

OPUS 2

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Ms Swarandeeep Birdi v (1) Specsavers Optical Group Limited (2)
Mr Kamaljit Singh (3) Dartford Visionplus Limited (4) Dartford
Specsavers Limited

Day 18

November 18, 2014

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Phone: +44 (0)20 3008 5900
Email: transcripts@opus2.com
Website: <http://www.opus2.com>

1 Tuesday, 18 November 2014
 2 (10.30 am)
 3 MR JUSTICE NUGEE: Yes. Good morning, Mr Stuart.
 4 Closing submissions by MR STUART
 5 MR STUART: Good morning, my Lord. My Lord, you have had
 6 the opportunity, I hope, to read --
 7 MR JUSTICE NUGEE: I have, thank you both, very much.
 8 MR STUART: -- written closings. The first thing I want to
 9 do this morning is to address some of the points, the
 10 wider points, raised by my learned friend's closing
 11 submissions.
 12 MR JUSTICE NUGEE: Yes.
 13 MR STUART: Rather than go to the detail of absolutely every
 14 little bit and piece, but there are some important
 15 aspects of the matter which I need to respond to from
 16 the outset.
 17 So, if your Lordship has my learned friend's
 18 closing, I'm really going to do it by reference only to
 19 the executive summary at the beginning, and not go into
 20 the detail of it.
 21 MR JUSTICE NUGEE: Yes.
 22 MR STUART: The first point is the ambit of this trial.
 23 MR JUSTICE NUGEE: Yes.
 24 MR STUART: And the issues for determination. We say that
 25 my learned friend's closing, certainly paragraph 2 of

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1 that closing submission, proceeds on a fundamental
 2 misapprehension as to what we are here doing because
 3 this trial of these issues, ordered by the registrar, is
 4 not proceeding on the basis that SOG is exercising its
 5 contractual option. This is a trial within our
 6 petition, our unfair prejudice petition, of issues
 7 raised by our unfair prejudice petition and remedies
 8 sought within our unfair prejudice petition.
 9 This is not the trial of a contractual option
 10 process, as my learned friend appears to seek to
 11 suggest. The respondents say here that they are
 12 proceeding on the basis -- and that we are all
 13 proceeding on the basis -- that the shares are being
 14 purchased under the contractual option, but they have
 15 not -- and it's not part of the pleaded case for the
 16 purposes of this trial -- they have not challenged the
 17 entire basis of the petition. This is a trial within
 18 this petition.
 19 MR JUSTICE NUGEE: Let me see if I understand. It is common
 20 ground, as I understand it -- I think we discussed this
 21 a little bit in opening -- that there will be an
 22 acquisition by SOG of Ms Birdi's shares.
 23 MR STUART: Yes.
 24 MR JUSTICE NUGEE: At a value to be decided by an
 25 independent valuer.

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1 MR STUART: With a value to be decided by an independent
 2 valuer, with adjustments to the purchase price --
 3 MR JUSTICE NUGEE: What you are seeking to do in this
 4 proceeding before me is to persuade me that I should
 5 direct an adjustment to the price. Is that right?
 6 MR STUART: That's right.
 7 MR JUSTICE NUGEE: Or do I say to the valuer, "I find --"
 8 clearly, I have to find the facts.
 9 MR STUART: Yes.
 10 MR JUSTICE NUGEE: I then have to find whether there are
 11 breaches of legal duties.
 12 MR STUART: Yes.
 13 MR JUSTICE NUGEE: I think I then have to find whether that
 14 constitutes unfair prejudice within the meaning of
 15 section 994.
 16 MR STUART: Yes.
 17 MR JUSTICE NUGEE: And then I have to find whether that
 18 warrants an adjustment to the price.
 19 MR STUART: Yes.
 20 MR JUSTICE NUGEE: And I want to ask you at some stage as to
 21 what "unfair" means, what "prejudice" means, what
 22 "warrant" means, what "adjustment to the price" means.
 23 MR STUART: Yes.
 24 MR JUSTICE NUGEE: But at the end of the day, if you succeed
 25 in persuading me: these are the facts, that was

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1 a breach, this is the prejudice, this is unfair and it
 2 warrants an adjustment, you want me to specify a figure?
 3 Is that right? Have I understood that correctly?
 4 MR STUART: On the adjustment to the price, yes.
 5 MR JUSTICE NUGEE: Yes. So, without knowing what the price
 6 is, because that has not yet been valued --
 7 MR STUART: No, your Lordship doesn't know what the value
 8 is.
 9 MR JUSTICE NUGEE: Since I don't know what the value is,
 10 I clearly don't know what the price is.
 11 MR STUART: That's correct.
 12 MR JUSTICE NUGEE: Suppose the value comes out at £100,000.
 13 MR STUART: Yes.
 14 MR JUSTICE NUGEE: I don't know that.
 15 MR STUART: No.
 16 MR JUSTICE NUGEE: It could be anything between, well,
 17 nought and £500,000.
 18 MR STUART: Absolutely. No, no, it's quite clear --
 19 MR JUSTICE NUGEE: What do I say, on your case? I say --
 20 let's take a specific example. Give me an example.
 21 MR STUART: The costs of the management charges --
 22 MR JUSTICE NUGEE: The management charges.
 23 MR STUART: -- that were levied.
 24 MR JUSTICE NUGEE: About £60,000-odd in management charges.
 25 Suppose I find that was all entirely unauthorised,

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1 unjustifiable, the product of a conspiracy.
 2 MR STUART: Yes.
 3 MR JUSTICE NUGEE: You want me to say the imposition of
 4 these management charges was a breach of all these
 5 duties and unfair and prejudicial and warrants an
 6 adjustment, and the price should be adjusted by £60,000.
 7 Is that right?
 8 MR STUART: It should be adjusted by such sum as your
 9 Lordship considers appropriate. So, for example, in
 10 that case, in the case of the £60,000, you might say
 11 it's the £60,000; you might say, "No, the adjustment to
 12 the price should be half of that sum because --
 13 MR JUSTICE NUGEE: Ms Birdi was only entitled to half the
 14 profits?
 15 MR STUART: "She was entitled to half the profits and I find
 16 that the reason why it's appropriate to adjust the price
 17 is because of the effect upon her entitlement to the
 18 profits and therefore the adjustment to the price
 19 shouldn't exceed her entitlement to the profits."
 20 MR JUSTICE NUGEE: But that doesn't look to me like
 21 adjusting the value of the shares.
 22 MR STUART: No, it's not.
 23 MR JUSTICE NUGEE: It looks to me like a different exercise.
 24 MR STUART: It is. It is a different exercise.
 25 MR JUSTICE NUGEE: I think you want me to do two things,

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1 don't you? You want me both to say -- let's say I'm
 2 satisfied she is only entitled to 50 per cent of the
 3 profits of that period. You float, not very rigorously,
 4 an argument she is entitled to 100 per cent of the
 5 profits during 2007, and I will have to ask you the
 6 basis of that, but let's assume I reject that and that
 7 she is entitled to 50 per cent of the profits, and I'm
 8 satisfied that the profits, distributable profits, would
 9 have been £60,000 more were it not for these unfairly
 10 prejudicial conspiratorial breaches of duties. You want
 11 me to say, "I direct that there be £30,000 added to the
 12 price in respect of that", and that the valuer in
 13 valuing the value of the shares at whatever date the
 14 value of the shares is to be valued at, should take
 15 account of the fact that the profits of the company
 16 should have been £60,000 more than they appear in the
 17 accounts. Is that right?
 18 MR STUART: That's right. That's it.
 19 MR JUSTICE NUGEE: I see. I don't think Mr Potts -- I mean,
 20 he doesn't accept all the premises, but I think even if
 21 all the premises are established, I don't think he
 22 accepts the result.
 23 MR STUART: No, I'm not saying he does. That's what I'm
 24 saying. We say that is the task and that it is clear
 25 from the order of Deputy Registrar Briggs, and it's

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1 clear from the sequence of events that led up to that
 2 order and it's clear from the pleading.
 3 MR JUSTICE NUGEE: Does it matter -- do I have to decide --
 4 is it an issue for me as to whether what is going on is
 5 the fulfilment of a contractual exercise of an option to
 6 purchase, or whether what is going on is a subsequent
 7 agreement between the parties that you will sell to
 8 them? Do I need to decide that? Is that an issue? Is
 9 that an issue before me?
 10 MR STUART: I don't consider it's an issue before you
 11 because I simply don't accept the premise that this
 12 could be simply -- the first of your hypothetical --
 13 simply, as Mr Potts put it, proceeding on the basis that
 14 they have exercised their option. There wouldn't be an
 15 adjustment to the price for reasons of unfair prejudice,
 16 using all the six layers that I have to get through to
 17 get there. There wouldn't be such an adjustment to the
 18 price as ordered by the registrar's order.
 19 MR JUSTICE NUGEE: There might be. I can envisage that one
 20 possible factual scenario might be that Ms Birdi is
 21 dismissed, the contractual option arises, is exercised,
 22 and you accept -- you are constrained to accept that
 23 that option has been validly exercised; but you still
 24 bring a 994 petition saying the whole thing was grossly
 25 unfair and if the company hadn't been unfairly run, her

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1 shares would now be worth more than their actual market
 2 value is. Couldn't the court, under section 994 --
 3 MR STUART: If we had accepted it, then I would be precluded
 4 from now saying that that was still somehow in issue
 5 between us at the point where the registrar made his
 6 order. But that's not what happened. We didn't accept
 7 it. We didn't accept that they had validly exercised
 8 their --
 9 MR JUSTICE NUGEE: What's the argument for saying they
 10 hadn't? Because I don't -- well, as I say, I haven't
 11 had any evidence on this --
 12 MR STUART: Well, first of all, they didn't exercise that
 13 option until after we had issued our petition.
 14 MR JUSTICE NUGEE: Why does that matter? Does the option
 15 lapse?
 16 MR STUART: No, I'm not saying it lapses. I'm just saying
 17 that what we are here determining is our petition and
 18 the relief that we seek in our petition. They hadn't
 19 purported to exercise any option when we issued our
 20 petition. You are determining issues within that
 21 petition and therefore the purported exercise --
 22 MR JUSTICE NUGEE: That's why I asked: is it any part of
 23 what I'm doing to decide whether they have validly the
 24 exercised the option?
 25 MR STUART: No.

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1 MR JUSTICE NUGEE: No.
 2 MR STUART: I fundamentally say it is not, and if that were
 3 to be an issue that you were to determine, it should
 4 have been made absolutely crystal clear --
 5 MR JUSTICE NUGEE: I didn't see it on the pleadings, I don't
 6 think.
 7 MR STUART: It's not on the pleadings and it's not in the
 8 agreed list of issues and it's not in Deputy
 9 Registrar Briggs's orders, so I just don't accept this
 10 concept that it is for you to start deciding whether
 11 they have or haven't, or proceeding on the basis that
 12 they have and that this trial is proceeding on the basis
 13 that they have and that this is all that is happening.
 14 MR JUSTICE NUGEE: Okay. So your case is I should be
 15 agnostic as to whether there has been a contract brought
 16 by about the exercise of an option, or a contract
 17 brought about by subsequent correspondence, it being
 18 common ground that it has been agreed that there will be
 19 a purchase at a valuation, but I don't have to go into
 20 how that contract came about or what its terms are,
 21 because I'm not interested in that?
 22 MR STUART: Yes, that's right, because we are saying that we
 23 are entitled to that remedy of them purchasing our
 24 shares by reason of our petition and the relief that we
 25 seek within the petition --

1 MR JUSTICE NUGEE: And they say that they were entitled to
 2 purchase the shares anyway and they have done that.
 3 MR STUART: Yes.
 4 MR JUSTICE NUGEE: And you are telling me that I don't need
 5 to decide who is right about that?
 6 MR STUART: That's right.
 7 MR JUSTICE NUGEE: Yes, okay.
 8 MR STUART: And it would be unfair for you to start
 9 determining that, where that issue has not been the
 10 focus of either the pleadings or the agreed issues, or
 11 anything else.
 12 MR JUSTICE NUGEE: The evidence or the argument; yes.
 13 MR STUART: The evidence, most importantly. We have
 14 certainly not got into evidence about the basis upon
 15 which this has happened.
 16 MR JUSTICE NUGEE: No. Right.
 17 MR STUART: So that's point number 1. I say that that is
 18 now the respondents trying to widen the scope, frankly,
 19 of this trial and it's --
 20 MR JUSTICE NUGEE: Before we lose sight of it, there is
 21 a related issue, which I hadn't anticipated, which is
 22 the question whether the purchase carries with it the
 23 right to unpaid dividends.
 24 MR STUART: Exactly. I see that inserted for the first time
 25 somewhere in the 600s, in the paragraphs of the closing

1 skeleton argument. That wasn't suggested in closing; it
 2 certainly hasn't been suggested in correspondence. We
 3 have been receiving letters, many of them, saying, "This
 4 is your money, what do you want to do with it?" It has
 5 never been suggested, "This is your money, but you are
 6 holding it on trust for us. What do we want to do with
 7 it?"
 8 It's absolute nonsense.
 9 MR JUSTICE NUGEE: At this stage, I don't think I meant it
 10 so much as whether it's right or not, but whether it's
 11 an issue for me.
 12 MR STUART: Well, I say it's plainly not an issue for you
 13 and, again, it would be wholly wrong for you to start
 14 determining issues about that.
 15 MR JUSTICE NUGEE: And it might depend on the prior question
 16 of when the contract came into existence.
 17 MR STUART: Of course, and the nature of the contract.
 18 MR JUSTICE NUGEE: Yes.
 19 MR STUART: The nature of the agreement. If the agreement
 20 is that under our unfair prejudice petition relief we
 21 are entitled to have them purchase our shares at value
 22 plus adjustment, which is what we say the agreement
 23 is -- so that was the agreement that led to the order --
 24 that's one form of agreement, which does not bring with
 25 it the implication of a trust on the monies for the

1 dividends that we have been paid in the last two years.
 2 Whereas, if it's being said that we have agreed in
 3 writing to them, having been entitled to serve that
 4 option notice back in 2012, and that we are only getting
 5 our shares pursuant to that contract, which contract
 6 they now say, for the first time, brings with it an
 7 implication of a trust on the monies payable by way of
 8 dividends in the last two years, that would be a wholly
 9 different agreement.
 10 MR JUSTICE NUGEE: No, but at some stage, that point ought
 11 to be resolved.
 12 MR STUART: If they are going to run that argument. If they
 13 are seriously going to run that argument, it will have
 14 to be resolved.
 15 MR JUSTICE NUGEE: And one would imagine it ought to be
 16 resolved before the valuer values the shares, because
 17 there is a difference between the value of shares which
 18 carry the right to unpaid dividends and the value of
 19 shares which don't. Presumably.
 20 MR STUART: I don't think it can be suggested that the
 21 valuer's valuation of the shares should proceed on the
 22 basis that these are shares which carry no right to
 23 dividend.
 24 MR JUSTICE NUGEE: No, but there is a question as to what
 25 SOG are buying.

1 MR STUART: Absolutely, I agree with your Lordship. There
2 may be an issue about -- it sounds like there will be an
3 issue, having read these paragraphs.
4 MR JUSTICE NUGEE: About the dividends.
5 MR STUART: -- about accrued but unpaid dividends for the
6 period up to the actual completion of the sale of the
7 shares. So, for example, on our side, no doubt, we
8 would say that there should be a terminal dividend
9 payable as part of the --
10 MR JUSTICE NUGEE: Yes, but at the moment all I'm trying to
11 identify is what you are expecting me to decide. You
12 don't expect me to decide that.
13 MR STUART: I absolutely do not expect you to decide that
14 and I say it would be unfair and wrong of you to do so
15 because that has not been pleaded as the issues for this
16 trial.
17 If this were the issue of the entire petition, and
18 all of these arguments were going to become open, then,
19 of course, all sides should have argued these points out
20 in full beforehand.
21 MR JUSTICE NUGEE: What is the procedural status of this
22 hearing? Is it technically a preliminary issue in the
23 petition?
24 MR STUART: That's how I understand it.
25 MR JUSTICE NUGEE: There will be a trial of issues?

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1 MR STUART: Of issues.
2 MR JUSTICE NUGEE: Yes.
3 MR STUART: Perhaps we ought to go to --
4 MR JUSTICE NUGEE: -- the order. We haven't looked at it
5 for a long time.
6 MR STUART: It's --
7 MR JUSTICE NUGEE: Volume A.
8 MR STUART: It's volume A, tab 3. {A/3/23} Just so that
9 your Lordship has it, obviously at tab 1 the petition is
10 issued. {A/1/1}
11 MR JUSTICE NUGEE: And what was the relief you sought in the
12 petition?
13 MR STUART: The relief sought in the petition was at page 18
14 of the bundle.
15 MR JUSTICE NUGEE: You had various different alternatives.
16 MR STUART: Various different alternatives. So: {A/1/18}
17 "An order regulating the conduct of the Company's
18 affairs ... that the First and Second Respondents shall
19 resign..."
20 We wanted them -- you know, the usual menu of orders
21 that one might expect on an unfair prejudice petition,
22 alternatively under (2):
23 "... that the First and Second Respondents shall
24 purchase the Petitioner's A shares ... at a fair value
25 to be determined by this Court or by an independent

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1 valuer without discount for non-majority status, and
2 taking into account the loss suffered by the Company as
3 a result of the matters of unfair prejudice and breach
4 of duty..."
5 Et cetera:
6 "(3) For the purposes of paragraph (2) above the
7 valuation of the Petitioner's shares shall be by
8 reference to the assets, profitability and future
9 prospects of the Company (as at such date as the Court
10 thinks fair and reasonable) without ..."
11 Et cetera, et cetera. So there was then an initial
12 order from Registrar Barber and she --
13 MR JUSTICE NUGEE: That's just procedural, is it not?
14 MR STUART: That's just procedural. So they were supposed
15 to file and serve their evidence, you will see under
16 that. They hadn't responded to the petition formally by
17 way of any form of evidence and they were supposed to --
18 MR JUSTICE NUGEE: I think that's evidence in support of the
19 application, isn't it?
20 MR STUART: Yes.
21 MR JUSTICE NUGEE: Yes. It's not --
22 MR STUART: Their application was effectively their initial
23 response to the petition.
24 And then the order of Deputy Registrar Briggs --
25 MR JUSTICE NUGEE: It's tab 3, yes.

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1 MR STUART: -- is that: {A/3/23}
2 "There be a trial to determine whether the matters
3 set out in [those paragraphs] of the Petition
4 constituted breaches of contractual and/or fiduciary
5 duties on the part of the First and/or Second Respondent
6 such as to warrant an adjustment to the price payable
7 for the Petitioner's shareholding in the Fourth
8 Respondent."
9 Then pleadings are ordered on those issues.
10 MR JUSTICE NUGEE: Yes. If I understand it correctly, at
11 various stages the respondents have said you have gone
12 outside those issues and got various things struck out.
13 MR STUART: They did. They absolutely did. You will see at
14 tab 5 the final version of the amended points of claim.
15 {A/5/27}
16 MR JUSTICE NUGEE: Yes.
17 MR STUART: Which show the deletions that were ordered, and
18 those were ordered because it was said these points
19 don't go to the issues that are to be determined in this
20 list of issues.
21 MR JUSTICE NUGEE: I see.
22 MR STUART: One of them -- for example, you will see
23 paragraph 5 of the points of claim -- {A/5/29}
24 MR JUSTICE NUGEE: Repudiation.
25 MR STUART: -- was an argument that by reason of their

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1 repudiation -- well, that they repudiated; that would
 2 therefore mean, of course, that they couldn't then seek
 3 to exercise an option some time later, which is what
 4 they did seek to do.
 5 That was an argument and of course it was said,
 6 "Hang on, that's not part of the issues in this trial
 7 and the points of claim are to be limited to the issues
 8 in the trial of this issue".
 9 MR JUSTICE NUGEE: Yes.
 10 MR STUART: And there are others. So it is for that reason,
 11 my Lord, that I say that it's not open to the
 12 respondents to proceed on the basis set out in their
 13 skeleton argument.
 14 MR JUSTICE NUGEE: Yes.
 15 MR STUART: If I need to, my Lord, I would also, in relation
 16 to this, refer you back to my closing written
 17 submissions, which in this part chimes with my opening
 18 written submissions, where I set out in fairly detailed
 19 length -- this is at paragraphs --
 20 MR JUSTICE NUGEE: I remember, the correspondence.
 21 MR STUART: -- 7 onwards, the correspondence.
 22 MR JUSTICE NUGEE: Yes. When I read that, I thought: why am
 23 I reading this? Why do I need to know --
 24 MR STUART: How we got here.
 25 MR JUSTICE NUGEE: -- how we got here.

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1 MR STUART: Absolutely. But the reason we need to know how
 2 we got here is so that you are not confused as to what
 3 we are doing here.
 4 MR JUSTICE NUGEE: I suspect I am confused, yes.
 5 MR STUART: Well, confused or -- that there is an issue to
 6 resolve as to what we are doing here.
 7 MR JUSTICE NUGEE: Yes.
 8 MR STUART: And so I set it all out in fairly great detail
 9 there. If it would assist your Lordship --
 10 MR JUSTICE NUGEE: No. Well, especially in the light of
 11 your submission that this is not an issue for me, I'm
 12 not sure I want to be taken through the correspondence.
 13 MR STUART: No.
 14 MR JUSTICE NUGEE: If, after having heard Mr Potts, when
 15 I go away and think about it, I decide I do need to
 16 decide it --
 17 MR STUART: I think I have got a short reply tomorrow
 18 anyway, or whenever.
 19 MR JUSTICE NUGEE: Yes.
 20 MR STUART: So if I can park that one for the moment.
 21 Running then to the executive summary in the
 22 respondent's submissions, to assist -- and I think it
 23 chimes with what your Lordship has just said -- if you
 24 go to paragraph 6 of the summary, Mr Potts and Mr Rivett
 25 set out four matters that need to be established and

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1 that rather chimes with your Lordship's points about
 2 what we are doing here. And I agree; I agree that
 3 I have to establish -- and your Lordship is going to --
 4 MR JUSTICE NUGEE: Section 994?
 5 MR STUART: Yes. And your Lordship is going to be
 6 considering in relation to each of the issues whether
 7 the matter complained of is conduct of the affairs of
 8 the relevant company -- if I can just deal with that
 9 very briefly.
 10 The relevant company is Dartford Specsavers Limited,
 11 but it has its subsidiary, you will recall, which is
 12 Visionplus, and so we say that the conduct of the
 13 business of Visionplus is part of the conduct of the
 14 business of Dartford Specsavers Limited because the
 15 business of Visionplus is a major part of the affairs of
 16 the business of Dartford Specsavers Limited.
 17 MR JUSTICE NUGEE: I did have some explanation as to the
 18 division between the two but I'm not sure I fully
 19 understood it.
 20 MR STUART: One way of perhaps illustrating it is to look at
 21 the accounts. I know it's by way of illustration
 22 only --
 23 MR JUSTICE NUGEE: Yes.
 24 MR STUART: -- but --
 25 MR JUSTICE NUGEE: But you accept that I need to find

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1 conduct of the affairs of Dartford, but you say that
 2 includes the way in which Dartford Visionplus was run?
 3 MR STUART: Yes, because Dartford Specsavers Limited
 4 conducts the business of the opticians -- that is its
 5 major or its only business -- through its subsidiary,
 6 Dartford Visionplus.
 7 MR JUSTICE NUGEE: Well, partially through. I don't think
 8 I have had a very full explanation of why you have this
 9 dual company structure and it may be that there is a VAT
 10 saving there somewhere.
 11 MR STUART: Yes, there is.
 12 MR JUSTICE NUGEE: But I haven't really understood it.
 13 MR STUART: No.
 14 MR JUSTICE NUGEE: But I'm not sure that I really need to --
 15 MR STUART: I don't think your Lordship does because my
 16 understanding is that certainly all the respondents'
 17 witnesses proceeded on the basis that the trading
 18 business of Dartford Visionplus is part of the business
 19 of Dartford Specsavers, but, as I say, could I just take
 20 your Lordship to the accounts --
 21 MR JUSTICE NUGEE: Accounts.
 22 MR STUART: -- just to illustrate that. If we take an
 23 example -- let's take the year ended 30 September 2009.
 24 Your Lordship will find --
 25 MR JUSTICE NUGEE: D2?

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1 MR STUART: In D2, your Lordship will find the Dartford
 2 Specsavers Limited's accounts for that period at 334.
 3 {D/25/334}
 4 MR JUSTICE NUGEE: That's consolidated.
 5 MR STUART: That's the consolidated accounts.
 6 MR JUSTICE NUGEE: I think there is a difference between the
 7 consolidated accounts and the company accounts.
 8 MR STUART: There is, certainly. So the Dartford
 9 Specsavers' Limited's only accounts as it were, start on
 10 page 318. {D/24/318}
 11 MR JUSTICE NUGEE: Yes.
 12 MR STUART: And you will see from that -- for example, if
 13 you go to 324, {D/24/324} for Dartford Specsavers
 14 Limited alone, its turnover is £360,000, with cost of
 15 sales of £273,000 and its gross profit is £86,000. It
 16 has administrative expenses of £315,000 so it makes an
 17 operating loss of £228,923.
 18 But --
 19 MR JUSTICE NUGEE: But it gets an income from its fixed
 20 asset investments of £170,000 and that is the dividend
 21 up from Visionplus to --
 22 MR STUART: That's right.
 23 MR JUSTICE NUGEE: -- the holding company.
 24 MR STUART: So, if your Lordship has simultaneously open D1,
 25 page 114. {D/9/114}

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1 MR JUSTICE NUGEE: Yes.
 2 MR STUART: Now we are in the accounts of Dartford
 3 Visionplus Limited for that year. Does your Lordship
 4 have it?
 5 MR JUSTICE NUGEE: I do.
 6 MR STUART: 114 is the profit and loss account for Dartford
 7 Visionplus Limited and you will see that the turnover
 8 for the year is £1,218,434. The cost of sales -- does
 9 your Lordship see the figure?
 10 MR JUSTICE NUGEE: Yes.
 11 MR STUART: £360,385 and your Lordship will remember that
 12 that is the figure that is shown as the turnover on
 13 page 324 for Dartford Specsavers Limited. 324?
 14 {D/24/324} So Dartford Specsavers Limited, the store
 15 company --
 16 MR JUSTICE NUGEE: Ah, I don't think I had appreciated that.
 17 So basically, Dartford's entire business is selling the
 18 wholesale goods to Visionplus, which then sells them
 19 retail. Is that right?
 20 MR STUART: That's on its profit and loss --
 21 MR JUSTICE NUGEE: Mr Potts seems to be nodding; is that
 22 right, Mr Potts?
 23 MR POTTS: My Lord, yes. There was some discussion about
 24 wholesaling and retail.
 25 MR JUSTICE NUGEE: There was, but what I had not understood

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1 was this correlation, which Mr Stuart has pointed out to
 2 me, that the entire turnover of the holding company is
 3 the cost of the sales of the operating company.
 4 MR POTTS: I think that's my understanding, my Lord, yes.
 5 MR JUSTICE NUGEE: Yes.
 6 MR STUART: That's the turnover of Dartford Specsavers
 7 Limited for its turnover business, that is its business
 8 of buying and selling things. Then, obviously, as we
 9 see in the consolidated accounts --
 10 MR JUSTICE NUGEE: Wait a minute. Before we leave
 11 Visionplus's accounts, I would expect to see a dividend
 12 up of £170,000 somewhere in those accounts to account
 13 for the investment return which is shown.
 14 MR STUART: Yes, you will see that on page 117. {D/9/117}
 15 Does your Lordship see it?
 16 "7. Dividends."
 17 MR JUSTICE NUGEE: There you are, £170,000.
 18 MR STUART: That's it, my Lord, you have it.
 19 MR JUSTICE NUGEE: Yes, right. And then if you compare that
 20 with the consolidated accounts which are at 337 --
 21 {D/25/337}
 22 MR STUART: Yes, 344 is the profit and loss for that year.
 23 {D/25/344}
 24 MR JUSTICE NUGEE: Sorry?
 25 MR STUART: 344 is the profit and loss account for the

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1 consolidated accounts.
 2 MR JUSTICE NUGEE: That's the more expanded one. I was
 3 looking at the one on 337.
 4 MR STUART: 337, that's the summary, yes. {D/25/337}
 5 MR JUSTICE NUGEE: We can see the turnover is the turnover
 6 of the operating company, Visionplus.
 7 MR STUART: Yes.
 8 MR JUSTICE NUGEE: The cost of sales consolidated is the
 9 cost of the sales to Dartford.
 10 MR STUART: That's right.
 11 MR JUSTICE NUGEE: The 273.
 12 MR STUART: That's right, because all it has doing is --
 13 MR JUSTICE NUGEE: It's then just passing them on at
 14 a mark-up.
 15 MR STUART: -- it's selling those to its own subsidiary, so
 16 you can't count the turnover twice.
 17 MR JUSTICE NUGEE: I understand that. I haven't understood
 18 why it's split like this but, as I said, it may be a VAT
 19 thing.
 20 The total profit before taxation is £140,000, which
 21 should be the £284,582 on page 114, {D/9/114} which is
 22 the profit of Visionplus, less the operating loss of
 23 142, roughly.
 24 MR STUART: Yes.
 25 MR JUSTICE NUGEE: Not quite, because there is some interest

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1 payable.
 2 MR STUART: That's right.
 3 MR JUSTICE NUGEE: Yes.
 4 MR STUART: So, my Lord, one sees from that that --
 5 MR JUSTICE NUGEE: Can I just ask: do you understand -- and
 6 if not, does Mr Potts understand -- why a dual company
 7 structure is adopted? Is it a VAT --
 8 MR POTTS: My Lord, I understand it is VAT tax-efficient.
 9 MR JUSTICE NUGEE: It's a VAT saving?
 10 MR POTTS: Yes, there is a scheme that is approved by --
 11 MR JUSTICE NUGEE: Because one of the companies is entitled
 12 100 per cent VAT relief and one to only partial relief?
 13 MR POTTS: Is that right? It is, yes.
 14 MR JUSTICE NUGEE: So you presumably put everything through
 15 the holding company, which is entitled to 100 per cent
 16 VAT relief?
 17 MR POTTS: It isn't.
 18 MR JUSTICE NUGEE: It's not as simple as that?
 19 MR POTTS: It's not quite as simple, because some matters
 20 are VATable in different ways, given the services which
 21 this company performs, sight testing and so on --
 22 MR JUSTICE NUGEE: I imagine that things like NHS sight
 23 tests might be exempt from VAT?
 24 MR POTTS: Exactly.
 25 MR JUSTICE NUGEE: Someone behind you is nodding.

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1 MR POTTS: Tax is not my strong point, but the understanding
 2 is that this dual structure scheme was a matter which
 3 was approved by HMRC. So it's a sort of global scheme
 4 for Specsavers, which has been approved over the years,
 5 but it is VAT-efficient.
 6 If it assists, if your Lordship is interested in the
 7 highways and byways of VAT issues, it's dealt with in
 8 Mr Dyson's third witness statement.
 9 MR JUSTICE NUGEE: I thought I had seen an explanation,
 10 because that was the £10,000-odd left over from
 11 Mr Patel.
 12 MR POTTS: Yes. We say it's not an issue for trial but
 13 there is --
 14 MR JUSTICE NUGEE: No, I don't think it is an issue for
 15 trial, but I'm very conscious that from a corporate
 16 point of view, there are two companies with different
 17 directors and indeed different shareholders.
 18 MR POTTS: Well, my Lord, yes. In terms of the issue -- if
 19 it assists, we address this, my Lord, in our skeleton.
 20 The relevant authority is Racking v Gross in relation to
 21 whether the conduct of the affairs of a company can
 22 include its subsidiary.
 23 MR JUSTICE NUGEE: I think you agree that it does.
 24 MR POTTS: We agree that it does, so in a sense it's not an
 25 issue between us.

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1 MR JUSTICE NUGEE: So, from the point of view of unfairly
 2 prejudicial conduct of the affairs of a company, you
 3 accept that if what has been happening is a conspiracy
 4 in relation to Visionplus, it's within the scope? Yes.
 5 MR POTTS: We say actually -- it's a wholly owned
 6 subsidiary, in fact.
 7 MR JUSTICE NUGEE: Yes.
 8 MR POTTS: And also there is in fact, effectively, an
 9 identity of board -- more or less, it's an identity of
 10 board control on each company as well.
 11 MR JUSTICE NUGEE: More or less, but I may or may not have
 12 to get precise about these things.
 13 MR POTTS: My Lord, I don't think there is actually a point
 14 between us on that.
 15 MR JUSTICE NUGEE: Thank you very much. That's very
 16 helpful.
 17 MR STUART: You can put away D1 and D2.
 18 MR JUSTICE NUGEE: Incidentally, while we are looking at the
 19 accounts, or having just finished looking at the
 20 accounts, at various stages both of you put to various
 21 witnesses improvements or otherwise in the accounts from
 22 one year to another, which I thought at the time was an
 23 exercise that one could be selective about. It might be
 24 helpful between you to agree what the accounts show year
 25 on year throughout the period, in terms of turnover,

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1 profit and so on. So that rather than just saying let's
 2 compare 2006 with 2012, and then someone else saying
 3 let's compare 2008 with 2011, one can see the whole run.
 4 MR STUART: Absolutely, my Lord. We can produce a short
 5 schedule with just the headline figures --
 6 MR JUSTICE NUGEE: I think that might be helpful.
 7 MR STUART: We will do that.
 8 My Lord, back to what I was agreeing with what
 9 I have got to establish in relation to these issues. So
 10 first of all, that the matters that are complained about
 11 constitute conduct of the affairs of the company, we now
 12 agree the company includes Visionplus.
 13 MR JUSTICE NUGEE: Does it matter whose conduct it is? Does
 14 it matter whether someone is doing it qua director or
 15 qua member or just --
 16 MR STUART: We say that either or both of those are --
 17 MR JUSTICE NUGEE: Are capable of grounding relief.
 18 MR STUART: Absolutely, and there is plenty of case law
 19 involved in unfair prejudice cases where either the
 20 conduct complained of is the directors taking steps, or
 21 it is the majority shareholding controlling the affairs
 22 of the business by exercising its power of majority.
 23 And that's the point, isn't it. It has got to be the
 24 majority control in this sort of case for the unfair
 25 prejudice remedy to apply.

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1 MR JUSTICE NUGEE: Yes.
 2 MR STUART: So then secondly, the conduct was prejudicial to
 3 the interests of the members generally or some part of
 4 its members, including herself. Yes, that is the
 5 standard -- and we say in this case, of course --
 6 MR JUSTICE NUGEE: But it has to be qua member, does it not?
 7 MR STUART: It does.
 8 MR JUSTICE NUGEE: Not qua employee. You can't, if you are
 9 sacked as an employee who happens to have
 10 a shareholding, complain of being sacked as an employee
 11 in these proceedings?
 12 MR STUART: That's right. Her employment tribunal claims
 13 are ongoing and --
 14 MR JUSTICE NUGEE: I know very little about the employment
 15 tribunal claims. Ought I to know what is in it them,
 16 because I ought not to be deciding anything which really
 17 the employment tribunal is seized of.
 18 MR STUART: No, you shouldn't and I'm not asking you to.
 19 What is in them is an unfair dismissal claim.
 20 MR JUSTICE NUGEE: Is it a wrongful dismissal as well, or
 21 just unfair dismissal?
 22 MR STUART: I think any notice pay would be covered --
 23 MR JUSTICE NUGEE: I mean, she was given notice --
 24 MR STUART: -- so there wouldn't be a need for wrongful --
 25 MR JUSTICE NUGEE: Just unfair?

1 MR STUART: It's an unfair dismissal claim. As you know, it
 2 got --
 3 MR JUSTICE NUGEE: It got struck out and reinstated.
 4 MR STUART: -- temporarily struck out while she wasn't able
 5 to turn up at the hearing because she had just had
 6 a termination of her pregnancy the day before, and that
 7 got overturned by the EAT.
 8 So now those proceedings stand stayed, the ET
 9 proceedings, the employment tribunal proceedings. So
 10 her claim for unfair dismissal stands stayed -- is that
 11 right?
 12 MR JUSTICE NUGEE: But it presumably will turn on such
 13 matters as the meaning of the resolution, the testing
 14 resolution, the fairness of the disciplinary process?
 15 MR STUART: Certainly the fairness of the disciplinary
 16 process and the substantive fairness of the decision to
 17 dismiss her.
 18 MR JUSTICE NUGEE: I'm a little concerned that I have had
 19 deployed before me those issues. I don't say they are
 20 issues which are the issues I have to decide, but they
 21 have been ventilated at some length.
 22 MR STUART: They have been ventilated at some length, not
 23 for the purpose of you making any finding of unfair
 24 dismissal --
 25 MR JUSTICE NUGEE: I'm certainly not going to.

1 MR STUART: Under section 96 of the Employment Rights Act,
 2 so there is no suggestion on either side that you should
 3 or should not determine whether this was unfair
 4 dismissal, as defined by the Employment Rights Act.
 5 MR JUSTICE NUGEE: No, but are you going to ask me to say,
 6 for example, which I think you are, that the resolution
 7 meant X and it was misinterpreted by --
 8 MR STUART: Yes.
 9 MR JUSTICE NUGEE: -- SOG to say why?
 10 MR STUART: Yes, because that is part of this case and the
 11 employment tribunal proceedings are stayed, as
 12 I understand it, pending the resolution of the issues in
 13 this case. So, yes, because of the overlap that your
 14 Lordship has just identified.
 15 The employment tribunal proceedings could have been
 16 got on with, but it was decided that -- as is often the
 17 case in cases where there is an employment case and
 18 a High Court case, whether it be a director's case or
 19 whatever -- it has been decided that those employment
 20 tribunal proceedings stand stayed until the outcome of
 21 this trial.
 22 MR JUSTICE NUGEE: Yes.
 23 MR STUART: So my Lord, back to the list.
 24 It's conduct prejudicial to her interests as
 25 a member, I agree, but one has to look at the particular

1 circumstances of this membership, this case.
 2 MR JUSTICE NUGEE: Yes, and she has entitled to half the
 3 profits and you say anything which loads the company
 4 with improper expenses reduces the profits and therefore
 5 is prejudicial to her in her capacity as member.
 6 MR STUART: It is, exactly. The unusual nature of this
 7 shareholder agreement and this company set-up is that
 8 she is entitled to the distributable profits -- the two
 9 A shareholders are entitled to the distributable profits
 10 and therefore anything which affects the distributable
 11 profits to a material level will affect --
 12 MR JUSTICE NUGEE: What's "a material level"?
 13 MR STUART: Well, that's for your Lordship to determine,
 14 but --
 15 MR JUSTICE NUGEE: What do you say material level is?
 16 MR STUART: Obviously, not de minimis.
 17 MR JUSTICE NUGEE: Yes, but --
 18 MR STUART: A few pounds here or there is de minimis, but
 19 certainly thousands of pounds is not de minimis.
 20 Certainly not, for a shareholder of this nature. You
 21 have seen how applications have to be put in to receive
 22 a dividend, you know, an equalisation dividend of
 23 hundreds of pounds or ...
 24 My Lord, I would argue that one can perhaps assess
 25 whether it's de minimis or not de minimis by reference

1 to whether they would have made an application for
 2 a dividend or a distribution for the sorts of figures
 3 that are in issue, and so, as I say, a few pounds,
 4 no one would have made an application for a distribution
 5 of a few pounds, but for a few hundreds of pounds, they
 6 did make applications for distributions and certainly
 7 for a few thousands of pounds, they definitely did, and
 8 a few thousands of pounds is definitely material.
 9 MR JUSTICE NUGEE: Yes. Again, just so I don't lose sight
 10 of it, and don't necessarily answer it now but at some
 11 stage, what we have just discussed, about it has to be
 12 prejudicial to her interest qua member --
 13 MR STUART: Yes.
 14 MR JUSTICE NUGEE: -- means there is a difference between
 15 getting employment bonuses and getting dividends.
 16 MR STUART: Yes.
 17 MR JUSTICE NUGEE: Because a failure to pay an employment
 18 bonus qua employee is not within the scope of 994,
 19 however unfair, however conspiratorial. A failure to
 20 pay an equalisation dividend might be.
 21 When it comes to the £8,700, is that a dividend
 22 or --
 23 MR STUART: That was an equalisation.
 24 MR JUSTICE NUGEE: Yes, but equalisation -- I think the
 25 evidence was that an equalisation sometimes takes the

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1 form of a distribution of profits and sometimes takes
 2 the form of an extra P11D payment as a benefit in kind,
 3 which is taxable under the PAYE system, rather than
 4 under the dividend system. Which is the £8,700?
 5 MR STUART: First of all, can I deal with an issue of
 6 principle here, which is that we say that because of the
 7 unusual nature of this particular set-up, where the two
 8 A shareholders are the two A directors, and that they
 9 are given the power, the discretion as to how they are
 10 to take their profits out of the company, either by way
 11 of dividend or equalisation bonus, as it's called, in
 12 fact in this particular case there is a complete
 13 coincidence of the interest as member in relation to
 14 these profits, in relation to these monies; the interest
 15 as member and the interest as employee for the purpose
 16 of being paid the profits.
 17 In other words, the reality was that the two
 18 A shareholders could decide between themselves and of
 19 themselves how they are going to take their profits out,
 20 and we say --
 21 MR JUSTICE NUGEE: I'm not sure I'm very clear on the
 22 evidence on this. Take a case where you have two
 23 A directors who are paid the same but one of them, in
 24 addition, gets a company car.
 25 MR STUART: Yes.

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1 MR JUSTICE NUGEE: That's a taxable benefit in kind and as
 2 a matter of HMRC looking at that, they would undoubtedly
 3 regard that as something which would go on your P11D,
 4 which was what was done, and you pay income tax on it.
 5 MR STUART: You do.
 6 MR JUSTICE NUGEE: As an emolument of an employment.
 7 MR STUART: You do.
 8 MR JUSTICE NUGEE: Whereas a pure money payment of
 9 a dividend is not an emolument of an employment and it's
 10 not taxed under that regime; it's taxed under the
 11 dividend regime.
 12 MR STUART: My Lord, I absolutely agree that for tax
 13 purposes, the two are totally different --
 14 MR JUSTICE NUGEE: Yes. Now, suppose director A has
 15 a company car and director B doesn't want a company car
 16 and he is given money instead. Is that a dividend, is
 17 it a distribution of profits, or is it a bonus paid on
 18 top of his basic salary to make up for the fact that his
 19 co-director has a car?
 20 MR STUART: For tax purposes, it will be whichever way they
 21 choose to pay it. So if they did choose to pay it as
 22 a dividend, it would be taxed as a dividend; if they
 23 chose to pay it as an employment bonus, it would be
 24 taxed as an employment bonus.
 25 MR JUSTICE NUGEE: If it's taxed that way, then why does it

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1 not follow that, for these purposes -- suppose there was
 2 a complaint that A has got a company car, "I should have
 3 been equalised and I wasn't, and I asked for a bonus and
 4 I didn't get it", why is that prejudicial to him in his
 5 capacity as a member, as opposed to prejudicial to him
 6 in his capacity as an employee?
 7 MR STUART: Because the basis upon which he argues that,
 8 that, "Oh, well, I should be entitled to the same amount
 9 of value out of the company", the basis upon which he
 10 argues that is not because, "My job is exactly the same
 11 as her job". It's not equalisation because we are
 12 doing -- it's not --
 13 MR JUSTICE NUGEE: Equal pay.
 14 MR STUART: It's not an equal pay claim, as we might have in
 15 the tribunal; it is that there is an agreement and an
 16 understanding of the whole A shareholder relationship
 17 that the two of them will receive equally out of the
 18 profits of the company. And if one person has received
 19 an element of the profits of the company by the
 20 provision of a company car, which is not part of their
 21 basic salary but it's still an employment emolument for
 22 the purposes of --
 23 MR JUSTICE NUGEE: It's clearly not a distribution of
 24 distributable profits.
 25 MR STUART: Not by way of a dividend, no.

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1 MR JUSTICE NUGEE: No.
 2 MR STUART: So that part of the profits, of the effective
 3 net profits of the company, has gone to that person,
 4 let's say Ms Birdi in this case. She had a company car.
 5 She has received that value out of the company by way of
 6 the provision of a company car; she is taxed on that as
 7 a benefit -- not as a dividend but as a benefit.
 8 MR JUSTICE NUGEE: No.
 9 MR STUART: Mr Singh, he comes to the table, as it were,
 10 with the basis, "I'm entitled to the same share of the
 11 profits of this company as she is. I'm not entitled to
 12 a company car because my employment contract entitles
 13 me --"
 14 MR JUSTICE NUGEE: But when he sent back the letter and
 15 changed the salary, he added, "Plus the same benefits as
 16 Ms Birdi"?
 17 MR STUART: He may have done, but whatever he sent in his
 18 letter, that's because he is looking at it from the
 19 attitude of an A shareholder, "We are entitled to the
 20 same, aren't we?" He is not saying, "My employment
 21 contract is the same as hers", because it's not. They
 22 had different salaries.
 23 MR JUSTICE NUGEE: There is only £500 difference but it
 24 was --
 25 MR STUART: In the case of Mr Patel, by way of example --

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1 MR JUSTICE NUGEE: Yes, it was quite a large difference.
 2 MR STUART: It was £10,000 difference. It's always
 3 envisaged that the employment benefits, the employment
 4 basic salaries, for example, may be different; whereas
 5 these equalisation payments, whether they be done by way
 6 of a distribution, a benefit in kind, a dividend or
 7 whatever, is brought about because of the underlying
 8 nature of the agreement between the parties.
 9 MR JUSTICE NUGEE: So your submission is that a failure to
 10 pay an equalisation payment, whether it's asked for
 11 qua bonus or qua dividend, is something which is capable
 12 of being prejudicial conduct; prejudicial to the person
 13 in their capacity as member?
 14 MR STUART: Correct.
 15 MR JUSTICE NUGEE: Yes.
 16 MR STUART: It's no different from cases where different
 17 categories of A shareholder have different rights under
 18 their shareholdings. Some have a right to a share of
 19 profits, some don't. Some have a right to a share of
 20 profits of a particular percentage, some don't, in
 21 different companies. It's no different to that, and
 22 because of the specific nature of this particular type
 23 of company -- and we do that this is a very unusual
 24 shareholder agreement.
 25 MR JUSTICE NUGEE: You don't need to persuade me it's

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1 an unusual company.
 2 MR STUART: It's not what one sees as a standard arrangement
 3 in all cases, but it is the arrangement in this case and
 4 it's the one that your Lordship should be looking at
 5 when looking at the unfair prejudicial remedy here.
 6 MR JUSTICE NUGEE: Yes.
 7 MR STUART: So that's my submission. I'm sorry --
 8 MR JUSTICE NUGEE: No, no.
 9 MR STUART: -- to avoid the question as to whether the car
 10 payment was a dividend or a --
 11 MR JUSTICE NUGEE: Bonus. You say it doesn't matter.
 12 MR STUART: I say it doesn't matter because you should look
 13 at the reality rather than the sort of artificial tax --
 14 MR JUSTICE NUGEE: I don't think tax is artificial,
 15 Mr Stuart.
 16 MR STUART: No, it's artificial for the purposes of
 17 assessing whether there is unfair prejudicial against
 18 the shareholder, we say.
 19 MR JUSTICE NUGEE: Yes, understood.
 20 MR STUART: Let me make it clear, I'm not saying for the
 21 record that tax is artificial. Tax is --
 22 MR JUSTICE NUGEE: Tax is very real, but it also should be
 23 charged on real transactions.
 24 MR STUART: And must be.
 25 MR JUSTICE NUGEE: And not artificial transactions.

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1 MR STUART: Absolutely. It must be charged to real
 2 transactions.
 3 So I agree that I must show that the conduct is
 4 prejudicial to her interest as a member and, as I say,
 5 in this particular case, because there are only ever two
 6 A shareholders, sometimes only one, but two
 7 A shareholders, and only ever one B shareholder,
 8 Specsavers, it is a relatively simple analysis here.
 9 She is always going to be no more than a 25 per cent
 10 shareholder of a company. She is always going to be --
 11 MR JUSTICE NUGEE: I don't have any difficulty with the idea
 12 that improper loading of expenses on to a company
 13 prejudices her qua member. I think the only difficulty
 14 I have is where you draw the line between conduct which
 15 damages her qua member and conduct which damages her qua
 16 employee, and some of the questioning, for example,
 17 of --
 18 MR STUART: Ms McIntyre?
 19 MR JUSTICE NUGEE: Yes, was you not being fair to her --
 20 MR STUART: I agree.
 21 MR JUSTICE NUGEE: But she is conducting a disciplinary
 22 investigation, or process, qua employee, is she not?
 23 MR STUART: My Lord, can I deal with that point and meet it
 24 head on in this way.
 25 Your Lordship will recall that within this

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1 shareholder agreement -- and can I take you to it --
 2 within this shareholder agreement --
 3 MR JUSTICE NUGEE: D1?
 4 MR STUART: D1. The only way -- one of the ways, certainly
 5 we say the material way -- in which Specsavers can
 6 affect Ms Birdi's rights as a shareholder is by
 7 affecting her status as an employee. Do you see
 8 page 186, my Lord? {D/15/186}
 9 MR JUSTICE NUGEE: I'm looking at it, the purchase notice.
 10 MR STUART: The purchase notice. This, of course, is what
 11 they eventually, some 18 months later, went on to do.
 12 MR JUSTICE NUGEE: 16.2.5, ceases to be employed.
 13 MR STUART: That's it.
 14 MR JUSTICE NUGEE: So you say that -- let me assume you
 15 establish that Mrs McIntyre's investigation was wholly
 16 unfair and motivated by malice.
 17 MR STUART: Malice or -- yes, I'll come back to malice in
 18 a moment, but yes, we will use malice just for the
 19 present.
 20 MR JUSTICE NUGEE: That's the extreme case.
 21 MR STUART: An abuse -- we say it was motivated by an
 22 abuse -- by a wrong --
 23 MR JUSTICE NUGEE: I think your pleading is motivated by
 24 malice, but it doesn't matter.
 25 MR STUART: Malice or a wish to remove Ms Birdi.

1 MR JUSTICE NUGEE: Let's come back to that in due course.
 2 MR STUART: Yes.
 3 MR JUSTICE NUGEE: Let's assume you establish all the facts
 4 as to the unfairness of the investigation.
 5 MR STUART: Yes.
 6 MR JUSTICE NUGEE: You say, although the direct effect of
 7 that is to cause her to lose her employment --
 8 MR STUART: Yes.
 9 MR JUSTICE NUGEE: -- that triggers 16.2.5, which enables
 10 Specsavers to acquire her shares. {D/15/186}
 11 MR STUART: That's it, and she is exited --
 12 MR JUSTICE NUGEE: And that prejudices her in her capacity
 13 as a member. Therefore, under section 994, I can look
 14 at the entire investigation of the way in which she was
 15 treated qua employee with a view to getting rid of her?
 16 MR STUART: Yes, with a view to getting rid of her.
 17 MR JUSTICE NUGEE: But then that does mean that I'm
 18 effectively trying the unfair dismissal?
 19 MR STUART: I'm not asking you to try the entire unfair
 20 dismissal, because the purpose for which you are looking
 21 at it is to determine whether they were doing this in
 22 order to go down this route, to exit her from the
 23 company as a shareholder.
 24 MR JUSTICE NUGEE: I see.
 25 MR STUART: Let me take an example. Let us say --

1 MR JUSTICE NUGEE: No, I'm going to give you an example
 2 because I think this is quite important in the
 3 understanding of what it is and what it is not that I'm
 4 deciding.
 5 Suppose I reject the improper purpose allegation and
 6 find that Mrs McIntyre was doing her honest best to
 7 conduct a fair investigation, but it was so deficient
 8 for all the reasons you put to her, that I think it was
 9 an unfair investigation. That would be directly
 10 relevant to the unfair dismissal claim, but if
 11 I understood it correctly, that I would not find it to
 12 be unfairly prejudicial conduct because what is said to
 13 be unfair in these proceedings is not the process or the
 14 outcome, but the aim or motive or intention with which
 15 it's conducted. Is that --
 16 MR STUART: No, that's not fair or doesn't adequately cover
 17 all aspects of the way in which it's put in these
 18 proceedings, I say, on the hypothetical example where
 19 Ms McIntyre is not herself motivated to make her
 20 findings by the effect of 16.2.5. {D/15/186}
 21 MR JUSTICE NUGEE: Yes.
 22 MR STUART: She reaches her findings because she honestly
 23 believes --
 24 MR JUSTICE NUGEE: She genuinely believes --
 25 MR STUART: -- that Ms Birdi is guilty of gross misconduct.

1 MR JUSTICE NUGEE: And it's the right way to deal with the
 2 situation.
 3 MR STUART: And it's merely the right way to deal with the
 4 situation.
 5 Nevertheless, if the procedure was wholly unfair --
 6 if the procedure was wholly unfair, and it starts right
 7 from the investigation which leads to the suspension,
 8 the suspension which leads to the investigation, the
 9 investigation which leads to the disciplinary process,
 10 and then the disciplinary process leads to the
 11 dismissal -- if the process is entirely unfair -- the
 12 process -- that is nevertheless conduct of the affairs
 13 of the company, because that process is part of the
 14 affairs of the company; dealing with employees is part
 15 of the affairs of a company. And if that process is
 16 wholly unfair -- I'm coming to unfair as the third item
 17 on the list in a moment.
 18 MR JUSTICE NUGEE: Yes.
 19 MR STUART: And if the conduct, the disciplinary process,
 20 was prejudicial to her interests, we say that the whole
 21 process does lead to prejudice to her interests as
 22 a shareholder, because her interests as a shareholder
 23 are automatically affected, prejudiced, by the removal
 24 of her as an employee.
 25 Can I just give one example, just to illustrate my

1 point? If Ms McIntyre had not decided upon dismissal as
 2 the penalty but had only said a warning, "I'm going to
 3 penalise you with a warning", that would not have had
 4 any effect upon Ms Birdi as shareholder because she
 5 hasn't had removed her status as an employee and
 6 therefore she doesn't face Specsavers taking her shares
 7 off her.
 8 MR JUSTICE NUGEE: And do you say it's automatically
 9 prejudicial to a shareholder to be subject to compulsory
 10 acquisition, even if the price is an entirely proper
 11 one?
 12 MR STUART: In the circumstances here, we say yes, it's
 13 prejudicial to her. She plainly doesn't wish to be
 14 exited from the business. I'm not talking about
 15 employment now; I'm talking about exiting in her
 16 capacity as a 25 per cent owner of this business. She
 17 has invested ten years of her life in that business and
 18 to be -- if it's under a purchase notice, rather than
 19 under some sort of consensual agreement, whereby she
 20 agrees to sell her shares -- if it's forced removal from
 21 the business through the purchase notice route, I say
 22 that's automatically prejudicial to her interests.
 23 MR JUSTICE NUGEE: Does that trip back into requiring me to
 24 decide, or potentially to decide, whether the purchase
 25 notice is valid or not?

1 MR STUART: No, because this is not about whether that is in
 2 fact what happened, because when we issued our petition,
 3 they hadn't even issued a purchase notice. So our
 4 relief that we are seeking is not, "You have issued
 5 a purchase notice, that's unfair". We are not saying
 6 that. We are saying, "You did all of these things to
 7 us, you exited us from the business; one of the
 8 prejudicial effects of dismissing us as an employee is
 9 that we lose our control over our shareholding to you".
 10 It becomes entirely a matter for Specsavers as to
 11 whether they will or won't serve a purchase notice,
 12 arguably. Arguably. Obviously, we have arguments
 13 about --
 14 MR JUSTICE NUGEE: Okay.
 15 MR STUART: -- whether it is invalid to do so.
 16 So we say that in this particular case, because of
 17 the particular relational nature of this agreement and
 18 the way in which the employment status is inextricably
 19 linked to the entitlement to keep your shares, and to
 20 benefit from those shares and all the money and time you
 21 have invested in the business and not to be forced out
 22 by a transfer, we say that is prejudicial.
 23 MR JUSTICE NUGEE: Yes, thank you.
 24 MR STUART: So the conduct was prejudicial to the interests
 25 of the members. Obviously, the example we have just

1 given is in relation to the dismissal part of it.
 2 MR JUSTICE NUGEE: Yes.
 3 MR STUART: Actually, if we return to the issues that are
 4 before your Lordship --
 5 MR JUSTICE NUGEE: The issues are all about money.
 6 MR STUART: It's actually all about money.
 7 MR JUSTICE NUGEE: But one of the issues is the costs of the
 8 investigation in 2010.
 9 MR STUART: Exactly.
 10 MR JUSTICE NUGEE: And if that whole process is unfair --
 11 MR STUART: Exactly.
 12 MR JUSTICE NUGEE: -- it loads costs on to the company.
 13 MR STUART: That's it. That's it. So I think the point I'm
 14 trying to get to is that one might almost say that
 15 whether Ms McIntyre's eventual decision was or was not
 16 a fair one, doesn't actually go to the financial
 17 effects.
 18 It doesn't actually go to the financial effects in
 19 that Specsavers may well have said, "Even if we don't
 20 find you guilty of gross misconduct, we are going to
 21 charge you for what we have just done".
 22 MR JUSTICE NUGEE: Yes.
 23 MR STUART: And if the process is wholly unfair, it's the
 24 unfairness of that process which has caused the
 25 charging. Does your Lordship have my point?

1 MR JUSTICE NUGEE: Yes, I do.
 2 MR STUART: It's an argument, at least.
 3 So I'm agreeing with (ii) but clarifying the way we
 4 put it to your Lordship.
 5 The conduct or act was also unfair. So there is an
 6 issue of unfairness within the conduct or act. The
 7 conduct or act in the particular cases of these issues
 8 are obviously specific to the issues, but I do agree
 9 that for unfair prejudice, it's no good simply just me
 10 saying, "Well, I'm prejudiced by that decision or you
 11 exercising your power in that way". I have to go on to
 12 show that the way in which you did it or the fact that
 13 you did it was itself unfair, for unfair prejudice.
 14 MR JUSTICE NUGEE: What does "unfair" mean? Is there
 15 authority on that?
 16 MR STUART: Yes. It's a matter for the courts --
 17 MR JUSTICE NUGEE: General assessment?
 18 MR STUART: General assessment, in my submission. Every
 19 case is different. It has to be material unfairness,
 20 not de minimis.
 21 MR JUSTICE NUGEE: Let me take an example. Suppose there is
 22 a case in which, with the best motive in the world,
 23 a majority shareholder makes a decision but doesn't call
 24 a board meeting as should have done, but had they called
 25 a board meeting, they would have taken exactly the same

1 decision.
 2 MR STUART: Yes, would or could have been no difference.
 3 MR JUSTICE NUGEE: And it is established that the failure to
 4 call a board meeting means that technically, the act was
 5 a breach of contract or the breach of director's duty or
 6 something.
 7 MR STUART: Yes.
 8 MR JUSTICE NUGEE: But the motive was bona fide in the
 9 interests of a company.
 10 MR STUART: Yes.
 11 MR JUSTICE NUGEE: And the decision was one that the
 12 directors could probably have taken at a properly called
 13 board meeting and if there had been a properly called
 14 board meeting, the likelihood is they would have reached
 15 exactly the same decision because the majority
 16 shareholders are also the majority on the board.
 17 MR STUART: The only quibble I'm going to have with that
 18 whole analysis is the point where your Lordship said at
 19 the end: on the balance of probability.
 20 MR JUSTICE NUGEE: The likelihood is?
 21 MR STUART: Yes. My submission is that the prejudicial
 22 conduct -- we will come on to the issue of unfairness --
 23 but where the prejudicial conduct is the failure to
 24 follow the process of the board meeting --
 25 MR JUSTICE NUGEE: Yes.

1 MR STUART: -- that will not be unfair if all of the
 2 evidence is accepted by your Lordship that at the board
 3 meeting, the same decision would have been made, because
 4 in those circumstances, there is probably no prejudice
 5 caused by a mere procedural failure, which would have
 6 made no difference.
 7 Certainly, even if it is prejudicial, it's not
 8 unfairly prejudicial because no unfairness is caused to
 9 the person who hasn't had the board meeting in that
 10 case.
 11 But in this particular case, on the facts of all of
 12 these board meetings and all of these procedural
 13 unfairnesses, our submission is that it is not open to
 14 the respondents to argue that it would have made no
 15 difference. There is no evidence that it would have
 16 made no difference. For example, the relevant director
 17 for all the board meetings, formally, strictly, is
 18 Dame Mary Perkins.
 19 MR JUSTICE NUGEE: One of them.
 20 MR STUART: Yes. If Dame Mary Perkins voted the same way as
 21 Ms Birdi at any of these board meetings, then things
 22 would have been different, if that had happened. There
 23 is no evidence before your Lordship as to what
 24 Dame Mary Perkins would or wouldn't have said.
 25 Obviously she wasn't a witness, nor have we had any

1 document from her, nor is there any evidence within the
 2 E15 bundles evidencing what she would or wouldn't have
 3 done. There is no evidence that she directed so-and-so
 4 to do something or not to do something. There is simply
 5 no evidence before you as to what would have happened.
 6 If I can take by way of a concrete example the lack
 7 of a board meeting or resolution of the board of
 8 directors for the 2007 suspension.
 9 MR JUSTICE NUGEE: Yes.
 10 MR STUART: So Ms Birdi gets suspended and a decision is
 11 taken to throw the whole might of the investigation
 12 process and disciplinary process at her. That, as your
 13 Lordship knows, leads to her being suspended for six
 14 months and huge costs being run up. That suspension and
 15 the way in which she is treated by SOG at that stage
 16 leads to her being ill, we have seen the evidence of
 17 that, and that leads to further time off and further
 18 costs and losses accruing.
 19 What would have happened if there had been a board
 20 meeting at which directors of Dartford Specsavers
 21 Limited and/or Dartford Visionplus had been considering
 22 whether or not to suspend Ms Birdi as an employee and/or
 23 throw the full might of a disciplinary process at her?
 24 You don't know what would have happened because there is
 25 no evidence about what would have happened if she had

1 been given the opportunity at the board meeting, at
 2 which she should have been given the opportunity, to
 3 explain to her fellow board members, the other directors
 4 sitting round the table, what the position was.
 5 For example, in this concrete example, one knows
 6 that the allegations made against her at that time
 7 included the allegation of dishonesty in relation to
 8 payments to Mr Rehman for doing no work -- that's the
 9 way Mr Patel put it; that's the way Mr McAlindon then
 10 turns it into an allegation. That's the allegation,
 11 which -- the dishonesty allegation is so serious that
 12 there must be a suspension to ensure that she is not
 13 tampering with any evidences or witnesses. That
 14 suspension then leads to a disciplinary process, where
 15 she is facing dismissal, et cetera, and has the stress
 16 and strains, et cetera.
 17 If, at the board meeting that should have been held
 18 back in March 2007, Ms Birdi was able to present to her
 19 two fellow directors who were present at that stage --
 20 because Mr Patel had already gone -- to her two fellow
 21 directors of the companies the evidence that she was in
 22 the end able to present to SOG, which showed that
 23 actually, Mr Rehman plainly was doing some work and that
 24 the payments that were being referred to were by
 25 reference to that work, the fundamental nature of the

1 allegations against her then becomes very much less
2 serious and may very well not have required her to be
3 suspended. Mr Singh, for example, doesn't get
4 suspended; when people make serious allegations against
5 him in 2010 he doesn't get suspended.

6 So it's by no means certain that she would have been
7 suspended if she had been able to show to that board
8 meeting and to her fellow directors that sort of
9 evidence.

10 She may still have faced a disciplinary process
11 relating to her administrative failures, the lack of
12 employment contracts, the lack of records to show that
13 people were meeting the minimum wage; the fact that
14 members of the staff who were not family members were
15 treated in one way where members of staff who were
16 family members -- Mrs Patel and Mr Rehman -- were
17 treated in a different way. She may well still have
18 faced some form of lesser disciplinary allegation and
19 lesser process from the directors sitting round that
20 table, and they may well have concluded in the best
21 interests of Dartford Visionplus and Dartford Specsavers
22 Limited that she should face some sort of disciplinary
23 process to deal with that.

24 But that is a wholly different case that she would
25 have had to be concerned with for that year period

1 from March 2007 through to March 2008. She wouldn't
2 have been -- she may not have been suspended. She
3 certainly wouldn't have faced the worry that she did and
4 she may well have just simply been able to deal with
5 those sorts of issues by accepting that she hadn't
6 controlled Mr Patel well enough, et cetera, et cetera.

7 So that's a concrete example of how I say it's not
8 open to the respondents merely to argue that the lack of
9 a board meeting made no difference and therefore no
10 unfairness or prejudice.

11 MR JUSTICE NUGEE: Is that a convenient moment to take
12 a break?

13 MR STUART: I see the time, yes, my Lord.

14 MR JUSTICE NUGEE: Yes, we will take five minutes.
15 (11.42 am)

(Short break)

17 (11.49 am)

18 MR JUSTICE NUGEE: Yes?

19 MR STUART: So, my Lord, finally on these fundamental points
20 of principle that need to be established, I also agree
21 that there is a sort of catch-all at the end of the
22 process; that even if you find conduct of the affairs
23 and even if you find that that was prejudicial and even
24 if you find that that was unfair, you still then have to
25 exercise a discretion to order an adjustment to the

1 price, in the sense of, if it can be shown that it would
2 have made no financial difference whatsoever, for
3 example, or could have made no financial difference
4 whatsoever, then it might not be appropriate to be
5 ordering an adjustment of the price, mightn't it?

6 We say in this particular case, that's not going to
7 apply because the specific issues that have been ordered
8 by Deputy Registrar Briggs, all that should go to
9 matters of financial effect, and therefore it's very
10 unlikely that your Lordship is going to get through (a),
11 (b) and (c) and then reach the conclusion: but no
12 adjustment to the price.

13 MR JUSTICE NUGEE: Yes.

14 MR STUART: Paragraph 7, causation; the issue of causation.
15 Just before I move on to that, can I just go back on one
16 thing?

17 On the issue of what would have happened, because
18 that obviously is to an extent a refrain of my learned
19 friend's closing submissions throughout: what would have
20 happened; what would have happened.

21 MR JUSTICE NUGEE: Yes, he says you have got two cases. You
22 have got a malice case.

23 MR STUART: Yes.

24 MR JUSTICE NUGEE: Which he says you can't prove.

25 MR STUART: Yes.

1 MR JUSTICE NUGEE: And then other than that, all you have
2 really got is a breach of process case and the breach of
3 process case doesn't get you anywhere because they are
4 all technical breaches.

5 MR STUART: And I want to just return to this issue of it's
6 not a mere technical breach to have a board meeting of
7 the relevant company at which a relevant director acting
8 in accordance with his or her duties as a director of
9 that company and the matters that he or she should have
10 in his mind when deciding things at that board meeting,
11 it's not mere process. It's not mere procedure in this
12 particular case, where you have a very small ambit of
13 shareholding and all the shareholders are directors, so
14 that you have got four directors. There will always be,
15 as your Lordship recalls, two A and B directors at any
16 meeting.

17 MR JUSTICE NUGEE: You say that, but actually there is
18 a question mark as to what happens when Mr Patel goes.

19 MR STUART: Absolutely and therefore, for that period of
20 time, when there is only one A director and two
21 B directors, there is going to be a majority if Ms Birdi
22 can persuade one of her fellow B directors of Dartford
23 Visionplus/Dartford Specsavers Limited, to do or not to
24 do something. Whether that be to award Mr Singh
25 a contract of employment with a much larger salary, or

1 whether that be commencing investigation and
2 disciplinary process against her, either in the 2007
3 system or the 2010 system. We are on this issue of,
4 well, what difference would it make if the procedure of
5 going through a board meeting for non-day-to-day
6 management issues had been adopted.

7 And, my Lord, I say that it's simply not good enough
8 for Mr Dyson, for example, to come in here and say, "It
9 would have made no difference because I had already
10 decided". Because it's quite plain he hadn't decided
11 these things as director of the relevant companies.

12 He was making decisions purely in the interests of
13 SOG, back in Guernsey. He hadn't even addressed his
14 mind to what he should be thinking about, namely the
15 interests of the store company, and it is the very
16 holding of a board meeting of a store company which, of
17 course, focuses the mind of a director of a store
18 company to the fact that they are sitting at a board
19 meeting of that store company.

20 If Dame Mary Perkins had herself, for example, gone
21 to a board meeting, as she was entitled to do, or, of
22 course, if she had sent somebody else along, but let's
23 say she had actually gone along. Is it seriously going
24 to be suggested by the respondents that at that board
25 meeting, she wouldn't even have taken the time to listen

1 to Ms Birdi and then decide properly, in the interests
2 of the company in which she was acting as a director,
3 what she should do, what should be done here? Can that
4 seriously be suggested? We submit it can't be.

5 MR JUSTICE NUGEE: Suppose there is a vacuum, an absence of
6 evidence, and suppose I find myself unable to say what
7 might have happened.

8 MR STUART: Absolutely.

9 MR JUSTICE NUGEE: I think that Mr Potts would say that in
10 that case, you lose because of his causation point. For
11 you to establish causation, you have to establish that
12 it has caused loss.

13 MR STUART: No.

14 MR JUSTICE NUGEE: And you are going to tell me that's
15 wrong.

16 MR STUART: I'm going to tell you that's wrong for the very
17 reason that I said before. The position here is that
18 the prejudice caused by not having the board meeting is
19 not having the ability to speak to your fellow directors
20 and for them, then, to consider those matters in the way
21 they should. In order for him to show no unfairness, no
22 prejudice, no loss, he has to show that it would -- not
23 "might" not have happened, but it would not have
24 happened, or it would have happened the same.

25 MR JUSTICE NUGEE: Isn't it technically for you to show

1 prejudice, unfairness and consequential loss?

2 MR STUART: Yes, but the prejudice and unfairness is not
3 having the ability to speak at the board meeting and
4 then to have the directors of that company take the
5 decisions of that company in the circumstances of
6 hearing the relevant matters.

7 MR JUSTICE NUGEE: How do you --

8 MR STUART: And that causes the loss of -- it at least
9 causes the loss of a chance. That's a loss. The loss
10 of the chance that they would have done the right thing.

11 MR JUSTICE NUGEE: But then am I going to assess the
12 adjustment to the price by reference to some percentage
13 chance, like Allied Maples, of a different decision
14 having been made?

15 MR STUART: You might do. One simply can't say that there
16 is no loss simply because there is no evidence of what
17 would have happened in circumstances where the lack of
18 evidence of what would have happened if those board
19 members --

20 MR JUSTICE NUGEE: It's quite a significant point and may
21 end up being quite an important point, I don't know yet.
22 Take the £60,000 of management charges in 2007. Leave
23 aside your malice case, your conspiracy case, but your
24 process case is that that was never authorised by the
25 relevant company.

1 MR STUART: Correct.

2 MR JUSTICE NUGEE: And I think you say the relevant company
3 was Visionplus, do you, or do you not say?

4 MR STUART: Dartford Specsavers and Dartford Visionplus, it
5 doesn't matter for these purposes.

6 MR JUSTICE NUGEE: It doesn't matter. So it was never
7 authorised by the relevant company. Look at the
8 shareholders' agreement. This isn't day-to-day
9 management so it is required to be decided at a board
10 meeting. There wasn't a board meeting, so it wasn't
11 authorised.

12 MR STUART: That's right.

13 MR JUSTICE NUGEE: And that's prejudicial and it's unfair
14 and it warrants to adjustment to the price.

15 MR STUART: Yes. And the response to that --

16 MR JUSTICE NUGEE: Well, no, before we get to that, I'm
17 interested in whether, in saying that warrants an
18 adjustment to the price, the onus is on you to persuade
19 me that, had there been a board meeting, as there should
20 have been, the outcome would have been different, or
21 there was at least a real and not fanciful chance that
22 the outcome would be different? Because I don't think
23 you do accept --

24 MR STUART: I'm not necessarily going to be prepared to
25 accept that onus being put upon me, because I say that

1 where one can see the breach, the procedural failure,
 2 where one can see that that has actually caused --
 3 sorry, that the costs of the investigation have been
 4 caused by the decision that was taken by SOG in breach
 5 of the process, that of itself is prejudicial conduct,
 6 it's unfair, and it has caused Ms Birdi the loss of the
 7 profits there. It is for the respondents who are coming
 8 along to say, "Ah, would have made no difference. That
 9 procedural breach, which, for these purposes, we are
 10 admitting we got wrong, that procedural breach would
 11 have made no difference."

12 I say that in the general scheme of things it's for
 13 them to prove such a defence. If they are putting
 14 forward an "it would have made no difference" defence,
 15 like any breach of contract claim, if the defendant
 16 wants to say --

17 MR JUSTICE NUGEE: You say that, but surely it's for the
 18 claimant in a breach of contract claim to establish what
 19 they have lost by reason of breach of contract, isn't
 20 it?

21 MR STUART: Yes, and once one has established that those
 22 costs were spent, and those costs were spent flowing
 23 from a decision of SOG, which decision itself was made
 24 in breach of the procedural issues, I have established
 25 that. If they then want to come along and say, "Ah,

1 would have made no difference" -- if they want the court
 2 to determine that even if they had not broken their
 3 procedural obligations it would have happened anyway,
 4 I say the onus is on them to show that by way of
 5 a defence to my case.

6 MR JUSTICE NUGEE: Okay. I understand what you are saying,
 7 yes. Yes.

8 MR STUART: I say it's like any pure breach of contract
 9 case -- we are not dealing with the malice point at this
 10 point. It's like any breach of contract claim/breach of
 11 obligation claim. If the claimant can show that the
 12 defendant has breached the contractual obligation, and
 13 that financial sums have been lost or paid out, in this
 14 case as a result of that breach of that act, which was
 15 itself a breach of obligation, that is capable of
 16 amounting to a cause of action.

17 If the defendant in such cases wishes to allege:
 18 would have made no difference, then it is for the
 19 defendant, on the balance of probabilities at least, to
 20 show: would have made no difference.

21 And on the hypothetical that your Lordship has
 22 a complete vacuum as to what would have happened, then
 23 I say the respondents here haven't done what they need
 24 to do.

25 My fallback argument, if your Lordship doesn't

1 accept any of that, is effectively the loss of the
 2 chance point put in a different way. It is that it is
 3 self-evident that my client would have been in a better
 4 position if she had had the opportunity to make these
 5 points at a board meeting, have the board members make
 6 their decisions about expending £60,000, as it turned
 7 out to be, in circumstances where they properly had in
 8 mind their duties owed to the store companies,
 9 et cetera. It is self-evident that that is better for
 10 her than the whole thing being avoided and ignored
 11 altogether and Mr Dyson merely saying, "Mr McAlindon,
 12 you told me I'm to do this, I'm going to do it, off we
 13 go".

14 So that is a lost opportunity for her and that
 15 opportunity would have enabled her, potentially, to have
 16 avoided these costs. So that is a loss of something of
 17 value.

18 MR JUSTICE NUGEE: Can't I look at all the board meetings
 19 that Dame Mary Perkins attended and see that there is
 20 a pattern in which she agrees with the SOG-nominated
 21 director --

22 MR STUART: Remember, my Lord, until this time, until 2007,
 23 there weren't any board meetings; there weren't any.

24 MR JUSTICE NUGEE: No, but there are a number --

25 MR STUART: Once we are into this little process, there are

1 a number; Dame Mary Perkins never actually turns up to
 2 any of them.

3 MR JUSTICE NUGEE: No, she is on the phone from Guernsey.
 4 It's not always her; sometimes there are other people.

5 MR STUART: No, but at least there is a discussion with her
 6 and she is considering the issues, and she is
 7 considering the issues -- or should be -- with her hat
 8 on as director of the store company.

9 MR JUSTICE NUGEE: Another point at some stage: I do want to
 10 hear your submissions on whether SOG became
 11 A shareholder or A director when Mr Patel went,
 12 because --

13 MR STUART: I'm going to deal with that now, my Lord.

14 MR JUSTICE NUGEE: Yes. And tied up with that is another
 15 point, which is not the same point but is also a point
 16 which I think is in issue between you, which is whether
 17 the suspension of Ms Birdi from her employment affected
 18 her executive position as director. I think it's
 19 accepted that she remains, in a corporate sense,
 20 a director of the company.

21 MR STUART: Yes.

22 MR JUSTICE NUGEE: But I think it is said that she is
 23 suspended from her executive position, so she no longer
 24 has any role to play in the day-to-day management.

25 Those are two separate points.

1 MR STUART: I'll deal with them both now.
 2 MR JUSTICE NUGEE: Yes.
 3 MR STUART: As to the directorship, if we have D1, under the
 4 shareholder agreement, in the definitions clause.
 5 {D/15/178}
 6 MR JUSTICE NUGEE: Yes.
 7 MR STUART: The A directors are the registered holders of
 8 the A shares, it says.
 9 MR JUSTICE NUGEE: Yes.
 10 MR STUART: That's the definition. Then under clause 3.2.
 11 {D/15/180}
 12 MR JUSTICE NUGEE: Yes.
 13 MR STUART: "... the following matters are not matters of
 14 day to day management."
 15 And we therefore know that under 3.3 they are to be
 16 determined at a duly convened meeting of the board of
 17 directors or general meeting. And so at 3.2.6:
 18 {D/15/180}
 19 "The appointment of any director of the Company or
 20 any Subsidiary other than the directors (it being
 21 acknowledged for the avoidance of doubt that Specsavers
 22 may appoint any of its nominees as B directors...) ..."
 23 MR JUSTICE NUGEE: Directors means A directors and
 24 B directors.
 25 MR STUART: That's right.

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1 MR JUSTICE NUGEE: And A directors includes all the
 2 registered holders of the A shares. So when SOG
 3 acquires Mr Patel's shares, does it become an
 4 A director?
 5 MR STUART: Not until it becomes a registered holder of the
 6 shares.
 7 MR JUSTICE NUGEE: When did it become a registered holder of
 8 the shares?
 9 MR STUART: Good question. The annual return for the
 10 relevant year is at page 196. Does your Lordship have
 11 it? {D/17/196}
 12 MR JUSTICE NUGEE: Yes.
 13 MR STUART: And at 197, {D/17/197} the full details of the
 14 shareholders show the position as at 22 June 2007: SOG
 15 is an A shareholder. But there is no evidence -- and if
 16 you go over the page --
 17 MR JUSTICE NUGEE: It says that Mr Patel disposed of his
 18 50 shares on 20 February.
 19 MR STUART: He did, but that doesn't mean that they were
 20 registered as the A shareholders then. And if you go
 21 over the page --
 22 MR JUSTICE NUGEE: But what does "registered" mean? Does it
 23 mean registered at Companies House or does it mean
 24 registered in the books of the company? Because if it
 25 means registered at Companies House, that annual return

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1 only takes place once a year, doesn't it?
 2 MR STUART: Yes. You could file an appointment -- certainly
 3 an appointment of a director, a new A director, SOG as
 4 a new A director; you could file that in the course of
 5 the year, if you wanted to.
 6 So the question being, was SOG an A director as at
 7 the date of the failure to carry out the board
 8 meeting -- which would, of course, have been back in
 9 early March 2007 -- the answer is, I don't accept that
 10 they were an A director at that time.
 11 MR JUSTICE NUGEE: Because they weren't registered?
 12 MR STUART: Yes. And they weren't appointed by a board
 13 meeting. There was no board meeting to say, "SOG is now
 14 an A director".
 15 MR JUSTICE NUGEE: Well, that's a different point. Suppose
 16 they were registered on 20 February 2007.
 17 MR STUART: Yes.
 18 MR JUSTICE NUGEE: Does the effect of a shareholders'
 19 agreement automatically make them officers of a company
 20 as well?
 21 MR STUART: No, I wouldn't accept that it does automatically
 22 do so. One would have to go to the articles, which we
 23 have at 171 {D/15/171} and specifically from 173 under
 24 the heading "Directors". {D/15/173} And there doesn't
 25 seem to be a provision within the directors' section,

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1 expressly appointing any given person as a director.
 2 MR JUSTICE NUGEE: In any event, I mean, SOG are a director
 3 as a B director, are they not?
 4 MR STUART: Certainly they are as a B director, absolutely.
 5 They are a director as a B director.
 6 MR JUSTICE NUGEE: Can one be a director of a company in
 7 more than one capacity, as it were? Once SOG are
 8 a director, aren't they just a director, as far as the
 9 corporate governance is concerned?
 10 MR STUART: Yes. They are a director. This is just
 11 a shareholder agreement, which is defining the terms --
 12 MR JUSTICE NUGEE: They don't have two votes, one as an
 13 A director and one as a B director; they are just
 14 a director.
 15 MR STUART: On the board, yes.
 16 MR JUSTICE NUGEE: So if you are right and they didn't
 17 become an A director, then what's the consequence,
 18 because the definition of B directors says there will
 19 always be an equal number of A and B directors. How
 20 does that work?
 21 MR STUART: I would have to concede that I don't suppose it
 22 was envisaged --
 23 MR JUSTICE NUGEE: I don't suppose any of this was
 24 envisaged.
 25 MR STUART: It wasn't envisaged that Specsavers would own

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1 the A shares. This is a JV partnership agreement in
 2 which it's always envisaged that there were going to be
 3 two A directors -- two A shareholders/directors and
 4 a separate SOG B director. This agreement simply
 5 doesn't fit the situation where SOG is purporting to act
 6 as a shareholder.
 7 MR JUSTICE NUGEE: Do you say Mr Patel remained
 8 the registered shareholder and remained an A director?
 9 That seems an unrealistic result.
 10 MR STUART: Many people can remain registered as a director,
 11 even when they don't realise it. And they turn out to
 12 be directors for that period when they don't realise it.
 13 MR JUSTICE NUGEE: But he has resigned as a director, hasn't
 14 he?
 15 MR STUART: Yes, he has resigned as a director.
 16 MR JUSTICE NUGEE: He is entitled to undertake (inaudible)
 17 to resign, can't he?
 18 MR STUART: Yes.
 19 MR JUSTICE NUGEE: Whenever he wants to? I have table A
 20 somewhere, don't I? Back of D2, is it? {D/32/432}
 21 MR STUART: Yes.
 22 MR JUSTICE NUGEE: And I think there was some agreement as
 23 to which is the relevant one. Is it --
 24 MR STUART: I perhaps also ought to have mentioned clause 2
 25 of the agreement under the heading, "Company Formation",

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1 so is it's obviously envisaged that it's at the start:
 2 {D/15/179}
 3 "... each shareholder shall take or cause to be
 4 taken the following steps:
 5 "2.1.1 The appointment of the A directors and the
 6 B directors as the directors of the company..."
 7 So it's plainly envisaged that merely owning some
 8 shares doesn't necessarily itself appoint you as
 9 a director.
 10 MR JUSTICE NUGEE: No.
 11 MR STUART: Because the parties own the shares when they own
 12 the shares, but there is a separate clause and provision
 13 for appointing those people as the A directors and the
 14 B directors.
 15 MR JUSTICE NUGEE: Yes. That seems a rather unconvincing
 16 discussion, Mr Stuart.
 17 MR STUART: Yes, is it Article 84 through to 86 of table A?
 18 Page 442. {D/32/442}
 19 MR JUSTICE NUGEE: These only commenced on 1 October 2007.
 20 MR STUART: Oh, yes, that's right.
 21 MR POTTS: I don't think it makes any difference, my Lord.
 22 I don't believe this was a regulation which was amended.
 23 We will check that over the short adjournment.
 24 MR JUSTICE NUGEE: Sorry, which wasn't?
 25 MR POTTS: Well, I think --

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1 MR STUART: 82.
 2 MR POTTS: 82.
 3 MR JUSTICE NUGEE: I don't think I have 82. Somebody handed
 4 me --
 5 MR POTTS: The correct version, yes; I did.
 6 MR JUSTICE NUGEE: Yes, on 28 October. But actually,
 7 looking at it, all I have got is pages 2105, 2109, 2110
 8 and 2111 and 2116 and 2117. So I don't a complete
 9 version of table A.
 10 MR POTTS: It's only because it was a particular point that
 11 I was taking your Lordship to --
 12 MR JUSTICE NUGEE: Yes, but I think I would like a complete
 13 version of the table A that is -- is it applicable to
 14 both companies?
 15 MR POTTS: Yes.
 16 MR JUSTICE NUGEE: Yes. And that explains why I couldn't
 17 find anything in there saying a director could retire,
 18 but he isn't -- directors are entitled to retire,
 19 presumably? 81(d): {D/32/442}
 20 "He resigns his office by notice to the company..."
 21 MR POTTS: My Lord, it doesn't need to be in the articles;
 22 as a matter of law a director is entitled to retire.
 23 It's not a fiduciary power. You can resign as
 24 a director at any time.
 25 MR JUSTICE NUGEE: It doesn't need to be accepted by the

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1 company? It just happens; is that right?
 2 MR POTTS: I think if you resign, you resign.
 3 MR JUSTICE NUGEE: I think you resign, yes. That's what
 4 I would have expected.
 5 MR POTTS: You can't be obliged to hold office as a director
 6 of a company.
 7 MR JUSTICE NUGEE: Yes.
 8 MR POTTS: I'm not sure that it is a point in issue.
 9 MR STUART: My Lord, yes, certainly subject to the
 10 shareholders' agreement -- let's just return to that for
 11 the moment -- other than the obvious fact that it was
 12 not envisaged that Specsavers would be an A shareholder
 13 and an A director -- that wasn't envisaged by this form
 14 of joint venture. So the question becomes: what is the
 15 effect of Specsavers merely purchasing Mr --
 16 MR JUSTICE NUGEE: -- Patel's shares.
 17 MR STUART: -- Patel's shares. And does that constitute
 18 them or appoint them as A directors? We submit that it
 19 doesn't.
 20 MR JUSTICE NUGEE: Right.
 21 MR STUART: Merely purchasing subject to contract A shares
 22 doesn't necessarily constitute you an A director as
 23 envisaged by the shareholders' agreement.
 24 MR JUSTICE NUGEE: But they do become entitled to Mr Patel's
 25 right to dividends, don't they? You have this argument

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1 floated in your submission but, as I say, not pressed
 2 very hard, that Ms Birdi was entitled to 100 per cent of
 3 the profits, and I have not understood that. Why don't
 4 they acquire the same rights as Mr Patel had to half the
 5 dividends that are declared?
 6 MR STUART: The rights of the A shareholder bring with them
 7 obligations of an A shareholder within this shareholder
 8 agreement and so, for example, the shares -- this is on
 9 page 177, under 3 {D/15/177} -- the shares are:
 10 optician, 50 A shares; dispenser, 50 A shares. Does
 11 your Lordship see that?
 12 MR JUSTICE NUGEE: Yes.
 13 MR STUART: It's plainly envisaged that the other
 14 A shareholder, not Ms Birdi, is going to provide the
 15 services of the dispenser at the store. She didn't
 16 enter into this agreement on the basis that her other
 17 A shareholder would provide nothing. So simply for
 18 Specsavers to say, "Well, we have bought Mr Patel's
 19 shares and therefore we are entitled to the benefits of
 20 those shares", ignores the fact that they should also be
 21 providing the obligations of an A shareholder, the other
 22 A shareholders, the dispensing shareholder --
 23 MR JUSTICE NUGEE: That's a slightly dangerous argument for
 24 Ms Birdi because it might suggest that since she ceased
 25 to be an employee, she wasn't entitled to keep any of

1 the dividends.
 2 MR STUART: No, just because she is not an employee doesn't
 3 mean she can't be a --
 4 MR JUSTICE NUGEE: Well, she is not providing any services
 5 at the store.
 6 MR STUART: Under her contract of employment, and she is
 7 still available to act as a director, and this comes on
 8 to your Lordship's second point, which is does her
 9 suspension as an employee and then dismissal as an
 10 employee affect her position as director, and we say it
 11 doesn't.
 12 MR JUSTICE NUGEE: Okay, just before you get to that, the
 13 dividend policy on page 181. 4.1 says: {D/15/181}
 14 "... the shareholders shall procure that all such
 15 profits ..."
 16 That's distributable profits:
 17 "... shall be applied in the payment of cash
 18 dividends to the maximum level to the holders of the
 19 A shares ..."
 20 Why is SOG not a holder of the A shares from
 21 February 2007?
 22 MR STUART: I accept it was a holder of A shares for an
 23 intervening period. I have to accept that. Whether it
 24 was envisaged under this shareholder agreement --
 25 MR JUSTICE NUGEE: It may not be envisaged but as holder of

1 the A shares it was entitled to half the profits that
 2 were distributable.
 3 MR STUART: Under clause 4.1 it was.
 4 MR JUSTICE NUGEE: Okay. Let's come to the next point then,
 5 which is the suspension of Ms Birdi as employee. Did it
 6 suspend her from her position as executive with
 7 responsibility for day-to-day management, it being
 8 accepted it didn't suspend her from her office of
 9 director?
 10 MR STUART: That's right, and her suspension was by her
 11 employer company.
 12 MR JUSTICE NUGEE: Yes.
 13 MR STUART: Dartford Visionplus.
 14 MR JUSTICE NUGEE: Yes.
 15 MR STUART: This shareholder agreement, which --
 16 MR JUSTICE NUGEE: -- is entered into between the
 17 shareholders of Dartford --
 18 MR STUART: -- Specsavers Limited, delegates the power of
 19 day-to-day management of the business of the company and
 20 any subsidiary to the A directors, and the A directors
 21 are the A directors of Dartford Specsavers. There are
 22 no A directors or B directors of Dartford Visionplus,
 23 despite what Mr Dyson --
 24 MR JUSTICE NUGEE: This was the point we had during the
 25 evidence.

1 MR STUART: Yes.
 2 MR JUSTICE NUGEE: But --
 3 MR STUART: There are no A and B directors of Dartford
 4 Visionplus, and the "powers of day-to-day management of
 5 the business of the company and any subsidiary" -- that
 6 must be the business of the company and of any
 7 subsidiary -- that is delegated to the A directors of
 8 the company. Therefore, her suspension from employment
 9 duties within Dartford Visionplus Limited is merely
 10 a suspension of her employment duties in Dartford
 11 Visionplus; it is not and cannot be the suspension of
 12 her executive duties as an A director of Dartford
 13 Specsavers Limited.
 14 MR JUSTICE NUGEE: But since Visionplus carries out all the
 15 actual retailing and dispensing and sight testing
 16 services, we have seen that all that Dartford does is
 17 wholesale goods to Visionplus. It doesn't provide any
 18 services to clients. All the day-to-day management of
 19 the store, is it not, is done through Visionplus?
 20 MR STUART: Through -- done through Visionplus, but it is
 21 the directors of Dartford Specsavers Limited, the
 22 A directors, and the A directors are defined as the
 23 A directors of Dartford --
 24 MR JUSTICE NUGEE: But what's the business of the company,
 25 Dartford --

1 MR STUART: No, no, it's the business of a subsidiary of the
2 company. 3.1.1:
3 "Day-to-day management of the business of the
4 company and any subsidiary ..."
5 MR JUSTICE NUGEE: Is delegated to the A directors. But is
6 that --
7 MR STUART: Of the company.
8 MR JUSTICE NUGEE: Yes.
9 MR STUART: Of the company.
10 MR JUSTICE NUGEE: I'm not sure; I think you may be making
11 two different points. It's probably my fault.
12 Firstly, there is a distinction between Dartford's
13 business and Visionplus's business.
14 MR STUART: Yes.
15 MR JUSTICE NUGEE: But I can see that this delegates
16 day-to-day management of both Dartford's business and
17 Visionplus's business --
18 MR STUART: That's right.
19 MR JUSTICE NUGEE: -- to certain individuals. Let's not
20 call them "A directors"; just say "certain individuals",
21 one of which is Ms Birdi. I can see that her suspension
22 from her employment by Visionplus may have arguably no
23 impact on the delegation to her of the day-to-day
24 management of Dartford, but my point is Dartford doesn't
25 really do anything on a day-to-day basis; all it does is

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1 wholesale goods to Visionplus. All the running of the
2 store -- employing of the staff, selling spectacles to
3 clients, giving them eye tests, and so on -- is all done
4 through Visionplus.
5 MR STUART: That's the business of Dartford Visionplus.
6 MR JUSTICE NUGEE: Yes --
7 MR STUART: One can manage --
8 MR JUSTICE NUGEE: So the fact that --
9 MR STUART: The director of company X can manage the
10 business of company Y. It's perfectly possible. It
11 happens all the time.
12 MR JUSTICE NUGEE: It can happen but then one asks: when
13 there is an issue of day-to-day management of the store,
14 whose business is that? It's Visionplus's business.
15 Has that been delegated? Yes, it has. But the question
16 is: when she is suspended from her executive office as
17 executive director, which is what the service
18 contract -- I can't remember what the service
19 contractual calls her. What does the service contract
20 call her?
21 MR STUART: The service contract for her is at --
22 MR POTTS: It's called a service contract, my Lord. It's
23 page 15. {D/3/15}
24 MR JUSTICE NUGEE: Job title -- it describes her as "the
25 executive".

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1 MR STUART: Yes.
2 MR JUSTICE NUGEE: And what she has to serve as is as
3 optician director.
4 MR STUART: Yes.
5 MR JUSTICE NUGEE: If she is suspended from that, does
6 that --
7 MR STUART: Of Dartford Visionplus.
8 MR JUSTICE NUGEE: Does that suspend her from the day-to-day
9 management of Visionplus?
10 MR STUART: It suspends her from her tasks, from her
11 employment tasks. It's an employment suspension, so it
12 suspends her from employment tasks under her contract of
13 employment with Dartford Visionplus. What it does not
14 do is suspend the powers of day-to-day management which
15 she has been delegated by clause 3.1 of the shareholder
16 agreement, and that is the power of day-to-day
17 management of not just the business of Dartford
18 Specsavers Limited, but the business of its subsidiary,
19 Dartford Visionplus.
20 So she has the power of day-to-day management over
21 Dartford Visionplus as well, and the fact that she has
22 been suspended from her employment duties under
23 a contract of employment does not --
24 MR JUSTICE NUGEE: Where is the power to suspend her in this
25 contract? It's 12.2, is it not? {D/3/18}

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1 MR STUART: Yes, page 18.
2 MR JUSTICE NUGEE: " ... suspend the director from his
3 duties ... "
4 Why do I confine that to duties other than the duty
5 of day-to-day management of the company? Because what
6 the executive is serving the company as is as optician
7 director. That's clause 1. And that includes, does it
8 not, directorial duties as well as optician duties?
9 MR STUART: That's duties; that's duties under a contract of
10 employment: "I employ you to carry out the following
11 duties for me."
12 MR JUSTICE NUGEE: Yes. Isn't day do day management part of
13 her duties?
14 MR STUART: It may be. It may well be. Day-to-day
15 management may well be part of her duties in the store
16 and if I, as her employer, then suspend her from those
17 duties, she has no longer those duties to perform. But
18 that is not the same as the delegation of powers --
19 MR JUSTICE NUGEE: It's the difference between powers and
20 duties, is it?
21 MR STUART: It's the difference between powers and duties.
22 It's also the difference between Dartford Specsavers
23 Limited, because she is an A director of Dartford
24 Specsavers Limited and it's in her capacity as A
25 director of Dartford Specsavers Limited that she is

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1 delegated with powers of day-to-day management over its
2 subsidiary. So as a director she has the power of
3 day-to-day management over the business of the
4 subsidiary, and merely being suspended from duties under
5 a contract of employment with that subsidiary can't of
6 itself remove her powers, take away the powers that she
7 has been delegated under 3.1.1.

8 MR JUSTICE NUGEE: Okay. So you say that all the decisions
9 made while she was suspended should have been -- all the
10 day-to-day decisions she should have been entitled to
11 make?

12 MR STUART: Absolutely. The A directors are delegated with
13 all of the powers of day-to-day management of the
14 business of both companies.

15 MR JUSTICE NUGEE: Yes.

16 MR STUART: And the A directors didn't do that, and she was
17 deliberately excluded by Specsavers from being involved
18 in those powers of day-to-day management merely because
19 she was suspended from her contract of employment
20 duties. It's not right.

21 MR JUSTICE NUGEE: Okay.

22 MR STUART: Of course, just returning for one moment to the
23 issues, the actual day-to-day management issues within
24 our six issues to which this would relate, it couldn't
25 be the Mr Patel stolen monies point.

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1 MR JUSTICE NUGEE: No.

2 MR STUART: That's not day-to-day management. It couldn't
3 be the security cost of £60,000; that's not day-to-day
4 management. Nor the investigation costs which -- as we
5 have seen with Mr Patel -- you know, your Lordship will
6 recall that when Mr Patel was suspended and he was to be
7 investigated, there was a resolution --

8 MR JUSTICE NUGEE: Yes, yes.

9 MR STUART: -- of all the board members, so it really --

10 MR JUSTICE NUGEE: Yes, including him.

11 MR STUART: Including even him. So it doesn't apply to
12 that. It could only be the increases in the salary and
13 bonuses paid to the store staff --

14 MR JUSTICE NUGEE: Yes.

15 MR STUART: -- to which this point goes, as I understand it,
16 because it then doesn't go on -- obviously, after 2008
17 we are back to the position where we have
18 two A directors and then Ms Birdi wasn't suspended again
19 until June 2010.

20 MR JUSTICE NUGEE: But the suspension in 2010 is again not
21 a day-to-day management issue.

22 MR STUART: No.

23 MR JUSTICE NUGEE: So it really just goes to -- is it
24 Mrs Groves -- is Carol --

25 MR STUART: Carol Slark/Carol Groves.

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1 MR JUSTICE NUGEE: Is she Mrs Slark or Mrs Groves?

2 MR STUART: So she was Miss Groves and she became Mrs Slark.

3 MR JUSTICE NUGEE: So at the time she was Mrs Slark. So

4 Mrs Slark's decision to recommend pay increases and
5 a bonus scheme, which was approved by Mr Dyson --

6 MR STUART: Yes, the implementation of pay increases and the
7 bonus scheme, which was done, certainly, without any
8 reference to Ms Birdi, was done by, it's said, Mr Dyson,
9 I think, authorising Mrs Slark to implement. It is only
10 that issue that really is affected by your Lordship's
11 point.

12 MR JUSTICE NUGEE: Well, I don't think it's my point.

13 I think it's a point --

14 MR STUART: The point that your Lordship has raised with me.

15 MR JUSTICE NUGEE: Yes.

16 MR STUART: Yes, the point that your Lordship is raising at
17 the moment and I'm trying to address by reference to the
18 suspension issue.

19 MR JUSTICE NUGEE: Yes, thank you.

20 MR STUART: But we do absolutely say that Ms Birdi, as
21 A shareholder and A director and -- just return to the
22 shareholder agreement for one moment. There is no
23 provision within the shareholder agreement for
24 suspension from duties or powers as an A director of
25 this company.

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1 MR JUSTICE NUGEE: Yes.

2 MR STUART: Ms Birdi has invested in this company a lot of
3 money. It's her company -- it's 25 per cent her
4 company. By reason of owning her shares and being
5 registered as the A shareholder, she is entitled to the
6 powers of day-to-day management, to be involved in the
7 power of day-to-day management of the business of the
8 company, and there is no provision entitling SOG,
9 unilaterally, to suspend her from that power.

10 Quite different in relation to her executive
11 employment contract, where she has agreed to an
12 employment contract which says, as an employee, you can
13 suspend me under clause 12.2 of my employment contract
14 if there is ground blah, blah, blah. So she has agreed
15 to that. Employees have to. That's one thing. But she
16 has not agreed to give SOG the power to suspend her from
17 her A directorship or her powers of day-to-day
18 management within that. Therefore we say it is simply
19 not open to Specsavers to purport to do that.

20 Not that they did actually purport to suspend her
21 from her directorship of the Dartford Specsavers
22 company; this is merely Mr Dyson's misapprehension of
23 the position, which Specsavers are now having to try to
24 support.

25 MR JUSTICE NUGEE: Yes.

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1 MR STUART: Mr Dyson plainly didn't understand the
 2 difference between the directorships of the various
 3 companies. He didn't even understand who the
 4 A directors and the B directors -- which companies they
 5 were directors of, let alone the difference between
 6 being an A director of Dartford Specsavers and an
 7 employee of Dartford Visionplus. He had no concept of
 8 that, I say, under cross-examination. At the end of it
 9 all, he just said he was confused. Well, he certainly
 10 was.
 11 MR JUSTICE NUGEE: I'm not surprised. In the sense --
 12 MR STUART: You say that --
 13 MR JUSTICE NUGEE: -- that the structure is quite confusing.
 14 MR STUART: It's unusual, but I don't say it's confusing.
 15 Take one step back, it is as simple as this: I buy
 16 shares in Dartford Specsavers Limited. I pay £125,000
 17 for 25 per cent. As parts of that bargain, I get the
 18 right to 50 per cent of the profits and I get the right
 19 of day-to-day management. That's important to me
 20 because I'm an optician and I want the right of
 21 day-to-day management over an optician store.
 22 I give up the rights/powers of all these other
 23 things, the financial matters and other things that
 24 shareholders might in other cases have; I give that up
 25 to the board, or the company in general meeting, and

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1 I give up control of the actual finances of payment
 2 et cetera. I give that up entirely to SOG.
 3 That's a bargain I enter into. That's a simple
 4 bargain. It's a quite separate bargain whereby I am
 5 then employed to provide 40 hours of week to Dartford
 6 Visionplus.
 7 Take Mr Dyson himself. He told you he is the
 8 A shareholder of three stores. So he has the powers of
 9 management --
 10 MR JUSTICE NUGEE: Was it Mr Raines.
 11 MR STUART: Sorry. Take Mr Raines himself. He has three
 12 stores as well as his role as director of SOS. In
 13 relation to those three stores, he gave evidence that he
 14 doesn't actually provide any services at all. He
 15 doesn't enter into a contract of employment --
 16 MR POTTS: I don't think that was his evidence, my Lord,
 17 actually, but there we are.
 18 MR JUSTICE NUGEE: I certainly got the impression he wasn't
 19 working 40 hours a week in each store.
 20 MR STUART: Or a zero-hours contract wherever he might be.
 21 So he is not being paid a salary for providing 40 hours
 22 a week, doing either the dispensing job or the retailing
 23 job or the optician's job in those stores. So it's
 24 quite clear, the difference between acting as an
 25 employee store manager -- or optician, in Ms Birdi's

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1 case -- and owning shares in a company and being able to
 2 obtain the benefit of those shares by way of dividends,
 3 and having the power of day-to-day management over the
 4 business of that company, the A company.
 5 So we say it's not that hard to understand, but
 6 Mr Dyson plainly didn't.
 7 So, my Lord, I think I have dealt with those four
 8 central points about the requirements to establish. Can
 9 I move -- and causation. Can I just deal with causation
 10 briefly?
 11 MR JUSTICE NUGEE: Yes.
 12 MR STUART: We say that causation, in any sense in this
 13 trial, is causation at its most basic level. This is
 14 not a mere contractual claim with causation as an
 15 element of a breach of contract case, nor is it a tort
 16 case with causation of damage, et cetera. So I have to
 17 show that there was some prejudice and that it was
 18 unfair prejudice and as part of that, in the case of
 19 these six specific examples, I have got to show that
 20 there was loss caused to Ms Birdi by the things which we
 21 complain about. So that she did suffer a loss of
 22 profits from Dartford being loaded with these excessive
 23 charges. She suffered a loss of profits from the salary
 24 and bonuses being loaded on to the company. She
 25 suffered a loss of profits from Mr Singh's salary being

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1 excessive, and from both sets of disciplinary
 2 proceedings, in 2007 and 2010, and she suffers a loss of
 3 dividends from what happens in the period after her
 4 dismissal.
 5 So in that sense, yes, causation, I have to show
 6 that that's what happened, but it is what happened and
 7 I say therefore it's not particularly difficult for me
 8 to get over that hurdle.
 9 Paragraph 8, I have sort of already dealt with this
 10 issue of the procedural element.
 11 MR JUSTICE NUGEE: Yes.
 12 MR STUART: Because your Lordship has challenged me about it
 13 and I have dealt with it. I don't accept the
 14 proposition as actually put in paragraph 8, which is
 15 that the loss has actually to be caused to Dartford or
 16 Dartford Visionplus. Some of the loss can be caused to
 17 the shareholder. Obviously, some of her loss will be
 18 caused through her ownership of the shares in the
 19 company and by way of the dividends not coming out, but
 20 other loss might be said not to be a loss to the
 21 company, but directly to her. That is, for example, the
 22 dividends issue, because how does the company suffer the
 23 loss of dividend? It doesn't.
 24 MR JUSTICE NUGEE: Yes.
 25 MR STUART: The company's profits are the company's profits.

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1 So that's an oversimplification as it's put there.
 2 I do need, importantly, to deal with paragraph 9 and
 3 the four subparagraphs.
 4 MR JUSTICE NUGEE: Yes.
 5 MR STUART: This is not a trial of an unfair dismissal
 6 claim. I accept it's not a trial of an unfair dismissal
 7 claim but, as I have explained to your Lordship, where
 8 the dismissal is part of the process of exiting her from
 9 her shareholding, it's an issue that you have to
 10 consider in the context. So it's an element of our
 11 unfairly prejudicial conduct case.
 12 As to (2), whether you consider that every one of
 13 the decisions made in the grievances, investigations,
 14 disciplinary hearings or board meetings were correct,
 15 I agree it's not simply for you to say, "I don't think
 16 that's the right decision", you know, or, "That decision
 17 you took there isn't correct", or, "I would have taken
 18 a different one". If that's what is being argued here,
 19 I accept that, but if you are looking at the overall
 20 assessment of the unfairness of the conduct and the
 21 conduct of the affairs of the company and the unfairness
 22 of that, then the nature of the decisions made, which is
 23 what is being talked of there, in relation to the
 24 grievances, the investigations, the disciplinary
 25 hearings, et cetera, that must be taken as part of the

1 context of assessing the unfairness.
 2 And then, secondly, evidence of a sham or biased
 3 nature of decisions on grievances, investigations and
 4 disciplinary hearings -- and board meetings, I suppose
 5 one would say -- if looked at in the round and looked at
 6 upon the evidence that you heard, if you find that they
 7 were pre-determined, they were biased, et cetera, that
 8 would be, we say, illustrative of the respondents'
 9 improper motivation and purpose.
 10 So, in other words, the very nature of the biased
 11 decision-making can be evidence to support our argument
 12 as to the improper purpose for which they were doing
 13 these things.
 14 I had understood 9.2 of my learned friend's skeleton
 15 argument to be seeking to try to argue that, really, the
 16 issue of the correctness of the grievance,
 17 investigation, disciplinary hearings and board meetings
 18 is entirely irrelevant to this trial, and he talks about
 19 a multi-million pounds witness action lasting almost
 20 four weeks. If your Lordship looks at his clients'
 21 witness statements, that is what they were doing. In
 22 the witness statements. So they knew that these were
 23 relevant issues, certainly when they put these witness
 24 statements in.
 25 Mr Raines and Mr Clark, if they are not here to deal

1 with the correctness of the investigations that they
 2 carried out, what are they here to deal with?
 3 MR JUSTICE NUGEE: I think there may be an ambiguity in the
 4 word "correctness". I'm looking, for example, at the
 5 points of claim -- paragraph 41. So this is just an
 6 example. This is 2010 investigations.
 7 MR STUART: Yes.
 8 MR JUSTICE NUGEE: And paragraph 40 pleads what
 9 investigations the respondents caused to take place, and
 10 41 says that was motivated by malice and/or
 11 improper/unlawful desire to remove the petitioner.
 12 Obviously, I have to decide whether it was motivated
 13 by malice or that improper desire.
 14 MR STUART: "Or"; exactly.
 15 MR JUSTICE NUGEE: Yes. From that point of view, I entirely
 16 understand your point that if I look at the process of
 17 investigation and decide it's a complete farce, it's
 18 a sham, and that the decision had been made beforehand
 19 and they were just going through the motions --
 20 MR STUART: Yes.
 21 MR JUSTICE NUGEE: -- I can infer from that that it was
 22 motivated by malice.
 23 MR STUART: Or the improper desire to exit her. The
 24 malice --
 25 MR JUSTICE NUGEE: Yes. But if I reject that case and find

1 that, no, Mr Clark and so on were genuinely
 2 investigating, but did it in an unfair way, is that
 3 something you can complain of? I'm not sure it is on
 4 this pleading.
 5 MR STUART: Not -- for the purposes of -- remember that this
 6 pleading is addressing the issues.
 7 MR JUSTICE NUGEE: Yes, and the issue here is the cost of
 8 the investigation.
 9 MR STUART: The costs and so --
 10 MR JUSTICE NUGEE: But the way in which you seek to recover
 11 the costs of the investigation is by saying that this is
 12 all motivated by malice or the improper desire.
 13 MR STUART: That's right, but the decision --
 14 MR JUSTICE NUGEE: Suppose I reject that and say that it's
 15 all purely bona fide; it's a genuine attempt but an
 16 unfair attempt.
 17 MR STUART: Well, what, you are saying in the conduct of
 18 it --
 19 MR JUSTICE NUGEE: In the conduct of it.
 20 MR STUART: Rather than the decision to do it at all --
 21 MR JUSTICE NUGEE: Rather than the decision to do it but the
 22 way that it was done: Mr Clark didn't ask the right
 23 witnesses; he asked leading questions, you know, you
 24 have a whole raft of criticisms --
 25 MR STUART: Absolutely, that's not --

1 MR JUSTICE NUGEE: That's not part of this trial.
 2 MR STUART: That wouldn't have caused the costs of that
 3 investigation, would it?
 4 MR JUSTICE NUGEE: It might have caused some of the costs.
 5 It might have caused the costs of the next stage.
 6 MR STUART: Not asking questions, for example. The next
 7 stage after Mr Clark is simply Ms McIntyre.
 8 MR JUSTICE NUGEE: Yes. But --
 9 MR STUART: The very unfairness of the conduct of that
 10 investigation process, for example, is not the --
 11 MR JUSTICE NUGEE: That's not the complaint.
 12 MR STUART: It is not the focus of the complaint, and
 13 certainly, nor is the correctness --
 14 MR JUSTICE NUGEE: That's what I was getting at. Simply
 15 because they come to a decision which I think wasn't the
 16 right decision doesn't get you anywhere, does it? You
 17 have to establish 41 in order to get the relief you
 18 want?
 19 MR STUART: I have to establish either that it was in breach
 20 of some contractual duty --
 21 MR JUSTICE NUGEE: Yes.
 22 MR STUART: -- or fiduciary duty of a director of a company
 23 and/or I have to show that it was an abuse of power in
 24 the sense of the power is the control of the company.
 25 MR JUSTICE NUGEE: Yes.

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1 MR STUART: That's paragraph 40, second line. So they are
 2 controlling --
 3 MR JUSTICE NUGEE: Yes.
 4 MR STUART: We say they are controlling the company. They
 5 are then causing the company to authorise the
 6 disciplinary process, the investigation process, the
 7 further disciplinary process, et cetera. If that is
 8 either done in breach of some contractual obligation or
 9 is done as an abuse of the power, because it's an
 10 improper purpose that that power is being exercised for,
 11 and the only improper purposes that I am able to suggest
 12 are the purpose of exiting us from the business and/or
 13 maliciousness --
 14 MR JUSTICE NUGEE: But it comes to much the same thing
 15 because exiting from the business can only be improper
 16 if you have decided to do it regardless of whether it's
 17 justified or not.
 18 MR STUART: Correct, or whether it's in the best interests
 19 of the company.
 20 MR JUSTICE NUGEE: Yes.
 21 MR STUART: That's the important point.
 22 MR JUSTICE NUGEE: Yes. Very well.
 23 MR STUART: So back to their list. Yes, so just to be
 24 absolutely clear, in relation to that -- whilst I'm on
 25 paragraph 37, as that was the example your Lordship has

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1 taken, paragraphs 42 and 43, insofar as they revert back
 2 to the allegations made in 40, they are alternatives and
 3 they are pleaded as such.
 4 MR JUSTICE NUGEE: Yes, 43 is an alternative to 42.
 5 MR STUART: That's right.
 6 MR JUSTICE NUGEE: But 42 is tied to 41. 42 is:
 7 "By acting in this way ..."
 8 That means by acting in the way alleged in 41.
 9 MR STUART: Yes. Well, acting in the way alleged in 40 --
 10 40 is the actions they have taken. 41 is a motivation
 11 argument. 42 is:
 12 "By acting in this way..."
 13 That is, using their powers of control of the
 14 company, so they are acting in breach of the duty to
 15 exercise the powers in accordance with the constitution
 16 of the company and with the authority conferred on them
 17 under that constitution. That's the director's duty.
 18 MR JUSTICE NUGEE: I have to say I read 42, "by acting in
 19 this way", as meaning by acting in the way alleged in
 20 41. That is, doing the things in 40 with an improper
 21 motive. Is that not what you meant? It's not your
 22 pleading, but is that not what's meant?
 23 MR STUART: My understanding is that it's not limited to 41.
 24 It's using their power of control of the company to do
 25 those things, to authorise the disciplinary process,

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1 carry out the investigation process --
 2 MR JUSTICE NUGEE: But merely instigating disciplinary
 3 proceedings can't be using powers for an improper
 4 purpose, failing to act with reasonable care and skill
 5 and so on and so forth, unless it's alleged that it's
 6 being done improperly in some way.
 7 MR STUART: Yes, it's got to be improper, yes.
 8 MR JUSTICE NUGEE: As I understand it, the allegation of
 9 impropriety is that alleged at 41. 40 doesn't allege
 10 anything improper at all. They are just facts.
 11 MR STUART: That's right.
 12 MR JUSTICE NUGEE: It's 41 which alleges the impropriety; 2,
 13 the motivation of malice or the motivation of improper
 14 or unlawful desire; and 42 which says that it's that
 15 which is a breach. But that must mean, must it not --
 16 MR STUART: Exercising powers for reasons other than --
 17 MR JUSTICE NUGEE: Yes.
 18 MR STUART: Which is what is then set out in 42(i) to (v)
 19 effectively, as subsections, and then 43 is the
 20 alternative --
 21 MR JUSTICE NUGEE: 43 is the process one. I understand that
 22 43 is an alternative, which is the process one.
 23 MR STUART: Yes.
 24 MR JUSTICE NUGEE: But I'm still not 100 per cent sure that
 25 you accept my reading of 42, which is that, "By acting

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1 in this way", at the beginning of 42, is not a reference
 2 to just what's in 40 but has to include the allegation
 3 in 41.
 4 MR STUART: I do accept that authorising a company to
 5 instigate disciplinary proceedings without more, without
 6 any other allegation going with that --
 7 MR JUSTICE NUGEE: Can't be a breach.
 8 MR STUART: -- can't be said simply on its own to be
 9 a breach of the exercise of powers.
 10 MR JUSTICE NUGEE: I must admit, that's how I read it.
 11 MR STUART: For proper purposes, for example. 42.2:
 12 "To exercise its powers for proper purposes to
 13 promote the success of the company for the benefit of
 14 the members ..."
 15 Et cetera. And then if your Lordship is taking 43
 16 as independent and as covering procedural breaches --
 17 MR JUSTICE NUGEE: Yes.
 18 MR STUART: -- then nothing is added by 42.1, for example,
 19 being in some way independent of the abuse of power, for
 20 reasons of improper purpose argument.
 21 MR JUSTICE NUGEE: Yes.
 22 MR STUART: Yes. So I have dealt with (ii).
 23 This is 9(iii) now of my learned friend's closing
 24 submissions:
 25 "Whether SOG and/or Mr Singh made good commercial
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1 decisions over the last seven years."
 2 Again, I agree --
 3 MR JUSTICE NUGEE: Yes.
 4 MR STUART: -- in the usual sense in such 994 petitions,
 5 your Lordship isn't simply starting afresh and saying,
 6 "Was that a good commercial decision or not, and because
 7 it's not, I'm going to somehow penalise the makers of
 8 the decision". Of course, that's not what's alleged.
 9 But, as in many cases, if the commerciality of what they
 10 have done -- let's say, for example, the £60,000
 11 management charges -- if that's so obviously not in the
 12 commercial best interests of the company, that can be
 13 evidence of --
 14 MR JUSTICE NUGEE: Evidence of an improper motive.
 15 MR STUART: -- of an improper motive, because directors of
 16 companies don't usually go round --
 17 MR JUSTICE NUGEE: I understand that. I think a better
 18 example is Mrs --
 19 MR STUART: -- Slark's --
 20 MR JUSTICE NUGEE: -- Slark's bonus scheme. There was some
 21 evidence that, actually, the way it operated wasn't very
 22 sensible, because you could end up paying bonuses even
 23 if --
 24 MR STUART: The store did worse.
 25 MR JUSTICE NUGEE: -- turnover hadn't improved at all.
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1 MR STUART: Yes.
 2 MR JUSTICE NUGEE: But that might be some evidence from
 3 which I might infer that she set out to improperly
 4 impose an expensive bonus scheme on the company, in
 5 order to damage Ms Birdi.
 6 MR STUART: Yes.
 7 MR JUSTICE NUGEE: But it might be that I came to the view
 8 that she hadn't appreciated the effect of the bonus
 9 scheme.
 10 MR STUART: Yes.
 11 MR JUSTICE NUGEE: And was genuinely trying to put in place
 12 what she thought was a good bonus scheme, a sensible
 13 bonus scheme. The latter wouldn't be something which
 14 would go anywhere near the relief you seek.
 15 MR STUART: That's right.
 16 MR JUSTICE NUGEE: It's irrelevant.
 17 MR STUART: I accept that merely discovering --
 18 MR JUSTICE NUGEE: Merely because I think it's a stupid
 19 bonus scheme is neither here nor there.
 20 MR STUART: That's right, it doesn't of itself amount to
 21 anything, but it may be evidence --
 22 MR JUSTICE NUGEE: -- from which one can infer improper
 23 motive.
 24 MR STUART: Exactly. And although Ms Slark's bonus scheme
 25 perhaps focuses one's mind on that point at that end of
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1 the spectrum, if we go to the other end of the spectrum,
 2 some of the other allegations -- so, for example, the
 3 sums paid to Mr Singh. A much larger sum, paying him
 4 from the start a grossly excessive salary, and then the
 5 concept of paying him his bonuses and increasing his
 6 salary, et cetera, et cetera. The uncommerciality of
 7 that is, we say, something which is evidence of the true
 8 motivation for that.
 9 MR JUSTICE NUGEE: What if there is a mixed motive? Suppose
 10 the true analysis is that the directors of SOG thought
 11 that Mr Singh was heroically soldiering on, running the
 12 store on his own, and really it was reasonable and fair
 13 that he should be given bonuses for doing so, which is
 14 the express reason for giving bonuses. But actually
 15 they also had in the back of their minds that they could
 16 just allow him to take profits out of the company but if
 17 they did that, he would have to share them with Ms Birdi
 18 and they didn't really particularly want to give
 19 Ms Birdi any more than they had to.
 20 Does that make it improper?
 21 MR STUART: Yes. Yes, because that element, that element of
 22 motive, which is to prejudice her unfairly --
 23 MR JUSTICE NUGEE: Is it unfair, if it's a perfectly
 24 justifiable decision in the interests of the company,
 25 but they have in mind also that they don't particularly
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1 want to bend over backwards to assist Ms Birdi?
 2 MR STUART: Well, that's a slightly different way to the way
 3 your Lordship put it to start with.
 4 MR JUSTICE NUGEE: Yes.
 5 MR STUART: If they took the decision to channel the profits
 6 of the company to Mr Singh in the way which advanced his
 7 interests the best, which was, as he put it in his
 8 letter -- do you remember? He had been advised that
 9 because Ms Birdi was a shareholder of the company,
 10 et cetera.
 11 So if it was done, even partially with the motive of
 12 preventing Ms Birdi from sharing in her fair share of
 13 the profits, which she is entitled to under the bargain
 14 of the shareholder agreement -- she has lost her salary
 15 by being removed from her employment.
 16 MR JUSTICE NUGEE: Understood, understood.
 17 MR STUART: So the fact that she is not being allowed to add
 18 to the profits of the company by her services is because
 19 they have decided to do that.
 20 MR JUSTICE NUGEE: Yes.
 21 MR STUART: And they have chosen to do that and that's
 22 happened. She is still a shareholder of the company and
 23 as such she is entitled -- she is bound in -- they are
 24 not giving her any money for her shares at that point,
 25 2011, for example; no dividends coming out at all at

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1 that time. No dividends come out until after -- well,
 2 until after the petition has been issued, actually.
 3 MR JUSTICE NUGEE: Yes, yes.
 4 MR STUART: So throughout 2011 at a time when she is being
 5 prevented from earning a living at the store, she is
 6 also not receiving her fair share of the profits in the
 7 store, and the way in which that's done is by doing what
 8 we see in here: paying Mr Singh in other ways, bonuses,
 9 company car, et cetera, which are not to be equalised by
 10 dividends to Ms Birdi. She can't equalise by any
 11 other -- because she is no longer an employee, so she
 12 can't receive a bonus herself or a P11D. She is not an
 13 employee.
 14 So she is getting absolutely nothing. He is getting
 15 everything, the route that they are taking. If that is
 16 even partially the motivation for awarding him these
 17 excessive salaries, excessive bonuses, excessive -- you
 18 know, excessive remuneration under his contract of
 19 employment, we say that is prejudicial conduct. It's
 20 the conduct of the affairs of the company. It's
 21 prejudicial to her interest as a shareholder because
 22 it's effectively bypassing her right to share in the
 23 profits. It's unfair, it's unfair because of what
 24 I have just described to your Lordship.
 25 MR JUSTICE NUGEE: Yes.

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1 MR STUART: And it's plainly something which should result
 2 in an adjustment to the price for her shares when she
 3 eventually gets bought out, we say.
 4 MR JUSTICE NUGEE: Yes.
 5 MR STUART: I think I have probably dealt with that issue.
 6 MR JUSTICE NUGEE: Yes. Is that --
 7 MR STUART: My Lord, I see the time. Yes, it is
 8 a convenient moment. I don't want to be too much longer
 9 because I know we need to try and have equal time.
 10 MR JUSTICE NUGEE: I'm afraid you are not making much
 11 progress because I keep asking you questions, but I did
 12 tell you --
 13 MR STUART: I'm making progress because these are the very
 14 issues that I wanted to actually discuss, rather than
 15 just take you through my skeleton argument, which your
 16 Lordship is quite capable of reading.
 17 MR JUSTICE NUGEE: Yes, and I don't think it's valuable
 18 spending a lot of time going through the minutiae of the
 19 evidence, because I'm going to have to do that anyway.
 20 MR STUART: Exactly. So I would much rather, frankly, deal
 21 with these more global issues and address them in the
 22 way that I have.
 23 MR JUSTICE NUGEE: The big picture points. Yes. Very well.
 24 We will say 2 o'clock.
 25 (1.02 pm)

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1 (The short adjournment)
 2 (2.00 pm)
 3 MR JUSTICE NUGEE: Yes, Mr Stuart.
 4 MR STUART: My Lord, can I just pick up on, before I go on,
 5 two matters that I dealt with this morning.
 6 MR JUSTICE NUGEE: Yes.
 7 MR STUART: I just need to make just two additional points.
 8 First of all, on the suspension issue.
 9 MR JUSTICE NUGEE: Yes.
 10 MR STUART: I think your Lordship has my argument that there
 11 is a difference between duties and powers.
 12 MR JUSTICE NUGEE: Yes.
 13 MR STUART: One point that I should have raised in support
 14 of that and didn't is the wording of the executive
 15 employment agreement. Would your Lordship pick up D1?
 16 MR JUSTICE NUGEE: D1, yes.
 17 MR STUART: Page 16. {D/3/16} Your Lordship will recall
 18 page 18. We had already looked at the power of
 19 suspension; it's under 12.2 at page 18 and it read:
 20 {D/3/18}
 21 "If the Company considers that the Executive may
 22 have been guilty of any misconduct or breach of duty
 23 which if established would justify his dismissal under
 24 the terms of this Agreement ... then the Company shall
 25 be entitled to suspend the director from his duties on

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1 full pay ..."
 2 Et cetera, et cetera.
 3 MR JUSTICE NUGEE: Yes.
 4 MR STUART: No mention there of "and powers of management".
 5 I ask you to contrast clause 2 on page 16 of the
 6 agreement. {D/3/16}
 7 MR JUSTICE NUGEE: Yes.
 8 MR STUART: "The Executive shall perform such duties and
 9 exercise such powers as shall from time to time be
 10 assigned to him by the Company's Board ..."
 11 That's -- Visionplus is "the Company" as a defined
 12 term up in (1) above. So I do say that this contract
 13 does differentiate between the duties that he is to
 14 perform, and his powers, which may have been delegated
 15 either by the board of Dartford Visionplus or in his
 16 capacity as director of Dartford Specsavers Limited,
 17 which -- I think your Lordship already has my
 18 submission -- is a different company, and he was
 19 delegated powers by that different company.
 20 MR JUSTICE NUGEE: Yes.
 21 MR STUART: That's the first point I need to pick up, my
 22 Lord.
 23 The second is the question of unfairness. You asked
 24 me, "What does unfairness mean", and I gave you
 25 a not very comprehensive answer.

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1 Could I ask you to go to the supplemental bundle of
 2 authorities -- O'Neill v Phillips. It's tab 6. I think
 3 you would have received, possibly last night/yesterday
 4 afternoon-ish, a supplemental bundle of authorities,
 5 probably from Erskine Chambers. Does your Lordship have
 6 it?
 7 MR JUSTICE NUGEE: Yes.
 8 MR STUART: Tab 6 is O'Neill v Phillips.
 9 MR JUSTICE NUGEE: Yes, Lord Hoffmann?
 10 MR STUART: Yes, that's right, Lord Hoffmann. If you go to
 11 page 1098.
 12 MR JUSTICE NUGEE: Yes.
 13 MR STUART: Halfway down under the heading, "Unfairly
 14 Prejudicial", if you then skip down to just above F --
 15 does your Lordship have F?
 16 MR JUSTICE NUGEE: Yes.
 17 MR STUART: Could I ask your Lordship to read from just
 18 above F on that page to just above F on the next page --
 19 not necessarily now but if you would like to do it now,
 20 of course, do it now. But that, I would submit, is
 21 a fair summary of what "unfairness" means in terms of
 22 a section 994 petition. (Pause)
 23 MR JUSTICE NUGEE: Yes, okay, I will have a look at that,
 24 thank you. Yes.
 25 MR STUART: In summary, I think it does more or less say

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1 what I did say off-the-cuff this morning, which is that
 2 one has to look at the context that we are dealing with.
 3 What is fairness. It's fairness in the context of
 4 a company, shareholders in a company, and then the terms
 5 of that agreement and understanding between those
 6 shareholders and what might seem fair as between -- for
 7 example, competitors in a game or in a business is not
 8 necessarily the same as what the court might consider
 9 unfair as between shareholders or partners, joint
 10 venture partners.
 11 MR JUSTICE NUGEE: Yes.
 12 MR STUART: Et cetera.
 13 MR JUSTICE NUGEE: Thank you.
 14 MR STUART: So, my Lord, can I return then to answering the
 15 sort of main points of principle.
 16 At paragraph 10 of the executive summary of my
 17 learned friend's submissions, he raises, fair and
 18 square, the issue of what is being alleged here: fraud,
 19 bribery, theft, et cetera.
 20 MR JUSTICE NUGEE: Yes.
 21 MR STUART: And at (i) he says that -- this is under the
 22 heading of what is my case; what is Ms Birdi's case.
 23 My Lord, my submission is that it's not a legitimate
 24 argument to take words used by Ms Birdi, either in her
 25 witness statement, which is drafted in her own language

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1 because it's what she believed she wants to say, or
 2 certainly in cross-examination, where it was put to
 3 Ms Birdi on many occasions that she was alleging fraud,
 4 bribery, theft, conspiracy and then --
 5 MR JUSTICE NUGEE: Yes.
 6 MR STUART: -- matters were put to her and she either did
 7 agree or, on occasion, she didn't agree and/or she
 8 withdrew the allegations. But the way in which it's put
 9 in this closing submission and throughout the
 10 submissions later on is that this is my case. And, my
 11 Lord, I say this is not my case. I don't have to
 12 prove -- and I don't seek to prove -- the concepts of
 13 bribery, theft. Theft is a crime, bribery is a crime.
 14 Fraud. What is fraud? Either the criminal or civil
 15 standard of fraud. Conspiracy. We are not talking here
 16 about a criminal level of conspiracy.
 17 The fact that these words were used at various
 18 stages by Ms Birdi, I submit, is not the test that your
 19 Lordship needs to be dealing with. You should revert to
 20 the pleadings, the amended points of claim, and you
 21 should see how it's put there.
 22 MR JUSTICE NUGEE: Yes.
 23 MR STUART: Indeed, we had a hearing earlier this year,
 24 where the fact that certain allegations are not put in
 25 these pleadings meant that it was not right for

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1 allegations to be pursued in witness statements of this
2 sort, and that is what happened.
3 So what we allege in this pleading is not criminal
4 fraud, criminal bribery, criminal theft; what we
5 actually complain of, as you will see, is that the
6 respondents have abused their powers as directors or as
7 majority shareholders, effectively controlling the
8 actions of the companies, Dartford and Dartford
9 Visionplus, and they have abused those powers in order
10 to further their own personal interests and agendas,
11 which are to make money from Dartford, in the case of
12 SOG; Mr McAlindon and his agenda, to provide for his
13 department an income stream, and we put forward the
14 evidence of that. Whether your Lordship accepts it or
15 not is another matter, but that's the allegation. It's
16 an abuse of power, using that power, the power of
17 control over the company, to divert the funds of those
18 companies to themselves or for their own purposes.
19 In her own language, Ms Birdi may say that's theft
20 or that's fraud. My submission is that one does not
21 need to prove theft or fraud in that sense and therefore
22 all the case law about what is theft, what is fraud,
23 what is conspiracy, what is bribery -- it does not come
24 into it.
25 I don't think it's fair to characterise my case,

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1 either as pleaded or as I have pursued it -- when I say
2 "I", I mean I have pursued it. What my client may have
3 said in the witness box is what she feels or thinks, but
4 I'm conducting this case and I'm pursuing it on the
5 basis of what I consider to be justifiable arguments
6 based on the evidence. That evidence, for example in
7 the case of Mr McAlindon, being the evidence of his own
8 emails, where he said what he was doing and why he was
9 doing it. And I put it to him squarely what he was
10 doing and why he was doing it, and I say that is the
11 basis of our case.
12 My Lord, the issue of malice. I think from
13 a comment your Lordship made earlier, perhaps we are at
14 cross purposes here. Malice in the sense of, if SOG or
15 the controlling minds at SOG -- let's take Mr Dyson, who
16 was plainly, probably, at the top of the tree. If he
17 and Mr McAlindon, let's say, because he is reporting in
18 to Mr Dyson -- if the two of them reach a point, perhaps
19 shortly after the Patel incident, when Ms Birdi is
20 raising all her issues -- and your Lordship will recall
21 the emails between Mr McAlindon and Mr Dyson, where
22 Mr McAlindon is talking about, "Perhaps this will
23 quieten her down", and those sorts of things. If there
24 came a point at around that stage where Mr Dyson and
25 Mr McAlindon felt that Ms Birdi was more trouble than

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1 she's worth, if they felt she was difficult, they felt
2 that she was somebody who was going to cause
3 difficulties for SOG -- for SOG; not for the store
4 company, for SOG -- and at that stage reached the view
5 that, "We should be pursuing a course aimed at exiting
6 her" -- and that phrase "exiting" is a phrase that they
7 themselves use, not that I use. I use it because I take
8 it from the way that they talk.
9 Exiting her from the business. That is the
10 malicious purpose that Ms Birdi in this claim is putting
11 forward. It's to have a motive of getting rid of
12 somebody because you don't want them, for whatever
13 reason, as long as the reason is not a justifiable one
14 or not one which is proper to take into account when
15 looking at the interests of the store companies.
16 So I do say, my Lord, that you can find on the basis
17 of all of the evidence that certainly by around that
18 time, March 2007, when they start this disciplinary
19 process -- and it is telling that they did not start the
20 process on 20 February.
21 So Mr Patel makes these allegations in a sworn
22 statement, which he signs on 20 February. Mr McAlindon
23 and Mr Dyson don't immediately go off and say, "This is
24 so important we have got to suspend this woman". What
25 happens is, in the days thereafter, Ms Birdi starts

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1 causing trouble. Your Lordship has seen Mr McAlindon's
2 log and the question of her raising the issue of, "Why
3 have you let Mr Patel off? What about the police?" and
4 all that sort of stuff. That happens in the days that
5 follow. And then there came a point where she was
6 becoming so difficult and raising so many queries that
7 they reached the conclusion that they wanted to get rid
8 of her.
9 That is my case on motive. That's where it starts
10 from, realistically, on the evidence that you have
11 heard.
12 I know that to an extent Ms Birdi gives some
13 evidence -- or maybe it was even before that. Maybe it
14 was back in 2006 that they thought they might want to
15 get rid of her, but there isn't a lot of evidence about
16 2006. There is a lot of evidence about 2007. That's my
17 submission.
18 So, my Lord, I think that probably deals with, I'll
19 say, the general issues that are raised and that need to
20 be covered. I think probably the best thing is if I can
21 just deal briefly with each of the issues.
22 MR JUSTICE NUGEE: Yes.
23 MR STUART: I will do it a little by reference to my learned
24 friend's summary -- the brief overview of the six
25 issues, which starts on his paragraph 22, but I'll also

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1 do it by reference just to the issues themselves.
 2 MR JUSTICE NUGEE: Yes.
 3 MR STUART: If we start with the first issue:
 4 "Monies paid to Mr Patel and monies not recouped."
 5 Let me just, first of all, deal with a few of the
 6 points raised in paragraphs 22 to 27. This is the
 7 overview, the way the respondent seeks to put it.
 8 He says that the evidence regarding the scope of the
 9 investigation showed that they, SOG, genuinely believed
 10 Mr Patel's thefts were only £4,000. My Lord, I don't
 11 accept that. I don't accept that's right or that there
 12 is any evidence of that.
 13 It is suggested that Ms Birdi had no evidence that
 14 the thefts were greater. In fact, I suggest that what
 15 she said was: look at the accounts for the period. You
 16 can see that the accounting position improved
 17 dramatically when Mr Patel is not in the business, the
 18 profits position, and that the accounts for the few
 19 years, which would be the years when he was carrying out
 20 his thefts, unbeknown to her, are getting poorer and
 21 poorer. So she does say there is some evidence to
 22 support the suggestion that his thefts were more than
 23 £4,000.
 24 My Lord, the point I would make is that Mr McAlindon
 25 and his team did not investigate the other potential

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1 thefts by Mr Patel. As soon as they put the one to him
 2 that they had evidence of, the camera work and their
 3 analysis, he admitted that and then they said, "Right,
 4 we are going to stop the investigation at that point".
 5 There is no evidence before you that they had done any
 6 other investigation of other potential thefts that he
 7 might have run. So the £4,000 is not --
 8 MR JUSTICE NUGEE: I thought Mr McAlindon did say that they
 9 had looked at all sorts of things and they had come to
 10 the conclusion that it was only the till refunds that
 11 was a problem?
 12 MR STUART: He was unable to show us any documentary
 13 evidence of them looking at anything else whatsoever, in
 14 my submission. Where are all these other things they
 15 have looked at? He said that eventually, but there is
 16 no evidence of it, and what you do have evidence of is
 17 the fact that Mr Patel is prepared to sell his £170,000
 18 worth of shares for £55,000. That is some evidence that
 19 this wasn't a matter of £4,000. It's some evidence.
 20 MR JUSTICE NUGEE: You say that, but Mr Patel is in a very
 21 unattractive position.
 22 MR STUART: He is.
 23 MR JUSTICE NUGEE: He has been caught completely red-handed.
 24 He is a professional person. He is looking at a jail
 25 sentence and the ruin of his career. He is offered

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1 a way out which allows him, as far as I can see, not to
 2 be reported either to the police or to the General
 3 Optical Council. I'm not surprised that he takes it,
 4 even if he is only taken £4,000 -- I say "only". Taking
 5 £20 is not the sort of thing one expects a professional
 6 director of a company to do. Taking £4,000 over
 7 a period of at least months, if not years, when you have
 8 completely caught -- I don't find it an obvious
 9 inference that the reason he sold his shares for £55,000
 10 was because he had actually taken more than £4,000.
 11 MR STUART: Right, my Lord. That was the argument. It's
 12 not one that finds favour with your Lordship. That's
 13 fine. But that's --
 14 MR JUSTICE NUGEE: You can seek to persuade me of things but
 15 it is only fair to tell you --
 16 MR STUART: No, no. I could repeat it over and over again,
 17 but that's all it amounts to and that's all Ms Birdi
 18 said it amounted to when she was cross-examined about
 19 this in evidence. I have looked at it carefully in the
 20 transcript and all she can say is -- she fairly admitted
 21 she doesn't know how much he stole.
 22 MR JUSTICE NUGEE: No.
 23 MR STUART: And she fairly admitted she can't prove figures
 24 beyond those he has admitted, because the only evidence
 25 that is available to her is that he has admitted £4,000.

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1 She can point to the fact that the accounts appear to
 2 show a steadily worsening position for no obvious
 3 reason, which might indicate some directorial pilfering
 4 by her joint venture partner, and she can point to the
 5 fact that in the period after he has gone, certainly
 6 when one strips out the illegitimate management charges
 7 of £70,000, which, of course, caused the profits to go
 8 under -- but from the period January 2008 onwards, your
 9 Lordship knows that it is everybody's case that the
 10 store's financial position improved dramatically, so
 11 that even by October 2008, it was out of TAPS serious
 12 watch and by January 2009, it was out of TAPS.
 13 So she points to those two things as indicative of,
 14 probably, Mr Patel was stealing money.
 15 MR JUSTICE NUGEE: But I'm not resolving a dispute between
 16 the company and Mr Patel as to how much he stole.
 17 MR STUART: No, you are not.
 18 MR JUSTICE NUGEE: What I'm resolving is whether there is
 19 evidence that the respondents mismanaged the powers they
 20 had over the company unfairly, so as to prejudice the
 21 members.
 22 MR STUART: Yes.
 23 MR JUSTICE NUGEE: And how does a suspicion that he might
 24 have stolen more feed into that?
 25 MR STUART: It feeds into it on the (inaudible) basis. If

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1 Mr Dyson and Mr McAlindon had not done that which they
 2 did, which was to offer Mr Patel the way out
 3 immediately, sign him up to that way out and basically
 4 do the deal, all before Ms Birdi knew anything about
 5 it -- that's what's complained of -- and excluded her in
 6 any way, shape or form from agreeing to these things on
 7 behalf of Dartford Visionplus Limited -- so Dartford
 8 Visionplus Limited gives up its rights to claim matters
 9 against Mr Patel and gives up any further recourse
 10 against him, so whatever he has stolen, that's it: he is
 11 going to give £4,000.

12 By doing that, without reference to the
 13 A shareholder -- this is not a matter of day-to-day
 14 management -- but without reference to the other
 15 shareholder, so part of the general rights of the
 16 shareholder, and without doing it at a board meeting or
 17 getting the directors of the company involved and
 18 without giving her the right to say anything about that,
 19 that has given up whatever claims the company has.

20 The value of those claims we shall never know
 21 because of what Mr McAlindon and Mr Dyson did. They
 22 stopped the investigation and agreed to stop it. They
 23 agreed not to pursue Mr Patel any further and they fixed
 24 his liability at £4,100.

25 By doing that, they have prejudiced the financial
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1 interests of the company, and thus Ms Birdi's
 2 50 per cent shareholding, in the potential claims to be
 3 made against Mr Patel.

4 Obviously, there was also the issue of the costs.
 5 Although they intended to charge the costs -- the SOS
 6 investigation costs into Patel -- they intended to
 7 charge those to the company, they say, when they
 8 initially were considering the deal, they didn't
 9 subsequently charge those costs for whatever reason.

10 MR JUSTICE NUGEE: So that doesn't go anywhere, does it, the
 11 £15,000?

12 MR STUART: It's not a financial loss that the company has
 13 actually suffered in the event. As to whether they were
 14 intending for it to suffer was another matter, because
 15 it may be that they thought they were going to charge
 16 the company, and then on the other hand, they were going
 17 to buy the shares for just £55,000 by giving full credit
 18 for the value of the costs.

19 My Lord, there is an issue here, which is that the
 20 figures don't work on their case. £70,000 minus the
 21 costs of the £15,000 --

22 MR JUSTICE NUGEE: And the £4,000.

23 MR STUART: -- which would be £20,000, would be only
 24 £50,000. The documents don't work either. That £15,000
 25 figure, that precise figure that Mr McAlindon says he

1 arrived at, it's not mentioned anywhere in the
 2 contemporaneous documents of the day: no emails, no
 3 little summary, no analysis by him as to how he has got
 4 to that figure. Nothing. It only comes in later as
 5 a justification for why they have only charged £55,000.
 6 "Oh, well, we have set off the costs of the matter".

7 MR JUSTICE NUGEE: Well --

8 MR STUART: And in the manuscript letter; we don't know the
 9 date of that manuscript letter.

10 MR JUSTICE NUGEE: Well, I have evidence that Mr Patel
 11 signed it on that day, don't I? I mean, I might not
 12 accept the evidence, but --

13 MR STUART: I'm not sure what evidence we have as to the
 14 date of that. Mr McAlindon seemed unsure as to quite
 15 what happened on that date when I started asking him
 16 about it. Certainly all of the typed-up documents -- so
 17 we are in E2 at page 289 {E/43.1/289} -- all of the
 18 typed-up documents are simply the sale of the shares for
 19 £55,000. No "£70,000 is set off" or anything like that.
 20 It's just a straightforward purchase of the shares for
 21 £55,000. There is no email and so all there is -- 287
 22 is his letter: {E/42/287}

23 "SOG board. I wish to resign with immediate effect
 24 as employee and director of Dartford Visionplus Limited
 25 and Dartford Specsavers Limited. I would also like to
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1 pay for investigation costs of ..."

2 And then a figure has been inserted:
 3 "... and stolen monies of ..."
 4 "£4,180", we have in there:

5 "I would also like to transfer my shares to SOG and
 6 would ask that the above funds be deducted from the
 7 share value. I would like to sell my shares to SOG at
 8 a reasonable value."

9 But there was no evidence there -- and I did ask the
 10 witnesses about this. There is no evidence there that
 11 the £70,000 figure had been arrived at, at this point.

12 MR JUSTICE NUGEE: No, but it is dated at the top right,
 13 Mr Stuart.

14 MR STUART: It is. It is dated --

15 MR JUSTICE NUGEE: Why should I assume that it's written on
 16 any other date than the date it bears?

17 MR STUART: I'm not saying it's not written on that date.
 18 I don't know what date it was written on. It may well
 19 have been written on 20 February.

20 MR JUSTICE NUGEE: Right.

21 MR STUART: It may have been. It may have been but those
 22 two figures don't tie in with the £55,000 document,
 23 which is dated 20 February and which we can see passing
 24 on that date, which is page 288, the email. {E/43/288}

25 MR JUSTICE NUGEE: Yes.

1 MR STUART: So we know those were in existence at that time
 2 and the £55,000 has already been put in.
 3 Mr McAlindon is unable to show us how the £15,610
 4 figure is arrived at. It's not a precise figure that he
 5 can -- it is a precise figure, but it is not one for
 6 which he can show the precise calculation. It's
 7 a figure that is in there, but it's not a figure which
 8 matches his version of events as to the £55,000 and
 9 £70,000.

10 MR JUSTICE NUGEE: Right, yes.

11 MR STUART: We started all of that little topic on the basis
 12 that I acknowledged that since those investigation costs
 13 weren't actually charged to the Dartford store company
 14 anyway, I can't say that that's an actual loss of
 15 £15,000, because it's not an actual loss of £15,000.

16 MR JUSTICE NUGEE: Yes.

17 MR STUART: What I'm saying is that the whole concept of an
 18 agreement which fixes the investigation costs at that
 19 sum and fixes the stolen monies at that sum and lets
 20 Mr Patel off without the store company having
 21 necessarily recovered all its losses from a man, who, as
 22 your Lordship has put it, is in very tight place and
 23 would not be able to challenge them -- so long as they
 24 could show the figures he wouldn't be able to challenge
 25 them as to his liability to pay any such sums. When one

1 21

1 then fits that in with the valuation of the shares,
 2 which we know took place on the 17th -- your Lordship
 3 will recall it, page 275.1. {E/34.1/275.1}

4 MR JUSTICE NUGEE: Mr Glass?

5 MR STUART: Mr Glass. £82,000 to £123,000 for those shares.
 6 We know that Mr Patel bought the shares for £125,000
 7 some seven years earlier. So selling them for
 8 £55,000 -- I accept he was in a tight place but we say
 9 it's indicative of the fact that more than £4,000 and
 10 investigation costs is the right level of loss for the
 11 company, and the Specsavers Dartford company has been
 12 prevented from investigating and pursuing that, and
 13 Ms Birdi herself was prevented from investigating and
 14 pursuing it, because she was told by Mr McAlindon as
 15 soon as she started raising these matters -- this is not
 16 a hypothetical. She raised these very issues with
 17 Mr McAlindon on the day and in the days thereafter and
 18 was challenging the concept of, "What, we are letting
 19 him off? What are we letting him off for?"

20 Mr McAlindon's response, according to her, was, "He
 21 will be paying for it, he has suffered a great financial
 22 loss".

23 "Yes, but how much are we, the company, Dartford
 24 Specsavers Limited, going to recoup from this man who
 25 has stolen from us?"

1 22

1 Answer: "You are not going to know. We have already
 2 done the deal. It's too late."

3 That's the loss.

4 If I can just look at that issue by reference to the
 5 steps: was the matter complained of conduct of the
 6 affairs of the company? Plainly it was. They, Mr Dyson
 7 and Mr McAlindon, are effectively settling the company's
 8 claims against the director who has stolen money from
 9 the company and any claims that it may have against
 10 them -- they are dealing with those matters alone.

11 And they are purporting to do so, it appears from
 12 Mr Dyson, at least, on the basis of, "Well, we are the
 13 B shareholder, we can do what we like".

14 Answer: "No, no, this is not a matter of day-to-day
 15 management and it's certainly not a matter that falls
 16 within 3.1.2." {D/15/180}

17 In other words, it's not merely paying out cheques
 18 and those sorts of things, so it must be a matter which
 19 should have formed a joint decision between the
 20 shareholders, the directors, the company. That would be
 21 Ms Birdi and SOG should have considered this.

22 So it's conduct of the company. Was it prejudicial
 23 to the interests of Ms Birdi as a shareholder of
 24 Dartford? Yes, it was. Because those thefts are sums
 25 which would go back into the company, Dartford

1 23

1 Specsavers, they would then be available to go towards
 2 her profits and it doesn't matter that those profits
 3 weren't immediately available in 2007. You know, it's
 4 said, well, they were making a loss that year. Well,
 5 yes, they made a loss that year because they were loaded
 6 with £80,000 worth...

7 Was the conduct or act unfair? Yes, it was unfair.
 8 This is her company. They are precluding her from
 9 involvement in the decision. They have actually told
 10 her in advance, "Don't worry, before we do any deal, we
 11 will call you back in and we'll discuss matters". And
 12 then they just do the deal, for obvious reasons; they
 13 are buying some shares worth £170,000 for £55,000.

14 What they then do with those shares in due course is
 15 later, isn't it? What was their plan when they bought
 16 the shares for £55,000? Their plan was to get those
 17 shares at a huge discount. They got them at a discount.
 18 Whose benefit was that? Who benefited from that
 19 discount? SOG. Did the company, Dartford Specsavers,
 20 benefit from that discount? No. Not one jot. Not one
 21 penny piece of the discount went to the company.

22 So was it unfair? Yes, it was unfair.

23 In the circumstances, should you exercise your
 24 discretion to order an adjustment of the price? Yes,
 25 you should, because of the fact that the loss --

1 24

1 potential loss, unquantifiable in precise terms but the
 2 potential loss -- is all one way; it's all to Ms Birdi.
 3 Nothing to SOG. And she has been precluded from the
 4 opportunity of recovering more than £4,000. Not that
 5 she has recovered the £4,000 anyway, actually, because
 6 what they then did was they then much later purport that
 7 the payment for the £4,000 is going to be by
 8 cancellation of his --
 9 MR JUSTICE NUGEE: -- loan account.
 10 MR STUART: His loan account. Hold on a minute. Do the
 11 store companies necessarily have to pay Mr Patel his
 12 loan account, in circumstances where he has admitted
 13 thieving from them and is in breach of all sorts of
 14 other duties and has caused them loss and damage? Not
 15 necessarily. There may be all sorts of other reasons
 16 why not.
 17 So that, in a nutshell, is where we are on that
 18 issue.
 19 MR JUSTICE NUGEE: Suppose I'm with you so far. How do
 20 I quantify it? What are you asking me to do? I can't
 21 just say that there should be an unquantified adjustment
 22 to the price.
 23 MR STUART: Not an unquantified adjustment. In essence, the
 24 way this is pleaded and the way this arose in the first
 25 place is because it feeds into what initially was the

1 25

1 explanation given for the £86,000 in total of sums that
 2 were --
 3 MR JUSTICE NUGEE: The explanation we now have for the
 4 £86,000 is it's not related at all to Mr Patel's theft;
 5 it's to do with the investigation of and management
 6 charges during Ms Birdi's investigation.
 7 MR STUART: That appears to be the --
 8 MR JUSTICE NUGEE: That is the explanation.
 9 MR STUART: That's what they are saying; yes.
 10 MR JUSTICE NUGEE: Yes.
 11 MR STUART: I accept, my Lord, that all you can really do
 12 is -- the unfair prejudice remedy is one which is
 13 infinitely flexible and it is open to you to seek to
 14 assign an amount by way of an adjustment to the price,
 15 to reflect the loss or potential loss that Ms Birdi has
 16 suffered.
 17 MR JUSTICE NUGEE: Without any evidence at all? Do I have
 18 literally no evidence of what, if anything, Mr Patel may
 19 have stolen over and above the admitted £4,100? You say
 20 that's because Mr McAlindon didn't investigate.
 21 MR STUART: That's what he says.
 22 MR JUSTICE NUGEE: Yes. That may be so.
 23 MR POTTS: My Lord, no, that's not what he said.
 24 MR JUSTICE NUGEE: Don't worry, I'm on a different point.
 25 That may or may not be so. I will look at the evidence,

1 26

1 of course.
 2 MR STUART: Yes.
 3 MR JUSTICE NUGEE: But suppose I accept that you are right
 4 that that was unfair and prejudicial. It still doesn't
 5 give me any assistance at all as to what I can do about
 6 it and in the end I have to act on something. I can't
 7 just pluck a figure out of the air.
 8 MR STUART: You could start with the £4,000 that he has
 9 admitted to and ignore the setting off of some loan
 10 account.
 11 MR JUSTICE NUGEE: How can I ignore that? If the truth is
 12 that the only evidence I have is that he stole £4,100
 13 and he was owed £3,700 -- or whatever it is, £3,400,
 14 I can't remember the exact figure -- then how can I say
 15 I can somehow ignore the fact that the company owed him
 16 £3,400?
 17 MR STUART: Because he owed the company -- certainly by the
 18 time that that set-off was made, which was much later,
 19 he actually owed the company more than the £3,000-odd on
 20 his loan account by way of a separate liability arising
 21 with the Revenue. So the £3,000 doesn't have --
 22 MR JUSTICE NUGEE: Why is that his liability? I haven't
 23 understood this. I saw it in your submissions.
 24 I haven't understood why that's his liability to the
 25 company. It's the company's VAT liability. There may,

1 27

1 as between successive partners, be an adjustment to the
 2 distributions as to who should bear that in their
 3 distributions, but it's not money owed by him to the
 4 company in any sense.
 5 MR STUART: No, my Lord, I think we are at cross purposes.
 6 I'm talking about the HMRC liability.
 7 MR JUSTICE NUGEE: The HMRC liability, which is all dealt
 8 with in Mr Dyson's third statement.
 9 MR STUART: For which Mr Patel had given a warranty to the
 10 company. Mr Patel is liable to indemnify the company --
 11 to an indemnity --
 12 MR JUSTICE NUGEE: Which company?
 13 MR STUART: Dartford Specsavers Limited.
 14 MR JUSTICE NUGEE: When did he give that warranty?
 15 MR STUART: In the share sale agreement.
 16 MR JUSTICE NUGEE: You must show me that because I haven't
 17 picked that up.
 18 MR STUART: We were in E2. So I think it's 5.1 -- we have
 19 got 4.2 and 5.1. So 4.2: {E/43.3/299}
 20 "Without restricting the rights of the buyer ..."
 21 The buyer is obviously SOG and the seller here is
 22 Mr Patel:
 23 "... or their ability to claim damages on any basis
 24 in the event of any breach of any of the Warranties the
 25 Seller covenants with the Buyer that they will pay to

1 28

1 the Buyer ..."
 2 So that's Mr Patel will pay to SOG:
 3 "... an amount equal to the aggregate of:
 4 "4.2.1 the amount by which the value of an asset ...
 5 or contract of any Group Company is or becomes less than
 6 its value would have been of there had been no breach of
 7 the warranties; and
 8 "4.2.2 the amount of any liability or increase in
 9 any liability which any Group Company has incurred or is
 10 or becomes subject to which it would not have incurred
 11 or which would not have increased if there had been no
 12 breach of the Warranties."
 13 But it's 5.1: {E/43.3/300}
 14 "The Seller covenants with the Buyer and (as
 15 a separate covenant) with each Group Company to
 16 indemnify and to pay to the Company on demand an amount
 17 or amounts equal to any liability loss or payment which
 18 already has or may hereafter at any time be brought or
 19 established against or suffered or incurred by the Buyer
 20 and/or any Group Company to the extent in each case that
 21 the they result from or are attributable directly or
 22 indirectly in whole or part to any act, omission,
 23 transaction or arrangement referred to in Schedule 5."
 24 Just so I can make good my suggestion that this is
 25 an obligation owed, a sum owed, it's in E10, page 2651.

1 29

1 {E/816/2651} Your Lordship will see the letter to
 2 Mr Patel in January 2010, so this is some three years
 3 later that this liability arose in relation to
 4 HM Revenue and Customs. And what's happened is your
 5 Lordship will see from that letter that the company --
 6 and the company is defined as "Dartford Specsavers
 7 Limited" -- does your Lordship see that at the headnote
 8 of the letter?
 9 MR JUSTICE NUGEE: Yes.
 10 MR STUART: "The company has now being required to pay out a
 11 sum to HM Revenue & Customs which partly relates to the
 12 period when you were a shareholder in the Company. The
 13 consequence of this is that the net assets of the
 14 Company would not have been £40,000 at the time you sold
 15 your shares had this liability for taxation been
 16 crystallised before you sold your shares in the Company.
 17 "Pursuant to clause 5.1 of the Share Sale Agreement
 18 you are obliged to indemnify the Company in respect of
 19 any claim or breach of any of the warranties given by
 20 you ...
 21 "It has been calculated that you are therefore
 22 required to pay the company ..."
 23 So that's Dartford Specsavers Limited:
 24 "... the sum of £9,469 at your earliest
 25 opportunity."

1 30

1 MR JUSTICE NUGEE: It says:
 2 "Please find enclosed the relevant calculation."
 3 But we don't seem to have it?
 4 MR STUART: No, we don't, no. So if the company owed
 5 Mr Patel £3,000-and-something by way of his director's
 6 loan account, that could have been set off against the
 7 £9,469 liability. That could not then be set off twice
 8 over against the £4,160 that he has admitted stealing.
 9 So your Lordship could, in order to fashion a fair and
 10 appropriate remedy in this particular example, reach the
 11 conclusion that at least £4,000 should have been put
 12 back in.
 13 Your Lordship asked me, you know, what is the
 14 figure, and I have already acknowledged on the basis of
 15 the evidence that I can't tell you how much --
 16 MR JUSTICE NUGEE: You can't say, no.
 17 MR STUART: -- Mr Patel stole and therefore I can't tell you
 18 what Dartford Specsavers Limited lost by reason of what
 19 Mr McAlindon and Mr Dyson unilaterally decided to do for
 20 their own benefit.
 21 MR JUSTICE NUGEE: Yes.
 22 MR STUART: For SOG's benefit. My Lord, I think I'm
 23 probably --
 24 MR JUSTICE NUGEE: Thank you.
 25 MR STUART: I'm certainly potentially going to be repeating

1 31

1 myself too much.
 2 So the second issue is the 2007 security expenses,
 3 which, of course, is what is now said is the £86,000.
 4 MR POTTS: My Lord, I'm sorry, before my friend moves on,
 5 I'm just not sure which of the small figures he is still
 6 pursuing, because --
 7 MR JUSTICE NUGEE: Well, I'm not expecting him to address
 8 every single item orally and I have got his written
 9 submissions.
 10 MR POTTS: Fine. It was just really in terms of what I need
 11 to address, really. That was all --
 12 MR JUSTICE NUGEE: I have got your written submissions as
 13 well, which I think address pretty well everything that
 14 might be in issue.
 15 MR POTTS: To put it neutrally. My Lord, the only point is
 16 that his written closing, which obviously I did not
 17 have -- things seem to have moved back again in the
 18 matters which I had addressed, things that I thought
 19 were accepted were proper and not pursued, such as the
 20 damage to --
 21 MR JUSTICE NUGEE: Mr Potts, we are not going to finish
 22 today. You can have an opportunity after court today if
 23 there are matters which you wish to clarify; what is and
 24 isn't an issue.
 25 MR POTTS: Yes.

1 32

1 MR STUART: If I can just turn then to the second issue, the
 2 2007 security expenses.
 3 MR JUSTICE NUGEE: Yes.
 4 MR STUART: Let me answer just a couple of points that I do
 5 need to mention in response to some of Mr Potts' points
 6 here:
 7 "29. Mr Dyson's decision to suspend Ms Birdi was
 8 a genuine one taken in what he considered to be the
 9 interests of the Dartford business in order to
 10 investigate allegations he considered serious."
 11 I have already made this point slightly in relation
 12 to the last point. It wasn't considered so serious on
 13 20 February, when the allegations were made. It wasn't
 14 considered so serious when Mr McAlindon phoned him up
 15 and notified him that he had made these allegations. No
 16 steps were taken along these lines, that is, "Let's
 17 start a detailed investigation. Let's put the McAlindon
 18 team in. Let's suspend her and keep her out of this
 19 business for whatever period it is."
 20 None of that was done in reaction to the allegation
 21 that was made.
 22 MR JUSTICE NUGEE: My memory of the evidence is that the
 23 reaction to the allegations made by Mr Patel was that
 24 Mr McAlindon then asked Ms Birdi for some -- well, for
 25 the A4 book.

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1 MR STUART: Yes.
 2 MR JUSTICE NUGEE: So you can't say that it wasn't being
 3 pursued.
 4 MR STUART: I'm not saying it wasn't being pursued. It
 5 wasn't taken so seriously as to require suspension and
 6 the full investigation process.
 7 What we see, in my submission, is that there came
 8 a point when Ms Birdi was raising her issues and
 9 Mr McAlindon and Mr Dyson, I say, became uncomfortable
 10 with the fact that she was raising her issues and she
 11 wasn't agreeing to what they had done, basically; you
 12 have that email from Mr McAlindon to Mr Dyson, which
 13 evidences the nature -- it's page 317 for your
 14 Lordship's reference, E2. {E/49/317} This is
 15 27 February, so this is a week later. A week later.
 16 MR JUSTICE NUGEE: Yes.
 17 MR STUART: "I have also spoken to Swarandeep. She has told
 18 the employees that Nimesh was forced to resign. I have
 19 told her that her actions are a breach of
 20 confidentiality and a breach of a legitimate management
 21 instruction from myself, as I had explained to her not
 22 only what she could say, but also what she could not...
 23 She is very apologetic. I have told her to back off,
 24 and if she has any other questions regarding operation
 25 issues, she should come to me and not go off around the

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1 business. I also spoke to her about her partner. She
 2 realises he will not be given shares, but wants an input
 3 into who the new partner is. I explained that this
 4 issue was linked to a raft of legal and investigative
 5 processes that are ongoing and that she is to drop the
 6 issue, someone will contact her in due course as this
 7 after is progressed.
 8 "Hopefully she will quieten down for a while at
 9 least, but I suspect we need to go back for a second
 10 stage investigation into the remaining payroll
 11 concerns."
 12 My point, my Lord, is simply that the decision to
 13 suspend Ms Birdi, allegedly on the basis of, "Oh, well,
 14 these were so serious", is not consistent with the
 15 evidence and that in reality, what has happened here is
 16 that these administrative issues about satisfactory
 17 documentation, which in the end were only pursued on
 18 26 March, over a month later, those were not so serious
 19 as to justify the immediate suspension and throwing the
 20 full McAlindon investigative and management charges at
 21 this small company.
 22 The second point, just in relation to this, is that
 23 it's suggested at paragraph 38 -- this is in my learned
 24 friend's skeleton:
 25 "There is no evidential basis to conclude that had

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1 the decision to make such charges been taken at a board
 2 meeting the outcome would have been any different."
 3 My Lord, I suggest quite the opposite: this company,
 4 this small company, Dartford Specsavers Limited, could
 5 not afford to pay SOG £86,000 during this period. We
 6 know that from the fact that that £86,000 caused
 7 Dartford to go into negative profit and loss.
 8 So, would the board members of Dartford Specsavers
 9 Limited, if they had properly been given the opportunity
 10 to consider matters and to understand what was being
 11 suggested -- ie we are going to charge your store £440
 12 a day, every day, every working day -- would that have
 13 been agreed? No. The directors would have said, "Hold
 14 on a minute, we can't afford that. £440 a day? What's
 15 that for?"
 16 "Oh, well, we are going to put in a person to act as
 17 a manager."
 18 "£440 a day for a manager of a Specsavers? That's
 19 an incredible amount of money. That's over £150,000
 20 a year. For a manager at a Specsavers? No, we won't
 21 agree to £440 a day. If we need to hire a manager for
 22 our store, if we do need to do that, then we will pay
 23 a proper rate for that, for a manager of a store. We
 24 are not going to pay £440 just because Mr McAlindon says
 25 he would like £440 a day."

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1 So I submit that if you look at the issues: was the
 2 matter complained of conduct of the affairs of the
 3 company? Plainly it was. Incurring these grossly
 4 extortionate amounts was the conduct of the affairs of
 5 the company.
 6 Was it prejudicial to Ms Birdi's interests? Plainly
 7 it was. The whole way in which this was done -- it
 8 should have been done a different way. The genuine
 9 grounds, if there were any, for disciplinary action,
 10 related to the administrative failings of Ms Birdi: the
 11 contracts of the employment didn't exist; the records
 12 regarding salary weren't there --
 13 MR JUSTICE NUGEE: Mr Stuart, that was what Mr Raines
 14 eventually upheld.
 15 MR STUART: Yes.
 16 MR JUSTICE NUGEE: But are you suggesting that there was not
 17 material that required investigation -- or justified an
 18 investigation, suggesting that the use of Mrs Patel and
 19 Mr Rehman as employees was a disguised means of
 20 extracting profits from the company?
 21 MR STUART: If there was any evidence of that at all, (a) it
 22 came from Mr Patel, who would wish to say that anyway --
 23 MR JUSTICE NUGEE: I'm not sure --
 24 MR STUART: It's Mr McAlindon's own case that Mr Patel was
 25 saying this because he had been --

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1 MR JUSTICE NUGEE: -- he had been badly treated, but --
 2 MR STUART: And he was going to get Ms Birdi. And that is
 3 also borne out by the report that Mr McAlindon did in
 4 the end to the board, wherein he explained that Mr Patel
 5 was threatening the board that if they didn't exit
 6 Ms Birdi from the store, he was going to --
 7 MR JUSTICE NUGEE: Yes, that's true.
 8 MR STUART: -- et cetera, et cetera.
 9 So it does all come from a combination of Mr Patel
 10 and Mr McAlindon. It all comes from that. And it comes
 11 from what Mr Patel is said to have said to Mr McAlindon,
 12 in that second interview held. We don't know the
 13 circumstances in which that came about, but what we do
 14 know is that if Mr McAlindon had properly investigated
 15 matters before the suspension, so by 26 March,
 16 Mr McAlindon could have investigated the central
 17 dishonesty allegation, which was against Ms Birdi, not
 18 the other matters -- we will come back to those. But
 19 the central dishonesty allegation was you are paying
 20 Mr Rehman these large sums of money and he has done no
 21 work for the store. That was the allegation contained
 22 in the Patel investigatory document.
 23 If Mr McAlindon had done the simplest of
 24 investigations in an unbiased and fair way, then he
 25 would have discovered that actually, Mr Rehman had

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1 provided some services to the store and that SOG were
 2 aware of those services and that the payments made to
 3 Mr Rehman were in relation to those services and that,
 4 of course, the person who had paid those monies were SOG
 5 itself, because Ms Birdi has no control over the payment
 6 of monies out of any bank account. They were paid
 7 through SOG and they were done for work done by
 8 Mr Rehman.
 9 Might there then have been issues about, "Ah, well,
 10 the right paperwork hasn't been dealt with", or, "You
 11 haven't got proper authority", or, "What's Mr Rehman
 12 ..." et cetera. Yes, there might have been, but would
 13 it have been an allegation of fundamental dishonesty,
 14 which would have justified suspending the only remaining
 15 A director of this company and leaving the store with no
 16 ability to manage itself and the need to hire a manager?
 17 No, it wouldn't.
 18 I remind your Lordship that allegations of
 19 misconduct against A directors don't always lead to
 20 suspension. Take, for example, the very serious
 21 allegations made against Mr Singh in 2010, whereupon he
 22 was not suspended. He was only suspended on
 23 8 June 2010, pursuant to the sham arrangement that
 24 Mr Raines noted in his day book of 3 June. He was only
 25 suspended as part of a sham of a process that was going

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1 to end in Ms Birdi being dismissed. He was not
 2 suspended for acts of serious -- alleged serious
 3 misconduct, which could certainly have led to
 4 substantial loss to the Dartford store if those two
 5 members of staff had been able to, or had, substantiated
 6 what they alleged.
 7 So would the board meeting of Dartford Specsavers
 8 Limited have said, "Yes, let's suspend our only
 9 A director; let's keep her out of the business and let's
 10 start incurring Mr McAlindon's £440 a day until
 11 Mr McAlindon and Mr Dyson end this process". Would they
 12 have done that? No, they would not, in my submission.
 13 And that is (a) conduct of the affairs; (b) conduct
 14 which is prejudicial to the interests of Ms Birdi; (c)
 15 it's unfair in the sense that suspending her and
 16 incurring all these costs are unfair because what they
 17 are really doing is stripping money out of the business
 18 at her expense, when they could have investigated her
 19 for the administrative errors, disciplined her in due
 20 course for the administrative errors without keeping her
 21 out of the business and without pursuing an illegitimate
 22 allegation of dishonesty, which, of course, in the end
 23 Mr Raines had to find not proven because SOG itself had
 24 the evidence that Mr Rehman was doing work for Dartford
 25 Specsavers. He had no choice but to not to find that

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1 proven.
 2 So that's how we put it on that issue. In the
 3 circumstances, should you exercise your discretion to
 4 order an adjustment? Yes, you should. Can you
 5 calculate that adjustment? Yes, you can, in my
 6 submission. It's all of the costs.

7 The next item is the salary increases and bonuses of
 8 the staff. I have already touched upon the fact that
 9 this is perhaps in a slightly different category to all
 10 of the others. This is a day-to-day management issue;
 11 everybody seems to be agreed on that.

12 MR JUSTICE NUGEE: Yes.

13 MR STUART: A small salary rise for each of the staff, of
 14 course, it all adds up, to £2,000 a month in due course,
 15 especially with this strange bonus scheme.

16 But is it conduct and affairs of the company? Yes,
 17 it is. A staff bonus structure and staff salary levels,
 18 a broad one, it must be the affairs of the company.

19 Is it conduct which prejudices Ms Birdi's interests?
 20 Yes, it plainly is, because all of those costs are
 21 coming straight off her bottom line and thus off her
 22 profits, entitlement, distribution. No one else is
 23 suffering any loss here.

24 You might say, well, the company is; yes, the
 25 company is, and she is entitled to the profits of the

1 company.

2 MR JUSTICE NUGEE: She is entitled to half the profits.

3 MR STUART: Half the profits; half the profits in the
 4 company.

5 (c) was it unfair? Yes, it was unfair. The conduct
 6 that's complained of is implementing these new salary
 7 increases and bonuses without the A director being
 8 involved. She is the A director and this is day-to-day
 9 management.

10 If she had been involved, she would have been able
 11 to point out, for example, that the bonus scheme is
 12 a completely illogical in the way it has been fashioned.
 13 It's completely illogical because it doesn't even
 14 achieve paying the staff more money if there is
 15 a substantial increase in turnover. What it achieves is
 16 paying the staff more money if on a given day -- and the
 17 daily rate is taken to be 1/6th of a weekly rate, but we
 18 all know, and it was the evidence, that in a Specsavers,
 19 you don't earn 1/6th of your money on Monday and 1/6th
 20 of your money on Tuesday, et cetera. So the whole bonus
 21 structure as implemented was flawed.

22 She already had a bonus structure in place which was
 23 paying the staff bonuses. You heard evidence from
 24 Ms Frondigoun that she wasn't unhappy with the bonus
 25 structure.

1 MR JUSTICE NUGEE: Ms Frondigoun went to work for other
 2 reasons. I don't think I have ever heard an employee
 3 say before that she wasn't very interested in what she
 4 was paid.

5 MR STUART: No, that's what she did. But there was no
 6 evidence that the existing bonus structure under which
 7 they were all receiving their share of the bonus pot --
 8 there was no evidence that that bonus structure was felt
 9 by the staff to be wholly unsatisfactory, or even
 10 unsatisfactory.

11 MR JUSTICE NUGEE: There was some evidence that it was
 12 regarded as opaque and not easy to understand, which I'm
 13 not surprised about because it was quite a complicated
 14 structure.

15 MR STUART: Yes, it was complicated, but it was one that had
 16 been in place for a number of years, not just recently
 17 brought in. There is no evidence of any complaints
 18 about the bonus structure at all.

19 So was it unfair, the conduct of excluding Ms Birdi?
 20 Yes, it was unfair, because she would have had much to
 21 say about the implementation of such a structure and she
 22 would have pointed out it doesn't work properly and it
 23 would cost the store too much money in circumstances
 24 where the store was at a loss at this stage.

25 We are talking about late 2007 -- mid to late 2007.

1 This is when Mr McAlindon is already stripping out money
 2 through his £440 a day. Now we are going to pay the
 3 staff bigger bonuses as well in circumstances where we
 4 are not making any more money, we are losing money, and
 5 we know from the accounts that they lost money that
 6 year, a substantial loss. So, yes, it was unfair.

7 In the circumstances, should you exercise your
 8 discretion to order an adjustment? Yes, you should, for
 9 all of the reasons that I have just told you, that this
 10 would not have happened, certainly in this format, had
 11 Ms Birdi been involved.

12 The way it's put by Mr Potts in paragraph 41 is that
 13 she had been suspended from all executive functions --
 14 your Lordship has my submissions on that. She blatantly
 15 had not been suspended from all executive functions and
 16 I challenge him to show your Lordship the document which
 17 suspends her from all executive functions. There is no
 18 such document.

19 The next one is the excessive salary for Mr Singh.
 20 This is not day-to-day management; this is the setting
 21 of a salary for a new director of the company when he
 22 joins in 2008, and your Lordship will remember that the
 23 setting of such salaries is within the list of things
 24 which are not day-to-day management.

25 MR JUSTICE NUGEE: Yes.

1 MR STUART: Is it, however, part of the conduct of the
2 affairs of the company? Yes, it plainly is. It must
3 be, the setting of directors' salaries. Indeed, there
4 are many 994 petitions involving allegations by minority
5 shareholders --

6 MR JUSTICE NUGEE: About excessive salaries; yes.

7 MR STUART: -- that the majority shareholders are paying
8 themselves huge salaries, thus depleting the profits of
9 the company such that, "I'm entitled to 5 per cent of
10 the profits, but there are no profits because all the
11 profits have been paid out by way of salary to the
12 majority shareholder, who happens also to be the
13 managing director, et cetera".

14 So this is the sort of allegation that one sees
15 fairly commonly in cases involving minority
16 shareholders.

17 Is it conduct which is prejudicial to the interests
18 of Ms Birdi as an A shareholder? Yes, it is, in the
19 sense that this salary is being paid out to Mr Singh.
20 It is therefore not available for the profits of the
21 company and she would have received 50 per cent of the
22 profits of the company.

23 Was it unfair? Yes, it was. The justification now
24 put on it is, "Ah, well, I'm Mr Singh. I'm a super
25 retailer. I need to be incentivised and I wouldn't come

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1 to this store for £32,000. I want £42,000."

2 That's not right, my Lord, in my submission. He was
3 getting his shares, on the respondents' evidence, at
4 a huge discount. £60,000.

5 MR JUSTICE NUGEE: £60,000.

6 MR STUART: He buys the shares --

7 MR JUSTICE NUGEE: Why do you say that was a discount on the
8 respondents' evidence? The respondents' evidence was
9 that Mr Ryan had calculated that in accordance with the
10 normal formula, and on the normal formula, it came out
11 at about £60,000.

12 MR STUART: The respondents' evidence was that
13 in February 2007, the A shares were valued at between
14 £83,000 and £125,000. In the period up to the date when
15 Mr Singh eventually buys his shares, which isn't
16 until July 2008, there is an initial dip in the affairs
17 of the company whilst Mr McAlindon strips out £86,000,
18 thank you very much, that comes straight off the bottom
19 line, but then, when Ms Birdi comes back into the store
20 from January onwards through to July, there is
21 a significant improvement in the affairs of the company.
22 And yet, when Mr Singh comes to be sold the shares, he
23 gets them for £60,000.

24 These are shares on which, on his own evidence, he
25 anticipated earning 50 per cent profits of around

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1 £60,000 a year. That's his own evidence as to how he
2 analysed the potential for this business, as long as
3 nothing seriously went wrong with it.

4 It had a £1 million a year turnover, even without
5 him. It was going to have more when he was there. It
6 had no unusual items of expenditure because the
7 McAlindon and everything else issues were history.
8 There was no reason why 10 to 15 per cent net profit for
9 the shareholders to share in -- which is the standard,
10 according to Mr Singh -- was not achievable at this
11 store, and therefore 10 to 15 per cent of £1 million to
12 £1.2 million worth of turnover -- the profits of this
13 company were somewhere between £50,000 and £75,000
14 each -- each -- to the two A shareholders. And he is
15 going to buy the right to that money for £60,000? It's
16 an incredible discount.

17 Mr Ryan's calculations appear to be on the basis of
18 2.5 times -- well, that would be -- if profits were
19 genuinely realisable, excluding the unusual items, at
20 £100,000 to £150,000 a year for the total, 2.5 would be
21 £250,000 to £375,000 value for the two lots of A shares.
22 So Mr Singh's half of those should be £125,000 to
23 £187,500. He gets them for £60,000. It's an incredible
24 discount on the respondents' own evidence.

25 Of course, they don't say that. They don't say,

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1 "Yes, we offered him an incredible document". They are
2 not going to say that now, are they, but the truth of
3 the matter is that if one looks at the evidence at the
4 time, it was an incredible discount.

5 So if I'm selling somebody the right to earn
6 £60,000-plus in dividends every year for the rest of his
7 time, do I also need to pay him above the top level for
8 standard DO directors or retailers? No, I don't.

9 MR JUSTICE NUGEE: What other evidence do I have of the
10 standard level of payment? In your closing submissions,
11 you said that it was common for optician directors to be
12 paid more than dispensing directors.

13 MR STUART: Yes.

14 MR JUSTICE NUGEE: But what's the evidence of that?

15 MR STUART: Certainly in Ms Birdi's statement there is
16 a section on that. I'll get that for your Lordship.
17 And it certainly was the case, and is the case, that
18 optical directors get paid a salary because their duties
19 are -- as your Lordship has heard, they have to do all
20 the testing and some management issues, and the costs of
21 finding an ophthalmologist, an ophthalmic optician, to
22 carry out their tasks, who is a serious professional, is
23 obviously a lot more costly -- finding a locum to do
24 those tasks is a lot more than finding a manager of
25 a shop, which is really what the retailer does, or

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1 a dispenser -- a mere dispensing person, the locum for
2 a dispenser would be less.

3 So we know what Mr Patel was being paid. That was
4 his salary, the level of his salary, down at £30,000,
5 and there is this rather odd evidence about what
6 Mr Singh was being paid the month after he left his
7 Grays store. I'm not quite sure how that works, how his
8 P45 for the month after he has supposedly left -- he is
9 supposed to join us in July, on the 22nd, and yet
10 a document is produced showing that the level of his
11 basic salary by August 20--something is at the rate of
12 £42,000. That was not what he was paid previously at
13 the Grays store. We have asked for disclosure, and it
14 hasn't been provided to us, as to what he was paid in
15 the year prior to his leaving.

16 We even asked for disclosure of Niki Kaur's -- do
17 you remember Niki Kaur took over his role and would have
18 been the DO director here if she had got her way. We
19 asked for disclosure of her salary in a similar store.
20 We heard from Mr Singh that Grays is a similar-sized
21 store in terms of turnover, et cetera, and we were
22 refused that as well.

23 So we don't have any evidence of precisely what he
24 was earning elsewhere but we challenge the suggestion
25 that he was earning £42,000 basic salary. No, he

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1 wasn't. Not for a mere DO over at Grays.

2 So was it a legitimate decision to pay him £42,000
3 just because he asked for it? No, it wasn't. Was it
4 fair? No, it wasn't. He has already had the benefit of
5 getting his shares at an incredible discount. Was it
6 necessary? No, it wasn't. So for all those reasons,
7 the conduct or act was unfair.

8 Should you exercise your discretion to order an
9 adjustment? Yes, you should. You have got all the
10 background evidence as to the basis upon which Mr Singh
11 was going in there, and obviously, my Lord, you have got
12 the April 2008 document. I know Mr Singh says, "I don't
13 know where he got that from", but my submission to you
14 is Mr McGonagle couldn't have plucked that idea out of
15 the air. He certainly wouldn't have written it down out
16 of the air. He must have heard that from Mr Singh; it's
17 the only person he could have heard it from, and it
18 tells the underlying truth here, which is that Mr Singh
19 was going to "communicate with and manage Ms Birdi
20 accordingly", and that all started, of course, on the
21 day after he joined:

22 "Dear Miss Birdi, some light reading for you."

23 So, should you order an adjustment? Yes, you
24 should.

25 My Lord, I see the time. I'm not quite finished but

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1 I'm almost there.

2 MR JUSTICE NUGEE: Shall we take a five minute break?

3 MR STUART: Shall we take a five-minute break because I'm
4 speaking quickly as well.

5 (3.12 pm)

6 (Short break)

7 (3.19 pm)

8 MR JUSTICE NUGEE: Yes.

9 MR STUART: My Lord, just before I turn to the last two
10 issues, there are two documents I would ask you to
11 consider on the last two points we just dealt with.

12 MR JUSTICE NUGEE: Yes.

13 MR STUART: On the question of -- sorry, on the one point,
14 which is the issue about this salary. Your Lordship
15 asked what evidence do I have as to what is the
16 appropriate salary. I forgot to mention two things.

17 Page 1216 in E5. {E/306/1216}

18 MR JUSTICE NUGEE: Yes.

19 MR STUART: 12 March 2008, Mr Singh's very keen, we know; he
20 has been trying to get these shares for a year and he
21 has been staved off for a while. Specsavers eventually
22 write to him.

23 MR JUSTICE NUGEE: They offer him £32,500, yes.

24 MR STUART: What do they assess? That must be what they
25 assess is the appropriate -- Mr Patel was on £30,000, my

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1 Lord, 3-0, on the day he left; £30,000 salary basic. So
2 what do Specsavers offer Mr Patel? £32,500. That is
3 some evidence, at least, isn't it -- in my submission --
4 that that is the appropriate salary for the job.

5 Secondly, my Lord, on my argument as to the
6 valuation of the shares and the huge discount, can
7 I remind you of page 1210. {E/302/1210} This is from
8 Mr Ryan. Does your Lordship have it?

9 MR JUSTICE NUGEE: Yes.

10 MR STUART: "Dartford - I've spoken to Kam Singh, who still
11 wants the Dartford shares, and he will start the process
12 of selling his Grays share. He will also call Michael
13 McGonagle, who I have asked to facilitate the initial
14 meeting with Swarandeeep, and generally manage Kam's
15 introduction to the store.

16 "We paid £55,000 for Nimesh's shares, so I propose
17 to sell them for £60K, which is 3 x p/e based on current
18 performance. This will cover BT fees."

19 That's business transfer fees. That's Mr Ryan's own
20 fees; he is the business transfer department:

21 "Are you okay with this sale price?"

22 That's how they arrived at the price for them. They
23 weren't interested in getting a proper price for the
24 shares. They were interested in recouping the £55,000
25 they had paid to Mr Patel and covering their own costs

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1 of £5,000. That is how they came upon £60,000. It was
 2 not in any way, shape or form properly determined as
 3 being the proper price of the shares.
 4 MR JUSTICE NUGEE: Does it matter?
 5 MR STUART: No. The only relevance of all of this is your
 6 Lordship asked me how do we get to this £42,000 being an
 7 unfair salary.
 8 MR JUSTICE NUGEE: Yes.
 9 MR STUART: And I'm trying to say if you give a man his
 10 A shares for £60,000, which his own sister-in-law would
 11 have paid £175,000 for a year earlier, which he
 12 himself -- Mr Singh's own valuation, he said in
 13 evidence, was £125,000, and I submit that he might have
 14 been somewhat conservative in the figure he was prepared
 15 to admit to; that's his own evidence to your Lordship,
 16 £125,000.
 17 When you give those shares to him for £60,000, you
 18 don't listen to him when he says, "Oh, and I would like
 19 £42,000 on my salary, please, even though the last guy
 20 was on £30,000 and you have offered me £32,500. I want
 21 £42,000 on my salary."
 22 The directors of the company, if they had met at
 23 a board meeting and considered all of that, they, the
 24 directors of the Dartford Visionplus Limited and
 25 Dartford Specsavers Limited, would have said, "Hold on

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1 a minute, is it in the best interests of Dartford
 2 Visionplus and Dartford Specsavers to give this man
 3 £42,000 a year basic salary even before he has joined?"
 4 We are still in loss-making. We are in a bad
 5 situation. He has got the shares for a snip. That's
 6 the relevance of it.
 7 MR JUSTICE NUGEE: Thank you.
 8 MR STUART: We are on to the costs incurred during the 2010
 9 investigation and disciplinary process. I think your
 10 Lordship probably more or less can guess my submissions
 11 on this. Is it a matter complained of; is it conduct of
 12 the affairs of the company? Yes, plainly it is.
 13 Incurring £17,000-odd on a disciplinary process is not
 14 day-to-day management, but it is certainly the affairs
 15 of the company.
 16 Is suspending an A director conduct of the affairs
 17 of the company? Yes, it must be. It must be.
 18 Is it prejudicial to the interests of a minority,
 19 Ms Birdi, as a qua member? Yes, it is, for the reasons
 20 that we went through earlier.
 21 Was it unfair? Yes, it was. I'm sure your Lordship
 22 already has it. I do rely upon Mr Raines's day book
 23 entries. It is clear from those, I say, that the
 24 outcome of this whole sham process had been determined.
 25 MR JUSTICE NUGEE: Well, you say that.

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1 MR STUART: I say that.
 2 MR JUSTICE NUGEE: Could he not have been thinking, "I think
 3 a likely outcome is that there will be a case for
 4 Swarandeeep to answer, let's line up somebody to deal
 5 with that"?
 6 MR STUART: It might have been as innocent as that, mightn't
 7 it, but for the words he has used and what they actually
 8 did, because what they did was they pretended that they
 9 were suspending both A directors. This is page 2948.
 10 {E/914/2948}
 11 MR JUSTICE NUGEE: I remember it.
 12 MR STUART: In bundle E11:
 13 "Dartford - agreed."
 14 What was agreed? A plan of action is being agreed
 15 between Mr Raines and somebody. I suggest it must be
 16 somebody higher up in the organisation, probably
 17 Mr Dyson:
 18 "DC to suspend next week ..."
 19 That's Mr Clark. So they are going to send Mr Clark
 20 in to do the suspension:
 21 "DC to investigate relationship breakdown."
 22 So that's going to be the basis used. They can't
 23 use anything else because Mr Singh is the one who has
 24 faced the actual allegations of formal grievances by
 25 this point. There are no formal grievances from the

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1 other staff against Ms Birdi. There are no proper
 2 allegations against Ms Birdi at that stage. And so all
 3 they can do is say, "Right, we will say that it's both
 4 of them that we are suspending and we are investigating
 5 the relationship breakdown."
 6 "One of Pauline's team to carry out Disp Hearing..."
 7 Not "hearings"; not potentially two hearings, one
 8 against Mr Singh and/or one against Ms Birdi, because
 9 they might both be responsible; do you see? If you were
 10 dealing with this in an unbiased and a non-pre-judged
 11 way, you might say, "They are both as bad as each other,
 12 or almost. We need to investigate both of them and see
 13 what's going on here and if there is a relationship
 14 breakdown why not suspend both of them properly,
 15 genuinely; why not discipline both of them? If they are
 16 both responsible for a relationship breakdown, why not
 17 dismiss both of them and let's get a pair of directors
 18 into this store who will work together."
 19 Is that on offer here? I submit it's not.
 20 So one of Pauline's team is going to carry out the
 21 disciplinary hearing. There is no "s" on the end:
 22 "... which is the relationship breakdown plus the
 23 not testing four days."
 24 So that gives away, doesn't it, the person who is
 25 going to be the subject of the disciplinary hearing,

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1 because the only person who is going to be disciplined
 2 for that is Ms Birdi. There is no possibility of
 3 Mr Singh being disciplined here. There is no
 4 possibility of him facing a disciplinary hearing.
 5 And then:
 6 "Off the record with Kam re suspension."
 7 It can only mean one thing: someone -- and I submit
 8 it's going to be Mr Raines himself, because if your
 9 Lordship goes down --
 10 MR JUSTICE NUGEE: -- it has got his mobile number on, yes.
 11 MR STUART: "Kam 07932 ... mobile - Action."
 12 It's a funny thing to be doing where you are
 13 suspending two A directors. Totally unbiased way; you
 14 are going to suspend both of them. We are going to
 15 investigate, see who is responsible for the relationship
 16 breakdown and then there is going to be a disciplinary
 17 hearing and it might be one or it might be the other or
 18 it might be both of you?
 19 No, that's not what's going on here. What's going
 20 on here is Ms Birdi is going to face the disciplinary
 21 hearing once Mr Clark has done the investigatory
 22 process.
 23 Mr Raines is having an off the record with Kam
 24 regarding what? Regarding his salary? No, regarding
 25 his suspension. Why not have an off the record with

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1 Ms Birdi about her suspension? Why not have an on the
 2 record with both of them about their suspensions? None
 3 of those:
 4 "Off the record with Kam re suspension."
 5 My Lord, that shows to you, certainly on the balance
 6 of probabilities, that this was a pre-determined
 7 investigation process. The outcome had already been
 8 determined before Mr Clark even sets foot in the
 9 building to suspend them. Ms Birdi alone is going to
 10 face a disciplinary matter and we know that that's
 11 exactly happened and that's going to result in her
 12 having her occupation taken away from her on the grounds
 13 of the relationship breakdown, and that's exactly what
 14 did happen. What a coincidence. No, it's not.
 15 My Lord, I submit on that basis alone -- and
 16 Mr Raines was unable to give any adequate explanation or
 17 proper explanation for that, and on that basis -- and
 18 Mr Singh, of course, "Oh, I can't remember any such
 19 conversation".
 20 MR POTTS: My Lord, it wasn't even put to Mr Singh,
 21 I believe.
 22 MR STUART: It was, I asked him:
 23 "Did you have a conversation with anybody about your
 24 suspension?"
 25 He said he couldn't remember.

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1 So on that basis, my Lord, in my submission, under
 2 this issue, was the conduct or act fair? No, it wasn't.
 3 It was unfair.
 4 Did it prejudice Ms Birdi's interests? Plainly it
 5 did, through the route we talked about earlier.
 6 Is there any loss or damage caused? Yes, plainly
 7 there is: the costs of the investigation into her and
 8 the disciplinary process, which was all a sham. They
 9 didn't need to incur any costs. Why not just go
 10 straight to dismissal? I'm being sarcastic. The costs
 11 were caused by what they decided to do and the way they
 12 did it and it was wholly unfair.
 13 Should you exercise your discretion to order an
 14 adjustment for the price payable? Yes, you should,
 15 given the evidence that you have.
 16 Disguised distributions post dismissal is the last
 17 item. These are the salary increases to Mr Singh. So
 18 not content with just his £42,000, let's get it up to
 19 £50,000, shall we? And let's get him £2,500 of
 20 quarterly bonus on top of his salary -- a remuneration
 21 bonus. So he is now at £60,000 plus company car,
 22 £30,000 to £35,000 worth of company car in circumstances
 23 where Ms Birdi no longer has a need for a company car
 24 because she is not an employee of the company.
 25 MR JUSTICE NUGEE: I think she still has the car.

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1 MR STUART: She does. It's quite an old car now. It goes
 2 right back to whenever it was. She has the car. It is
 3 being demanded of her; she has the car under --
 4 MR JUSTICE NUGEE: I'm not expected to resolve that, I don't
 5 think.
 6 MR STUART: No. So we have increase in salary from £42,000
 7 to £50,000 a year. That's just on his basic salary
 8 alone. We have the bonus payments totalling over
 9 £30,000. We have that letter from him, which we say
 10 discloses what's really going on here.
 11 Everybody really recognises that what Mr Singh is
 12 doing here is he is getting out of the company what he
 13 considers to be a fair share of the profits because he
 14 considers he is entitled to a lot more than 50 per cent
 15 of the profits because he considers he is doing all the
 16 work. That's what he now thinks.
 17 But that's not right, is it, because he is getting
 18 paid for doing the work, for being in the store. He is
 19 getting paid under a service agreement at £42,000, or
 20 £32,500 he should have been, but whatever it was, he is
 21 getting paid for his work.
 22 Ms Birdi is not providing the work but she is not
 23 getting paid either. She is not getting any salary out
 24 of the store.
 25 She is entitled to her fair share of the profits and

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1 he is not entitled to an unfair share of the profits,
 2 merely because he is the only person who has the ear of
 3 Specsavers and because, between the two of them, they
 4 agree at these rather odd board meetings that he is
 5 going to receive all of these benefits.
 6 So it that conduct of the affairs of the company?
 7 Yes, it is. We are almost back to the standard 994-type
 8 petition where the controllers, the controlling
 9 majority, pay themselves all the money through
 10 directors' emoluments leaving, "Oh dear, no profits left
 11 for the minority shareholder".
 12 Is it prejudicial to the interests of the minority
 13 shareholder? Plainly it is. It's the most obvious
 14 example of conduct which is prejudicial to the minority
 15 shareholder because the minority shareholder is being
 16 kept out of distributable dividends by reason of the
 17 fact that it's being paid that way.
 18 Is it unfair? Yes, it's unfair, and there is no
 19 answer to unfairness simply by saying, "Ah, but he is
 20 working so hard". He is not working any harder than she
 21 was working when she was the sole director
 22 between January 2008 and July 2008. He is not working
 23 any harder than that. She doesn't get large bonuses or
 24 huge increases in salary merely because she is working
 25 harder.

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1 Is he working any harder? He is doing what he is
 2 doing. He is running the store, which is what he was
 3 doing before. There is no evidence that he is working
 4 any harder because she is not there. The fact that she
 5 is not there -- she is the optician. Because she is not
 6 there they have to hire, no doubt, an optician and pay
 7 that person a salary. Fair enough. We are not claiming
 8 that that's an unfair prejudice to Ms Birdi. She is
 9 being kept out of the store and that's a £30,000 salary
 10 that's being paid to some optician, which is coming off
 11 her share of the profits. We are not complaining about
 12 that. So it is artificial to suggest that this becomes
 13 fair because he is the only A director left in the
 14 store, which is really all that the respondents' case
 15 amounts to.
 16 So, it is unfair. In the circumstances, should you
 17 exercise your discretion to order an adjustment? Yes,
 18 you should, because it's the most obvious example of
 19 him -- we have seen it from his letter:
 20 "I'm advised that because she is still the
 21 A shareholder, we can't distribute the profits to me
 22 because she would then be entitled to her share of it,
 23 so let's do it this way."
 24 And hey presto, over the course of the next few
 25 board meetings, it is done this way and he is now

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1 earning this huge salary with these bonuses plus the
 2 other benefits of employment that he has received.
 3 So you should exercise your discretion.
 4 My Lord, I see the time and I think I have probably
 5 covered the main issues as best I can. You have our
 6 written submissions. Are there any other major points
 7 that I need to address your Lordship on?
 8 MR JUSTICE NUGEE: I don't think so. Let me just have
 9 a look. (Pause)
 10 The disputed duty that you allege, have I understood
 11 it correctly that that is, you say, an implied term in
 12 the shareholders' agreement?
 13 MR STUART: Yes.
 14 MR JUSTICE NUGEE: Yes. You haven't addressed me on the
 15 proposition that the shareholders' agreement obliges
 16 SOG, in return for its 6.5 per cent management fee, to
 17 provide all support and services which it ever provides.
 18 MR STUART: Let me deal with that. We are in --
 19 MR JUSTICE NUGEE: D1.
 20 MR STUART: It's here. The management fee, clause 5.
 21 {D/15/181}
 22 MR JUSTICE NUGEE: Yes.
 23 MR STUART: "In return for the services and support
 24 supplied..."
 25 "Supplied".

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1 MR JUSTICE NUGEE: Yes.
 2 MR STUART: So:
 3 "In return for the services and support supplied..."
 4 MR JUSTICE NUGEE: Does that mean --
 5 MR STUART: "... the Company shall pay ... the management
 6 fee..."
 7 MR JUSTICE NUGEE: Yes. It imposes an obligation on the
 8 company --
 9 MR STUART: To pay a fee.
 10 MR JUSTICE NUGEE: -- to pay a fee. Does it impose
 11 an obligation on Specsavers to supply any services or
 12 support which the company requests for nothing more?
 13 MR STUART: Can we break that down in two parts? Does it
 14 oblige Specsavers to supply any services at all? No, it
 15 doesn't.
 16 MR JUSTICE NUGEE: Right.
 17 MR STUART: But if Specsavers does supply services, can
 18 Specsavers charge additionally for those services? No,
 19 it can't, because any services and support supplied, in
 20 return for that, the company shall pay the management
 21 fee.
 22 In some months, Specsavers won't supply many
 23 services at all and it gets the benefit; it reaps the
 24 benefit of still receiving its 6.5 per cent even if it
 25 doesn't have to supply many services.

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1 In other months, Specsavers chooses to supply more
2 services and support and that might cost Specsavers
3 a little more than it usually does and it might cost
4 them more than the management charge, 6.5 per cent, but
5 that's the quid pro quo of the agreement. That's the
6 bargain.

7 So it's not a question of: is Specsavers obliged to
8 provide services for nothing. There is a bargain here.
9 Specsavers will receive the management fee in return for
10 any services and support it has supplied.

11 That's our argument.

12 MR JUSTICE NUGEE: Okay.

13 MR STUART: And we say it's four square on the terms of the
14 bargain.

15 There is no obvious provision that even refers to
16 Specsavers charging the store more money beyond the
17 management fee. For example, on page 180 in the list at
18 3.2: {D/15/180}

19 "... the following matters are not matters of day to
20 day management."

21 One might have seen there, if it was intended or
22 envisaged that Specsavers could charge some very
23 substantial sums for support and services beyond the
24 management fee -- one might there have presumed that
25 that would be listed amongst the matters that are not

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1 day-to-day management. We have, for example -- you see
2 3.2.8: {D/15/180}

3 "The employment or dismissal of officers or staff at
4 salaries or rates of pay in excess of £10,000 per
5 annum..."

6 3.2.9:

7 "The purchase lease or any other form of acquisition
8 and the sale or any other form of disposal of any
9 property ... [to] a value in excess of £1,000 ..."

10 So it goes down to that much. But there is nothing
11 in there which even gives an inkling that Specsavers is
12 going to be entitled charge £86,000, thank you very
13 much, for providing some support and services at its own
14 decision.

15 It decides to provide the services. It does so at
16 a time when it purports to be an A shareholder/director
17 as well. So it has got an interest in the business to
18 provide those services because it, on its case, is
19 entitled to 50 per cent of the dividends for that
20 period. There is every reason to provide some support
21 and services if it wants to. It's up to it. It's
22 getting its 6.5 per cent management fee anyway for the
23 support and services it provides, and yet, what actually
24 happens is it wants to say, "No, no, no, we get the
25 6.5 per cent management fee. That's just for head

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1 office. When we actually send somebody into your store,
2 you have got to pay £86,000."

3 My Lord, I say that's not right.

4 MR JUSTICE NUGEE: I think finally there is a brief
5 reference in your submissions to terminal dividend
6 in February 2007. I don't think I have really
7 understood the argument there.

8 MR STUART: Can I make it clear, my Lord. The argument is
9 this, and then I'll come back to where it fits into the
10 issues.

11 The argument is this: it is standard when one of two
12 A shareholders leaves a joint venture of this sort --
13 and one can understand why -- for there to be an account
14 taken at the date of the departure, which won't
15 necessarily be the end of year 30 September -- and here
16 it wasn't, it was half way through the year. An account
17 to be taken; a line drawn, if you like, and for the
18 distributable profits to that point to be calculated, so
19 that it can be seen that when the new shareholder buys
20 his shares, he is coming in effectively from a starting
21 point of nil. He is not buying shares that have accrued
22 all the previous period's profits. It's like an ex-div
23 shareholding when you buy your shares ex-div, or with
24 div.

25 So the standard practice is for there to be a line

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1 drawn and then, even if the company doesn't have the
2 cash available to pay out that distribution of dividend
3 at that time to that A shareholder -- and, of course, to
4 start the process afresh, draw a line in the sand, the
5 other A shareholder is entitled to their div at that
6 point as well. So both shareholders start from a point
7 of zero, and then any profits that then run right
8 through to the end of time as between those two
9 A shareholders are split equally.

10 So if Mr McAlindon and Mr Dyson hadn't excluded
11 Ms Birdi and they had sat around and decided, "Yes, we
12 will buy the shares from Mr Patel", the ordinary course
13 would have been for there to have been a calculation at
14 that point to see what accrued profits there were,
15 whether there was cash in the bank or not, and Ms Birdi
16 would have been entitled to have a dividend declared to
17 her at that point.

18 That didn't happen. What has actually happened is
19 that Mr Patel has left. He has waived his entitlement
20 to that dividend.

21 MR JUSTICE NUGEE: Insofar as there were any accumulated
22 distributable profits as at February 2007 and --

23 MR STUART: And her evidence is that there were.

24 MR JUSTICE NUGEE: Well, I'm not sure where that comes from,
25 because I thought --

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1 MR STUART: She says it comes from the bottom line report.
 2 MR JUSTICE NUGEE: Can you show me a document which --
 3 MR STUART: Yes.
 4 MR JUSTICE NUGEE: You have a figure of £39,000, I think.
 5 Don't worry if you can't track it down.
 6 MR POTTS: My Lord, I think it may be 306-2. {E/44.2/306.2}
 7 I don't know if that's what my friend had in mind.
 8 I don't know.
 9 MR STUART: Yes, so 306-1 is the actual calculation, your
 10 Lordship will recall. {E/44.2/306.1}
 11 MR JUSTICE NUGEE: Yes.
 12 MR STUART: And 306-24. {E/44.2/306.24}
 13 MR JUSTICE NUGEE: Yes.
 14 MR STUART: Is where the figures on 306-1 come from. If you
 15 look at 306-24 at the bottom.
 16 MR JUSTICE NUGEE: Yes, okay.
 17 MR STUART: We have got net assets.
 18 MR JUSTICE NUGEE: £117,000.
 19 MR STUART: And the prior year's is £128,812. And then
 20 profit and loss for this year is £11,000 and so the
 21 net -- does your Lordship have it?
 22 MR JUSTICE NUGEE: Yes.
 23 MR STUART: -- is £117,000. Someone's calculator is off,
 24 because on 306-1, {E/44.2/306.1} that figure has become
 25 £116,981, rather than £117,081. So there is £100

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1 calculator error. But leave that to one side. It's
 2 roughly £117,000 distributable profits.
 3 Then deducted from that is the £40,000 reserve
 4 figure, and your Lordship might recall the evidence on
 5 that. Mr Dyson seeks to suggest that, "Ah, no, that
 6 £40,000 figure got changed to £70,000. We used to work
 7 on £40,000 but ..."
 8 MR JUSTICE NUGEE: Oh, yes, yes.
 9 MR STUART: But then I pointed to him that, actually, on one
 10 of the company's own calculations for what was -- do you
 11 remember it was a terminal dividend? Does your
 12 Lordship --
 13 MR JUSTICE NUGEE: But let's assume all this is right.
 14 MR STUART: Yes.
 15 MR JUSTICE NUGEE: And that Mr Patel gave up a right to
 16 a terminal dividend that he might otherwise have had
 17 a right to.
 18 MR STUART: And Ms Birdi lost her --
 19 MR JUSTICE NUGEE: But she didn't lose it.
 20 MR STUART: She lost it at that point.
 21 MR JUSTICE NUGEE: But she didn't lose it because it's still
 22 in the company. That's what I don't understand.
 23 MR STUART: No, no, my Lord, I agree. There is no separate
 24 claim here.
 25 MR JUSTICE NUGEE: It doesn't fit into any of the issues.

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1 MR STUART: Well, it only fits into whether it was unfair,
 2 what Mr McAlindon and Mr Dyson did, at the Patel stage.
 3 It fits into the background to that. It is the context
 4 of that. I'm not seeking from you --
 5 MR JUSTICE NUGEE: No, okay.
 6 MR STUART: -- £39,000. I'm not seeking from you £39,000.
 7 MR JUSTICE NUGEE: Thank you very much.
 8 There is one other thing, which is that it's
 9 inevitable that I'm going to reserve my judgment for
 10 what may be some time, depending on my other
 11 commitments.
 12 MR STUART: Not as long as I'm having to wait elsewhere, no.
 13 MR JUSTICE NUGEE: It is possible that Mr Justice Hildyard
 14 will hand down judgment in his case before I finalise my
 15 judgment. What do you say I should do when he does so,
 16 if anything? You can think about that overnight.
 17 MR STUART: My Lord, can I take some instructions on that?
 18 I must say my initial reaction as an advocate, as it
 19 were, is you should do absolutely nothing about it. You
 20 have heard this trial; you should determine this trial
 21 on the evidence.
 22 MR JUSTICE NUGEE: I know very little about it, but I do
 23 know that both you and Mr Potts were in it, I think.
 24 I know that Ms Birdi gave evidence and I imagine that
 25 quite a few of the respondents' witnesses gave evidence.

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1 MR STUART: They did.
 2 MR JUSTICE NUGEE: And I imagine that Mr Justice Hildyard
 3 may have something to say, firstly, purely
 4 non-contentious stuff about the set-up of Specsavers,
 5 which, to be quite frank, if he sets out the dual
 6 company operation, blah, blah, blah, it will save me
 7 a bit of time if I don't have to do it all again.
 8 MR STUART: I agree, my Lord --
 9 MR JUSTICE NUGEE: But secondly he may say something about
 10 section 994 and how it applies in this situation, which
 11 is a matter of law.
 12 MR STUART: My Lord, let me make it clear, if he issues
 13 a judgment --
 14 MR POTTS: My Lord, it wasn't a 994.
 15 MR JUSTICE NUGEE: It wasn't a 994? Oh, well, I have
 16 misunderstood. I thought it might have been a 994
 17 petition, but that illustrates how little I know about
 18 it, apart from the fact that reference to it has been
 19 made at odd spots throughout the trial, and he may say
 20 of a particular witness, "I'm satisfied that he or she
 21 was telling the truth and doing what was best"; he may
 22 say of a particular witness that, "I'm satisfied that he
 23 or she was attempting to mislead the court".
 24 My instinct -- but I do want both your submissions
 25 on this -- is that it's irrelevant what some other judge

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1 thinks of the same witness, because I have to form my
2 own view, but I can see that it might be a bit odd if
3 precisely the witness, cross-examined by the same
4 counsel on either side, appears to one judge to be as
5 honest as the day is long, and appears to another judge
6 to be telling a series of lies, without the second judge
7 even knowing that that is what he is doing, if you see
8 what I mean.

9 If I don't look at the judgment at all, I won't even
10 know what assessment Mr Justice Hildyard will have made
11 of particular witnesses, if any. Sometimes judges don't
12 feel it necessary to make assessment of particular
13 witnesses.

14 Now, I'm certainly not encouraging you to take any
15 particular view at all, but I think I ought to have both
16 your submissions on what I should do.

17 MR STUART: Yes.

18 MR JUSTICE NUGEE: If, which I think is not improbable, the
19 judgment is delivered before I finalise mine.

20 MR STUART: Understood, my Lord.

21 MR JUSTICE NUGEE: Maybe you would like to take instructions
22 and think about that overnight.

23 MR STUART: I would need to think about it carefully,
24 because I understand what you say, my Lord. It might
25 make a difference as to whether the judgment was --

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1 MR JUSTICE NUGEE: In your favour or not?

2 MR STUART: Well, no, certainly -- that's the point I am
3 going to make. No, no. Actually it won't because, as
4 Mr Potts has explained, the issues are actually
5 different.

6 MR JUSTICE NUGEE: As I say, it shows how little I know
7 about it.

8 MR STUART: The legal issues are different.

9 MR JUSTICE NUGEE: Yes.

10 MR STUART: The factual issues are very similar, in the
11 sense of allegations against Specsavers, who are the
12 defendants in both --

13 MR JUSTICE NUGEE: Respondents, yes.

14 MR STUART: -- cases and the allegation of plans, agendas,
15 and the people involved in those plans and agendas being
16 the same.

17 MR JUSTICE NUGEE: I'm not going to start treating findings
18 in that case as similar fact evidence, or anything like
19 that.

20 MR STUART: No, absolutely, exactly, and that's why I'm --

21 MR JUSTICE NUGEE: Hesitant.

22 MR STUART: -- hesitant about there being any perceived or
23 actual prejudice caused to this trial by what's going on
24 or not going on in a completely different case --

25 MR JUSTICE NUGEE: Yes.

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1 MR STUART: -- involving partly the same parties, but not --
2 you know, Ms Birdi wasn't a party to that other case,
3 et cetera.

4 So as I say, as an advocate -- leave aside who won
5 or lost that case, I'm concerned that your Lordship's
6 judgment in this trial is --

7 MR JUSTICE NUGEE: It has to be decided on the evidence
8 before me; I understand that entirely.

9 MR STUART: Yes.

10 MR JUSTICE NUGEE: But I'm a little troubled by the idea
11 that I might come to a radically different view, on the
12 law or on the facts or on the witnesses, without knowing
13 that I'm doing so.

14 MR STUART: I agree, I agree.

15 MR JUSTICE NUGEE: But as I say, let's not debate it any
16 further now. Think about it overnight and you can tell
17 me and Mr Potts can tell me what I should do as well.

18 MR STUART: My Lord, yes. And the other thing I have to do
19 overnight with Mr Potts is we will do that accounting
20 schedule.

21 MR JUSTICE NUGEE: It doesn't need to be done straight away.

22 MR STUART: At some point.

23 MR JUSTICE NUGEE: At some point. Thank you very much
24 indeed, Mr Stuart.

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1 Closing submissions by MR POTTS

2 MR POTTS: Just in relation to the last point, I have
3 actually addressed your Lordship on this already in
4 writing.

5 MR JUSTICE NUGEE: Yes.

6 MR POTTS: It's the Hollington v Hewthorn and so on. Your
7 Lordship is absolutely right, the opinion of another
8 judge in another case of facts is not admissible
9 evidence at all. So I commend my note; it may have been
10 your Lordship took the view it wasn't relevant --

11 MR JUSTICE NUGEE: Yes, but what do you say I should do?
12 Should I read the judgment as a matter of interest and
13 to see what law it decides and whether it will save me
14 time writing my judgment, or do I put it in a drawer not
15 to be looked at and so on?

16 MR POTTS: The first point, my Lord, is there is no res
17 judicata; there is no issue estoppel.

18 MR JUSTICE NUGEE: There is no identity of parties.

19 MR POTTS: There is no identity of parties, so that's the
20 end of that. So I would say I can't stop your Lordship
21 reading it.

22 MR JUSTICE NUGEE: I would normally -- leave aside the facts
23 of this case, I would normally have a look at what other
24 judges in this division have decided as part of my
25 general keeping-up with what people are doing.

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1 MR POTTS: I can't stop your Lordship reading the judgment,
 2 as I said, but if you are asking me the question: is it
 3 a matter which should affect your reasoning in this
 4 case, the answer to that, my Lord, is no, definitely no.
 5 MR JUSTICE NUGEE: Yes.
 6 MR POTTS: And I have set that out in writing for your
 7 Lordship, the relevant authorities in relation to that.
 8 It may be that we didn't go into it in any detail
 9 because it was an academic point at the time, because
 10 what I was concerned about was a judgment happening half
 11 way through this case.
 12 MR JUSTICE NUGEE: Yes.
 13 MR POTTS: That hasn't happened.
 14 MR JUSTICE NUGEE: Not yet.
 15 MR POTTS: Not yet. There is still tomorrow, my Lord. But
 16 indeed there may be a race to the finish line between
 17 your Lordship and Mr Justice Hildyard.
 18 But the serious point is, no, it's not admissible;
 19 there is no *res judicata*. In fact it wasn't even a 994
 20 case. It was a claim for rectification and damages.
 21 MR JUSTICE NUGEE: So it's unlikely even to give me any
 22 guidance on any legal points which are relevant to this
 23 case.
 24 MR POTTS: I think it won't, my Lord, because in fact even
 25 the shareholders' agreement is different. The relevant

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1 clause in that case concerned -- without going into too
 2 much highways and byways. In that case the purchase
 3 option -- the shares were purchased. So there was no
 4 standing to present a 994 petition because they weren't
 5 members; we had purchased the shares.
 6 The relevant clause that permits -- I'm
 7 paraphrasing, but allows the shares to be purchased --
 8 if we have, I think it was, grounds to conclude that the
 9 JVP partner had been guilty of fraud or dishonesty of
 10 any kind whatsoever and was a purchase at a price of --
 11 in fact of par.
 12 So that option had been exercised. So that was the
 13 scope of that case -- was this -- what the proper
 14 construction of that shareholders' agreement, what the
 15 circumstances --
 16 MR JUSTICE NUGEE: So you bought 50 shares at 50p?
 17 MR POTTS: My Lord, yes, we did.
 18 MR JUSTICE NUGEE: Yes. Well, I can see why it gives rise
 19 to litigation.
 20 MR POTTS: My Lord, yes.
 21 MR JUSTICE NUGEE: Yes. But it doesn't sound as if it's
 22 very similar.
 23 MR POTTS: It's not really very similar to this at all.
 24 Your Lordship is right that Ms Birdi gave evidence in
 25 that case, in fact twice actually, once in each action.

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1 MR JUSTICE NUGEE: I know she gave evidence because you rely
 2 on the fact --
 3 MR POTTS: On the shredding.
 4 MR JUSTICE NUGEE: -- that she produced a bag of
 5 shredding --
 6 MR POTTS: Yes.
 7 MR JUSTICE NUGEE: -- during the course of her evidence.
 8 MR POTTS: But I don't know what evidence she gave and Yes.
 9 MR JUSTICE NUGEE: I suspect, but I don't think that I've
 10 been told about it, that some of your witnesses gave
 11 evidence.
 12 MR POTTS: Yes, indeed, quite a few of -- indeed.
 13 MR JUSTICE NUGEE: I think Mr Rowe --
 14 MR POTTS: Mr Rowe, yes.
 15 MR JUSTICE NUGEE: -- was asked about something he had said
 16 in a previous --
 17 MR POTTS: Yes. Some, but not all, of our witnesses gave
 18 evidence as well.
 19 So that is what it is, my Lord, but we would say,
 20 firstly, it doesn't provide your Lordship with any
 21 permissible assistance, if you like, because of the
 22 cases we set out in the note. Indeed on the law it's
 23 not really going to help your Lordship, I think. It's
 24 unlikely -- obviously, I haven't seen the judgment but
 25 I think it's unlikely to assist your Lordship in

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1 relation to the law at all. I suppose it may be that
 2 his Lordship might refer to Specsavers: how many
 3 companies there are, the structure, the JVP structure,
 4 or something. He might do.
 5 MR JUSTICE NUGEE: He might do.
 6 MR POTTS: He might do.
 7 MR JUSTICE NUGEE: Funnily enough, this is the second time
 8 when I have had an action which is, as it were,
 9 following on another action between arising out of
 10 similar events.
 11 MR POTTS: Yes.
 12 MR JUSTICE NUGEE: The first one was a case called
 13 *Barnsley v Noble*, where Mr Justice Morgan had already
 14 given a judgment and it saved me quite a lot of time,
 15 when writing the judgment, to be able to lift wholesale
 16 parts of his description of the background of the
 17 transaction.
 18 MR POTTS: Who knows, firstly, when the judgment is going to
 19 arrive.
 20 MR JUSTICE NUGEE: What or when, yes.
 21 MR POTTS: What or when, and my guess is your Lordship
 22 should not defer judgment in the hope that it's going
 23 to --
 24 MR JUSTICE NUGEE: Oh, no, I'm not going to do that.
 25 MR POTTS: I'm sure your Lordship wouldn't.

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1 My guess is that it's not going to provide your
 2 Lordship much assistance. As I said, it's not even
 3 a 994 case.
 4 MR JUSTICE NUGEE: No, understood.
 5 MR STUART: Just before Mr Potts -- can I just mention on
 6 that: the only issue which does seem to me that might
 7 be -- there might be potential relevance, on the legal
 8 issues, is the implied term, the relational contract
 9 and -- the precise agreement was different but the
 10 nature of the --
 11 MR POTTS: I think the implied term was also pretty
 12 different as well, my Lord, that --
 13
 14 MR STUART: Well, slightly different, slightly different.
 15 MR POTTS: -- my friend contended for last time.
 16 MR JUSTICE NUGEE: I'm obviously very much in the dark.
 17 Maybe, if the judgment comes out before I've finished,
 18 I should give you both liberty to send in written
 19 submissions if either of you think there is anything in
 20 there which affects the law or is otherwise admissible
 21 and relevant to anything I have to decide.
 22 MR POTTS: That may be sensible.
 23 MR JUSTICE NUGEE: Because I can see that it is possible
 24 that there might be something on the law which I ought
 25 to take account of. But, subject to that, I think

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1 I have a fairly clear steer from you as to what you
 2 think I should be doing with any judgment that might
 3 emerge.
 4 MR POTTS: I think your Lordship should determine the case
 5 on the evidence that your Lordship has heard.
 6 MR JUSTICE NUGEE: Well, I'm certainly proposing to do that,
 7 yes.
 8 MR POTTS: Yes.
 9 My Lord, that's my submission on the Hollington v
 10 Hewthorn and, as I said, we have got a note there, maybe
 11 buried somewhere --
 12 MR JUSTICE NUGEE: Yes, I remember it.
 13 MR POTTS: Yes. My Lord, briefly, just whilst it's fresh in
 14 my mind, the severance dividend point --
 15 MR JUSTICE NUGEE: Yes.
 16 MR POTTS: -- which my friend says is not ...
 17 The first point is it's not pleaded. It's not
 18 a pleaded -- it's paragraph 211 of my friend's closing.
 19 It was in fact, I think, mentioned -- I think it emerged
 20 in cross-examination, in fact. It wasn't even in her
 21 witness statement, I believe. It was on day 7,
 22 page 158, and day 8, pages 13 and 14, I think.
 23 The first point: not a pleaded allegation. It's not
 24 even in her witness statement. It's not one of the
 25 directed issues. Furthermore, it is not a contractual

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1 obligation to pay a severance dividend under the
 2 shareholders' agreement. I don't think it has even been
 3 asserted that it is. Fourthly, Ms Birdi accepted that
 4 there was no money in the business.
 5 I thought my friend was going to take your Lordship
 6 to E2/306-3, which is the bottom line report.
 7 {E/44.2/306.3} Your Lordship heard evidence, which
 8 wasn't challenged, that the payment of dividends
 9 involves a number of steps by SOG, and one of those is
 10 there are a number -- distributable profits, reserves,
 11 future expenditure and so on, but also a cashflow point
 12 and that doesn't go to the question just as to the
 13 timing of a dividend but as to whether a dividend should
 14 be declared at all.
 15 I think your Lordship raised an issue with me on the
 16 first day, to say, "Well, it's just a question of
 17 looking at distributable profits, purely as to whether
 18 there are accumulated P&L," and that's the only issue.
 19 The evidence, which I'll take your Lordship to,
 20 I suspect, tomorrow, now is that Financial Planning --
 21 this was evidence which wasn't challenged by Ms Birdi.
 22 She accepted that the issue as to whether a dividend
 23 would be declared was also dependent on whether the
 24 company could afford to pay a dividend and that's a cash
 25 flow/bank balance issue.

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1 MR JUSTICE NUGEE: You take three months' average of the
 2 bank balance?
 3 MR POTTS: Yes. For example, if your Lordship had 306-3.
 4 {E/44.2/306.3} Does your Lordship still have that? E2?
 5 I don't know if --
 6 MR JUSTICE NUGEE: Well, I do, but actually there is another
 7 example where Financial Planning come back and say, "You
 8 can take this in one of the following ways."
 9 MR POTTS: We are looking at the way that this is dealt with
 10 at 306-3. {E/44.2/306.3} This is a bottom line report
 11 and I think Ms Birdi accepted that she left it to
 12 Specsavers to tell her ...
 13 MR JUSTICE NUGEE: I think you have to really.
 14 MR POTTS: Well, Lord, yes, absolutely. But the table at
 15 the bottom:
 16 "Financial Planning analysis."
 17 "Cash available for distribution."
 18 MR JUSTICE NUGEE: Yes.
 19 MR POTTS: And in fact Ms Birdi accepted that the company
 20 didn't have any cash at this time. And the table at the
 21 bottom -- does your Lordship have that? There is
 22 a lovely picture of Mr Ward on the right --
 23 MR JUSTICE NUGEE: Yes.
 24 MR POTTS: -- to help locate it.
 25 MR JUSTICE NUGEE: Yes, I remember that.

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1 MR POTTS: At the bottom is the table and you have the P&L
 2 reserves, but then it says cash available for
 3 distribution is dependent on reserves, and it is the
 4 lower of net current assets and the three-month average
 5 bank balance, and that it shows as minus £1,100.
 6 MR JUSTICE NUGEE: That is the bank balance because the net
 7 current assets are £120,000-odd.
 8 MR POTTS: Exactly, but the point is it's the lower of the
 9 two.
 10 MR JUSTICE NUGEE: Obviously, if you don't the cash --
 11 MR POTTS: Then they are not going to declare a dividend.
 12 MR JUSTICE NUGEE: Yes, but it is just a cashflow point, in
 13 the sense that if the company then is cash-rich,
 14 distributable profits just feed through from one year to
 15 the next, don't they?
 16 MR POTTS: The first point is there is unattacked evidence
 17 on this, Mr Dyson's evidence -- I'll take your Lordship
 18 to it -- and it wasn't challenged by Ms Birdi -- that
 19 the issue of payment of a dividend does involve
 20 a question of a decision. Specsavers would decide is
 21 this affordable on cashflow, and if it wasn't, then no
 22 dividend would be declared.
 23 MR JUSTICE NUGEE: That wasn't my point. My point was, if
 24 you don't declare a dividend, the distributable profits
 25 remain in the company and sooner or later, when you've

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1 got the cash, then they get paid out.
 2 MR POTTS: The first point is your Lordship is right, which
 3 is, there is no loss because --
 4 MR JUSTICE NUGEE: Exactly.
 5 MR POTTS: Yes.
 6 MR JUSTICE NUGEE: And I don't think in the end it was
 7 suggested there was a loss. It's not one of the issues
 8 which is suggested to have financial consequences
 9 precisely because, suppose £39,000 of distributable
 10 profits was available for Mr Patel and £39,000 for
 11 Ms Birdi and Mr Patel didn't take it --
 12 MR POTTS: Yes.
 13 MR JUSTICE NUGEE: -- it just means the £78,000 of
 14 distributable profits, once the company is back in the
 15 black, she gets half of it.
 16 MR POTTS: Yes.
 17 MR JUSTICE NUGEE: I don't see that this point --
 18 MR POTTS: Well --
 19 MR JUSTICE NUGEE: -- goes anywhere in financial terms.
 20 I think in the end it was put on the basis it doesn't go
 21 anywhere in financial terms; it goes to the propriety
 22 and fairness of the way in which Mr McAlindon and
 23 Mr Dyson allegedly brought the Patel investigation to
 24 a premature end.
 25 MR POTTS: My Lord, a couple of points. The first point is

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1 actually in cross-examination -- I think it may even be
 2 possibly be in re-examination. In fact, it was put that
 3 somehow there could have been some sort of transaction
 4 to -- money could have been loaned back or something,
 5 but that's not being pursued.

6 But in terms of the propriety point, the first point
 7 is there is no contractual entitlement. My friend says,
 8 "Oh, well, you know you have this final dividend,"
 9 (inaudible) or whatever, but there is no contractual
 10 obligation or entitlement to that, and the position is
 11 that as at that date, as at February 2007, the company
 12 wasn't in a position to pay any dividend. So it can't
 13 be said to be improper when the company's own records
 14 say there is no prospect of a dividend at this date.

15 MR JUSTICE NUGEE: Right, yes.

16 MR POTTS: My Lord, I deal with that just with it fresh in
 17 my mind, to clear it out of the way.

18 My Lord, your Lordship has, obviously, I think, what
 19 your Lordship has described as "full written closings"
 20 from us but we've tried to --

21 MR JUSTICE NUGEE: I'm very grateful.

22 MR POTTS: There has been a lot of evidence and we thought
 23 it would be of assistance to try and set out relevant
 24 references. I'm obviously not going to go through the
 25 entirety of section E or indeed of section C.

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1 MR JUSTICE NUGEE: No.

2 MR POTTS: Similarly, my Lord, just for the sake of
 3 completeness, my friend has -- I was slightly concerned
 4 when, at about midday, we were on paragraph 7 of my
 5 closing submissions but we moved much more swiftly
 6 thereafter. But the executive summary is not
 7 a substitute for the analysis --

8 MR JUSTICE NUGEE: No.

9 MR POTTS: -- which is --

10 MR JUSTICE NUGEE: I assume it's a summary.

11 MR POTTS: It is indeed a summary but it is not an
 12 exhaustive one --

13 MR JUSTICE NUGEE: No, no.

14 MR POTTS: -- of course, and it gives an overview of the
 15 case but it isn't a substitute.

16 My Lord, what I propose to do -- your Lordship has
 17 explored, I think, to some extent with my friend what
 18 the trial was and was not about by reference to section
 19 A, and I think most of that has been covered.

20 MR JUSTICE NUGEE: Yes.

21 MR POTTS: But maybe just a couple of points which I just
 22 need to clarify.

23 MR JUSTICE NUGEE: I would quite like your answers to the
 24 same questions: What is prejudice, what is unfair and
 25 so on and so forth.

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1 MR POTTS: My Lord, firstly I will take you to the law,
 2 which I think would be helpful. My Lord, in terms of my
 3 submissions, subject to being diverted, of course,
 4 I propose to just deal a little bit with what the trial
 5 was and was not about.
 6 MR JUSTICE NUGEE: Yes.
 7 MR POTTS: I want to touch on then the law, section 994.
 8 MR JUSTICE NUGEE: Yes.
 9 MR POTTS: I have that set out in fact, the authorities on
 10 unfairness. I think what hasn't been addressed is
 11 prejudice and I think, with respect, your Lordship and
 12 indeed my friend may have been slightly confusing the
 13 element of prejudice and the element of unfairness, but
 14 I will come to that.
 15 MR JUSTICE NUGEE: That's something which I would find
 16 helpful.
 17 MR POTTS: Yes.
 18 MR JUSTICE NUGEE: Thank you.
 19 MR POTTS: There is the implied term, which I will address.
 20 MR JUSTICE NUGEE: Yes.
 21 MR POTTS: There is the issue of causation, which I want to
 22 touch on, and then, my Lord, I was proposing to gently
 23 work through -- gently -- the six issues, not on a micro
 24 level but dealing with some observations in relation to
 25 those.

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1 MR JUSTICE NUGEE: No, but on each of the issues there are
 2 points which are worth highlighting.
 3 MR POTTS: Yes, indeed, my Lord, and that's what I propose
 4 to do.
 5 My Lord, really just to start, just one point.
 6 I know your Lordship has said you are not interested in
 7 it, and I take my lead from your Lordship on that, but
 8 just in terms of the chronology, as to how we got to
 9 where we are, my friend cut and pasted that history as
 10 to how we got to the list of issues. What he failed to
 11 do was the point which I made in opening, which your
 12 Lordship may not have been interested in, either in
 13 opening or in closing.
 14 MR JUSTICE NUGEE: I may have forgotten it.
 15 MR POTTS: Indeed, your Lordship may have forgotten it. But
 16 I don't want your Lordship to accept my friend's
 17 chronology because he has just cut and pasted it, and
 18 the point which I made in opening -- and it's
 19 a five-second point -- is that, firstly, the chronology
 20 includes the ET claim, which was seeking
 21 reinstatement -- first point -- and, secondly, that in
 22 fact what my friend omits -- and indeed the very letter
 23 he refers to -- is that this wasn't some generous
 24 acceptance by them of the position. The position in
 25 advance of the hearing, and indeed the very letter which

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1 my friend refers to at F1/42, {F/17/42} was that the
 2 offer didn't come even close to resolving the issue
 3 between their clients and they were seeking to restore
 4 the entire petition for full trial at directions. And
 5 it was for that reason -- and that was clear on that
 6 very letter which my friend took you but didn't refer to
 7 that. And that was the position.

8 I did the hearing. My application for the list of
 9 issues was opposed, and your Lordship will see that it's
 10 opposed by the costs order that was made.

11 MR JUSTICE NUGEE: Yes.

12 MR POTTS: All the costs were made in our favour. So it's
 13 just a caveat. It may be that your Lordship is really
 14 not interested in how we got to it, but if your Lordship
 15 was to accept that as a summary, it would be --

16 MR JUSTICE NUGEE: My present understanding is I am not
 17 being asked to resolve how the agreement between the
 18 parties that the shares be bought at a valuation came
 19 about, but if either of you thinks that I need to
 20 understand how they came about, then I'll look at it.
 21 But at the moment I don't think either of are saying
 22 I do need to understand it.

23 MR POTTS: Your Lordship is right. The way we view it is
 24 that the thinking behind the application was that you do
 25 get cases where -- we do have a contractual mechanism

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1 for determination.

2 MR JUSTICE NUGEE: Yes.

3 MR POTTS: And, frankly, having -- and indeed I would
 4 respectfully say that events have proved this to be
 5 accurate, that having a four-week witness action to
 6 resolve these kind of things was, frankly, not a very
 7 sensible way forward and we were trying to see if we can
 8 limit the issues at the very least. We have been
 9 partially successful in that but it's still four weeks
 10 later.

11 But the point is that your Lordship will be aware
 12 that sometimes the O'Neill v Phillips, which is the case
 13 on fairness --

14 MR JUSTICE NUGEE: Yes.

15 MR POTTS: -- and I may go back to that tomorrow. The issue
 16 about fairness is if there is any unfairness in a quasi
 17 partnership exclusion case, that's usually dealt with by
 18 an offer of fair value and, therefore, if you proceed
 19 with the petition, it's an abuse of process because
 20 there is no --

21 MR JUSTICE NUGEE: You get everything you can stand to get
 22 from the petition --

23 MR POTTS: Correct, and the point is that the statutory
 24 jurisdiction to make an order is removed because there
 25 is no unfairness because you have been offered the fair

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1 price. So to proceed in those circumstances is an abuse
2 of process and there is no unfairness.

3 What one sometimes has as a difficulty is, what
4 happens if you have an issue of mixed law and fact which
5 isn't suitable for an accountant, and the case on that
6 is North Holdings v Southern Topics -- is one of the
7 cases on that, and it may be said, "Well, that may be a
8 case that's just not suitable for an accountant."

9 And that's what we're doing here; we are dealing
10 with the mixed law and fact issues.

11 But you are right, your Lordship isn't concerned
12 with quite how we got to the agreement, but I would say
13 that what your Lordship is concerned with is the fact
14 that we did get to an agreement and that there is
15 an agreement between the parties that the shares will be
16 purchased: the shares will be purchased on the basis of
17 an independent valuation and they will be purchased on
18 the basis of it's subject to the issues as defined by
19 that order having been determined.

20 The reason why that is important is -- and I don't
21 think my friend is contending otherwise -- that is
22 a specifically enforceable agreement, and that does
23 raise an issue because it goes to the question, where
24 you have a specifically enforceable agreement, the issue
25 of dividend -- my friend says, "Ah, well, you just can't

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1 deal with that; it's to do with dividends." It's not
2 just that; it goes to the issue as to my friend's
3 complaint in relation to issue 6 because he says
4 disguised distributions going into the future. But if
5 Ms Birdi ceases to have a beneficial entitlement to the
6 shares after the date of that agreement, which it
7 doesn't seem to be contended otherwise, that is
8 a material factor for your Lordship in determining that
9 issue. It's a short point of law.

10 MR JUSTICE NUGEE: Sorry, why is it a material factor in
11 determining the issue? Because it doesn't matter how
12 much Mr Singh is paid?

13 MR POTTS: After the --

14 MR JUSTICE NUGEE: After what date?

15 MR POTTS: After, certainly, the agreement in --

16 MR JUSTICE NUGEE: When do you say that there was a specific
17 enforcement agreement?

18 MR POTTS: We say it is the date of the service of the
19 notice.

20 MR JUSTICE NUGEE: Then you are asking me to resolve -- if
21 this is an important point --

22 MR POTTS: My Lord, can I say it is either that -- at the
23 very latest it is by the time of the court's order.

24 MR JUSTICE NUGEE: Well, the court doesn't order a sale.

25 MR POTTS: No, no, it orders a -- the agreement, it must be

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1 said, to have been concluded by the time that the court
2 has directed the issue.

3 MR JUSTICE NUGEE: It sounds to me as if you are asking me
4 to decide when the agreement came into force -- when
5 there was a concluded agreement.

6 MR POTTS: My friend didn't contend that it wasn't common
7 ground between the parties that the shares were going to
8 be purchased on that basis. My friend may say, "Ah, no,
9 it's not pursuant to the contractual mechanism in the
10 shareholders' agreement; it's pursuant to a separate
11 agreement."

12 MR JUSTICE NUGEE: I think that is what he says.

13 MR POTTS: It is. With respect, it doesn't matter. It's
14 still a specific --

15 MR JUSTICE NUGEE: What's the latest date?

16 MR POTTS: The latest date is the date of that order.

17 MR JUSTICE NUGEE: Which is?

18 MR POTTS: 30 July.

19 MR JUSTICE NUGEE: Which year?

20 MR POTTS: 12.

21 MR JUSTICE NUGEE: 2012?

22 MR POTTS: Yes, 2010.

23 MR JUSTICE NUGEE: But don't some of the increases in salary
24 and --

25 MR POTTS: Some pre-date.

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1 MR JUSTICE NUGEE: -- pre-date that?

2 MR POTTS: Yes, some do.

3 MR JUSTICE NUGEE: So, unless you confine this point to
4 30 July 2012, if you want to run the point any earlier
5 than that, you have to persuade me (a) that it's open to
6 you to run the point --

7 MR POTTS: It's a difference of three months, my Lord.

8 MR JUSTICE NUGEE: Right.

9 MR POTTS: It doesn't make much difference.

10 MR JUSTICE NUGEE: Right, I see. You don't have to do it
11 now, but I think, before I go away, I would like to know
12 whether you are confining this point to 30 July 2012 or
13 whether you are going to seek --

14 MR POTTS: Absolutely, my Lord, I'm happy to do that.

15 MR JUSTICE NUGEE: Right.

16 MR POTTS: It's the worst case scenario.

17 MR JUSTICE NUGEE: Right, okay. Is it a pleaded point?

18 MR POTTS: It's not a pleaded point, it's a short point of
19 law.

20 MR JUSTICE NUGEE: Why can I take account of it if it's not
21 a pleaded point?

22 MR POTTS: My Lord, my friend has run a --

23 MR JUSTICE NUGEE: Don't worry about his case, I want to
24 know about this point.

25 MR POTTS: Well, my Lord, it involves no issues of evidence;

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1 it's a pure point of law on the cases, and my friend has
 2 the cases. It's a very short point. Frankly, it's
 3 trite law, as far as I'm aware.
 4 MR JUSTICE NUGEE: I don't have any difficulty with the
 5 proposition but a contract for the sale of shares in
 6 a private company is a specifically enforceable
 7 contract. I don't think I'm going to need a great deal
 8 of persuading that, once a contract has been entered
 9 into, in some sense, some qualified sense, the vendor
 10 becomes a constructive trustee for the purchaser.
 11 MR POTTS: Yes.
 12 MR JUSTICE NUGEE: There is a recent decision of the Supreme
 13 Court on how qualified that constructive trusteeship is.
 14 MR POTTS: Yes, my Lord.
 15 MR JUSTICE NUGEE: I would need to be shown -- but I doubt
 16 I will need much persuading -- that that constructive
 17 trusteeship extends to unpaid dividends.
 18 But does it follow that, if your specifically
 19 enforceable contract for the purchase of these shares
 20 carries with them the unpaid dividends, the valuation
 21 takes account of the fact they come with dividends?
 22 MR POTTS: My Lord, it does tie in with another point, which
 23 your Lordship raised at the outset --
 24 MR JUSTICE NUGEE: Which is what date do you value it at.
 25 MR POTTS: -- which is the question of the date. Yes.

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1 MR JUSTICE NUGEE: And I'm not being asked to decide that,
 2 am I?
 3 MR POTTS: Well, someone is going to have to decide that.
 4 I think my friend has contended in his skeleton that
 5 it's a present day valuation. We would say no for
 6 a number of reasons. It's the date of the -- well,
 7 either the March or it's July. It's either the exercise
 8 of the option or the concluded agreement. There is
 9 a number of reasons for that. Firstly, it just makes
 10 sense commercially. Just take an example. In the usual
 11 case this would -- well, let's take an example. If --
 12 in this case. If this case were -- your Lordship finds
 13 in -- just hypothetically, let's say, what, 50/50 --
 14 let's say your Lordship finds in my favour but we have
 15 an appeal which runs all the way up to the Supreme Court
 16 and it runs for five years. So there is no valuation
 17 done for five years but in the meantime the business
 18 goes bust. Would it really be right to say -- would it
 19 be commercially absurd to suggest that the valuation
 20 should take place at the date that the valuation takes
 21 place in five years' time? No. Absurd.
 22 Secondly, is that right? Just in terms of a 994
 23 jurisdiction, would that be appropriate in the case of
 24 an exclusion case?
 25 MR JUSTICE NUGEE: No.

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1 MR POTTS: Plainly not.
 2 MR JUSTICE NUGEE: No.
 3 MR POTTS: And it does tie in with a point of discretion.
 4 Your Lordship is right that under 994 -- the various
 5 steps. And one of the steps is discretion. You have
 6 to beat the jurisdictional hurdles of showing
 7 membership, conduct of the affairs of the company,
 8 unfairness, prejudice. But once you have got over all
 9 those jurisdictional hurdles, there is the discretionary
 10 point, the question is it fair. And there is a point in
 11 issue 5, which is is it right that one can complain
 12 about matters in relation to -- way after the valuation
 13 of the company five years on, say, from the date of
 14 exclusion. Is it right to say that an improvement in
 15 the value of the business over five years where they
 16 have had no input into the creation of that wealth and
 17 the improvement in the profits over the five-year
 18 period -- because Ms Birdi has not been in the business
 19 since 2010 -- would that be fair? Would it be, as
 20 a matter of discretion -- would it be appropriate? And
 21 the answer to that is no.
 22 MR JUSTICE NUGEE: Well, this is all very interesting,
 23 Mr Potts, but I'm concerned that I'm told that it's not
 24 pleaded, and Mr Stuart says, "But, look, when she was
 25 offered these dividends, she was told, "This is your

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1 money," which sounds to me there might be some factual
 2 dispute about which I have heard no evidence.
 3 MR POTTS: The fact of the position is she didn't accept any
 4 dividends until just before trial.
 5 MR JUSTICE NUGEE: I don't think I'm going to spend any more
 6 time on it now but I'm not yet sure whether I accept
 7 that this is a matter for this hearing in the way that
 8 you suggest, so you might need to revisit that tomorrow.
 9 MR POTTS: My Lord, I will.
 10 MR JUSTICE NUGEE: Yes. Very well. We will say 10.30
 11 tomorrow? If -- and I know it's quite a big if. If
 12 I have any time before 10.30 tomorrow, are there
 13 particular authorities which it would be helpful for me
 14 to look at? You can take it that I have read, quite
 15 closely, both your submissions, but not any of your
 16 authorities referred to.
 17 MR POTTS: My Lord, on the law, it's -- I have set out the
 18 law in section D. It may be worth your Lordship --
 19 I don't know how your Lordship's stamina was by the time
 20 your Lordship got to section D, but section D deals with
 21 the law. Can I just have a quick look to see which ...
 22 MR JUSTICE NUGEE: And, Mr Stuart, the same for you. If
 23 there is any particular authorities that it would be
 24 helpful -- I will read that passage in O'Neill v
 25 Phillips which you asked me to.

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1 MR POTTS: Yes, I think your Lordship -- maybe your Lordship
2 perhaps might have a quick look at Howard Smith v Ampol.
3 MR JUSTICE NUGEE: Is that Lord Wilberforce?
4 MR POTTS: Yes, your Lordship raised the question about
5 improper purpose on the dividends, and your Lordship
6 said, "Well, what happens if they thought it was a good
7 thing to pay the salary but it also had a --
8 MR JUSTICE NUGEE: Yes.
9 MR POTTS: The answer to your Lordship's question is it's
10 predominant --
11 MR JUSTICE NUGEE: Predominant purpose.
12 MR POTTS: Dominant purpose.
13 MR JUSTICE NUGEE: Dominant purpose.
14 MR POTTS: It must be improper. That's Howard Smith v
15 Ampol.
16 MR JUSTICE NUGEE: Howard Smith v Ampol, O'Neill v Phillips.
17 MR POTTS: Yes, my Lord. In fact I think actually, your
18 Lordship, if you are going to read anything, I think
19 Lord Hoffmann -- or indeed Lord Justice Hoffmann, as he
20 then was -- in Saul D Harrison at page 17 to 18 is
21 actually -- I think is a very clear statement on the
22 question of fairness.
23 MR JUSTICE NUGEE: I don't promise to read anything at
24 all --
25 MR POTTS: No.

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1 MR JUSTICE NUGEE: -- because it depends on other things
2 which I'm asked to do.
3 MR POTTS: Yes. Well, I'm proposing to take your Lordship
4 through those quite quickly anyway.
5 MR JUSTICE NUGEE: Is there anything else, Mr Stuart?
6 MR STUART: My Lord, if you look at paragraph 239 of my
7 closing submissions skeleton, the reference there to
8 Redwood Master Fund v TD Bank Europe. I have actually
9 written out the chunk for you but there is an analysis
10 there, which is again -- it's about the issue of the
11 improper purpose and whether they -- if the power is
12 exercised for collateral benefits and so -- direct and
13 then collateral benefits as well. So that sort of feeds
14 into that issue.
15 MR JUSTICE NUGEE: Where do I find -- I have got Saul D
16 Harrison and O'Neill v Phillips in the supplemental --
17 MR POTTS: Saul D Harrison is in supplemental tab 4 and
18 O'Neill is in tab 6 in the supplemental authorities
19 bundle.
20 MR JUSTICE NUGEE: Yes, where do I find Howard v Ampol and
21 Redwood Master --
22 MR STUART: Redwood Master is 17 in the original --
23 MR JUSTICE NUGEE: Original bundle.
24 MR POTTS: And Howard Smith I think is number 4 in the
25 original, is it? Volume 1, tab 4, is the original.

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1 MR JUSTICE NUGEE: I think I have only got one -- oh, no,
2 there was --
3 MR POTTS: There are two, my Lord.
4 MR JUSTICE NUGEE: Joint bundle, is it?
5 MR POTTS: Yes.
6 MR JUSTICE NUGEE: 17 is Redwood Master, and Howard v Ampol
7 was?
8 MR POTTS: Tab 4, I believe, from memory.
9 MR JUSTICE NUGEE: Yes.
10 Right. Thank you both very much. 10.30 tomorrow.
11 (4.25 pm)
12 (The court adjourned until 10.30 am the following day)
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