckfield site. Before Seneca Global acquired it in 2013, the site was jointly owned by Shanks Group PLC and Aggregate Industries. Shanks Group PLC had a major contract with Derby Council, which involved processing waste and disposing of unusable items by way of landfill at the site. Shanks wished to cease its servicing of the contract with Derby Council, and offered to pass the contract on to the new owners of the site. According to Mr Paul Hornshaw's evidence, this was an attractive proposition. There was money to be made in processing and recycling much of the waste made available by Derby Council, and disposing of only the remainder by way of landfill at the Caird Peckfield site. Logistically, however, it made more sense for the whole of the waste to be processed by TRAL at Melton, rather than for it to be split and processed partly in Hartlepool by the Elliotts and partly at Melton by TRAL. TRAL therefore took over the valuable contract with Derby Council. To compensate the Elliotts for the resulting loss of income from waste processing, it was agreed that TRAL would pay a commission to Seneca Investments at a rate of £10 per tonne for the waste it received from Derby Council.

iii) Seneca Investments is also the owner of plant and machinery, which it hires out to customers. One such customer is TRAL. Thus, over time, TRAL has paid hire charges as part of its business to Seneca Investments.

The Hornshaws' Interests

52. One point which emerges from the above is that TRAL's operations intersect at a number of points with companies owned and controlled by the Hornshaw brothers. Since this issue came to be central to the submissions made by Mr Chaisty KC for Mr Wells, it is useful to summarise those interests. Some of them are matters which exercised Mr Clark when he undertook his valuation exercise, as I will mention shortly below.

53. The relevant interests may be summarised as follows:

i) HPL: Since about 2003, TRAL has been a tenant of HPL, both in relation to the site at Hessle Dock and later the site at Melton Waste Park. Paul and Mark Hornshaw are owners and directors of HPL, initially with Mr Taylor but latterly, since Mr Taylor's death, on their own.

ii) TWS: TWS provides haulage services to TRAL, for which TRAL pays haulage fees. TRAL has also paid management fees to TWS in respect of Paul and Mark Hornshaw's services. Paul and Mark Hornshaw are owners and directors of TWS.

iii) Wauldby: Wauldby hires mobile plant and machinery to TRAL, in respect of which TRAL pays hire charges. TRAL has also, since 2012, paid management charges to Wauldby in respect of Paul and Mark Hornshaw's services to TRAL. At all material times, Paul and Mark Hornshaw have been the beneficial owners of Wauldby. Paul Hornshaw has been a director since 2017.

iv) Seneca Global/Caird Peckfield: TRAL disposes of waste at the Caird Peckfield site, and pays fees to Caird Peckfield for doing so. Caird Peckfield is owned by Seneca Global, a joint venture in which the Hornshaw brothers (via Wauldby) have a 50% share.

Mr Clark's Valuation (including Adjustments)

54. Mr Clark's methodology in his 2016 Report involved assessing the overall value of TRAL by applying a multiple to its sustainable earnings. In order to arrive at a figure for sustainable earnings, Mr Clark took figures for TRAL's profits before tax for a 3 year period covering the calendar years 2012, 2013 and 2014, but then applied a number of adjustments, in particular to reflect what he considered to be uncommercial arrangements, including with certain of the companies associated with the Hornshaw brothers mentioned above.

55. Mr Clark's evidence was that most of the information for the valuation exercise he conducted came from TRAL's audit files. He said that during the audit process for TRAL historically, he had of course been aware of transactions with companies connected to the Hornshaws, but had no evidence which cast doubt on whether the rates paid by TRAL to such companies were above relevant market rates. There was no

secret about these arrangements, which were disclosed in detailed Notes to TRAL's accounts headed, "*Related Party Disclosures*". The matter being low risk, no further investigations were carried out during TRAL's audits. Importantly, however, Mr Clark said he had adopted a different approach when valuing Mr Wells' shares. Indeed, he had started from the opposite assumption: i.e., that if there were transactions with related parties, then he would assume the relevant charges were overstated unless positive evidence was made available to the contrary. This approach led him to remove a number of items completely in the first draft of his Report (i.e., by adding the relevant payments back into profit), but then during the ongoing process, as evidence became available that the relevant charges were fair, appropriate corrections were made and the additions removed from his calculation of a sustainable earnings figure. In describing this process, Mr Clark said that he could remember, for example, looking at the haulage charges levied by TWS. This involved him looking at the basis of the relevant charges and at invoices. He looked at the costings provided to see how the lorry rates were calculated and sought confirmatory evidence of the costs used in the calculations. He compared the rates to those charged by comparable contractors as far as he was able to. He did the same with the other hire charges from connected companies. In almost all cases his conclusion was that the charges were at market rates and were commercially justified.

56. Unfortunately, as Mr Clark also explained in his evidence, his working papers for this exercise of verifying connected party transactions have been lost. That is unfortunate of course, but it does not make me doubt the overall account given by Mr Clark, since it is consistent with contemporaneous documents which are available. For example, in an email to Mr Jenneson and Mr Wells dated 16 May 2016 Mr Clark said that his delay in finalising the valuation had been caused by *"... difficulties ... about getting assurance about whether the transactions with connected parties are at commercial levels ...*". Mr Clark's account is also consistent with the outcome of his exercise, which involved him making certain adjustments where he was *not* satisfied that payments made by TRAL were at market or commercial levels.

57. The adjustments were as follows.

i) Rent: Mr Clark made adjustments in respect of rent paid in connection with the Melton site. These reflected rental payments made to HPL in excess of the rental amount payable under TRAL's lease with HPL. The adjustments involved adding back the excess amounts into the overall calculation of sustainable earnings.

ii) Management charges and directors' remuneration: Management charges were payable at the time both to TWS and Wauldby, as well as Mr Wells' own company, YCS. Mr Wells was also paid a salary. As noted, Mr Clark's approach was effectively to disregard these figures altogether (by adding them back into the overall figure for sustainable earnings), but then to substitute for each of Paul Hornshaw, Mark Hornshaw and Mr Wells "*a commercial rate of salary*" (by deducting estimated salary amounts from the overall figure for sustainable earnings).

iii) Advertising charges: Mr Clark's report said that advertising charges had been paid to a related company at a non-commercial rate. In fact, he was in error in thinking that payments had been made to a company related to the Hornshaw

brothers. The payments made for advertising had in fact been made to Seneca Investments, the company which was wholly-owned by the Elliott brothers, not Seneca Global, the company in which the Hornshaws had an indirect interest via Wauldby. In any event, Mr Clark thought that excessive and uncommercial amounts had been paid for advertising so he made adjustments accordingly, by adding back such amounts into his overall figure for sustainable earnings.

58. Mr Clark's adjustments reflecting these points were contained in an Appendix to his Report. The table below extracts the adjustments in question and shows them as Mr Clark set them out:

Item	**31.12.2014**	**31.12.2013**	**31.12.2012**
Profit before tax	3,032,633	2,438,656	2,713,006
Adjustments:-			
Management charges:-			
TW Services	100,800	100,800	100,800
Wauldby	300,000	355,000	350,000
Yorkshire Commercial	36,000	36,000	36,065
Other:-			
Directors Rem'	33,550	33,550	33,550
Directors Ers NI	33,816	4,010	3,842
Advertising	311,446	337,000	304,000
Rent	135,000	20,000	205,000
Directors market pay:-			
PH	-250,000	-250,000	-250,000
MH	-175,000	-175,000	-175,000
SW	-125,000	-125,000	-125,000

59. After making his adjustments, Mr Clark then took an average of the adjusted earnings over a three year period to produce an overall estimate for sustainable earnings, and then having deducted tax from that figure, applied a multiple of 6x earnings to arrive at overall value for TRAL of £15,389,964. These calculations are shown in the following table, which again shows information extracted from the Appendix to Mr Clark's Report:

Item	**31.12.2014**	**31.12.2013**	**31.12.2012**
Sustainable earnings (pre-tax)	**3,321,580**	**2,762,061**	**3,252,906**
Average	**3,206,243**		
Tax @ 20%	**-641,249**		
Sustainable earnings after tax	**2,564,994**		

Company value@6 times	**£15,389,964**		

60. On the face of it, 14.3% of that overall figure of £15,389,964 would have resulted in a value for Mr Wells' shareholding of £2,200,764.85. But as noted already above, Mr Clark also applied a discount to reflect the fact that Mr Wells had only a minority stake in TRAL: his discount was 75%, giving a figure for Mr Wells' shareholding of £550,191.

V. The Petition

61. The 2019 Petition in its present form, which reflects amendments following the successful strike out and summary judgment application made by the Respondents in 2020, relies essentially on allegations of unfair prejudice arising from the following matters.

Share Dilution

62. This concerns the alleged dilution of Mr Wells' shareholding from 18.1% to 10% in June 2008 (mentioned above at [12]). Mr Wells' submission is that he should be treated as having retained an 18.1% shareholding in TRAL in 2008, and in consequence argues that the shareholdings in TRAL following the redistribution of Mr Taylor's shares on his retirement should be treated as having been as follows:

Shareholder	**No. of shares**	**% shareholding**
Paul Hornshaw	751	37.55%
Mark Hornshaw	751	37.55%
Stuart Wells	498	24.9%

63. The effect, if Mr Wells is right, would be to treat him as having a 24.9% shareholding in TRAL for valuation purposes, rather than a 14.3% shareholding (compare the figures above with the shareholdings shown in the table under [43]).

Payments to Associated Companies of the Hornshaws

64. The Petition starting at para. 73 challenges a number of payments made to associated companies of the Hornshaws (i.e., the companies summarised above at [53]). Essentially the same formulation is adopted in respect of each set of payments. First, they are described as only having "*purportedly*" been made, which Mr Grant KC for the Respondents interpreted (reasonably in my opinion) as implying that the payments had not in fact been made at all, or at any rate not made for their stated purposes. The second point then made is that in any event the payments were "*excessive and uncommercial*". In many cases, of course, these were the same payments considered by Mr Clark in preparing his Report.

65. The payments challenged in the Petition may be summarised as follows:

i) TWS: Payments made by TRAL to TWS of both (i) haulage charges in the TRAL financial year ended 30 June 2015 (£6,941,825), and (ii) management fees in the calendar years 2012, 2013 and 2014 of £100,800 per year.

ii) HPL: Rental payments made by TRAL to HPL in respect of the Melton premises, in the period January 2010 to 30 June 2016, totalling £2,173,341.

iii) Wauldby: Payments made by TRAL to Wauldby of both (i) plant hire charges in the financial year 2013 and in the accounting period ending 30 June 2015, totalling some £3,617,930; and (ii) management fees for the calendar years 2012, 2013 and 2014 totalling £1,005,000.

iv) Seneca Global/Caird Peckfield: Payments made in the TRAL accounting period to 30 June 2015 to Caird Peckfield/Seneca Global, totalling some £9,515,866.

66. The making of such excessive and uncommercial payments is said (Petition at para. 84) to have constituted a breach by the Hornshaws of various duties, including in particular (Petition at para. 84.1) their duty to avoid positions of conflict and/or properly to declare their interests in transactions with associated companies. The desired end-point is then reflected in the form of relief sought (mentioned above at [16]), which seeks the addition of a "*premium*" in calculating the value of Mr Wells' shareholding, corresponding to the amount by which any payments are in fact shown to be uncommercial or excessive.

Payments to the Elliotts/Associated Companies of the Elliotts

67. In the same way, the Petition also relies on certain payments made to Seneca Investments – i.e., the company mentioned above (at [49]) which is owned not by the Hornshaws but by the Elliott brothers. The same formula is adopted as above – i.e., a challenge to the legitimacy of the payments by means of the allegation that they were only "*purportedly*" made, and then a further challenge on the basis that they are excessive and uncommercial. The relevant payments are as follows:

i) Payments in respect of "*advertising costs*" in the calendar years 2012 and 2013 (of £304,000 and £337,000 respectively), and in the accounting period to 30 June 2015 totalling some £559,986.

ii) Payments described as for "*consultancy fees*" and "*commission*" in the 18 month accounting period to 30 June 2015, totalling some £697,300. According to Paul Hornshaw's evidence, these are payments made pursuant to the arrangement mentioned at [51(ii)] above, under which Seneca Investments would be paid £10 per tonne in respect of waste processed by TRAL under its contract with Derby Council.

iii) Payments for "*hire charges*" in the same period totalling some £2,294,520.

Benefits paid to the Hornshaws

68. Complaint is also made that Paul and Mark Hornshaw received unauthorised benefits from TRAL, *viz.* the receipt of mileage payments in the period 2012-2014 totalling some £72,000, notwithstanding the fact that they each also had use of a fuel card, so that their fuel costs were borne by TRAL.

Investments in the Melton Premises

69. This is a complaint about the matters mentioned at [41] above, i.e., the investments made by TRAL in the Melton premises, both as regards construction works necessary to make the site usable as a waste management facility, and provision of static equipment used in the business of waste management.

70. The gist of the pleaded case is not so much that these payments were unnecessary or excessive, but rather that in authorising them, the Hornshaw brothers failed to have proper regard to the interests of TRAL, most particularly by failing to ensure that the value of TRAL's investments was sufficiently protected – for example, by ensuring a clear paper-trail which properly demarcated ownership of the structures and other items at the Melton site as between TRAL on the one hand and HPL on the other.

Personal (and other) Loans and Guarantees

71. The main points concern the following:

    i) The decision made by Paul Hornshaw in October 2014 to have TRAL lend a sum of £1m to a company called Knightsbridge Park Investments Ltd ("*Knightsbridge Park*"). Knightsbridge Park is incorporated in Malta. It had, in fact, been incorporated only the day before the loan from TRAL was advanced. It was involved in a property development in the United States. Its owners were the Elliott brothers. The loan was repaid shortly afterwards, but nonetheless the arrangement was criticised in the Petition as having no proper commercial purpose and as being imprudent.

    ii) The practice which developed from 2015 and after of the Hornshaw brothers borrowing substantial sums on an interest free basis from TRAL, via their directors' loan accounts (mentioned at [13]) above).

    iii) An arrangement entered into in 2013, at the time when the Caird Peckfield site was acquired, under which TRAL (alongside other parties including Wauldby and Seneca Investments) agreed to provide an indemnity to an institutional surety which in turn had provided a bond to the Environmental Agency. The contingent liabilities assumed under the indemnity were shown in TRAL's accounts for the period to 30 June 2015 as amounting to £3,540,000. The pleaded case is essentially that there was no commercially justifiable reason for TRAL to have entered into this arrangement, and it was entered into by Paul and Mark Hornshaw because it suited them to have TRAL do so, given their interest in Caird Peckfield. (I should mention that the indemnity was never called on and was later released).

Failure to Declare Dividends

72. This complaint is related to the point above, about the practice of the Hornshaws borrowing funds from TRAL from 2015 onwards. Starting at about the same time, TRAL ceased to pay dividends, although Mr Wells argues it was in a position to do so. The upshot, he says, is that the Hornshaws were able to maintain a good standard of living by means of interest free advances from TRAL, while he was effectively starved of any dividend income.

The Attero Transaction

73. This is mentioned above (see at [14]). It is the ultimately aborted transaction in 2018 under which Attero was to take over TRAL's business and lease many of its assets. Mr Wells' description of the Attero transaction covers a number of pages in his Petition, but since the transaction did not, in fact, come to fruition, little remains of the complaint as formulated. Mr Wells confirmed in his oral evidence that his underlying point was really that he had not been properly consulted about the Attero transaction by Paul and Mark Hornshaw, even though he was still a director of TRAL at the time it was being discussed.

VI. Issues

74. As it often the case with Petitions under s.994, the Court is presented with a complex picture, with allegations of wrongdoing stretching over a number of years. Deciding how to respond is not straightforward. The equation has a number of moving parts. What I therefore propose to do is to address the following issues in the following order, before drawing the threads together and stating my conclusions and then identifying the relief I consider appropriate.

75. The issues I will address are as follows:

i) Whether Mr Wells has a valid complaint about his shareholding having been improperly diluted in 2008 (Section VII).

ii) The effects of Mr Wells' decision to depart TRAL in September 2015, including the operation of cl. 7 of the SHA and the status of the valuation exercise carried out by Mr Clark (Sections VIII and IX).

iii) Whether the basic allegations made in the Petition or advanced at trial are made out, *viz*.,

a) The allegation that excessive and uncommercial payments were made by TRAL to associated (and other) companies (Section X).

b) The allegation that the Hornshaws should be liable to account for profits made via their associated companies, given their conflicts of interest (Section XI).

c) The allegation that there were other instances of mismanagement of TRAL by the Hornshaws (Section XII).

d) The allegation that there was a failure to make payment of dividends after 2014, or indeed even to consider the payment of dividends (Section XIII).

iv) Having determined the matters at (iii) above, I then propose to consider whether any shortcomings in the Hornshaws' behaviour which are proven were in fact unfairly prejudicial to Mr Wells in his capacity as shareholder (Section XIV).

v) I will then consider the appropriate remedy (Section XV).

VII. The 2008 Dilution

76. There are a number of problems with Mr Wells' claim that his interest in TRAL should be valued on the basis of a 24.9% shareholding, not a 14.3% shareholding, and I have come to the clear view that the claim must be rejected.

77. One can start with its factual basis.

78. The essential pleaded allegation (Petition at para. 57) is that Mr Wells attended a meeting on 20 June 2008 with Mr Paul Hornshaw, Mr Mark Hornshaw, Mr Taylor and Mr Thompson, and during that meeting Mr Thompson, acting for and on behalf of the others present, told Mr Wells that additional investment was required for the move to the Melton premises, that this additional investment was to be provided by the two Hornshaw brothers and Mr Taylor, and that as a result they were entitled to an increased shareholding which would require Mr Wells' shareholding to be reduced from 18.1% to 10%. It is then pleaded that Mr Thompson represented that that outcome was appropriate, fair and reasonable.

79. It is also said (Petition paras 59-60), that at some point shortly after 20 June (i.e., within a day or so) Mr Wells had a separate conversation with Mr Thompson on the telephone, during which Mr Thompson – again said to be acting on behalf of the Hornshaws and Mr Taylor – said words to the effect that Mr Wells should not be concerned, because a smaller shareholding in TRAL after the move to Melton would be worth the same as, if not more than, a larger shareholding in TRAL if it remained at the Hessle Dock site.

80. The Petition then makes the allegation (at paras 63 *et seq*.) that the representations made by Mr Thompson at [78] above were false, because TRAL did not in fact require any additional funds to be introduced for the purpose of the move to Melton, and neither the Hornshaws nor Mr Taylor made any further investments in TRAL and never intended to; and consequently the realignment of the existing shareholdings was not undertaken for any proper purpose but instead solely for the improper purpose of diluting Mr Wells' interest.

81. No allegation of falsity is made as regards the pleading summarised at [79] above.

82. In terms of analysing these allegations, I think it convenient to deal separately with (1) the allegations concerning the 20 June 2008 meeting, and (2) the allegation concerning the subsequent discussion with Mr Thompson.

<u>The 20 June 2008 Meeting</u>

Mr Wells' Case

83. As to the 20 June 2008 meeting, the evidential problems are extensive.

84. To start with, the gist of the pleaded case is not even supported by Mr Wells' own Witness Statement. The nub of the pleaded case is that Mr Wells was told that *future* investment in TRAL was to be provided by the Hornshaws and Mr Taylor, and that was not true because they never had any intention of providing future investment and so lied about it (Petition at para, 63.4: "*It is to be inferred, there being no other inference*

*possible, that none of them ever intended to provide the further investment to the Compan*y").

85. Mr Wells' recollection of what he was told at the meeting, as recounted in his Witness Statement, is different, however. There he says it was explained to him at the meeting that " *… because of the extra financial investment which the others had put into TRAL but I hadn't my shareholding in TRAL would be reduced*" (emphasis added). The representation Mr Wells recalls here is obviously not the same as the one relied on in the Petition: it is a representation about an imbalance in terms of *past* investments made by the shareholders, not about what they might do in the future. This is the version of events Mr Wells affirmed during his oral evidence.

86. When cross-examined on the point, Mr Wells was not concerned. He said, "*Well, one says past and one says future but it's still an investment.*" It seems to me though that the representations *are* qualitatively different, not least in terms of what would be required to show them to be false. To show the falsity of a statement that there had been an imbalance in terms of *past* financial contributions one would need to see particulars of what they were, and why it was said there was in fact equality. No such case is set out in the Petition, where such particulars of falsity as are given are aiming at a different target, namely the conclusion that the Hornshaws and Mr Taylor never had any real intention of injecting future funds into TRAL but pretended that they did. The overall result is that there is no pleaded case that the representation Mr Wells said he could remember was false.

87. Such essential confusion in Mr Wells' account is mostly likely the product of his having a poor memory of it. I am reinforced in that conclusion by two other points:

    i) The first is that although Mr Wells' case both in the Petition and in his Witness Statement was that the Hornshaws were both present at the meeting on 20 June 2008, he accepted in cross-examination that that was likely not the case. I think Mr Wells was correct to make that concession, because it is supported not only by the evidence of both the Hornshaws and that of Mr Thompson, but also by a contemporaneous document namely Mr Thompson's diary entry for 20 June, which records a meeting at his offices with "*DEREK TAYLOR + STUART WELLS*" at 11am.

    ii) The second point is that although Mr Wells' case both in the Petition and in his Witness Statement was that Mr Thompson "*did the talking*" at the 20 June meeting, in cross-examination he said he thought that "*both Bob [Thompson] and Derek [Taylor] were talking during the meeting*", although when then asked what Mr Thompson was saying, Mr Wells replied that he could not remember specific comments that were made.

88. A poor memory of the details of a meeting which took place now over 15 years ago is to be expected, but provides a fragile platform for this part of Mr Wells' case, which depends on understanding the detail of what was said and why it is now alleged to have been false. In that regard, another (and related) matter of concern which emerged from Mr Wells' cross-examination was a lack of clarity as to what he had in fact been *told* (which might form the basis of a representation which he relied on), versus what he had simply *presumed*. At a number of points in his oral evidence, Mr Wells said that he merely *presumed* that the proposed realignment of the shareholdings had been worked

out by Mr Thompson, based on his calculation of the historic investments made by the shareholders. But what he may have *presumed* does not provide a basis for what is essentially a case in misrepresentation – i.e., that he was *told* things that he relied on that were inaccurate or deliberately untrue.

89. The following extracts from Mr Wells' cross-examination fairly illustrate the point (my emphasis added in each case):

i) Day 3, pp. 57-58

> "*A. I presume that Bob [Thompson] had, with him being the accountant, had done some figures on this with extra monies that had been put into the company and that's how my shareholding had been worked out.*
>
> *Q. So, therefore, you do accept at least this, Mr Wells: that there was discussion between you and Mr Taylor about your lesser contribution (putting the matter broadly) to the company as against the contribution of Taylor, Hornshaw and Hornshaw?*
>
> *A. In this meeting, it was discussed financially, yes.*
>
> *Q. And you agreed that you had made a lesser contribution in that regard, did you not?*
>
> *A. I got told in the meeting that both Paul, Mark and Derek had put more money into the business than what I had done, and this was why there was going to be a reflection in the shareholding of the company.*"

ii) Day 3, pp. 76-77:

> "*Q. What, you thought it was Bob that had decided you should have 10 per cent?*
>
> *A. I thought that Bob would be the one that calculated it, judging by the monies that Paul, Mark and Derek had invested.*
>
> *Q. Just pause there. You thought - the evidence you are giving to my Lord, you thought that the decision as to how much - what the new overall shareholding should be was ultimately a decision that Mr Thompson would make by reference to various financial considerations.*
>
> *A. Yes, I thought, in my own mind I thought he'd have looked at the money that the others had invested into the company and done an exercise and costed it out as to what the company was valued at and the money that they had put in would reflect in their shareholding.*"

90. The result is that in my opinion, Mr Wells' case based on what he was told at the 20 June 2008 meeting is simply too unclear to be convincing. It suffers from a basic level

of incoherence and cannot be accepted. Moreover, what appears to me to be a coherent alternative case emerges from the evidence of the other witnesses, and from the few available documents. That alternative case is inconsistent with the case advanced by Mr Wells.

The Alternative Case

91. The picture can be summarised as follows.

92. For some while before 2008 it had been a matter of concern to Paul and Mark Hornshaw, and to Paul Hornshaw in particular, that there was an imbalance between the contributions made by them to TRAL's business and that made by Mr Wells. In the case of Paul Hornshaw, his attitude was no doubt affected by comments made to him by his then wife, Ms Katie Noble, who felt resentment about the fact that Paul was so frequently at work and able to spend so little time with her, especially during the period when they were trying to start a family.

93. At the trial some time was spent in cross-examining the witnesses on the question of the relative levels of commitment to TRAL's business shown by the Hornshaw brothers on the one hand, and Mr Wells on the other. That seems to me to miss the point, however. It is impossible for the Court to determine whether Mr Wells was as committed as the Hornshaws to TRAL's business in 2008 and earlier. There is no judicially manageable standard against which to make the assessment, and as Lord Hoffmann once put it, an unfair prejudice petition is not the occasion for a contest of virtue between competing shareholders. What is relevant, however, is that certainly a large part of what drove Ms Noble, and therefore Paul Hornshaw, was the *perception* that Paul was working harder than Mr Wells. There is no doubting that that was what they felt and that they felt it keenly.

94. Matters came to a head in 2008 because of the intended move to Melton. This was to be financed through borrowing, but as had happened previously, personal and other guarantees were required by the lenders, and again it was the Hornshaws and Mr Taylor who would be exposed, not Mr Wells. This prompted a confrontation on the issue of Mr Wells' commitment which had been bubbling under the surface for some while. The focus, in the event, was not so much on the time Mr Wells devoted to TRAL's business, but instead on the personal risks the Hornshaws and Mr Taylor had undertaken in the past and were now to undertake again in light of the move to Melton.

95. One can see the point emerging in a handwritten note prepared by Mr Taylor for a meeting on 8 January 2008. The note is in the form of a proposed agenda for a meeting with "*RT*" – Mr Thompson. It shows the initials "*MH, PH and DT*", suggesting that only the Hornshaws and Mr Taylor attended, not Mr Wells. The agenda items include the following:

> "*Positive 08 cash required for Deposits and Buildout of Melton – Redox New Plant B Scotland*
>
> *HP Cross Guarantee 350/400 + 160 Deposit*
>
> *How does this effect (sic.) SW Shares!! Way forward/18% John Gardam advice*."

96. Mr Thompson explained in his oral evidence that John Gardam was a solicitor. Mr Thompson's recollection was that he recommended to Mr Taylor that Mr Taylor seek advice from Mr Gardam on the topic of Mr Wells' shareholding. The reference to "*HP Cross Guarantee*" is a little obscure, but seems consistent with a letter dated 9 February 2008 from Bank of Scotland, which offered a facility of £1,440,000 on condition that HPL provided cross-company guarantees.

97. The general picture is clear enough, which is that organising the funding needed for the move to the Melton site was a substantial exercise, and while the funding was largely (if not entirely) being made available by commercial lenders, the Hornshaws and Mr Taylor were in one way or another underwriting the resultant liabilities and were thus undertaking a level of personal risk which Mr Wells was not.

98. This is all, to my mind, consistent with the evidence of Mr Paul Hornshaw on the topic of the reduction in Mr Wells' shareholding. In his Witness Statement, Mr Hornshaw said the following:

> *"Mark and I were getting increasingly annoyed by Stuart's lack of work and commitment to TRAL, and I remember that we complained about this to Derek. We continued to work long and hard hours and invested a lot of money in TRAL and it simply was not matched by Stuart. It was suggested by Derek that Stuart should increase his investments and provision of security or reduce his shareholding, and I agreed with this solution which seemed fair to me."*

99. Mr Hornshaw went on in his written Statement to say that Mr Wells was confronted at a meeting of all shareholders at some point in early 2008. The matter was not resolved, and it was left to Derek Taylor to work out what the consequences would be in terms of Mr Wells' shareholding, if his personal financial exposure did not increase. Mr Wells in his evidence did not deny he attended such a meeting; he said only that he could not remember it.

100. I accept Mr Paul Hornshaw's account because it seems to me consistent with the inherent probabilities and also with one other piece of contemporaneous correspondence, namely a letter written by Mr Thompson to Mr Wells dated 26 February 2008. Mr Thompson informed Mr Wells that he had heard back from Bank of Scotland but they were not in a position to accept Mr Wells' offer of being a guarantor, both because it would not provide the bank with additional cover and because matters were too far progressed to enable the proposed funding structure to be rearranged. Mr Thompson said: "*I regret therefore that despite our attempts the Bank will not accept the restructuring of the guarantees that already exist*." Mr Thompson said, "*I shall make the other shareholders aware of this letter*." This to my mind fits neatly with the idea that at some point in early 2008 Mr Wells had been confronted with the point that his own level of personal risk had to increase if he was to remain a shareholder at the same level, and he had sought to do so but had been rebuffed.

101. It seems to me that this then provided the backdrop to the later meeting in June. It was left to Mr Taylor, the senior figure in the business who was respected by all and looked on as a sort of father-figure by Paul and Mark Hornshaw, to determine what it would all mean as regards the various shareholdings. I am not at all persuaded that that would

have been a job for Mr Thompson, TRAL's accountant. I consider it would have been Mr Taylor who determined the percentage split as between the shareholders (30%/30%/30%/10%). I also consider it much more natural to think that he was the one who explained the proposed split to Mr Wells at the meeting on 20 June 2008, and who justified it on the basis of the level of financial risk undertaken by himself and the Hornshaws. I therefore accept Mr Thompson's evidence, given both in his Witness Statement and in cross-examination, that Mr Taylor was the one who took the lead in the meeting. I think Mr Taylor then left it to Mr Thompson to deal with the mechanics of achieving the outcome he had determined involved the issue and allotment of new shares by TRAL in a manner designed to achieve the intended percentage split. Mr Thompson's workings are shown in a handwritten note of his dated 20 June, which appears to have been prepared either during the meeting or shortly afterwards.

102. Mr Thompson's note contains the following comment:

> "*Restructure of Shares*
>
> *Shares to be issued not in proportion of existing shareholdings – SW happy to accept this issue, to reflect SW less involvement in Cy [to achieve] 30/30/30+10%*."

103. This note rather emphasises the fact that the matter was not one Mr Wells complained about at the time. He seems to have been content to live with it, or at least to have been resigned to it. Mr Wells more or less accepted as much in his cross-examination, because he acknowledged that Paul and Mark Hornshaw and Derek Taylor had entered into personal guarantees but he had not, and then when asked about a passage in Mr Thompson's evidence where Mr Thompson said he was aware at the time of a sense of frustration felt by TRAL's other shareholders, Mr Wells commented as follows:

> "*Q. Do you think Mr Thompson had a proper basis for entertaining that awareness?*
>
> *A. From the financial side of things I would say he would do, yes."*

Discussion with Mr Thompson

104. There is then the issue of Mr Wells' later, private conversation with Mr Thompson, in which Mr Thompson is said to have assured Mr Wells that a smaller (10%) shareholding in a larger operation at Melton would have been worth as much as, if not more than, a larger (18.1%) shareholding in a smaller operation based only at Hessle Dock. In the course of Mr Wells' cross-examination, this became his main focus, rather than the meeting on 20 June 2008.

105. Mr Thompson disputed that he would have expressed himself in the emphatic and concrete terms suggested by Mr Wells, although he said he did recall being positive about TRAL and the direction it was moving in, and to that extent being encouraging.

106. On this point, I am inclined to accept the basic account given by Mr Thompson, because the idea that he would have given general encouragement but not concrete assurance

seems to me more consistent with the inherent probabilities. Ultimately, however, I do not think it matters in terms of the overall outcome. That is for at least three reasons.

107. The first is that, as already noted above at [81], there is no pleaded case that the statement made by Mr Thompson was in fact false or inaccurate. Second, even if expressed in more concrete terms that I have suggested, the statement was at best an expression of opinion by Mr Thompson, and that being so, demonstrating its falsity would involve showing that Mr Thompson either did not believe what he was saying or did not care whether it was true or not. There is no evidential basis for either conclusion and Mr Thompson's state of mind was not explored during his cross-examination. The third point is that I find it difficult to see on what basis Mr Thompson can be said, in this later conversation, to have been acting as agent for, or spokesperson for, the Hornshaws, such that they should have legal responsibility for any representation made. Mr Wells accepted in cross-examination that he initiated the conversation by calling Mr Thompson. He plainly wanted some personal guidance and reassurance from Mr Thompson, who for a long time had acted as his personal accountant as well as TRAL's accountant and was a trusted adviser. It seems to me plain that in speaking to Mr Wells, Mr Thompson was performing that function, and that his statements cannot be attributed in law to the Hornshaws.

VIII. Mr Wells' decision to leave/the SHA

Mr Wells' Decision to Leave TRAL

108. I have mentioned already above the email that Mr Wells sent on 26 September 2015 (see at [6]). This was addressed to Paul and Mark Hornshaw, and it read as follows:

> "*Mark/Paul,*
>
> *After thinking long and hard about this I have decided that I will be leaving Transwaste.*
>
> *I already have appointments made throughout October and am working on a couple of on-going things that I would like to conclude. Also I think it is important that customers who I have dealt with over many years have a new contact within the company so that no business is lost at all. Therefore I would like to introduce these people to Ben, Ed etc or whoever you think will be taking this roll over. I would have thought that by the end of November everything could be completed and handed over. If you do need me to do anything after this date then I am more than willing to do so.*
>
> *I hope that I am leaving Transwaste with no hard feelings either way and I will continue to always promote the company in the future.*
>
> *Can we please meet up at some point next week to discuss this further?*
>
> *Regards, Stu*."

109. On 3 November 2015, Mr Wells indicated in an email to Mr Thompson that he intended to resign as a director of TRAL on 1 January 2016. A few days later, however, on 12 November, his solicitor, Nasim Sharf of Rollits, wrote to ask that Mr Wells' resignation as an employee effective from 23 November 2015, and his resignation as a director effective from 1 January 2016, be treated as withdrawn. Mr Sharf's email went on though to say that Mr Wells would not bring any claim for salary, wages or other benefits after 23 November 2015, and confirmed that he would return all TRAL property. The rationale for this approach was explained as follows:

> "*The intention is that once a deal has been done on Stuart's shares there will be a clean break between TRAL and Stuart and all elements will be tied up at that point.*
>
> *The main purpose of Stuart remaining an employee and director is to maximise tax reliefs so that once a deal has been done it can be delivered in the most tax efficient way, which I would hope is in everyone's interest*."

110. It seems to me entirely clear on the basis of this correspondence that Mr Wells wanted to break all ties with TRAL – to effect a "*clean break*" as Mr Sharf put it. That meant selling his shareholding. I think the matter in fact plain from Mr Wells' own email of 26 September, but it is put beyond any doubt by Mr Sharf's later email of 12 November.

The Mechanism in Cl. 7 of the SHA

111. What were the effects of this in terms of the SHA?

112. Cl. 7 of the SHA is headed, "*Transfers of Shares*". The key provisions for present purposes are those in Cl. 7(d)(i)-(iii). I set out the language of these provisions below, but in summary their broad scheme is as follows: (i) any shareholder wishing to sell his shares is obliged to make an offer to sell them to the remaining shareholders at a price to be calculated by an appointed accountant; (ii) if the remaining shareholders do not wish to accept the offer then the departing shareholder can seek to sell to other parties at whatever price he can get; alternatively, (iii) the departing shareholder can instigate a process intended to result in TRAL itself acquiring his shares, at the price fixed by the accountant under the mechanism at (i).

113. More precisely the language of cl. 7(d)(i)-(iii) is as follows:

> *"(i) Subject to the provisions of this clause in the event of any Shareholder ('the Offeror') attaining a sale eventuality he shall make a written offer ('the Sale Offer') to sell the same to all of the other Shareholders proportionate to their respective shareholding in the Company at the relevant time at the 'sale price' which shall be calculated by the appointed Company Accountant at any time by reference to standard and historical accounting practices of the Company including any element of valuation properly and reasonably attributable to the goodwill of the Company*

> ***(ii) If*** *the sale offer is not accepted by all or any number of the Shareholders within thirty days (or ninety days in the event of the death of the shareholder) the Offeror shall have the option of proceeding with the sale to any other party at any price or to invoke the provisions of part (iii) of this clause*
>
> ***(iii) If*** *no sale is negotiated in accordance with part (ii) of this clause the Offeror shall have the right to convene a meeting of the Shareholders of the Company within 28 days thereafter at wich (sic.) the Participators agree to pass a resolution for the Company to acquire the total shareholding of the Offeror at a price to be calculated in accordance with part (i) of this clause and subject to compliance with the Companies Acts completion of such sale shall be completed within 28 days of such resolution*."

114. As will be seen from cl. 7(d)(i), it requires a "*sale eventuality*". This is defined in the SHA as follows:

> " *... 'sale eventuality' means the death, Bankruptcy or making of any Formal arrangement or composition with his creditors generally and or mental incapacity of a shareholder, vacating employment with the Company for whatever reason or the wish to effect a voluntary sale*."

115. Having regard to this language, in my opinion there is no real doubt that a *sale eventuality* occurred in relation to Mr Wells in September 2015.

116. For the reasons already set out above, in my opinion there is no doubt at all that Mr Wells expressed "*the wish to effect a voluntary sale*" in September 2015. I think the matter is entirely clear. He was nervous and concerned after the HMRC raid and wished to sever ties with TRAL and with the Hornshaws, with a view to limiting his ongoing risk from any continuing association. That meant selling his shares. He was later concerned to retain the nominal titles of employee and director but only in order to facilitate a more tax efficient method of disposal. Consistent with that, Mr Wells effectively left employment with TRAL at the end of November 2015. He stopped working there and ceased to be paid any salary or draw any other benefits. He remained an employee, if at all, in name only, and likewise remained a director only in a nominal sense. He never changed his mind about wanting to exit.

Did the parties agree to bypass cl. 7?

117. One of the points developed by Mr Chaisty KC for Mr Wells was that the parties had effectively overridden the mechanism in cl. 7 in this case by agreeing to negotiate on price instead.

118. Although I agree with Mr Chaisty KC that some of the correspondence concerning Mr Clark's valuation exercise reflects the language of negotiation (for example, Mr Jenneson's initial email of 12 November 2015 referred to the "*expectation that both parties will ultimately find a negotiated agreement*", an approach which was not rebutted by Mr Thompson in his reply who instead said only, "*Stuart Clark will prepare*

the company valuation for your review"), in my view the idea that there was scope for negotiation on the basis of the figure to be arrived at by Mr Clark is not inconsistent with the idea that that figure would be binding in the absence of any negotiated agreement. I think the truth of it is that Mr Jenneson, acting on behalf of Mr Wells, wanted to try and retain as much flexibility as possible for his client, and so was keen to promote the idea of a dialogue irrespective of what cl.7 actually required; and Mr Thompson, acting on behalf of the Hornshaws, was happy enough to go along with the idea that there might be a commercial discussion to be had at some stage, if a degree of pragmatism would promote finality and an amicable parting of the ways. He certainly did not rule it out. But neither point supports the conclusion that the parties agreed that the contractual mechanism was to be dispensed with, or more particularly that, in the absence of any agreement between them on a figure, the valuation conducted by Mr Clark would have no effect. The evidence of Mr Clark himself, which I accept, is that he was *not* told that his role was only to provide a figure which would be a starting point for negotiation. Instead he was told to identify a value for Mr Wells' shareholding, and that is what he did: his Report is expressed in just those terms. In such circumstances, I reject any argument that the cl.7 mechanism was in some way to be abandoned. There would need to be a clear expression of consensus for that to be the case, and I do not detect any such clear consensus in the parties' exchanges.

The Legal Effects of Clause 7

119. Two important points flow from this. The first is that Mr Wells came under an obligation to offer to sell his shares to the "*other Shareholders*" in TRAL, i.e., the Hornshaws. I think that is quite clear. The language of cl. 7 is mandatory. The effect of a sale eventuality occurring in respect of a given shareholder is that he "*shall make a written offer"* to sell his shares to the other shareholders using the prescribed mechanism. I think it is significant and relevant to the issues in this case that, as from 26 September 2015, when he indicated he wished to part company with TRAL, Mr Wells not only had a particular exit route available to him, but was required to take that one and no other.

120. The second point is about timing, and more specifically about the date of valuation of the shareholding of the departing shareholder under cl. 7. Again, I think the position quite clear as a matter of the contractual language. The relevant obligation is to make a Sale Offer to sell to the other Shareholders proportionately to their existing shareholdings *"at the relevant time at the 'sale price'".* For my part, I think it clear that the reference to "*relevant time*" is a reference to the date of occurrence of the *sale eventuality*. That is the trigger event which gives rise to the obligation to make a Sale Offer, and it makes good sense to fix at that point both the proportions in which the shares are to be offered to the existing shareholders, and the value to be attributed on sale. Again, in my opinion it is highly relevant in the context of this case that the contractual exit route available to Mr Wells required a valuation of his shareholding at that point in time.

IX. Mr Clark's Valuation

121. The next question is whether the valuation conducted by Mr Clark is binding. I have reached the view it is not binding, for the following reasons.

122. To start with, I should say that I reject any suggestion of bias on the part of Mr Clark. His role, as the parties were agreed, was as expert not as arbitrator, and in that context what is needed in order to impugn the expert's determination is evidence of actual partiality or bias, not the appearance of bias. As Robert Walker J put it in Macro v. Thompson (No. 3) [1997] 2 BCLC 36 at 65G:

> *"... when the court is considering a decision reached by an expert valuer who is not an arbitrator performing a quasi-judicial function, it is actual partiality, rather than the appearance of partiality, that is the crucial test. Otherwise auditors (like architects and actuaries) with a long-standing relationship with one of the parties (or persons associated with one party) to a contract might be unduly inhibited, in continuing to discharge their professional duty to their client, by too high an insistence on avoiding even an impression of partiality."*

123. There is nothing in the case supporting the idea that Mr Clark was actually impartial or actually biased in favour of the Hornshaws. He struck me in his evidence as a careful and professional person who did his best in somewhat difficult circumstances to identify a valuation figure, as he had been requested to do. The most that can be said is that he had discussions with Paul Hornshaw, as he accepted; but these were essentially discussions seeking assurances that payments made by TRAL to associated companies were consistent with market rates. They are not evidence of actual partiality or bias, not least because in those cases where satisfactory assurances could not be obtained, Mr Clark's approach (set out above) was to make adjustments accordingly, in order to conform the relevant payments to market levels. That methodology, and the outcome, are inconsistent with the idea of actual partiality or bias. Relatedly, I see nothing at all in any complaint that Mr Clark was not sufficiently independent, because he was TRAL's auditor. I think any such point would be misguided, given the terms of cl. 7 itself, which refer expressly to the valuation being carried out by "*the appointed Company Accountant*." This phrase is not defined, but in my judgment is apposite to include TRAL's auditor; and indeed the intention seems to have been for the valuation to be carried out by someone familiar with TRAL's affairs, so that the process would be streamlined and efficient (see, to similar effect, the decision of John Brisby QC (sitting as a Deputy High Court Judge) in Isaacs v Belfield Furnishings Ltd [2006] 2 BCLC 705).

124. I thus reject such points. I am, however, persuaded by the argument that Mr Clark departed from his instructions.

125. It is well settled that a determination by an expert will be invalid where there has been a material departure from instructions: see, for example, Jones v. Sherwood [1992] 1 WLR 277, and Veba Oil Supply & Trading v. Petrotrade Inc. [2002] 1 All ER 703 (CA), in which the majority said that the question of materiality should be approached as follows:

> "*I would hold any departure to be material unless it can truly be characterised as trivial or de minimis in the sense of it being obvious that it could make no possible difference to either party*."

126. In this case, Mr Clark's instructions, which are set out in his Report, were to estimate "*the fair market value of the business enterprise of TRAL as at 30 September 2015*." In my opinion, he did not do that, because he relied on outdated figures from December 2014 (see above at [9]). It seems to me that in substance what he did was therefore to value TRAL as at December 2014, and not as at 30 September 2015.

127. As against this, Mr Grant KC argued that Mr Clark *had* done what he was asked (i.e., arrived at a valuation as at 30 September 2015), even if he had gone about it the wrong way (in effect, by assuming that there had been no change in its financial position between the end of 2014 and the end of September 2015). Mr Grant KC said it is equally well known that where an expert answers the right question in the wrong way, even if he produces an answer that is demonstrably wrong, that will not invalidate the resulting certificate or report: see, for example, Nikko Hotels (UK) Ltd v. MEPC Plc [1991] 2 EGLR 103.

128. I follow that point, but it seems to me it does not adequately describe this case. I think it clear that in giving instructions to TRAL's auditor to produce a valuation, the parties must implicitly, even if not expressly, have required him to take account of TRAL's most up-to-date audited financial statements available at the time of production of his Report. That would be an entirely reasonable expectation, and it seems to me that if the parties had been asked at the time whether that was what they intended and indeed required in appointing TRAL's auditor to carry out the valuation, they would unhesitatingly have said yes. Mr Clark's instructions did not authorise him to guess or estimate if audited figures were available, which they were by June 2016 (see above at [11]). The position in my view is no different to that in other cases where specific aspects of the expert's instructions have not been complied with, for one reason or another (such as an instruction to surveyors to assume certain facts and disregard others in establishing a new rent: see Kendall on Expert Determination (5^{th} Edn) at 14.10-1). I think the deficiency is reflected in Mr Clark's own acknowledgment, in his email referenced at [11] above, in which he said that *"[t]he delays in producing this report are such that the figures are out of date*".

129. On that basis I do not regard Mr Clark's valuation as binding on Mr Wells. It does not automatically follow, however, that Mr Wells is entitled to the full range of relief under s.994 CA 2006 which he seeks.

130. In order to determine that, I think it is first necessary to consider whether the basic allegations in the Petition are made out, and then having done so, to consider whether there is in fact unfair prejudice and if so to what extent, before determining the appropriate remedy. As noted above, I will deal with Mr Wells' allegations under what seem to me a convenient set of headings, starting with the payments made to associated (and other) companies.

X. Payments to Associated (and other) Companies

131. To be clear, the payments in question are the following (which in all cases, as pleaded, are complaints about payments in the period 2012 to 30 June 2015, save as regards rent where the stated period was up to 2016):

i) Companies associated with the Hornshaws: (a) payments to HPL for rent; (b) payments to TWS for haulage charges and management fees; (c) payments to

Wauldby for hire charges (movable equipment) and management fees; and (d) payments to Caird Peckfield/Seneca Global for waste processing charges.

ii) Companies associated with the Elliotts: (a) payments for advertising costs; (b) payments for consultancy fees/commissions; (c) payments for hire charges.

Were the Payments Made?

132. I can state my assessment quite shortly.

133. To start with, I reject any contention that the payments were either not made at all or were not made for their stated purposes. The evidence simply does not support such a conclusion. Extensive disclosure has been given, including of invoices, and no challenge to the authenticity of any document has been advanced. The payments would in any event have been subject to checks as part of the audits for the relevant accounting years, since they are reflected in TRAL's published accounts. I see no reason to doubt their basic veracity.

134. In truth, Mr Chaisty KC did not press this form of allegation, save perhaps as regards the matter of payments for advertising made to Seneca Investments, especially in the 18 month period to 30 June 2015. The overall figure for that period is a striking one: roughly £559,986. What is also striking is the form of advertising in question, which involved Seneca Investments making available 3 Mercedes Sprinter vans, configured with advertising hoardings on the back, showing advertisements for TRAL. The forensic point, mined at some length by Mr Chaisty KC, is that the cost of three second-hand Mercedes Sprinter vans is likely to have been a great deal less than £559,986 in 2014/15, and so it seems extraordinary that TRAL actually agreed to pay Seneca Investments such a large sum of money for a service it could have procured for itself for a fraction of the cost. There was even some doubt, it was said, whether there had ever been 3 Mercedes Sprinter vans used for advertising at all, or only one or two. Mr Wells gave evidence that there was only one van, or at least only one that (as he put it) was "*logoed up*".

135. Other witnesses, however, gave evidence that there was more than one van. Most significantly in my view, Mr Betts, who is a director of Seneca Investments and who negotiated with Paul Hornshaw over the provision of advertising services, gave evidence that there were three of them and produced documents showing a number of Mercedes Sprinter vans on Seneca Investments' fleet insurance policy at the relevant times. Overall, it seems to me the balance of the evidence is in favour of the conclusion that there were three advertising vans, and that TRAL paid for their use as such.

Were the payments excessive or uncommercial?

136. The further issue though is whether any or all of the payments were excessive or uncommercial.

Payments identified by Mr Clark

137. Some of course were determined to be excessive or uncommercial by Mr Clark in his review (see above at [57]) – i.e., rental payments in excess of the stipulated contractual rent, management charges (although he substituted market salary), and advertising fees

paid to Seneca Investments (including for the 12 month period to 31 December 2014, though not for the full 18 month period to 30 June 2015).

138. Mr Grant KC sought to revisit the assessments made by Mr Clark and to say that the relevant payments *were* at a commercial rate, but on these points I was not persuaded by his submissions. Taking the points in turn:

i) Rent: Mr Grant's point was essentially that one cannot characterise the rental payments made by TRAL as excessive without looking at the wider picture. The wider picture included the facts that (i) according to Paul Hornshaw's evidence, HPL granted leeway to TRAL during certain periods, by charging below market rent when it was clear that TRAL could not afford to pay and needed flexibility; (ii) correspondingly, during other periods TRAL was charged more than the contracted rental amount to balance things out; and (iii) TRAL's occupation of space at Melton increased considerably between 2012 and 2015, so that over time the rental amount in the lease it signed in 2012 became out of date (there was evidence that by 2017, a total of 40 acres was occupied, with a rental value of £400,000 per annum).

ii) The difficulty though is unscrambling these (and similar) points to arrive at a reliable overall assessment of what was paid, and what should have been paid. The available information is limited (for example, regarding how decisions were made and what areas of the site were in fact occupied from time to time). Mr Clark's approach, which was to treat anything beyond the contractual rate as excessive, strikes me as an entirely rational and proportionate response to an otherwise messy situation with no clear parameters for making a reliable alternative assessment. In short, like Mr Clark I would hold that payments made in excess of the contracted for rental amount should be treated as excessive and/or uncommercial.

iii) Management charges: I would again, in effect, accept Mr Clark's figures as evidence of market rates prevailing at the time. Although, as I have explained, I consider that his Report is not binding (see above at [121]), Mr Clark's evidence was that he conducted research on rates for executive pay at the time, and that research provided the basis for his adjustments. I see no reason not to accept that evidence. Mr Grant KC argued that Mr Wells had not produced any expert evidence on market rates, which is true, but it seems to me that the fruits of Mr Clark's research are the next best thing and have evidential value, notwithstanding my conclusion about his Report. In any event, the truth of it is that the differences between Mr Clark's figures and those actually charged by the Hornshaws are minimal: over the period covered by the pleadings (2012 to 2015) they are practically the same, so the relevant excess is marginal. As with the rental payments, part of Mr Grant's argument was that in determining what was excessive one should take a broader view, and cast back over the entire history of TRAL, to consider the minimal payments received by the Hornshaws during the early days of its existence – and look to average everything out. I am not though persuaded by that argument. The pleaded allegation is a straightforward one, and is that the payments made between 2012 and 2015 were excessive. That allegation is made out, because they were excessive, although only marginally so.

iv) Advertising: Mr Clark reached the view that advertising charges paid by TRAL during the period 2012-2014 were excessive. Mr Grant KC argued that that was not a reliable determination, and that Mr Clark's work should have no evidential weight for present purposes, because it was apparently based on the mistaken assumption that the advertising charges were paid to an associated company of the Hornshaws (for Mr Clark's general approach see above at [55]), but that was not true: the company which provided advertising was Seneca Investments, a company wholly owned by the Elliotts, rather than Seneca Global, the joint venture company in which the Hornshaws also had an interest. The payments to Seneca Investments should thus be treated as arm's length payments made to a third party, and there was no incentive on the part of the Hornshaws to overpay. Mr Grant KC said that again in this instance, Mr Wells had produced no expert evidence on what market rates were for such services at the time, and Mr Clark's own evidence was that he and his team had had difficulty in identifying market comparables. What he had done instead was to compare TRAL's advertising spend in the period prior to 2012 with that in the period 2012 to 2015, which showed (as Mr Clark described it) that the spend had "*shot up*" after 2012, from about £68,000 per annum to over £300,000 per annum (and as noted above, to over £500,000 for the 18 month period to 30 June 2015). Mr Clark's response was to peg advertising spend at the previous figure of £68,000, and add back the excess as an adjustment to his calculation. He accepted that that was a cautious approach.

v) Despite the attractive points made by Mr Grant KC, I have again come to the conclusion that the payments made in respect of advertising services were excessive and uncommercial, and I think Mr Clark was justified in adopting the view that he did. It is true that there is no expert evidence, but the amounts paid are patently very large indeed given the nature of the service supplied, namely the provision of the Mercedes vans fixed up with advertising logos. The figures appear disproportionate. Mr Grant said the Court could not proceed simply on the basis that the figures feel too high. I agree, but there is a difference between operating on unfounded instinct and applying straightforward commercial common sense. Here, common sense suggests that the charges were disproportionately high: over £1m over a 3½ year period, when equivalent vans could have been purchased for a fraction of that amount. As to Mr Clark, as I understood his oral evidence given under cross-examination, his concern at the time was essentially the same, namely that TRAL's advertising spend had increased in a way which did not obviously make commercial sense. He may have mistakenly assumed that the counterparty was Seneca Global, but it seems to me that, independently of that, his commercial instinct was telling him that something was off and it needed to be corrected. In that regard, the lack of comparables is also telling: Mr Clark was not able to draw comfort from evidence that others were paying similar rates, hence his decision to disallow the amounts he was unsure about. Again, I take the view that this evidence about what Mr Clark's concerns were, and about what he did in light of those concerns, is all useful and relevant evidential material in forming a judgment now about whether the advertising payments made by TRAL were excessive, even though I have reached the view that Mr Clark's Report is not binding. I therefore conclude, as he did, that the payments were excessive, and in the absence of any

alternative figure, accept his starting point of £68,000 per annum as the relevant benchmark for determining what would have been reasonable and appropriate.

Other Payments

139. Aside from these points, however, I find there is no evidence of any of the relevant payments challenged by Mr Wells being uncommercial and excessive, in the sense of being in excess of prevailing market rates at the relevant time. On the contrary, the available evidence, and other relevant indicators, all point the other way.

140. Most importantly it seems to me there is again the evidence of Mr Clark as to the work he did in producing his valuation (see above at [55]). He was plainly anxious about the risk of overcharging by related entities, and made it part of the exercise he carried out to seek positive verification that payments made to such parties were not excessive but were consistent with what the market was charging. It is true that his own working documents relevant to that exercise have been lost, but his written evidence was clear that the issue of possible overpayments was a point of particular concern for him, that he checked it with care, and indeed made adjustments to his valuation when he could not be satisfied on the basis of positive evidence that market rates had been applied. In the circumstances it seems to me this is the best evidence available that the remaining, unadjusted payments were at or around prevailing market rates at the time.

141. I am reinforced in that view by the fact that Mr Wells has not sought to lead any evidence, expert or otherwise, to the contrary. He is himself an expert in waste management and will have had access to industry sources and intelligence. Under the directions Order made by DJ Jackson (mentioned above at [22]), Mr Wells had the opportunity of seeking a direction for expert evidence after disclosure had been given. Such disclosure included TRAL's own documents as to the amounts charged by the counterparties in question. But no expert evidence was led on either side. In such circumstances, I agree with Mr Grant KC's submission that if inquiries of experts were made by Mr Wells, they must have produced results which were consistent with Mr Clark's conclusions and thus unhelpful to Mr Wells' case.

142. In the circumstances, I feel compelled to reject Mr Wells' case on excessive or uncommercial payments, save in the respects identified at [138] above. There is no evidence to support it.

143. Where does that leave Mr Wells? As noted already, the response of Mr Chaisty KC was to argue that, despite the focus of the pleaded case being on seeking credit in any valuation for excess amounts paid over market rates, Mr Wells' case also included wide-ranging claims for an account of profits based on the Hornshaws' breaches of fiduciary duty. I will now come on to consider that submission.

XI. Conflict of Interest and Account of Profits?

<u>The Argument</u>

144. In his submissions, Mr Chaisty clarified that Mr Wells' case was that Paul and Mark Hornshaw had breached their duty under s.177 CA 2006 – i.e., the duty incumbent on them as directors, if directly or indirectly interested in a proposed arrangement or transaction with TRAL, to declare the nature and extent of that interest to the other

directors. Mr Chaisty KC said there had been clear breaches of this duty as regards transactions with a number of associated companies, especially TWS, Wauldby and Caird Peckfield/Seneca Global, because the Hornshaws had not made satisfactory disclosure to Mr Wells of their interests in such transactions. Mr Chaisty argued that the Court could comfortably go that far in the present trial, and that was all that was needed at the present stage. The question of assessing what profits the Hornshaws had made in breach of duty, to be disgorged to TRAL and used in the valuation of Mr Wells' shareholding, could be left to a second trial.

145. In making this submission, Mr Chaisty KC said that in fashioning an appropriate remedy at the present stage, the Court should not feel hamstrung by the pleaded issues, but should be realistic and should be prepared to make findings based on the totality of the evidence at trial. Mr Chaisty relied on the following statement in the opinion of the Privy Council in Ming Siu Hung v. JF Ming Inc [2021] UKPC 1 at [14], endorsing the principle agreed between counsel that in the unfair prejudice context:

> " *... at the remedy stage, the court is entitled to have regard to any aspect of the facts as found about the history of the company and the relationship between its shareholders inter se, and between them and the directors, including those occurring after the issue of the claim and those which may fairly be found by the court even though not necessarily pleaded. In short, nothing is off-limits, subject only to the twin tests of relevance and weight, in relation to the choices to be made in the exercise of the discretion ...."* (emphasis added).

146. A number of points arise from these submissions. In my view, however, they all point in the same direction, which is that Mr Chaisty KC's argument provides no antidote to the problem that he has no evidence of TRAL having made excessive and uncommercial payments to TWS, Wauldby and Caird Peckfield/Seneca Global.

Section 177 CA 2006

147. A good starting point is the language of s.177 CA itself. As Ms McNicholas emphasised in her submissions, the requirements of s. 177 are not absolute. There are exceptions to the requirement that a director must declare his interest in a proposed transaction or arrangement, and one such is where (see s. 177(6)(b)):

> *"... the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware)."*

148. The "*it*" referred to here is obviously a reference back to the relevant director's interest in the proposed transaction or arrangement with the company in question. The factual question which arises here is thus whether Mr Wells either was aware, or ought reasonably to have been aware, of the Hornshaws' interests in transactions with TRAL undertaken via TWS, Wauldby and Caird Peckfield/Seneca Global.

What Did Mr Wells Know?

149. In my opinion an examination of the facts shows a base level of knowledge on the part of Mr Wells which is inconsistent with any claim for breach of the s.177 CA duty.

TWS

150. Mr Wells concedes in the Petition (para. 83.8) that the Hornshaws' interests in TWS were known to him (and indeed says the same as regards their interests in HPL). On the face of it, that concession seems to present an answer to Mr Chaisty's alternative argument as far as TWS is concerned.

Wauldby

151. What we are concerned with are both management fees and hire charges paid to Wauldby, which was owned by Paul and Mark Hornshaw.

152. TRAL began paying management charges to Wauldby in 2012 and hire charges in 2013. Mr Wells' case in the Petition was that he was not aware of any payments being made to Wauldby until around May 2015. I think that must be wrong, however, and have come to the view that he was very likely aware of payments being made long before then, or alternatively ought reasonably to have been so aware.

153. In cross-examination Mr Wells said he did not think he was aware of TRAL paying hire charges to Wauldby in 2012, but later accepted that he was so aware by early 2014, because "*Paul had told me*." (This was in the context of questioning about TRAL's management accounts for the period to March 2014, in which "*Direct Expenses*" recorded for the period to March 2014 included some £236,977.16 for March (£653,657.92 year-to-date) in respect of "*Equipment lease/hire*").

154. This concession by Mr Wells was obviously at variance with the case in the Petition, and seems to me significant because it is consistent with the idea that there was no secret about Wauldby and the Hornhsaws' connection with it, and that Paul Hornshaw is likely to have been open about it, both as regards management charges and as regards payments for equipment hire.

155. To my mind, other matters also point in the same direction:

i) Payment of management charges was shown in TRAL's monthly management accounts, which were regularly provided to Mr Wells in his role as director. Although only a global figure was given, Ms Berry, who worked in the accounts team at TRAL, confirmed in her evidence that a full breakdown was easily available via the nominal ledger for each category of cost, including details of relevant suppliers. Mr Wells agreed that was the case. Ms Berry also said that she would easily have been able to provide full details on request.

ii) TRAL's published accounts for the 12 month period to 31 December 2012 expressly referred (in the note on "*Related Party Disclosures*") to payments in respect of management charges being made to Wauldby, which was said to be under the control of the Hornshaws. These 2012 accounts were finalised on 7 August 2013. The published accounts for later periods contain similar disclosures.

iii) The same accounting conventions were followed in respect of hire charges paid to Wauldby from 2013 onwards. Hire charges were reflected in TRAL's management accounts sent regularly to Mr Wells, and although again only an

overall figure was given, Wauldby was easily identifiable as a supplier by interrogating the nominal ledger or upon requesting clarification from Ms Berry.

iv) As to TRAL's published accounts, the accounts for the 12 month period to 31 December 2013 (dated 26 June 2014) refer both to the payment of management charges and to the payment of hire charges. The note in the 2013 accounts is as follows:

> "*P Hornshaw and M Hornshaw own 90% of the share capital of Wauldby Associates Limited and exert a significant influence over the activities of the company. The company pays management fees and hire fees to Wauldby Associates Limited. Transactions are on normal commercial terms and details are as follows …* "

v) The payments to Wauldby were then set out are as follows:

	2013	**2012**
Management fees paid	£355,000	£350,000
Hire charges paid	£749,170	£nil
Amount payable at year end	£387,276	£180,000

vi) The same pattern is followed in later published accounts.

156. I think the factual question which arises is this. Mr Wells accepted in cross-examination that he was aware of hire charges being paid to Wauldby by early 2014. Is it likely that in fact Mr Wells knew earlier than that about Wauldby, and about payments being made to it? Paul Hornshaw in his evidence said he was certain he did, and the submission of Ms McNicholas is that Mr Wells likely knew at the outset.

157. I accept that submission, essentially for two inter-related reasons. The first is that I think it very likely that Paul Hornshaw would have mentioned the point naturally in discussions. He had no reason to hide it, made no attempt to do so, and on the contrary the relevant payments later featured prominently in TRAL's public disclosures. Mr Hornshaw's evidence, which rings true, is that Wauldby was set up in part because of ongoing frustrations within TRAL about the way it was treated by other hire companies, who could be unreliable. It is entirely natural to think the matter would have come up in discussions between directors in a small business. Mr Thompson plainly knew about Wauldby, since he was a director, and he too was regularly at TRAL's premises and was in contact with Mr Wells.

158. The second reason is that Mr Wells' memory on the point was plainly faulty, given his evidence in cross-examination which contradicted that in the Petition. The more likely explanation it seems to me is that he did come to know about Wauldby when it began to interact with TRAL, but has simply forgotten the details, or the relevant timescales have become confused and compressed in his mind, because at the time it was not a matter he had any real concern about. This interpretation seems to me consistent with other passages in Mr Wells' oral evidence, in which he accepted frankly that he had never really paid much attention either to TRAL's management accounts or its published accounts, despite his role as a director. For example, in relation to the management accounts he said:

> "*I'd certainly look at the turnover, look at the profit and see if any major costs jumped out. I didn't go through them with a fine tooth comb, to be honest.*"

159. And in relation to the published accounts he said:

> "*To be honest, I've got to say I didn't, I didn't read them, no. Or, if I did, it was very fleetingly. I didn't go right into the in-depth of going through the different companies like we've done just now.*"

160. I accept that evidence of Mr Wells, which seems to me consistent with his general character and approach, which was to leave the detail of such matters to other people, as long as things seemed to be going well at a high level. It seems to me that this attitude means he was likely not too interested in the precise detail of how the Hornshaws were extracting management charges (as he was doing himself), or of how equipment hire was being organised, and even if told information which is now relevant, is likely not to have paid too much attention to it at the time if not a matter of immediate concern.

161. Even if that is wrong, I would still conclude that the payments made to Wauldby are nonetheless matters of which Mr Wells ought reasonably to have been aware, within the meaning of that phrase in CA s.177(6)(b). The reason is that in my view, it is reasonable to consider that Mr Wells, as a director of TRAL, ought to have been aware of material items of expenditure reflected in its management accounts and its published accounts. In the circumstances of this case, that conclusion is reinforced by two further points. First, as regards management charges, it was an entirely open matter that the Hornshaws were drawing remuneration from TRAL by way of management charges: that was a long-standing practice and Mr Wells was doing the same, via his company, YCS. If Mr Wells has any complaint, it is only about not knowing the identity of the company such charges were being paid to. But in circumstances where he could quite easily have found out if he had been interested, it seems to me correct to say that is a matter he ought to be regarded as having been aware of: if he was not actually aware, it was because he did not care enough at the time to make simple inquiries. The second point, perhaps more directly relevant to the question of hire charges, is that one of Mr Wells' responsibilities as a director of TRAL was involvement in setting its budget. It is reasonable to think that in performing that function, he ought to have taken an interest in costs paid by way of hire charges, which were substantial (see the figures extracted above) and were an important component in TRAL's cost of doing business. One would have expected him to examine such matters in TRAL's management accounts, and certainly in its published accounts. It seems he did not do so, as he himself explained, only because he was content to take a more high level approach, and to leave the detail to others.

162. On the question of published accounts, Mr Chaisty KC argued that disclosure in a set of statutory accounts was insufficient to fix Mr Wells with notice. In doing so he relied on the approach of the Court of Appeal in Re Tobian Properties Ltd [2012] EWCA Civ. 998, another unfair prejudice case. There, the trial Judge had thought it significant that the petitioning minority shareholder had failed to review the company's accounts. The Court of Appeal criticised this reasoning and said (at [32]):

> "*The judge's approach means that minority shareholders are at risk of losing their rights if they do not read the company's filed accounts. This approach imposes a requirement for due diligence that has no basis in the statutory provisions or in principle or authority*."

163. In Re Tobian, however, the petitioning shareholder was not a director. The Court was therefore answering a different question. The question in this case, given the context and the allegation under consideration, is whether Mr Wells, who at the time was not only a shareholder in TRAL but also a director, ought reasonably to have been aware in the latter capacity of the Hornshaws' interest in Wauldby, and of the fact that Wauldby was levying management charges and hiring equipment to TRAL. In my opinion, he should, not least because, as the Respondents pointed out in their submissions, company directors owe statutory duties in connection with the preparation and approval of annual accounts (see for example CA 2006 ss. 393, 394, 414 and 415). The context here is quite different in my view to that in Re Tobian.

Caird Peckfield/Seneca Global

164. The position as regards Caird Peckfield is similar. Here we are concerned with the payment of tipping fees to Caird Peckfield starting in 2013, profits from which would make their way to the Hornshaws via their 50% interest in Seneca Global (the owner of Caird Peckfield), which of course was held by Wauldby.

165. On this topic Mr Wells had the following exchange with Mr Grant KC, during a passage in his cross-examination when he was being asked about entries for tipping costs in TRAL's March 2014 management accounts. Mr Wells accepted he was aware of the Hornshaws' ownership interest in the company which had acquired the Caird Peckfield site, and to which TRAL was paying substantial tipping charges:

> "*Q. And you know by this stage, which is 2014, that Caird Peckfield has been purchased by Seneca Global, do you not?*
>
> *A. Um, I didn't know the name of the company that had actually purchased it. Yes, I knew it had been.*
>
> *Q. You knew that Paul and Mark Hornshaw had an interest in the company that owned the Caird Peckfield tip, did you not?*
>
> *A. Yes, I did, yes.*
>
> *Q. Yes, and you knew that Caird Peckfield had become the major tipping site for TRAL waste, did you not?*
>
> *A. Yes.*
>
> *Q. And you knew that the bulk of the sums paid in that period, £487,000 for that month, and we can see the year to date of £1.298 million, were fees, tipping fees, charged by Caird Peckfield to TRAL, did you not?*
>
> *A. Yes.*

> *Q. And you had literally no issue or dispute with that level of payment because you knew it was fair and reasonable, did you not?*
>
> *A. Um, I presumed it was and I just trusted Paul and Mark that the figures would be at a market rate for waste*."

166. I am entirely satisfied that these admissions were properly made. In terms of what to make of them, I think the same logic applies as above. They support the conclusion that if Mr Wells was aware of TRAL's arrangement with Caird Peckfield by March 2014, it is very likely he was aware of it before then, because it was an important part of TRAL's business. Indeed it was part of the same set of arrangements which included the hugely valuable waste processing contract TRAL had taken on with Derby Council (see above at [51(ii)]). It is therefore entirely natural to suppose that it would have come up in discussions and that the Hornshaws would have been open about it from the outset. They had no reason not to be when again, the relevant charges were recorded in TRAL's management accounts which were regularly sent to Mr Wells, and in due course reflected in TRAL's published accounts (Caird Peckfield appears for the first time in TRAL's 2013 accounts, dated 26 June 2014, which show TRAL as having paid waste processing costs to Caird Peckfield during the year of some £3,493,683). Mr Wells' view in his evidence, again consistent with his approach to other matters, was that he was not too concerned about the details and left the Hornshaws to make sure that tipping costs were at market levels – which I have now held they were. Again, therefore, my view of it is that any lack of clarity on Mr Wells' part about when precisely he in fact came to know about Caird Peckfield is most likely the result of a poor memory, especially for matters which at the time he took no particular interest in.

167. If I am wrong about that, I would nonetheless again hold that the tipping arrangement with Caird Peckfield is a matter that Mr Wells ought reasonably to have been aware of, given his position as a director of TRAL and his involvement in TRAL's budgeting process. The tipping costs were substantial (see above) and it is reasonable to think Mr Wells ought to have been aware of them. The point is reinforced by the fact that Mr Wells was the person within TRAL responsible for submitting Environment Agency returns. Paul Hornshaw said it was therefore difficult to understand how Mr Wells could not have been aware of the costs of tipping incurred by TRAL. That seems an entirely fair point, and it is just another way of saying that Mr Wells ought to have known what costs were being paid for tipping and who they were being paid to.

The Counter-Argument

168. Perhaps sensitive to this evidence about the base level of knowledge attributable to Mr Wells, Mr Chaisty deployed other points. Relying on Gwembe Valley Development Company Limited & Anor v. Koshy & Ors [2003] EWCA Civ. 1048 at [65], Mr Chaisty KC said that in order for disclosure of a director's interest to be effective, it had to be full disclosure of "*all material facts*." Here, Mr Chaisty said that had not happened. For example, he said Mr Wells had not been told quite how much profit TWS was making, which Mr Thompson in his evidence had indicated was in the region of 25%. The same logic applied, argued Mr Chaisty KC, as regards Wauldby and Seneca Global/Caird Peckfield, and if anything with even greater force certainly as regards Wauldby, because Mr Thompson in cross-examination had suggested that Wauldby's profits were in the region of 50%. Whatever Mr Wells may have known about Wauldby

and the Hornshaws' interest in it, said Mr Chaisty, he had certainly never consented to any arrangement under which it would make such large profits. The result was that there had never been any proper disclosure of the Hornshaws' interests, and thus they were liable to disgorge any and all profits made by their associated companies.

Discussion and Analysis

169. Part of the difficulty in evaluating this argument is that it came only late in the day, and was really only developed during Mr Chaisty's oral closing submissions. Even on limited examination, however, I do not think it tenable and I reject it.

170. It is premised on the idea that what needed to be disclosed was the overall level of commercial profits made by companies such as TWS and Wauldby, rather than the amount by which payments for services made to them by TRAL exceeded market rates and thus were excessive and uncommercial. It proceeds on the assumption that if a breach of duty is shown, then what would need to be disgorged by way of an account of profits would be all commercial profits made by such associated companies, rather than any amount(s) by which they had overcharged TRAL. I am not persuaded that either point is correct.

171. I think it best to start at the end and work backwards.

172. Even if a breach of the s.177 CA duty is shown, as Ms McNicholas pointed out in her submissions, the orthodoxy is that the only available remedy is rescission of the relevant transaction at the option of the company: see Palmer's Company Law at §8.3114, and the authorities there cited. It is via the option of rescission that the company is protected, and if there is rescission then the defaulting director is automatically stripped of any profit or benefit he has made in breach of duty. But if the company has affirmed the transaction, or if recission is no longer possible, then the orthodoxy is that the Court will not intervene and strip the director of any profits or benefits the contract has brought him. That is said to be because of the difficulty in such a case of determining what the director's profit or benefit actually is: logically it would be the difference between the price actually paid and the estimated or true value of the property transferred or service provided, but to allow a claim on such a basis would involve the courts fixing a new contract price between the parties. Fry LJ put the matter as follows in an old case, Re Cape Breton Co (1884) 26 Ch D 795 at 812:

> "*It appears to me that to allow the principal to affirm a contract, and after the affirmance to claim, not only to retain the property, but to get the difference between the price at which it was bought and some other price, is, however you may state it, and however you may turn the proposition about, to enable the principal, against the will of his agent, to enter into a new contract with the agent, a thing which is plainly impossible, or else it is an attempt on the part of the principal to confiscate the property of the agent on some ground which, I confess, I do not understand*."

173. On appeal to the House of Lords, Re Cape Breton Co was reported as Cavendish Bentinck v. Fenn (1887) 12 App. Cas 652. This is one of the authorities referenced in the extract from Palmer (starting at §8.3101) which Mr Chaisty KC referred me to in his oral closing. He did not, however, seek to address how the orthodoxy I have

described above could be squared with his putative claim for an account of profits, in particular bearing in mind the impossibility of rescinding many (if not all) of the transactions in question in this case, which will have involved (for example) contracts for equipment hire which will no doubt long have expired. There is no attempt at any claim for rescission in the Petition, perhaps because the pleader correctly realised that a claim to unwind (even notionally) the arrangements on which TRAL depended for its commercial operations would have a catastrophic effect on its sustainable profits, which was the crucial criterion in Mr Clark's valuation of Mr Wells' shareholding.

174. The commentary in Palmer at §8.3114 is critical of the orthodoxy, on the basis that in other contexts the Courts are not shy about making commercial assessments of value. It may well be that there are limitations to the general principle. Again, however, none of them was explored before me, and whatever they are, I do not immediately understand why any financial remedy granted in such circumstances should extend beyond recovering the amount of any overpayment for the goods or services procured under the offending contract. That would be a fair way both of stripping the director of his unauthorised profit and compensating the company for its loss, which are really one and the same thing. If that it right, however, it is of no help to Mr Wells, because as I have already held, there is no evidence of any difference between the prices paid by TRAL for the services it received from TWS, Wauldby and Caird Peckfield and the relevant market prices for such services. To put it another way, on this view of it, the evidential shortcomings in Mr Wells' case on overpayments by TRAL would be fatal to Mr Chaisty's alternative argument as well, because any claim for an account of profits would be targeting the same overpayments as the claim in the Petition in respect of TRAL's loss.

175. In light of such uncertainties, arising as they did from the fact that Mr Wells' alternative argument was something of a departure from his pleaded case, I am not at all persuaded by the submission that there was a failure to make proper disclosure by the Hornshaws under s.177 CA 2006, because they failed to make disclosure of the commercial profits made by (for example) TWS and Wauldby. It is not at all clear to me that information about the overall commercial profitability of these companies needed to be disclosed, as opposed to information about amounts charged to TRAL and in particular the extent to which TRAL was being charged amounts in excess of prevailing market rates. If, as it seems to me, the latter is the relevant point, then on the evidence there was nothing to be disclosed, because there is nothing so suggest that TRAL was being charged in excess of prevailing market rates.

176. I think there are further objections also to proceeding as Mr Chaisty KC invited me to.

177. First, there is the point I have already mentioned about the scope of the present trial. This arises from the Order made by DJ Jackson, referenced at [22(iv)] above. As noted, that Order provided that the trial should include not only the making of any necessary findings of unfair prejudice but also findings as to *"... the extent of any financial prejudice caused thereby*." It seems to me clear that properly construed, the intention of this language was to require the financial consequences of any findings of unfair prejudice to be made in the present trial, with any later phase of the proceedings (if needed at all) then to be concerned only with valuation evidence. That structure included the requirement to make good in this trial, to the extent they were advanced, any claims for amounts to be disgorged by way of an account of profits. Mr Wells though has not sought to make any claim for an account of profits, save his claim for

(in effect) recoupment of excessive or uncommercial payments by TRAL, which I have determined has failed. In my opinion, Mr Grant KC was correct to submit it is now too late for Mr Wells to seek to advance a different type of claim, and to argue there is no problem because a more detailed evaluation of what he now submits are the relevant figures can simply be considered at a later trial.

178. Mr Chaisty said that any restrictions flowing from DJ Jackson's Order should not matter, and the Order could if necessary be varied. No doubt it is correct that there is the power to vary the Order, but in the circumstances, I do not see there is any good reason to do so, because its requirements were clear and Mr Wells was given plenty of opportunity to formulate an alternative case properly but did not do so. Perhaps more importantly, and for the reasons I have given above, the possible alternative case is to my mind simply too inchoate and unconvincing to justify subverting the existing case management structure of the proceedings at this stage.

179. The second point is a related one. As I have noted (see above at [145]), in proposing his alternative case and procedure, Mr Chaisty sought to embolden me by reference to the statement of the Privy Council in the Ming case. I think there must be limits on the principle stated in Ming, however. In fact, the quotation I have set out says so in terms, because it is an encouragement only to have regard to those facts which may *fairly* be found by the court even though not pleaded.

180. The main thrust of Mr Chaisty's argument was that I should have regard to the profit figures of 25% (TWS) and 50% (for Wauldby), referenced by Mr Thompson in cross-examination, because they were unusually high. However, I do not consider it would be fair to make any adverse findings based on the limited information available. To start with, Mr Thompson's evidence was hesitant and really in the nature of guesswork, and I am not at all convinced of its reliability. More fundamentally, the relevant points were not sufficiently tested, because the matter of TWS's and Wauldby's profits, including whether such profits derived solely from TRAL and whether they were unusual in relative terms or not, was never put in issue in the proceedings and there was no disclosure or written evidence about it. The reason is that the pleaded case was understood to be targeting a different issue. In my opinion, the resultant limitations surrounding the evidential fragments secured from Mr Thompson mean it would be unfair and indeed unsafe to make any relevant findings based on them, and certainly I think unfair to use them at this late stage as a platform for overriding the carefully crafted litigation procedure reflected in DJ Jackson's Order.

XII. Other Allegations of Mismanagement

181. I can deal more briefly with the other allegations of mismanagement complained of in the Petition (I will look separately below at the question of dividends).

182. In short, my opinion is that there *were* deficiencies in the Hornshaws' conduct in certain respects falling under this general heading. I identify these where relevant below. I should say though that in each case, it seems to me a separate question whether there was unfair prejudice to Mr Wells. I will come back to that topic later (see Section XIV).

Benefits Paid to the Hornshaws

183. Paul Hornshaw conceded in cross-examination that during the 2012-2015 period, he and his wife had the benefit of a fuel card which was used for purchasing petrol/diesel, while at the same time receiving an allowance from TRAL of £1,000 per month in respect of travel/vehicle costs. Mr Chaisty KC submitted that Mr Hornshaw should not have had the benefit of both, and accordingly that any benefits obtained through use of the fuel card should be added back in attributing a value to Mr Wells' shareholding. I agree. Mr Grant KC submitted there was evidence that Mr Hornshaw would recharge to TWS any expenses incurred on the fuel card, but that was not clearly documented and in the circumstances I conclude there was an element of "*double-dipping*" in Mr Hornshaw having the benefit of a fuel card.

Investments in the Melton Premises

184. I have summarised the pleaded allegations above (see at [69]). There is little in them, they did not feature as a major part of the trial, and no detailed submissions were made on the topic. In the circumstances, I am not prepared to hold that there were breaches of duty, or misuses of fiduciary power, by the Hornshaws, arising from any lack of clarity about the ownership of structures and other items on the Melton premises. Perhaps more importantly, I am entirely unclear how such breaches, even if shown, would give rise to losses on the part of TRAL, or to profits on the part of the Hornshaws (if different), likely to have any impact on the value of Mr Wells' shareholding. On the contrary, the investments were in the sort of infrastructure necessary for TRAL to operate profitably, and without them any sustainable earnings would have fallen, not risen. This part of Mr Wells' case was too undeveloped to be persuasive and I will say no more about it.

Personal (and other Loans) and Guarantees

Personal Loans

185. To start with, I agree with the point made by Mr Chaisty that there were breaches of s.197 CA 2006 arising from the decisions made by the Hornshaws to advance themselves substantial (and interest free) personal loans, which by June 2015 were in the region of £500,000, and by a year later in 2016 were in the region of £2m. The reason is simple. Section 197 requires informed shareholder approval of loans made to directors, and there is no evidence of any such approval having been sought or given. Again, however, this conclusion does not automatically give rise to the result that there was unfair prejudice. I will need to come back to that question.

Knightsbridge Loan

186. I also think there was a default in the decision by Paul Hornshaw in October 2014 to advance an interest free loan of £1m to Knightsbridge Park (see above at [71(i)]). Section 172 CA 2006 requires a director to promote the success of his company, and s. 174 requires him to exercise reasonable care, skill and diligence. In my judgment advancing an interest free, unsecured loan to a newly established entity, most likely as a favour to a friend, was a risky and unwise enterprise. It is entirely unclear what the *quid pro quo* was, if any; and if there was one it was too vague and nebulous to justify the risk undertaken with such a substantial amount of TRAL's working capital. The

obvious lack of prudence and commercial care to my mind involved a failure to seek to promote the success of the company and/or failure to exercise reasonable care, skill and diligence.

Caird Peckfield Guarantee

187. I am not persuaded however there was any breach of duty arising from TRAL having agreed to indemnify the institutional surety which in turn had guaranteed obligations owed by Caird Peckfield to the Environment Agency (see above at [71(iii)]). Drawing that conclusion would require a more sophisticated analysis than any presented to me.

188. Although at first blush it may seem surprising that the Hornshaws deemed it appropriate to enter into such an arrangement, deciding whether that was a breach of duty (whether under s. 172 CA or s. 174 – Mr Wells' case was vague on such points) would involve comparing the potential risks against the potential benefits. There were certainly risks, although it is true they were not realised; but there were potential benefits as well, most particularly the income that would flow to TRAL from processing waste under the substantial contract with Derby Council (see [51(ii)]) above, which it assumed responsibility for under the same overall arrangement. In short, the decision to give the indemnity seems to me defensible as a commercial decision; or at any rate, it is not so obviously uncommercial as to justify a holding that there was a breach of duty in doing so.

189. A related point arises. One of the Respondents' witnesses, Mr Brierly, who in the event was not called to give evidence at trial, served a witness statement in which he dealt briefly with the Caird Peckfield guarantee. Mr Brierly is the Area Director for Towergate Insurance Brokers, who provided brokerage services to TRAL and others. He said, at para. 12 of his Statement, that in 2013 he had "*arranged an insurance bond for the purchase of Caird Peckfield by TRAL*", and said that from memory the premium was circa. £255,000. The premium presumably was that payable to the institutional surety, which provided the primary bond to the Environmental Agency.

190. In light of the decision not to call Mr Brierly, which prevented him being cross-examined on the point, Mr Chaisty KC argued that I should conclude that it was TRAL which had paid this premium. I do not agree. The language used by Mr Brierly does not to my mind support that conclusion. It says nothing in terms about who in fact paid the premium, and the matter had not been explored during disclosure, because until Mr Chaisty KC's closing it was assumed that the criticism made was about TRAL having exposed itself to a contingent liability under its indemnity, rather than about it having paid the premium required to obtain the primary guarantee. After the trial, some researches were conducted, which disclosed documents evidencing that in fact it was Caird Peckfield which paid the premium. Even without such documents, however, I would have rejected Mr Chaisty KC's argument. If, as I therefore accept, TRAL did not pay the premium, that is obviously another point reinforcing the conclusion that the decision to grant the indemnity was defensible commercially, because it cost TRAL nothing to do so.

<u>The Attero Transaction</u>

191. This is Mr Wells' point that he was not properly consulted about the Attero transaction, even though he was a director of TRAL at the time. As to this, I think it correct to say

that Mr Wells was not involved in the discussions about the proposed transaction to the extent one would have expected from someone who was a company director. However, to my mind this says as much about Mr Wells as it does about the Hornshaws, and particularly about the odd state of limbo he had allowed himself to fall into, which meant he still held shares in TRAL and was still notionally a director of it, but had played no part in its business for a number of years despite having made it plain that he wished to exit and sell his shareholding.

XIII. Non-Payment of Dividends

192. The final point to consider is the alleged failure to pay dividends, or at any rate properly to consider the payment of dividends.

193. I find the precise chronology is a little unclear. Mr Wells' pleaded case is that he received modest dividends of £14,000 per annum, in addition to his salary, in 2012, 2013 and 2014. TRAL's accounts say something different. Prior to 2013, TRAL's accounting year had corresponded to the calendar year, and had run from 1 January to 31 December. It published audited accounts for the 2013 accounting year in June 2014. Consistently with the pleaded case, these referenced total dividends paid of £100,000, in Mr Wells' case presumably of £14,000. Paul Hornshaw's evidence was that the £100,000 was paid just before Christmas, and split among the shareholders in accordance with their shareholdings. This appears to have been in the form of a Christmas bonus.

194. Following this same pattern, the audited accounts for the 2014 accounting year (1 January to 31 December 2014), should have been finalised at some point during 2015. As noted already, however, there were delays, caused at least in part by the HMRC raid in September 2015. The consequence was that TRAL altered its year-end date to 30 June, and instead of publishing accounts for the 12 month period 1 January to 31 December 2014, published accounts for the 18 month period 1 January 2014 to 30 June 2015. Those accounts were finalised and published in April 2016. They indicate that no dividends were declared in respect of that 18 month period. I take that to be the correct position. It is common ground that none have been paid since.

195. In argument, Mr Chaisty KC had two main submissions on the question of dividends, one based on the evidence of Mrs Wells, and one based on the evidence of Paul Hornshaw.

196. In Mrs Wells' evidence she said that at some point during 2015, Mr Thompson had told her that the directors of TRAL had decided not to declare a dividend because Paul Hornshaw was going through a divorce. The suggestion was that this was part of a scheme to hide assets which might otherwise feature in Mr Hornshaw's divorce settlement. Mr Thompson denied having made this statement, and Mr Paul Hornshaw denied having any such motivation.

197. On this point, I accept the evidence of Mr Thompson and of Paul Hornshaw. Accordingly, I find on the balance of probabilities that no such statement was made by Mr Thompson to Mrs Wells. For one thing, there is no other evidence of a scheme by Mr Hornshaw to hide assets from his former wife. In her evidence Katie Noble described Mr Hornshaw as generous. In his evidence Paul Hornshaw said he continues to support Ms Noble and it seemed clear to me that there is still affection and respect

between them despite their separation. In any event, the focus in any divorce would no doubt have been on the overall value of Mr Hornshaw's business interests, and any dividend paid or not paid in a given year would have been a small component in the overall assessment. It therefore seems to me implausible that Mr Hornshaw would have been motivated by such a consideration.

198. The other point to make, stressed by Mr Grant KC in his submissions, is that if Mrs Wells had in fact been told what she said she was told by Mr Thompson, then it would have been entirely natural for her to have shared it with Mr Wells. Mr Wells however made no reference to it in his Witness Statement, and on the contrary said only that he was never told why dividend payments were stopped. On the last day of his cross-examination, Mr Wells then suggested he did recall his wife telling him about her conversation with Mr Thompson, but to my mind this change of position only served to emphasise the fallibility of Mr Wells' memory, especially at such a distance of time, as a source of reliable evidence. I think the probabilities are very much against it, and I think Mrs Wells too, although no doubt in good faith, must have been mistaken in her recollection.

199. Mr Chaisty KC's second point relied on Paul Hornshaw's evidence. Although he denied that any part of his motivation was to disguise his sources of income in his divorce settlement, Paul Hornshaw frankly accepted that from September 2015 onwards, he simply did not give consideration to the payment of dividends. Thus, as Mr Chaisty KC put it, there was no decision and no policy, and the reality is that the Hornshaws simply did not want to pay Mr Wells anything.

200. On this point, I accept Paul Hornshaw's evidence that after 2015 he and his brother simply did not consider the question of payment of dividends, and specifically did not consider the position of Mr Wells and the question of his possible entitlement to a dividend. I am not persuaded that that was motivated by a positive desire to deny Mr Wells something they thought he was entitled to. It is much more likely, it seems to me, and consistent with the evidence as a whole, that by then the Hornshaws had simply ceased to pay any regard to the position of Mr Wells as a shareholder, given his departure from TRAL and his intended sale of his shareholding. I will analyse the legal effects of this below.

XIV. Unfair Prejudice

201. Finally, and in light of the findings now made above, I come back to the question whether Mr Wells was unfairly prejudiced in his capacity as a shareholder in TRAL. In the circumstances of this case, I do not find this a straightforward question. I think it best to consider the point by reference to the overall story of this case, as it developed chronologically.

Periods pre-September 2015

Mr Wells' decision to leave

202. The starting point, and a key event in my view, is that Mr Wells expressed his firm desire to leave TRAL in September 2015, following the HMRC raid. At the time, as I have held, he was a 14.3% shareholder in TRAL. As I have also held (see [114 and 115] above), in my opinion Mr Wells' actions gave rise to a "*sale eventuality*" within

the meaning of the SHA, and that in turn meant that Mr Wells came under an obligation to make a Sale Offer in respect of his shares, with the value or "*sale price*" to be calculated by an accountant acting as expert and to be fixed at the "*relevant time*", which I take to be the date of occurrence of the "*sale eventuality*" – here, 26 September 2015.

Prejudice

203. At the time of the "*sale eventuality*", there were in fact aspects of the conduct of TRAL's business by Paul and Mark Hornshaw which in my opinion *were* prejudicial, in the sense of that word as it is used in s.994 CA 2006.

204. As to that, it is well known that the most obvious form of prejudice is prejudice in the sense of damage to the value of the Petitioner's shareholding. In Bovey Hotel Ventures Ltd 31 July 1981 (unreported but quoted with approval in Re RA Noble & Sons) (Clothing) Limited [1983] BCLC 271 at 290g-290i), Slade LJ put it as follows:

> "*Without prejudice to the wording of the section, which may cover other situations, a member of a company will be able to bring himself within [s.994] if he can show that the value of his shareholding in the company has been seriously diminished or at least seriously jeopardised by reason of a course of conduct on the part of those persons who have had de facto control of the company, which has been unfair on the member concerned*."

205. Here, there was prejudice in this sense in September 2015, since the value attributable to Mr Wells' shareholding was negatively affected by the following matters:

i) the overpayments of rent, management charges and advertising costs identified by Mr Clark in his researches (see [137]-[138] above); and

ii) the use of fuel cards as well as receipt of a car allowance, and the advances of both personal loans and of the Knightsbridge loan without any provision for the payment of interest (see [183], [185] and [186] above).

Was the prejudice unfair?

206. Prejudice on its own though is not enough to engage the jurisdiction under s. 994. The prejudice must also be unfair. This is a flexible concept and fairness is contextual (see O'Neill v. Phillips [1999] 1 WLR 1092, at 1098F). The context in September 2015 included the fact that Mr Wells had activated the contractual mechanism available to him, which enabled him to sell his shares and required him to make a Sale Offer – i.e., an offer to sell at a price to be fixed at a specified time by an appointed valuer acting as expert.

207. Given that context, was any prejudice to Mr Wells arising from the matters I have referred to unfair? I think not, at least not after September 2015, in short because by then he had said he wanted to leave, and had an exit route from TRAL available to him which allowed the matters of prejudice to be taken into account in fixing the value he was to obtain on exit.

208. A more usual context is perhaps that of the minority shareholder in a quasi-partnership company who is excluded from management, in a manner inconsistent with an agreement binding in equity that he would remain in a management position while still a shareholder – i.e., the context exemplified by Ebrahimi v. Westbourne Galleries [1973] AC 360. Relief from the Court under s. 994 is needed in such cases – usually in the form of an order that the majority shareholders buy out his shareholding for fair value – because without it the minority shareholder has no exit route for the sale of his shares, and is left marooned in a company managed by others and without his involvement, contrary to the understanding on which the undertaking was established. That is unfair. However, it has been held that exclusion of the minority is *not* unfair, and any petition for unfair prejudice will be struck out, if the majority makes an offer to acquire the minority's interest for fair value, to be determined by an expert valuer: see, most famously, the speech of Lord Hoffmann in O'Neill v. Phillips [1990] 1 WLR 1092 at p. 1107C ("*If the respondent to a petition has plainly made a reasonable offer, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out*"), and CVC/Opportunity Equity Partners Limited v. Demarco Almeida [2002] UK PC 16, [2002] BCC 684, per Lord Millett at [34].

209. By parity of reasoning, it seems to me that in this case, looking at the position as it stood in September 2015, there was no prejudice to Mr Wells which was *unfair* prejudice, requiring intervention by the Court under s.994, because he wanted to leave and had an available exit route from TRAL which enabled him to obtain fair value of his shares on exit, including an allowance for any identified matters of prejudice arising as at that point. That did not come about as a result of any offer made to him, but instead because of the pre-existing exit and valuation mechanism contained in cl. 7 of the SHA – but it does not seem to me that that makes any difference to the basic context.

210. In such cases of course the valuation process must be adequate to the task at hand. If not then there may be unfairness.

211. The point is illustrated by Re a Company No. 006834 of 1988 (Kramer) (1989) 5 B.C.C. 218, a decision of Hoffmann J as he then was under the predecessor of s.994, s. 459 of the Companies Act 1985. The Respondent sought to strike out a Petition in light of an open offer he had made to acquire the minority shareholder's interest for fair value to be determined by an expert valuer, but the Petitioner objected that the proposed valuation mechanism was inadequate because the Petition alleged there had been improper extraction of the company's funds. Hoffmann J disagreed and struck out the Petition. He thought the effect of the alleged improprieties on the valuation exercise was likely to be minimal, because the exercise for the valuer was to apply a suitable multiple to the profits which the company appeared to be likely to earn in the future, and moreover the majority shareholder had conceded that the valuer should be free, if he felt it fair to do so, to write back into the accounts any sums which he considered to have been improperly disbursed (see at p. 221). Hoffmann J went on at p. 222 to say:

> "*A similar contention was made to Millett J. in Re a Company No. 003843 of 1986 (1987) 3 BCC 624 , where the judge said that counsel had argued that, because there was suspicion of misfeasance and misappropriation, it was not possible that the petitioners, who had offered to submit to an independent valuation, had made a fair offer. The judge said (at p. 632):*

> *'In my judgment, there is nothing in that point. The terms of the offer that I have read ensure that both sides will have an opportunity to have access to all the company's books and papers and to make whatever representations they wish to make to the independent accountants. In case there is any doubt about it, I should make it absolutely clear that, in my judgment, if the accountants have any reason to think that there has been any misappropriation or misapplication of the company's assets which would have the effect of depreciating the value of the petitioners' interest, then they will have to take that into account in valuing the company.'*
>
> *This seems to me to be just such a case.*"

212. In my opinion the nub of Hoffmann J's reasoning in Kremer, and of Millett J's reasoning in Re A Company to which Hoffmann J referred, is that even in a case where there is evidence of impropriety, there will be nothing unfair in holding a minority shareholder to a valuation mechanism (where pre-agreed or in the form of a later open offer), if the mechanism allows the valuer to take account of any such impropriety in valuing the minority interest. *A fortiori*, there will be nothing unfair in holding the minority shareholder to the valuation mechanism if the allegations of impropriety are not in fact made out.

213. In the present case, Mr Chaisty KC argued that the mechanism in cl. 7 *was* inadequate to address the widespread corporate wrongdoing Mr Wells has been exposed to, largely stemming from the Hornshaws' breaches of fiduciary duty arising from the positions of conflict there were in given their interests in other companies with which TRAL traded. I have however rejected any argument based on alleged conflicts of interest, said to give rise to a claim or claims for an account of profits (see Section XI above, at [144] *et seq*.]), and have held that Mr Wells' primary allegations as to excessive or uncommercial payments are not supported by any evidence (see above at [139]-[143]).

214. What we are left with as at September 2015 are the more limited points already summarised at [205] above, which in my opinion were perfectly well capable of being accommodated within any valuation conducted under the cl. 7 mechanism, for example by the valuer making an allowance for an appropriate rate of interest payable on the personal loans and the Knightsbridge loan (the form of adjustment proposed by Mr Chaisty KC). Mr Clark took a similar view in preparing his 2016 Report, and I consider he was correct to do so.

215. The overall result is that, in my opinion, there was no prejudice to Mr Wells as at September 2015 which was unfair. Mr Wells had himself expressed a clear wish to exit TRAL and sell his shareholding, and was not only able to sell, but could do so at a fair price, which was to be calculated making due allowance for the effect on value of any shortcomings in the way TRAL had been managed up to that point.

Periods post-September 2015

216. In the event of course, and again as I have already held (see above at [126]), the valuation process under cl. 7 was started, but not properly completed by Mr Clark, and so his Report was not, and is not, binding on Mr Wells. What are the effects of this?

Matters are left to drift

217. The practical effect at the time was that Mr Wells' shares were not in fact transferred to the Hornshaws, although Mr Wells still wanted to sell them, and was still bound to do so using the cl. 7 mechanism.

218. Instead, matters were left to drift (see above at [11]-[13]). Neither side had a satisfactory response to why this was the case. The Hornshaws did nothing, no doubt because they were happy with the valuation produced by Mr Clark and were content to bank it and leave Mr Wells to bring the fight to them. As for Mr Wells, he did not begin his Petition proceedings until 2019, and more significantly, did not press Mr Jenneson's suggestion in 2016, which Mr Clark himself had endorsed, that there should be a fresh valuation using more up-to-date information (see above at [11]). Instead, the parties' positions became entrenched and polarised, and when the Petition proceedings were started, Mr Wells made wide-ranging allegations of wrongdoing which in large part I have now rejected.

219. In the meantime, again as I have already noted, Mr Wells and the Hornshaws were left in a state of limbo. Mr Wells remained a shareholder and director in the technical sense, but in substance had committed himself to a process of selling his shares in September 2015 for their value as at that time, and as regards his directorship was no longer working at TRAL and played no ongoing part in its business.

220. As it seems to me, the reality of it is that given the circumstances, the Hornshaws took no real account of Mr Wells or of his interests from September 2015 onwards. As far as they were concerned, he had cashed in his chips at that stage, and afterwards TRAL was really theirs. The results can be seen in two matters in particular, namely the growth of the directors' loans the Hornshaws advanced to themselves (above at [13]), and the related failure to consider the possible payment of dividends for the benefit all shareholders, including Mr Wells (above at [13] and [192]-[200]).

Was there unfair prejudice?

221. The question is: do such matters amount to unfair prejudice vis-à-vis Mr Wells? I am not persuaded that they do.

222. I think that follows from the fact that, from September 2015 onwards, Mr Wells was committed to a process of selling his shares which required them to be valued at that point in time. Mr Wells' decision in September 2015 seems to me to provide a natural break point in this case in terms of assessing unfair prejudice, because of the legal effects of his having done so under the SHA - i.e., the fact that he became contractually obliged to make a Sale Offer, meaning an offer to sell his shareholding for its value *at the relevant time*, which I take to be (as the parties did) the end of September 2015.

223. It seems to me that this inflection point is important, because from then on, Mr Wells having signalled his intention to leave TRAL and to transfer his shareholding, his interests as shareholder became attenuated. His only remaining interest was in realising the value to be attributed to his shareholding at *the relevant time*. He had no obvious interest in matters occurring subsequently, which by definition would not affect the financial value of his shareholding interest at *the relevant time*, because they would not affect the assessment of such value.

224. In my view, this analysis must then have a bearing on what, after September 2015, could properly be said to amount to unfair prejudice to Mr Wells.

Directors' Loan Accounts

225. Consequently, I do not see how the decisions made by the Hornshaws after September 2015 to advance themselves directors' loans with no provision for the payment of interest can be said to have been unfairly prejudicial to Mr Wells. His only continuing interest as shareholder was to receive fair value for his shares as at September 2015. That would not be affected by any later decision by the Hornshaws not to charge a commercial rate of interest on loans they caused TRAL to make to themselves. As I see it, in the circumstances there was neither prejudice nor unfairness, even if there were breaches of duty by the Hornshaws given the manner in which the loans came to be made.

Dividends

226. There is then the question of dividends, but I think a similar logic applies.

227. The submission of Mr Chaisty KC was that the Hornshaws, as directors of TRAL, were bound at least to consider whether any dividends should be paid (see, for example, Routledge v. Skerritt [2019] BCC 812 at [25]). Mr Chaisty KC also referred to the following statement of Harman J in a just and equitable winding-up case, Re A Company (No. 00370 of 1987), Ex p Glossop [1988] 1 WLR 1068 Ch D (Companies Court) at p. 1076:

> *"[I]t is, in my judgment, right to say that directors have a duty to consider how much they can properly distribute to members. They have a duty, as I see it, to remember that the members are the owners of the company, that the profits belong to the members, and that, subject to the proper needs of the company to ensure that it is not trading in a risky manner and that there are adequate reserves for commercial purposes, by and large the trading profits ought to be distributed by way of dividends.*"

228. Mr Chaisty KC submitted that on the evidence of Mr Paul Hornshaw himself, the directors of TRAL had entirely failed even to consider the question of paying dividends in respect of the 18 month accounting period to 30 June 2015 (the last dividend payment referenced in the accounts being in December 2013 – see above at [194]), or indeed at any point thereafter.

229. In my opinion, however, the allegation of unfair prejudice on this basis is not made out either.

230. No clear allegation was made that TRAL's directors (who of course included Mr Wells) were bound to consider the payment of an interim dividend before the end of the 18 month accounting period terminating on 30 June 2015. Thereafter, the natural time to have considered payment of a final dividend would have been on finalisation of the accounts in June 2016. But by then Mr Wells had already, in September 2015, signalled his intention to depart from TRAL and had thus become contractually bound to make an offer - i.e., a "*Sale Offer*" in the terminology of the SHA - to sell his shareholding.

231. As I have already explained, it seems to me a fair way of looking at it is to say that Mr Wells' interests as shareholder effectively crystallised at that point. That follows from sub-paragraphs (i) to (iii) of cl. 7(d) of the SHA, but to my mind is reinforced also by sub-paragraph (iv), which deals specifically with dividends (my emphasis added):

> "*At completion the Offeror will deliver against payment of the purchase price duly executed transfers of the Shares in question together with the certificate or certificates relating thereto. The sale shall be exclusive of any dividend declared on the Shares prior to the date of the Sale Offer but shall be inclusive of all dividends declared subsequently*."

232. In my view, the effect of this language is clear. Under the terms of cl. 7, the departing shareholder who has made (or is required to make) a Sale Offer has no ongoing entitlement to participate in dividends. The Sale Offer operates as a cut-off. Any dividends declared but not paid prior to the Sale Offer must still be paid and can be kept in addition to any amount payable by way of the *sale price* calculated under the cl. 7 valuation mechanism; but thereafter all the departing shareholder is entitled to is the *sale price* and no more.

233. That being so, I find it very difficult to see how Mr Wells was unfairly prejudiced by any failure to consider the payment of dividends after September 2015. Whether there was consideration or not, or indeed whether any were declared or not, dividends were not to feature in the calculation of the value to be paid for Mr Wells' shares. The same analysis applies as above. Matters occurring after that September 2015 which might otherwise have affected his interests as shareholder could not, in my view, amount to unfair prejudice, because he was committed to a process of valuation and sale which meant that his only remaining interest was in realising the fair value of his shareholding at that point in time. Later-occurring matters which would not affect that calculation of value would be neither prejudicial to his remaining interests nor unfair.

234. I can also put the matter another way. It seems to me that even had the directors of TRAL given proper consideration to the payment of dividends after September 2015, they would have been entitled, in deciding whether to exercise their fiduciary power to recommend the payment of a dividend, to take into account the fact that Mr Wells was not entitled to receive one, even though still a shareholder, since he had become contractually obliged in September 2015 to make a Sale Offer which effectively crystallised his financial interests in TRAL at that point in time. In such circumstances, even had they considered the matter, it seems to me the directors would have been justified in deciding not to recommend any dividend, since the only shareholders with an ongoing interest in receiving one were Paul and Mark Hornshaw, and they preferred to obtain value from TRAL in different ways, principally via directors' loans which they had been advised were more tax efficient. The same logic follows of course for later accounting periods.

235. For all those reasons, I am not persuaded that Mr Wells was unfairly prejudiced by the Hornshaws' admitted failure to consider the payment of dividends after September 2015.

The Attero Transaction

236. Even if Mr Wells was excluded from discussions about the Attero transaction in 2018 (which I doubt), I do not see why that would have been unfairly prejudicial to him as a shareholder, given his own decision to cease to play any part in the management of TRAL, and given the fact that by 2018 his financial interest in TRAL was fixed at point in time in 2015 that meant it would not be affected by the Attero transaction.

The Valuation Exercise

237. Mr Chaisty KC also submitted, however, that Mr Wells was unfairly prejudiced given the manner in which the valuation exercise carried out by Mr Clark was conducted. On this point, I agree with Mr Chaisty KC, at least to the extent I have held that Mr Clark did not properly comply with the instructions given to him.

238. Section 994 is engaged where *the affairs of a company* are conducted in a manner that is unfairly prejudicial to the interests of a member. A number of authorities have held that the concept of the affairs of a company is a broad one: for example in Re Neath Rugby Ltd (No. 2) [2009] BCLC 427, Stanley Burnton LJ said at [50] that "*the words 'affairs of a company' are extremely wide and should be construed liberally*." Likewise, in Re Coroin Ltd, in his Judgment at first instance at [2012] EWHC 2343, David Richards J (as he then was) said *"[t]he Court will not adopt a technical or legalistic approach to what constitutes the affairs of the company but will look at the business realities*." In Oak Investment Partners XII, Limited Partnership v. Boughwood [2009] 1 BCLC 453, Sales J (as he then was) in his judgment at first instance said the following:

> "*Conduct of anyone involved in a company may be so far removed from actually carrying on the affairs of the company that it does not amount to the conduct of the company's affairs for the purposes of s.994. But in my view, s. 994 is concerned with the practical reality which obtains on the ground in relation to the conduct of the company's affairs, and there is no sound reason to exclude the possibility that what someone does in exercising or purporting to exercise managerial powers as a director or senior employee should not in principle qualify as conduct of the affairs of a company for the purposes of that provision*."

239. Here, we are concerned with conduct on the part of TRAL's auditor in carrying out a valuation exercise in order to facilitate an orderly transfer of the shares of a departing shareholder. It seems to me that such conduct can very fairly be characterised as conduct of the company's affairs, not least because in the last resort, it was the company itself which would have to acquire the shareholding at the price fixed by the valuer (see cl. 7(d)(iii) – above at [113]). The company – TRAL – thus had its own interest in the valuation exercise being properly conducted, and it was to be carried out in part at least for the company's benefit.

240. I think the test of unfair prejudice is easily made out. Mr Wells was prejudiced because the failure to complete the valuation exercise using up-to-date information was likely to have an impact on the proper calculation of the sale price to be paid for his shares, and that was unfair since Mr Wells had a contractual right under the SHA to insist that

any valuation carried out by Mr Clark was properly completed in accordance with the instructions given to him.

XV. Remedy

General

241. Section 996(1) CA 2006 is headed "*Power of the Court under this Part*", and provides as follows:

> *"(1) If the Court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of".*

242. In the present case, the key element of unfair prejudice I have found is that the valuation exercise conducted by Mr Clark was not completed in accordance with his mandate. One of the submissions made by Mr Grant KC was that this was not pleaded as a self-standing ground of unfair prejudice in the Petition, and that in the Reply, the essential criticism of Mr Clark's valuation made by Mr Wells was not that it was not properly completed, but that that it was infected by bias, an allegation I have now rejected. Both points are true, but the pleaded case necessarily required a close interrogation of the exercise conducted by Mr Clark, and disclosure was given on it and Mr Clark cross-examined about it in some detail. I consider that the finding I have made in relation to it is one that can fairly be made (cf. the Ming decision, above at [145]), and that I should take it into account in determining what remedy should follow. Indeed, I think it would be a serious mistake to ignore it.

243. In such circumstances, and since the unfair prejudice I have found relates to the failure to complete in a satisfactory manner the expert valuation exercise required by cl. 7 of the SHA, it seems to me that the appropriate remedy is one which seeks to mirror the structure of the cl. 7 valuation mechanism, with appropriate adjustments to ensure transparency and confidence in the process among the parties.

Order

244. The precise details of the process can be the subject of submissions, and will need to be reflected in an appropriate Order, but what I envisage is that there should be:

i) A valuation process undertaken by a valuer to be appointed jointly by the parties, or, failing agreement, by the Court.

ii) The valuer to act as expert, not as arbitrator.

iii) The valuer to conduct a fresh valuation of Mr Wells' shareholding, but incorporating as necessary the findings made in this judgment (including as to the matters addressed below).

iv) A process to be agreed, or fixed by the Court, to allow the parties an equal opportunity to make submissions to the valuer on what they say the value should be.

v) The process however to be a summary one, consistent with the valuer's role as expert. The emphasis is on achieving a speedy and cost-effective determination. Unnecessary elaboration to be avoided.

245. Certain specific points require determination, so as to facilitate the valuation. I deal with these immediately below.

Valuation Date

246. The question of the appropriate valuation date is routinely disputed in unfair prejudice petitions, because value often fluctuates over time, and it is in the interests of the seller (usually the minority shareholder) to have a date which maximises his sale value, and in the interests of the buyer (usually the majority shareholder) to have a date which minimises his cost.

247. The approach of the Court is flexible. It must make an order which is fair. In Profinance Trust SA v. Gladstone [2001] EWCA Civ. 1031, [2002] 1 BCLC 141, Robert Walker LJ endorsed the view that the "*starting point*" should be that a minority stake will be sold at a date "*as close as possible to the actual sale so as to reflect the value of what the shareholder is selling"* (see Profinance at [33]). Here, Mr Chaisty KC in closing the case at trial, and having had the opportunity in cross-examination to question Paul Hornshaw about the current status of TRAL, said that the Court should adopt that course, and order a valuation of Mr Wells' shareholding at its current value.

248. It will be apparent from what I have said already that I do not agree. Also in Profinance at [61], Robert Walker LJ went on to say that there will be "*many cases in which fairness (to one side or the other) requires the court to take another date."* Here, I think it obvious that fairness requires Mr Wells' shareholding to be valued as at the end of September 2015, since that is the point in time when he evinced his intention to leave, and became contractually bound to a process for selling his shares which committed him to sell at a value fixed at that point in time. In the circumstances, I do not see anything unfair in effectively holding Mr Wells to that bargain, and I think it would be unfair to the Hornshaws to allow Mr Wells the opportunity to pick another date which he now thinks might suit him better.

249. That is subject to one qualification. The process for valuing Mr Wells' shareholding should have been, but was not, completed a long time ago. It is not Mr Wells' fault that it was not properly completed at the time it was first commissioned, because he was not the cause of the deficiency which in my opinion means the valuation is to be set aside. On the face of it, it therefore seems to me that the Court should be open to awarding interest to Mr Wells on the sale price now to be determined, to run from the point in time at which it is reasonable to think a valuation carried out in late 2015 should have been completed. I will however need to hear submissions in due course from the parties on the following:

i) the rate of interest to be applied; and

ii) the period or periods over which interest should run, bearing in mind that, although Mr Wells was not the original cause of the problem, he must bear some responsibility for the overall delays in reaching a resolution, given that he chose not to press Mr Jenneson's suggestion in mid-2016 (which Mr Clark agreed

with) that there be a new valuation (see above at [11]), and also because his attack when it eventually did come took the form of the present Petition, which made a wide-ranging set of allegations, a number of them very serious, the majority of which have not been made good.

Minority Discount

250. The next question is whether Mr Wells' minority shareholding should be valued on a discounted basis. As Lord Millett pointed out in delivering the advice of the Privy Council in CVC/Opportunity Equity Partners Limited & Anor v. Demarco Almeida [2002] UKPC 16 at [39], the application of a discount is the common practice in the case of small private companies whose articles contain pre-emption rights, requiring shareholders desirous of selling their shares to offer them first to the other shareholders at a price to be fixed by the auditors. The logic is that if the departing shareholder were to seek an external buyer for his shares, he could expect the price to be discounted: a fair price between a willing seller and willing buyer would normally be expected to reflect the minority status of the holding. The invariable practice is to apply the same approach where the buyer is the majority shareholder (or shareholders) under the pre-emption provisions, because (per Lord Millett at [39] in CVC), *"[i]t would seem to be unreasonable for the seller to demand a higher price from an unwilling purchaser than he could obtain from a willing one*."

Mr Wells' arguments

251. In the present case, however, Mr Chaisty KC submitted that a different result should follow, and that Mr Wells' shareholding should be valued without any discount. That is usually the approach in the case where a minority shareholder in a *quasi-partnership* company establishes unfair prejudice arising from his exclusion from management, but Mr Chaisty KC here was forced to accept that TRAL is not a quasi-partnership company: that is the result of the decision of DJ Jackson, which I have summarised above (see at [22(v)]). Nonetheless, he submitted that there were grounds for valuing Mr Wells' shareholding without any discount, for example: (i) the fact that the circumstances of the case would justify an Order for the winding-up of TRAL on the just and equitable ground; (ii) the terms of the SHA, and in particular the provisions which contemplate all the shareholder/directors being required to attend Board meetings and them taking turns to act as chairman; (iii) the fact that there was "*equality in terms of contribution*" when Mr Wells first acquired his shareholding in TRAL (meaning, as I understand it, that Mr Wells invested on the same basis as the Hornshaws and Mr Taylor, rather than at a discount to the initial contributions they had made); and (iv) the conduct of the Hornshaws, in particular their use of TRAL as in effect their own personal fiefdom, as exemplified by the failure to declare dividends after 2014.

252. Of these points, (i) was really at the forefront of Mr Chaisty KC's submissions – i.e., the fact that the circumstances would have justified an Order for the just and equitable winding-up of TRAL. In that context, Mr Chaisty KC again emphasised the failure to pay dividends after 2014. He said that such conduct in and of itself would have provided grounds for winding-up TRAL on the just and equitable ground, and that being so, it was appropriate for any valuation of Mr Wells' shareholding to be on a pro-rata or non-discounted basis.

Discussion & Conclusion

253. I am not persuaded by Mr Wells' arguments and consider that in this case, Mr Wells' shareholding should be valued subject to a discount to reflect its minority status. It will be for the valuer to determine what the amount of any discount should be.

254. I think a good starting point is the observation made by Blackburne J in Irvine v Irvine (No 2) [2006] EWHC 583 (Ch), [2007] 1 BCLC 445, when at [11] he said: "*A minority shareholding … is to be valued for what it is, a minority shareholding, unless there is some good reason to attribute to it a pro rata share of the overall value of the company*." The same point was later made by Lady Arden in delivering the advice of the Privy Council in Shanda Games Ltd v. Maso capital Investments Limited [2020] UKPC 2. At [35] she said as follows (emphasis added):

> *"In the opinion of the Board, it is a general principle of share valuation that (unless there is some indication to the contrary) the court should value the actual shareholding which the shareholder has to sell and not some hypothetical share. This is because in a merger, the offeror does not acquire control from any individual minority shareholder. Accordingly, in the absence of some indication to the contrary, or special circumstances, the minority shareholder's shares should be valued as a minority shareholding and not on a pro rata basis."*

255. The jurisdiction under the statute is a broad one, and the Court is given a wide power to fashion an Order that is fair. I think the point being made in these dicta, and by Lord Millett in the CVC case mentioned above, is that in very many cases where what is being sold is a minority stake, it *will* be fair for the stake to be valued subject to a minority discount, because that will properly reflect the nature of the asset being transferred.

256. Special circumstances may sometimes exist, however, which require a different outcome. Perhaps the best known is the example of the minority stake in a quasi-partnership company. But considering what seem to me to be the special circumstances in play in such cases, I see no obvious parallel with the present case, or any reason to depart from the usual practice of applying a discount.

257. Lord Millett at [40]-[41] in the CVC decision explained why the quasi-partnership case is routinely treated as having special characteristics. Those special characteristics derive from the particular nature of a quasi-partnership company, which as Lord Millett said at [32], typically include (i) a business association formed or continued on the basis of a personal relationship of trust and confidence, (ii) an understanding or agreement that all or at least some shareholders should participate in management, and (iii) restrictions on the transfer of shares so that a member cannot realise his stake if he is excluded from the business. In the paradigm case where the minority shareholder in a quasi-partnership is excluded from management, the result is deeply unfair because, in breach of the agreement or understanding on which the business was formed, he is left as a minority investor in a business managed by somebody else, with no means of escape.

258. At [41], Lord Millett explained why in such cases it is usual to value the petitioner's holding as a rateable proportion of the total value of the company as a going concern, without any discount:

> "*The rationale for denying a discount to reflect the fact that the holding in question is a minority holding lies in the analogy between a quasi-partnership company and a true partnership. On the dissolution of a partnership, the ordinary course is for the court to direct a sale of the partnership business as a going concern with liberty for any of the former partners who wish to bid for the business to do so. But the court has power to ascertain the value of a former partner's interest without a sale if it can be done by valuation, and frequently does so where his interest is relatively small: see Svers v Syers (1876) 1 App Cas 174. But the valuation is not based on a notional sale of the outgoing partner's share to the continuing partners who, being the only possible purchasers, would offer relatively little. It is based on a notional sale of the business as a whole to an outside purchaser.*"

259. Expanding on this logic, Lord Millett said the following at [42] (my emphasis added):

> *"In the case of a company possessing the relevant characteristics, the majority can exclude the minority only if they offer to pay them a fair price for their shares. In order to be free to manage the company's business without regard to the relationship of trust and confidence which formerly existed between them, they must buy the whole, part from themselves and part from the minority, thereby achieving the same freedom to manage the business as an outside purchaser would enjoy."*

260. The denial of a discount, looked at in this way, is entirely consistent with the idea that one should value what is being sold. In the quasi-partnership case where the minority investor has been excluded, what is being sold, notionally, is the *whole* of the business, from which the minority investor is entitled to recover a *pro rata* share of the sale proceeds, without any discount. That is the fair outcome in such cases. Indeed, in Re Bird Precision Bellows [1986] Ch 658 CA, Oliver LJ said at p. 677 that it was " *... the only fair method of compensating an unwilling vendor of the equivalent of a partnership share*."

261. That all seems to me a long way from the facts of the present case. Mr Chaisty KC rightly accepted that TRAL was not a quasi-partnership company. Neither was Mr Wells an unwilling seller, who had been forced to seek relief from the Court having been excluded from management, and thus left marooned as a shareholder in a company managed by others and with no available means of exit. On the contrary, Mr Wells was a willing seller of his shares – he was very keen to leave in September 2015 after the HMRC raid; and he did have an available means of exit, namely via the pre-emption/valuation mechanism in cl. 7 of the SHA. The situation is much more closely aligned with what Lord Millett in CVC thought was the common situation where a discount would be applied (described above at [250]), than with the more unusual one where the Court proceeds on the basis of a notional sale of the company as a whole.

262. What of Mr Chaisty KC's argument summarised at [251 and 252] above? To develop this a little further, it proceeds in a similar fashion to the logic applied in quasi-partnership cases, but on a different basis and assumes a different form of notional sale.

As I understand it, the argument is that if in a given case, the facts would justify winding-up of the company on the just and equitable ground, and if moreover the company is a solvent company, then whether or not a winding up order is in fact sought, the Court in a s.994 case should proceed on the basis one could in theory be made, and should further assume that if that were to happen then the company might well be continued by the liquidator and sold as a going concern, and then the minority shareholder would receive a rateable proportion of the value realised on sale. Ergo, the minority shareholder should have his stake valued without any discount, so as not to be in a worse position than he would be in if the company were to be wound up. In making this submission, Mr Chaisty KC relied on the analysis to the same effect in the Judgment of HHJ Purle QC in Re Sunrise Radio Ltd [2009] EWHC 2893 (Ch) at [303].

263. Moreover, argued Mr Chaisty KC, the present *was* a case in which winding up on the just and equitable ground would be justified. In saying that he relied again on the decision of Harman J in the Ex parte Glossop case, already referenced above, in which Harman J said that if the directors of a company were simply to "*pile up profits in the company and … not distribute them by way of dividend*", then the members would be entitled to "*make the company the subject of a petition for a just and equitable winding up; because the proper and legitimate expectations of members have not been applied, but have been defeated*" (see p. 1076C-D).

264. This is a creative line of argument, but I am not persuaded by it. To start with, I have already rejected the proposition that in the circumstances, there was any unfair prejudice to Mr Wells stemming from the Hornshaws' admitted failure as directors to consider the payment of dividends from 2015 onwards (see above at [226]-[235]). For the reasons I have explained, the defaults in relation to the payment of dividends all came too late for Mr Wells to have a valid complaint that they amounted to unfair prejudice. Further, although Harman J in the Glossop case expressed himself in typically forthright terms, it seems to me the critical question in such cases is not so much whether dividends have been paid or not, but instead whether the directors abused their fiduciary powers in failing to recommend them (see per Hoffmann J in Re Saul D Harrison [1995] 1 BCLC 14, at p. 18). On the facts of the present case, it is far from clear that anything happened which could properly be characterised as such an abuse, because even if the Board *had* considered the question of paying dividends, it would have been entitled after 2015 to proceed on the basis that Mr Wells was not entitled to receive one, and would have had a sound basis for deciding not to (see above at [234]).

265. In such circumstances, I do not see how the non-payment of dividends could properly be said to justify the making of a winding up Order, even notionally; and it would be quite wrong and unfair, in fashioning a remedy for the instances of unfair prejudice I *have* found, to assume that it might.

266. Even if I am wrong about that, I am not persuaded that any underlying point of principle would, in a case such as the present, justify proceeding on the basis of Mr Chaisty KC's hypothetical winding-up order. I go back to the injunction in cases like Shanda Games, that what is to be valued is what the minority shareholder has to sell. In this case what Mr Wells has to sell is his minority stake in TRAL. He is a willing (indeed enthusiastic) seller and had and has the means at his disposal to effect a sale to the majority shareholders, the Hornshaws. It is not like the quasi partnership case where the minority shareholder is an unwilling seller and has no means of sale and exit absent an order from the Court, and where the Court is forced to proceed on the basis of a notional sale

of the business as a whole because that is the only fair option. Here, I see nothing unfair in holding Mr Wells to the contractual framework he signed up to, to govern precisely the situation which arose, in which he wanted to leave TRAL and dispose of his minority shareholding to the remaining shareholders. I think it would be artificial and unfair in valuing that minority holding to pretend, by means of whatever legal fiction, that there is to be a sale of the whole business of TRAL, because that it not what is intended to happen.

XVI. Conclusion and Disposal

267. The Petition succeeds, but only in the limited respects identified above. I will need assistance from counsel in drawing up an Order which fairly reflects the findings expressed in this Judgment and its outcome.