

# OPUS 2

## INTERNATIONAL

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

Day 19

November 19, 2014

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1 Wednesday, 19 November 2014  
2 (10.30 am)  
3 Closing submissions by MR POTTS (continued)  
4 MR JUSTICE NUGEE: Yes. Good morning, Mr Potts.  
5 MR POTTS: Good morning, my Lord. My Lord, I would like to  
6 start today just by dealing with a few points to partly  
7 touch on some of the things my learned friend raised  
8 yesterday, in terms of the nature of the allegations and  
9 how the case was being put.  
10 MR JUSTICE NUGEE: Yes.  
11 MR POTTS: Firstly, my Lord, my executive summary.  
12 Paragraph 9, my learned friend went to. He said what  
13 this trial is not about and I do stand by the points  
14 made in our paragraph 9.  
15 There is an important distinction which -- as often  
16 is the case, the important points are sometimes to be  
17 found in the footnote.  
18 If your Lordship has my skeleton argument, it may  
19 be, my Lord -- I'm certainly not proposing to read out  
20 the --  
21 MR JUSTICE NUGEE: I think it's probably time you abandoned  
22 the word "skeleton", Mr Potts.  
23 MR POTTS: Written closings.  
24 MR JUSTICE NUGEE: Written closings is a more accurate  
25 description.

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1 MR POTTS: Perhaps it is.  
2 MR JUSTICE NUGEE: That's not a criticism. That's  
3 a semantic point.  
4 MR POTTS: Your Lordship is right. It's certainly too  
5 corpulent to be described as a skeleton.  
6 MR JUSTICE NUGEE: Yes.  
7 MR POTTS: The footnote, my Lord. Your Lordship had an  
8 exchange with my learned friend about whether the task  
9 was to review all the disciplinary findings and to  
10 decide whether Specsavers was right or wrong, and it was  
11 further accepted that the court wasn't entitled to  
12 decide who was right in making decisions. And that is  
13 an important distinction.  
14 This is not an employment tribunal.  
15 MR JUSTICE NUGEE: No.  
16 MR POTTS: I accept that if my learned friend makes good his  
17 pleaded allegation that the decision to suspend and  
18 dismiss involved a malicious breach of fiduciary duty,  
19 and done with the malicious purpose of driving her out  
20 of the business, then that can constitute unfairly  
21 prejudicial conduct.  
22 And indeed my friend goes further. He makes  
23 allegations -- and I'll come back to this -- of sham,  
24 that the investigation and disciplinary processes were  
25 a sham and were not carried out genuinely. If he makes

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1 good on those allegations, that is unfairly prejudicial  
2 conduct.  
3 He does not get home by saying that with the benefit  
4 of hindsight -- which I have to say I don't accept --  
5 but with the benefit of hindsight the investigation  
6 process could have been better. That is not unfairly  
7 prejudicial conduct.  
8 As your Lordship said yesterday, if the fact is that  
9 it was carried out genuinely with a view to carrying out  
10 the process, but in fact it was not done in a fair way,  
11 that is also not properly unfairly prejudicial conduct.  
12 The court is not an employment tribunal. This isn't  
13 a question of unfair dismissal. The issue is: that is  
14 qua employee; we are talking about qua member. And that  
15 is an important distinction, and the pleaded allegation  
16 in relation to that, as I said, is one of malicious  
17 breach of fiduciary duty.  
18 MR JUSTICE NUGEE: Is this a pleading point, Mr Potts or is  
19 it a substantive point?  
20 MR POTTS: It's a substantive point, my Lord.  
21 MR JUSTICE NUGEE: Let me be sure I have understood this --  
22 MR POTTS: Yes. Well, it is both.  
23 MR JUSTICE NUGEE: Mr Stuart said the process of  
24 investigation and disciplinary -- let's just call it the  
25 disciplinary process.

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1 MR POTTS: Yes.  
2 MR JUSTICE NUGEE: So, Mr Clark's investigation.  
3 MR POTTS: Yes.  
4 MR JUSTICE NUGEE: Mrs McIntyre's interview and conclusions.  
5 MR POTTS: Yes.  
6 MR JUSTICE NUGEE: And the appeal and so on. That's all  
7 a disciplinary process, which leads to dismissal.  
8 MR POTTS: Yes.  
9 MR JUSTICE NUGEE: He said that affected Ms Birdi in her  
10 capacity as member because the dismissal led to her  
11 having her shares compulsorily acquired.  
12 MR POTTS: Yes.  
13 MR JUSTICE NUGEE: Do you accept that?  
14 MR POTTS: My Lord, yes and no. The answer to your  
15 question, my Lord: doing something badly, making bad  
16 decisions or doing things badly in the conduct of the  
17 affairs of the company is not unfairly prejudicial  
18 conduct. I'll come on --  
19 MR JUSTICE NUGEE: That's a different point. The point I'm  
20 on at the moment is: is it something which affects you  
21 in your capacity as member, as opposed to as employee?  
22 MR POTTS: I don't think it does, my Lord, because I say the  
23 issue is this: if my friend says this was a sham, it was  
24 pre-determined, aimed to kick her out of the company --  
25 MR JUSTICE NUGEE: Yes, that effectively, Mr Clark and

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1 Ms McIntyre had instructions from somewhere superior,  
 2 saying, "Please go through these processes, but we all  
 3 know the result we want you to reach".  
 4 MR POTTS: Yes, and that is a precursor. The act and  
 5 conduct of the affairs of the company -- the act of the  
 6 company that we are talking about is really -- acts of  
 7 the company are matters which come before the board or  
 8 general meeting for determination. Those are acts of  
 9 a company, and the act of the company that we have here  
 10 is the dismissal of Ms Birdi. That is an act of the  
 11 company.  
 12 MR JUSTICE NUGEE: Yes.  
 13 MR POTTS: As your Lordship said at the outset, you have to  
 14 focus on what is the power that is being exercised, and  
 15 it is a pleading point but it is also a fundamental  
 16 legal point. The power that is exercised is the  
 17 directors' fiduciary duties in voting, in this case for  
 18 dismissal, and if that --  
 19 MR JUSTICE NUGEE: There is ultimately a board resolution of  
 20 Visionplus.  
 21 MR POTTS: Exactly.  
 22 MR JUSTICE NUGEE: Which says, "All the processes have been  
 23 gone through, we dismiss Ms Birdi".  
 24 MR POTTS: That, I accept, is conduct of the company's  
 25 affairs.

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1 MR JUSTICE NUGEE: It plainly is.  
 2 MR POTTS: It plainly is, of course it is. If that was done  
 3 maliciously -- and I'm not taking a dry pleading point;  
 4 that is my friend's case.  
 5 MR JUSTICE NUGEE: I know.  
 6 MR POTTS: It's not just a pleading point. That is the case  
 7 he has put; it's the case I have a meet. If that was  
 8 done maliciously, then I accept that that is unfairly  
 9 prejudicial conduct. Obviously, my client's case is  
 10 that he does not come anywhere near making that point.  
 11 MR JUSTICE NUGEE: Yes, but that's a factual point.  
 12 MR POTTS: Of course, that's a factual point, but the  
 13 analytical point is that that is the conduct of the  
 14 affairs of the company. That is the act or omission of  
 15 the company that we are focused on.  
 16 The general sort of ongoing running of the company,  
 17 if you like, that is not properly conduct of the affairs  
 18 of the company, which is justiciable in an unfair  
 19 prejudice petition, because -- I'll come back to this on  
 20 the law -- the essence of 994 is the commercial bargain.  
 21 It is holding people, as indeed is the case in terms of  
 22 the law of contract -- it's holding people to the  
 23 commercial bargain, and the commercial bargain is you go  
 24 into business with someone; you expect them to honour  
 25 their fiduciary duties; you expect them to honour the

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1 terms of the shareholders' agreement. You don't have an  
 2 expectation that they are going to do a good job of  
 3 running the business. You take your chances with your  
 4 business partner on that. They do things well or they  
 5 do things badly. If they do things maliciously and it's  
 6 a breach of fiduciary duty, that engages the  
 7 jurisdiction.

8 But a sort of review of the dismissal, was it an  
 9 unfair dismissal procedurally, or was there some kind of  
 10 flaw in the investigation, could an aspect of it be done  
 11 better -- firstly, that is not the case that is put.  
 12 It's not the pleaded case.

13 MR JUSTICE NUGEE: Let's take an example.

14 MR POTTS: Yes.

15 MR JUSTICE NUGEE: One of the points which emerged from the  
 16 cross-examination of Mrs McIntyre was that her decision  
 17 letter had not reproduced precisely the testing  
 18 resolution.

19 MR POTTS: Yes.

20 MR JUSTICE NUGEE: That was put to her as a deliberate --

21 MR POTTS: Absolutely.

22 MR JUSTICE NUGEE: -- misrepresentation of the position.

23 MR POTTS: Yes.

24 MR JUSTICE NUGEE: As part of the conspiracy, which I'm  
 25 using as a label for --

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1 MR POTTS: For malice.

2 MR JUSTICE NUGEE: Malice, improper motive whatever.  
 3 Obviously, if it's evidence which supports that  
 4 inference, then it goes to that case.

5 But suppose that Ms McIntyre's explanation, which is  
 6 that she couldn't remember how it happened but it must  
 7 have just been a mistake --

8 MR POTTS: Yes.

9 MR JUSTICE NUGEE: -- was accepted, but I think it was  
 10 unfair of her in a sense of, if I was judging the  
 11 competence and fairness of the procedure which she  
 12 adopted, it was unfair of her not to check with more  
 13 care the text of the resolution. You say that would be  
 14 completely irrelevant to anything I have to decide?

15 MR POTTS: Well, two points. Firstly, that is not the  
 16 pleaded case.

17 MR JUSTICE NUGEE: Yes, that's a pleading point. At the  
 18 moment -- I understand you have a pleading point.

19 MR POTTS: My Lord. It isn't just a pleading point.

20 MR JUSTICE NUGEE: That's not to denigrate it.

21 MR POTTS: It's not a dry pleading point, no.

22 MR JUSTICE NUGEE: Because I think it's important in a case  
 23 like this to understand what the allegations are you are  
 24 facing. So by describing it as a pleading point, I'm  
 25 not saying it's an unimportant point, but I'm trying to

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1 elucidate what you say is the scope of the jurisdiction  
2 under 994.  
3 MR POTTS: Yes, and I would say it is not part of the -- in  
4 the ordinary case, bad management or mismanagement --  
5 and if you like, this is a sort of mismanagement point;  
6 it's something carried out by an employee.  
7 MR JUSTICE NUGEE: But it could be described as unfair, and  
8 in the employment proceedings, it might be regarded as  
9 unfair for management to get its own resolutions wrong.  
10 MR POTTS: To make a mistake -- well, to err is human, my  
11 Lord, that is not the jurisdiction of 994. To say that  
12 you have made a mistake, that something could have been  
13 done better in terms of the ongoing management of the  
14 affairs of the company, that's just not what 994 is  
15 about.  
16 There may be circumstances -- the authorities do  
17 refer to that -- there may be circumstances where gross  
18 mismanagement, which effectively goes so far over the  
19 line that that might constitute unfairly prejudicial  
20 conduct, that might be -- but this is not that case.  
21 It's not how it's pleaded but it's also not that kind of  
22 case.  
23 As I said, you go into business with people; people  
24 do things in business and one of them is conducting  
25 disciplinary grievance procedures and so on, and it may

1 be that that gives rise to a claim qua employee for  
2 unfair dismissal, but the court's jurisdiction does not  
3 overlap with that and I would say that that is not --  
4 MR JUSTICE NUGEE: So I should be looking at the  
5 investigation process, purely in order to see whether it  
6 supports the inference of malice?  
7 MR POTTS: Yes, and that's --  
8 MR JUSTICE NUGEE: And you accept that that's a proper  
9 purpose for looking at it?  
10 MR POTTS: Absolutely.  
11 MR JUSTICE NUGEE: But you say that's the limit --  
12 MR POTTS: My Lord, yes. That's the pleaded case. It's the  
13 case which is being run.  
14 MR JUSTICE NUGEE: Absolutely. I'm not sure that Mr Stuart  
15 really dissents from you on that. He said that all  
16 these matters which he relies on are matters from which  
17 I can infer --  
18 MR POTTS: Absolutely.  
19 MR JUSTICE NUGEE: -- that everything was being done with an  
20 improper motive.  
21 MR POTTS: Yes, I accept that's his case. Obviously,  
22 I don't accept it's right.  
23 MR JUSTICE NUGEE: No, I think I understand that, Mr Potts.  
24 MR POTTS: I think we have been here long enough to  
25 understand that, but, my Lord, that is right.

1 I think there was some sort of floating point in my  
2 friend's skeleton as to, in fact, that the case was not  
3 being put of malice and that it was some other kind of  
4 breach of fiduciary duty, lesser, not a malicious  
5 breach. That was floated and you explored that with my  
6 learned friend yesterday on the pleadings, and I think  
7 where we got to is that he accepts that is the case;  
8 that is the malice case which he is running.  
9 I accept, of course, he has his procedural point and  
10 he has his implied term point, and I'll come back to  
11 those in due course. But in terms of the breach of  
12 fiduciary duty qua director, it is one of malice and  
13 it's one of intentional wrongdoing, and I have addressed  
14 your Lordship in opening on the Paragon case and so on.  
15 I'm going to come back to that briefly in terms of how  
16 these allegations have been put and have been developed  
17 in light of my friend's submissions yesterday.  
18 MR JUSTICE NUGEE: Yes.  
19 MR POTTS: So as I said, that's what we say the trial is and  
20 is not about.  
21 Briefly, my Lord, just in terms of housekeeping, I'm  
22 just going to make some points on a couple of minor,  
23 minor allegations which I thought had gone; I'm not sure  
24 they have, but I'm just going to tell you what our  
25 position is.

1 The repairs to Mr Patel's car, the grand sum of  
2 £300-odd. It was conceded in evidence by Ms Birdi it  
3 was a genuine business decision. It's dealt with at  
4 306. It's back in --  
5 MR JUSTICE NUGEE: I have not understood it. I have not  
6 understood on what basis the company -- I understand the  
7 company remained the insured and therefore was the  
8 person to claim on the policy.  
9 MR POTTS: Yes.  
10 MR JUSTICE NUGEE: But the policy doesn't cover the excess.  
11 That's what policies don't do. That's the whole point  
12 of them being excesses. Why is the excess borne by the  
13 company when an ex-employee who has resigned because he  
14 has been caught stealing has, for some reason that has  
15 escaped me, been allowed to be given a company car --  
16 it's his. Why is the company paying for it? It may go  
17 nowhere in these proceedings, but do you have an  
18 explanation?  
19 MR POTTS: My Lord, the explanation, I think, is the one  
20 that was given in evidence. We did explore it in  
21 evidence and we have dealt with it in my written  
22 submissions. Ms Birdi conceded it was a genuine  
23 business decision. Whether it was a good decision, who  
24 knows. The point is I think she accepts it was  
25 a genuine decision, which was taken, and it was

1 a business decision taken. It may be that your  
 2 Lordship -- it's now seven years after the event --  
 3 might think that it was a slightly odd decision. Unless  
 4 your Lordship says that it was motivated by malice --  
 5 MR JUSTICE NUGEE: Well, that's the point, because I looked  
 6 at some of the authorities you asked me to look at and  
 7 the Howard Smith case is quite useful, because  
 8 Lord Wilberforce says courts do not sit as a sort of  
 9 Court of Appeal for business decisions. But if you look  
 10 at a business decision -- in that case issuing shares  
 11 said to be in order to raise capital -- and you think  
 12 there wasn't any need to raise capital, it enables you  
 13 to form a view as to the likelihood of the decision  
 14 having been made for the reasons which were ostensibly  
 15 put forward.

16 It is relevant for the court to understand what  
 17 business people think they are doing, and I have to say  
 18 I do not understand what people thought they were doing  
 19 by paying Mr Patel's excess. He was the one who had the  
 20 accident. It's his car. The fact you insure it doesn't  
 21 mean that you are responsible for the excess.

22 I literally don't understand it.  
 23 MR POTTS: My Lord, Ms Birdi's evidence was she considered  
 24 it to be a genuine business decision which was taken.  
 25 She has had seven years to look at it. So if she

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1 doesn't consider it's evidence of malice, then she has  
 2 not asserted -- that was her evidence. So if she --  
 3 MR JUSTICE NUGEE: I understand that and I understand it's  
 4 only a few hundred pounds and I understand that you say,  
 5 in any event, it's not evidence of malice.  
 6 MR POTTS: No.  
 7 MR JUSTICE NUGEE: It's a more fundamental problem I have  
 8 with it, which is I don't understand --  
 9 MR POTTS: The highways and byways of that point are  
 10 addressed in my submissions.  
 11 MR JUSTICE NUGEE: Anyway, there we are.  
 12 MR POTTS: I think I have probably spent -- collective court  
 13 time has probably already exceeded £300 on that.

14 My Lord, the other one is the THP invoices. Now, my  
 15 friend --  
 16 MR JUSTICE NUGEE: Again, I have a difficulty with what the  
 17 company thought it was doing paying these invoices. The  
 18 evidence is that Mrs Slark identified that they were  
 19 Mr Patel's personal invoices. They weren't the  
 20 company's invoices.  
 21 MR POTTS: My Lord, the only point I'm making is just the  
 22 quantum of the issue.

23 MR JUSTICE NUGEE: Yes, it's a tiny point in the grand  
 24 scheme of things, but what is she doing paying those  
 25 invoices? And there does come a point where a failure

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1 by those responsible for managing the affairs of the  
 2 company, while Ms Birdi is suspended, to look as if they  
 3 have in view the interests of those who own the  
 4 company --

5 MR POTTS: Yes.

6 MR JUSTICE NUGEE: -- does start to raise question marks as  
 7 to why they were really doing things.

8 MR POTTS: Yes.

9 MR JUSTICE NUGEE: Why did Mrs Slark think it, on any view,  
 10 in the interests of the company to pay bills which were  
 11 for services rendered to an ex-director?

12 MR POTTS: I think, my Lord, there is a question mark as to  
 13 in what capacity services were supplied. THP was  
 14 supplying services to large numbers --

15 MR JUSTICE NUGEE: It's perfectly plain, when you look at  
 16 the invoices on their face, that they are there for his  
 17 own purposes and not for the company purposes. And the  
 18 point is, it didn't slip through unnoticed. Somebody  
 19 picked it up in the accounts department and Mrs Slark  
 20 said, "Pay them anyway". That is my memory of what the  
 21 document said.

22 MR POTTS: Yes. The allegation is --

23 MR JUSTICE NUGEE: Why is she doing that?

24 MR POTTS: The allegation which is made in relation to those  
 25 matters is that this is a bribe -- well, it's an

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1 inducement, is the allegation. It's a serious  
 2 allegation of dishonesty being made. That's the pleaded  
 3 allegation. My short answer to that is the evidence  
 4 just doesn't come anywhere close to showing the  
 5 conspiracy and a dishonest intention in relation to that  
 6 on the part of the accounts payable departments or  
 7 Ms Slark.

8 MR JUSTICE NUGEE: No, but I'm left without any positive  
 9 explanation as to why Mrs Slark thought it was a proper  
 10 thing to do, the right thing to do.

11 MR POTTS: I think the facts are addressed in the skeleton.

12 MR JUSTICE NUGEE: Yes, they are.

13 MR POTTS: It's just in terms of the scope of that.

14 My Lord, the basis of allegations was a point which  
 15 my friend made yesterday. My learned friend suggested  
 16 yesterday that, effectively, it didn't really matter  
 17 what his client says in her witness statement. That was  
 18 just her using her own words and he would run the case  
 19 that he thought was an appropriate.

20 There are a number of problems with that submission.  
 21 The first point is it's not just his client who is  
 22 running the case in that way. Does your Lordship have  
 23 volume A?

24 MR JUSTICE NUGEE: I do.

25 MR POTTS: The difficulty, my Lord -- just to be clear what

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1 I am and am not asking your Lordship to do. This is not  
 2 a criminal court. I'm not asking your Lordship to  
 3 find -- and I don't think my learned friend is asking  
 4 your Lordship to find -- that the criminal offences  
 5 which are referred to of fraud, bribery, and so on and  
 6 so forth --  
 7 MR JUSTICE NUGEE: False accounting.  
 8 MR POTTS: -- tax fraud, et cetera, are made out. I accept  
 9 that the case that he is running, the case that is  
 10 asserted, is the malicious breach of duty.  
 11 MR JUSTICE NUGEE: Yes.  
 12 MR POTTS: The difficulty is -- and I'll come back to this  
 13 in a moment to develop the point -- that the pleading  
 14 is wholly deficient in pleading the proper particulars  
 15 if you are going to make an allegation of that kind. So  
 16 we are left with some difficulties as to how that is  
 17 fleshed out.  
 18 Partly, they are fleshed out in the pleading, and  
 19 I'm about to take your Lordship to the reply, but they  
 20 are partly also fleshed out in the witness statement of  
 21 his client. It's not just any witness statement. It's  
 22 his client's witness statement, and I certainly don't  
 23 want to take arid pleading points, but the case that we  
 24 have understood to be being advanced is the combination  
 25 of those two together, and to say that one can just sort

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1 of ignore the witness statement ...  
 2 What is clear is that -- it may be that questions of  
 3 the precise legal consequences and the standard and  
 4 burden of proof and so on are issues which may not be  
 5 for his client, but it's quite clear from his client's  
 6 witness statement the seriousness of the allegations  
 7 which are being made by his client, and I don't accept  
 8 that it's open to him to say that he can just sort of  
 9 ignore that.  
 10 I'll come back to develop that, but firstly, can  
 11 I just show your Lordship the reply.  
 12 MR JUSTICE NUGEE: Yes.  
 13 MR POTTS: That starts at page 78. {A/7/78}  
 14 MR JUSTICE NUGEE: Yes.  
 15 MR POTTS: And it's settled by my learned friend.  
 16 Paragraph 59. This is in relation to Mr Singh's  
 17 salary. {A/7/97}  
 18 MR JUSTICE NUGEE: Yes.  
 19 MR POTTS: "It is averred that the salary figure was an  
 20 unnecessary inducement offered to the Second Respondent  
 21 ... in order to persuade the Second Respondent to leave  
 22 the Grays store which he was running ... to serve the  
 23 First Respondent's purpose of driving the Petitioner out  
 24 of the business."  
 25 MR JUSTICE NUGEE: Yes.

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1 MR POTTS: That's again at the bottom of the page, 63:  
 2 {A/7/98}  
 3 "... the salary figure was an unnecessary  
 4 inducement..."  
 5 MR JUSTICE NUGEE: Yes.  
 6 MR POTTS: This is a pleading. My learned friend knows what  
 7 an inducement is. We are not going to mix words and  
 8 beat about the bush about this. It is an allegation of  
 9 bribery. We have also got in 62 --  
 10 MR JUSTICE NUGEE: I don't regard inducement as synonymous  
 11 with bribery.  
 12 MR POTTS: Well, my Lord, obviously not on its own, one has  
 13 to look at the context, but the context is it's  
 14 a payment in order to persuade someone to do something  
 15 improper. Payment or provision of something of value in  
 16 order to do something which they shouldn't otherwise do.  
 17 In the context of an agent -- I have to say it does  
 18 constitute -- I'm not asking your Lordship to make  
 19 findings --  
 20 MR JUSTICE NUGEE: I don't think I find it helpful to decide  
 21 whether to re-label that pleading as effectively  
 22 a pleading of bribery.  
 23 MR POTTS: My Lord, the point I am making is it's a serious  
 24 allegation of wrongdoing.  
 25 MR JUSTICE NUGEE: It's serious enough just to say that what

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1 your clients were doing was paying Mr Singh more than  
 2 they needed to.  
 3 MR POTTS: Yes.  
 4 MR JUSTICE NUGEE: That's the effect of "unnecessary".  
 5 MR POTTS: Yes.  
 6 MR JUSTICE NUGEE: Over what was required to persuade him to  
 7 come, in order that it would assist them -- regardless  
 8 of what they were getting Mr Singh to do -- but assist  
 9 them with their aim, which was to get Ms Birdi out.  
 10 MR POTTS: Yes.  
 11 MR JUSTICE NUGEE: And that is the case.  
 12 MR POTTS: That is the case.  
 13 MR JUSTICE NUGEE: And this is a serious allegation.  
 14 MR POTTS: It is, my Lord.  
 15 MR JUSTICE NUGEE: And I don't regard it as either helpful  
 16 or necessary to try and identify whether that is  
 17 bribery, either in a civil law or criminal law sense.  
 18 MR POTTS: My Lord, I accept that. The point I'm trying to  
 19 emphasise, my Lord, is the seriousness of the  
 20 allegations.  
 21 MR JUSTICE NUGEE: Yes, it is more than just saying, "You  
 22 called the market wrong and you could have got away with  
 23 paying him £32,000 because he would have come way".  
 24 It's saying, "You are doing it for a purpose", and it's  
 25 the improper purpose which is at the heart of the

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1 allegation.  
 2 MR POTTS: "Improper purpose" is a label which in some  
 3 contexts has an issue that it's just not the right  
 4 purpose, but in this case, "improper"" is used in the  
 5 context of serious, you know, moral impropriety. This  
 6 is --  
 7 MR JUSTICE NUGEE: I'm not sure it even needs to be moral  
 8 impropriety. Improper purpose is using powers --  
 9 MR POTTS: Nor for the purpose --  
 10 MR JUSTICE NUGEE: -- not for the purpose they were given.  
 11 The reason you give someone a fiduciary power is to run  
 12 the affairs of the company in the interests of the  
 13 company. Paying an employee more than you need to is  
 14 not in the interests of a company. If you are doing  
 15 that because you make a mistake as to how much you need  
 16 to pay to persuade him to come, that's not improper,  
 17 because you are still trying to further the interests of  
 18 the company. But if you are doing it in order to  
 19 achieve something else, that is, to get someone else out  
 20 of the business, you are not doing it in the interests  
 21 of the company.  
 22 MR POTTS: My Lord, just to take an example, the improper  
 23 purpose, Howard Smith v Ampol, for example, the  
 24 allotment of shares. An improper purpose for the  
 25 allotment of shares is in order to create or change

1 majorities.  
 2 MR JUSTICE NUGEE: Yes.  
 3 MR POTTS: That is an improper purpose. It doesn't carry  
 4 with it any sense of -- I suppose, of course in the  
 5 context it might, but it doesn't have a sense of --  
 6 MR JUSTICE NUGEE: It can be bona fide.  
 7 MR POTTS: It can be bona fide.  
 8 MR JUSTICE NUGEE: The directors in Howard Smith might well  
 9 have thought it was the right thing to do to block the  
 10 takeover -- the majority position of Ampol and  
 11 Bulkships.  
 12 MR POTTS: They may even indeed have thought it was in the  
 13 interests of the company, but this is not that type of  
 14 allegation. This is an allegation of a deliberate  
 15 decision --  
 16 MR JUSTICE NUGEE: But I don't think there is any dispute  
 17 about this. I don't think either you or Mr Stuart are  
 18 at odds that, if he establishes his case --  
 19 MR POTTS: Yes.  
 20 MR JUSTICE NUGEE: -- your clients have behaved appallingly.  
 21 MR POTTS: Absolutely.  
 22 MR JUSTICE NUGEE: I don't think either of you are trying to  
 23 persuade me that this is something which is a less than  
 24 serious allegation.  
 25 MR POTTS: My Lord, not. I think we are ad idem on the

1 point. I'm just trying to show your Lordship the  
 2 seriousness of the allegations as they are put in the  
 3 pleading. That's a couple.  
 4 You have also got 96, third line, this is a plan to  
 5 persecute and harass her over the four days' testing.  
 6 Do you see that there? {A/7/106}  
 7 MR JUSTICE NUGEE: Yes.  
 8 MR POTTS: Back at 72, plan to use four days' testing to  
 9 harass her out of the business. {A/7/100}  
 10 MR JUSTICE NUGEE: Yes.  
 11 MR POTTS: And then at 128: {A/7/114}  
 12 "The finding of gross misconduct ... was wholly  
 13 unjustified, and merely a sham."  
 14 MR JUSTICE NUGEE: Yes.  
 15 MR POTTS: "Sham" does have connotations. "Sham" --  
 16 obviously your Lordship knows Snook. Attorney  
 17 General --  
 18 MR JUSTICE NUGEE: I don't read that as a Snook -- sham in  
 19 the Snook sense is: here is a document which purports to  
 20 be a contract of type A but what's really going on is  
 21 something B. That's Snook, but this is not about  
 22 a document; this is a process. What I understood the  
 23 allegation that the process was a sham to mean is  
 24 that -- what is this? Is this Ms McIntyre's?  
 25 MR POTTS: Yes, I think it is.

1 MR JUSTICE NUGEE: Mrs McIntyre's -- is that she wasn't  
 2 genuinely assessing whether, in her view, Ms Birdi had  
 3 committed acts of misconduct such as to justify her  
 4 dismissal, because it had been decided beforehand that  
 5 she would be dismissed.  
 6 MR POTTS: Yes. I'm not saying Snook. The slightly shorter  
 7 definition in Attorney General v Bourne, I think is more  
 8 helpful in this sort of context, which is that where  
 9 parties say one thing but intending another.  
 10 MR JUSTICE NUGEE: Well, yes.  
 11 MR POTTS: It is closer, my Lord, in here, because what is  
 12 being said is it's a document which is giving the  
 13 appearance of a genuine investigation, when in fact it  
 14 was never intended to be a genuine --  
 15 MR JUSTICE NUGEE: Just going through the motions.  
 16 MR POTTS: Just going through the motions. But these are  
 17 serious allegations. That's all the point I'm making.  
 18 The second point is, as I said, on the witness  
 19 statements. I accept that, as I have said, it's not  
 20 a criminal trial; we are not talking about bribery and  
 21 so on, but the way the allegations are made in the  
 22 witness statement is important because they are, if you  
 23 like, the development. They are the particulars which  
 24 one doesn't find in the pleading in relation to the  
 25 nature of the allegations.

1 Just to give you an example, the allegations of  
 2 malice which are made, the pleadings don't identify any  
 3 human agents.  
 4 MR JUSTICE NUGEE: No.  
 5 MR POTTS: For example. If your Lordship has -- I think we  
 6 have finished with A but if your Lordship has my  
 7 skeleton open, paragraph 286 of my closing  
 8 submissions --  
 9 MR JUSTICE NUGEE: Yes.  
 10 MR POTTS: -- I set out the Chancery Guide in relation to  
 11 provisions and these are of wider import in relation to  
 12 pleadings and witness statements otherwise.  
 13 If you are going to make an allegation of fraud,  
 14 dishonesty or malice, you must provide full particulars,  
 15 and where an inference of fraud or dishonesty is  
 16 alleged, the facts and bases of that must also be set  
 17 out, and then below that, the professional conduct  
 18 obligations about how you must have credible material.  
 19 MR JUSTICE NUGEE: Yes.  
 20 MR POTTS: You won't find any of that, really, in the  
 21 pleadings. The inferences to be drawn are not  
 22 specified, or the bases of inferences are not to be  
 23 drawn.  
 24 Where one finds the particulars of that and some  
 25 extent of the individuals as to who the human agents of

1 this -- because obviously the company is an artificial  
 2 being -- that's developed to some extent in the witness  
 3 statements and also, in fact, in cross-examination.  
 4 Your Lordship will have seen the tables in my executive  
 5 summary.  
 6 MR JUSTICE NUGEE: I was conscious while you were  
 7 cross-examining that you were seeking to get Ms Birdi to  
 8 identify which individuals she accused of what.  
 9 MR POTTS: Yes, and I respectfully say that's an entirely --  
 10 MR JUSTICE NUGEE: That's an entirely fair line of  
 11 questioning.  
 12 MR POTTS: Yes, and you will have seen the tables. We have  
 13 got about 25 or more individuals who are parties to  
 14 dishonest conspiracies identified, and we set out the  
 15 references. Obviously I have made a point, my Lord,  
 16 which is, in terms of judging that allegation, the  
 17 unlikelihood of 25 people being a party to an improper,  
 18 dishonest -- and I say it is dishonest -- dishonest  
 19 conspiracy is inherently -- of course, it's not  
 20 impossible, but we would say it's inherently unlikely.  
 21 But just in terms of the allegations, firstly, my  
 22 Lord, on the witness statement. Firstly, my friend said  
 23 yesterday, well, all the witness statement is doing is  
 24 setting out her position in her own language. Well, the  
 25 first point is that is plainly not the case; that is not

1 what the witness -- it is littered with the language of  
 2 lawyers. We had "sophistry" -- words that she didn't  
 3 understand. "Gratuitous" -- it's not an insult to her,  
 4 I'm not suggesting a criticism of her, but the fact is  
 5 the witness statement is a heavily lawyered document.  
 6 "Gratuitous", "purport", we even had --  
 7 MR JUSTICE NUGEE: They always are, Mr Potts.  
 8 MR POTTS: They always are and I am not criticising --  
 9 MR JUSTICE NUGEE: I wouldn't be surprised if your witness  
 10 statement had had some input from your instructing  
 11 solicitors.  
 12 MR POTTS: Indeed, entirely proper that they should.  
 13 MR JUSTICE NUGEE: Yes. Well, it's not what the  
 14 Chancery Guide says, but in practice, people always put  
 15 their witness statements through their legal advisers.  
 16 MR POTTS: Exactly, but the point I'm making is, to step  
 17 back and say that therefore it has got nothing to do  
 18 with the lawyers. Firstly, it doesn't reflect the  
 19 reality of Ms Birdi's statement, because of the points  
 20 I have just taken to your Lordship. But secondly,  
 21 I don't accept that, in relation to assisting in the  
 22 preparation of witness statements, the obligation of the  
 23 lawyers is merely just to say, you know, it's in the  
 24 client's own language.  
 25 There is an obligation to identify clearly -- if

1 there are serious allegations to make, you have to  
 2 identify that there is a proper basis for them,  
 3 particularly if that is one of belief.  
 4 And my Lord, just so that note, could I just show  
 5 you the SRA rules, briefly. Two rules on the SRA.  
 6 MR JUSTICE NUGEE: Yes.  
 7 MR POTTS: (Handed)  
 8 MR JUSTICE NUGEE: Thank you.  
 9 MR POTTS: Rule 5.7. Your client and the court. This is to  
 10 comply with the overall principles.  
 11 MR JUSTICE NUGEE: Yes.  
 12 MR POTTS: 5.7: You will not have complied with the  
 13 principles if you construct facts supporting your  
 14 client's case or draft any document relating to the  
 15 proceedings containing -- (b) in particular:  
 16 "Any allegation of fraud, unless you are instructed  
 17 to do so and you have material which you reasonably  
 18 believe shows, on the face of it, a case of fraud."  
 19 And then 5.8:  
 20 "Suggesting that any person who is guilty of  
 21 a crime, fraud or misconduct unless such allegations:  
 22 "(a) go to a matter in issue which is material to  
 23 your own client's case; and  
 24 "(b) appear to you to be supported by reasonable  
 25 grounds."



1 MR JUSTICE NUGEE: Does that apply to witness statements?  
 2 MR POTTS: My Lord, I believe it does.  
 3 MR JUSTICE NUGEE: But a witness statement is what the  
 4 witness wants to say. It's clearly the case that if you  
 5 write letters or draft pleadings or issue proceedings  
 6 containing allegations of fraud, you have to be  
 7 satisfied not only that those are your instructions but  
 8 that you have got some reasonably credible material on  
 9 which to base them. But I'm not sure that's true of  
 10 witness statements.  
 11 MR POTTS: I'm afraid I don't have them here but the BSB  
 12 guidelines for the bar make it clear that that applies  
 13 to witness statements expressly, the similar  
 14 obligations. The point is, my Lord, your client -- you  
 15 have an obligation in the preparation of witness  
 16 statements, for example, to ensure that the witness  
 17 statements are focused on the issues in the case. It's  
 18 not just to let your client --  
 19 MR JUSTICE NUGEE: That's a different point.  
 20 MR POTTS: It's part of the point, my Lord, because firstly  
 21 there is that, but if you are going to make allegations  
 22 of -- just take one example. In this witness statement  
 23 there is an allegation made which is the -- in fact,  
 24 it's an allegation made by my learned friend's  
 25 instructing solicitor, which is recorded in the witness

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1 statement, of an allegation of tax fraud against my  
 2 client, which is put into the witness statement.  
 3 MR JUSTICE NUGEE: I can't remember which one it was. What  
 4 was that in relation to?  
 5 MR POTTS: My Lord, I think it was in relation to -- we will  
 6 find the reference, but your Lordship does remember the  
 7 allegation, which Ms Birdi --  
 8 MR JUSTICE NUGEE: Yes.  
 9 MR POTTS: -- eventually withdrew. And we have got numerous  
 10 assertions in the witness statements of conspiring  
 11 together to cheat and defraud me and so on.  
 12 My Lord, the point I'm making is that I don't accept  
 13 that lawyers, when drafting or assisting in the  
 14 preparation of witness statements, have no professional  
 15 obligations in relation to the kinds of allegations that  
 16 are bandied around in the witness statement.  
 17 MR JUSTICE NUGEE: How does this help me resolve the issues?  
 18 MR POTTS: It doesn't help you. The point I'm making -- the  
 19 short point is -- my friend said, oh, well, effectively  
 20 he can run a different case from his client. The short  
 21 point, my Lord: no, his client's case is particularised  
 22 in the witness statement. That is the case which we  
 23 understand and properly understood was the case that we  
 24 have to meet. That's the short point.  
 25 MR JUSTICE NUGEE: Right, okay.

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1 MR POTTS: And just for your Lordship's note -- yes, the  
 2 security expenses were said to be a tax fraud. It's  
 3 paragraph 214 of her witness statement for your  
 4 Lordship's note. {B/1/45} I don't think we need to go  
 5 to it.  
 6 MR JUSTICE NUGEE: I'm not going to look at it now.  
 7 MR POTTS: That's for the transcript. So, my Lord, the only  
 8 point I'm making is that's the case we have understood  
 9 it to be and that's the case we have met.  
 10 But we are entitled to know the allegations that we  
 11 have to meet and as I said, in terms of the way and the  
 12 manner in which allegations have been proceeded with, it  
 13 may be that Ms Birdi genuinely feels that she has been  
 14 a victim to a plot or various conspiracies --  
 15 MR JUSTICE NUGEE: I certainly got the impression that  
 16 that's her genuine feeling.  
 17 MR POTTS: My Lord, I'm not suggesting otherwise. But that  
 18 doesn't, I would respectfully say, justify the assertion  
 19 and running a case on -- that doesn't allow counsel to  
 20 just say, well, because you believe it, I'm going to run  
 21 a case of dishonesty. That's not the professional  
 22 obligation on counsel. And it also doesn't excuse  
 23 counsel from the professional obligations -- or indeed  
 24 solicitors -- in relation to the preparation of  
 25 documents for court.

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1 And just to give another brief example, a couple of  
 2 allegations --  
 3 MR JUSTICE NUGEE: Mr Potts, I have enough things to decide.  
 4 I'm not tempted to decide anything relating to the  
 5 duties of counsel and solicitors.  
 6 MR POTTS: No, my Lord, I'm not asking your Lordship to.  
 7 MR JUSTICE NUGEE: No, but what I have to decide is whether  
 8 the evidence makes out the case which is made. You can  
 9 make the point that this is the case that is alleged  
 10 against me. It's the pleaded case supplemented by the  
 11 witness statements.  
 12 MR POTTS: My Lord, yes. There is an additional point,  
 13 which is also in relation to the assessment of Ms Birdi  
 14 as a witness and her credibility because -- and I'll  
 15 just give you two examples. Allegations without  
 16 substance were advanced in her witness statement. There  
 17 were quite a number of them -- in fact, a large number  
 18 of them, but some of them were particularly stark. For  
 19 example, Ms Birdi alleged in her witness statement that  
 20 Ms Khan had been victimised by Mr Singh, if your  
 21 Lordship remembers that. And she made that allegation  
 22 at some length in the witness statement, notwithstanding  
 23 the fact that she accepted she had not even read  
 24 Mr Rajan's grievance report/investigation, which, of  
 25 course, wouldn't have been sent to her at the time, but

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1 she said in evidence that despite the fact that Mr Rajan  
2 had acquitted Mr Singh of those matters and she didn't  
3 take issue in the end with Mr Rajan's conclusions, the  
4 fact was she was prepared to make that serious  
5 allegation against Mr Singh, without having even read  
6 that report.

7 That is a matter which does go to her credibility  
8 and her general approach in relation to the making of  
9 allegations and this case generally.

10 Again, one other example. The allegations which she  
11 made in her witness statement in relation to Mr Clark's  
12 investigation of the grievance that she made in relation  
13 to Mr McAlindon. Again she said -- it's dealt with in  
14 paragraph 59 of our closing but again, she said there  
15 that she made that allegation without having read  
16 Mr Clark's report. Serious allegations made without  
17 having even taken the trouble to actually read the  
18 underlying documents. And that is a matter which goes  
19 to the manner in which the case is being proceeded with.

20 And it's not a question of counsel or solicitors;  
21 I'm not trying to personalise this. It's a question  
22 about how the case is being run and the credibility of  
23 Ms Birdi as a witness, and I think that is a legitimate  
24 matter.

25 MR JUSTICE NUGEE: I certainly understand why the

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1 credibility of all the witnesses is something I have to  
2 form a view on.

3 MR POTTS: My Lord, yes, and we say that's a matter which  
4 properly goes to that.

5 MR JUSTICE NUGEE: Yes.

6 MR POTTS: One other point. Another allegation which is  
7 being noted in my learned friend's submissions. He  
8 didn't, I think, mention it yesterday but the RCS camera  
9 invoices. At paragraph 85 of my friend's submissions,  
10 he makes an allegation of fraud and sham in relation to  
11 invoices. He said that they were concocted invoices and  
12 that RCS is a branch of SOG, is how he puts it in his  
13 closing submissions.

14 My Lord, a number of points on that. There is no  
15 pleaded allegation to that effect. If it were pleaded,  
16 professional obligations would apply. No evidence is  
17 referred to; none of those allegations --

18 MR JUSTICE NUGEE: Well, the evidence he has is the meta  
19 data on the Excel version of the invoice, which  
20 contradicts what Mr McAlindon said, which is that he  
21 received it as a paper document, which he PDF'd and sent  
22 to Guernsey. And in fact, the invoice which he refers  
23 to, turns out to be an Excel invoice and turns out to  
24 have been created by someone called Mr Gutteridge,  
25 I think, in Mr McAlindon's department.

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1 MR POTTS: Yes.

2 MR JUSTICE NUGEE: That is some evidence that the account  
3 that Mr McAlindon gave was not actually accurate.

4 MR POTTS: But not put to Mr McAlindon.

5 MR JUSTICE NUGEE: That's a different point.

6 MR POTTS: That's my final point, my Lord. It's an  
7 allegation which was not put.

8 MR JUSTICE NUGEE: Yes.

9 MR POTTS: That's the four points on that.

10 Other points, my Lord, which weren't put: dishonesty  
11 by the staff in relation to the June letter. It was not  
12 properly put or indeed put to them that they were  
13 dishonest in making the allegations, which is Ms Birdi's  
14 case.

15 The inducements and -- indeed I don't believe it was  
16 put to Mr Singh that he was recruited to drive her out  
17 of the business at any time. It wasn't put to the  
18 witness.

19 MR JUSTICE NUGEE: It was certainly put to him that he had  
20 an ulterior motive.

21 MR POTTS: A different ulterior motive to the one which is  
22 alleged.

23 MR JUSTICE NUGEE: Not that different. An ulterior motive  
24 to manage and communicate with Ms Birdi in such a way as  
25 to achieve his aim of getting one of the members of his

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1 family into the business doesn't seem to me to be very  
2 different from a motive of getting Ms Birdi out of the  
3 business.

4 MR POTTS: My Lord, yes. I'll come back to that perhaps in  
5 due course, but the allegation that SOG recruited him  
6 for this purpose and he knew he was recruited for that  
7 purpose of driving her out, which is the pleaded  
8 allegation, was not put to him at all.

9 My Lord, that's just a preamble. Can I move on the  
10 law.

11 MR JUSTICE NUGEE: Yes.

12 MR POTTS: Does your Lordship have tab D in my submissions?

13 MR JUSTICE NUGEE: I do.

14 MR POTTS: We have set out, obviously, the Act. We have set  
15 out the provisions, the requirements, and I think that's  
16 common ground. There is an issue as to the burden of  
17 proof, perhaps, which I will come on to in causation.

18 Conduct of the affairs of the company, my Lord.  
19 Just 245. I have referred to Racking v Gross, the point  
20 about parent and subsidiary. I think your Lordship may  
21 have been a little confused and I'll come back to this  
22 because it actually ties in with the shareholders'  
23 agreement.

24 The identity of the directors is the same for both  
25 companies and always has been the same.

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1 MR JUSTICE NUGEE: The directors?  
 2 MR POTTS: Yes, the directors. Your Lordship said that the  
 3 directors were different --  
 4 MR JUSTICE NUGEE: Well, the members are different. So who  
 5 are the directors of Visionplus?  
 6 MR POTTS: Let me have a look. If I can get D1. If you  
 7 have -- D1/41 is the annual return for Dartford  
 8 Visionplus. You have got SOG, Ms Birdi,  
 9 Dame Mary Perkins. {D/5/41}  
 10 MR JUSTICE NUGEE: Sorry, which page are we looking at?  
 11 MR POTTS: 41/42.  
 12 MR JUSTICE NUGEE: And this is which company?  
 13 MR POTTS: This is --  
 14 MR JUSTICE NUGEE: Visionplus?  
 15 MR POTTS: Visionplus. The directors are Specsavers,  
 16 Ms Birdi, Dame Mary Perkins, and then this time it's  
 17 Mr Singh. And then Dartford is at page 204 {D/17/204}  
 18 and we have got Specsavers, Ms Birdi, Dame Mary Perkins  
 19 and Mr Singh.  
 20 MR JUSTICE NUGEE: Right.  
 21 MR POTTS: And the directors are the same at all times.  
 22 Sorry, they are not the same, of course. Mr Singh, of  
 23 course, comes and goes, but there is a uniformity and  
 24 I'll come back to that, my Lord, because it's of some  
 25 relevance in relation to the construction of the

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1 shareholders' agreement, which I'll come back to in  
 2 a moment.  
 3 MR JUSTICE NUGEE: Yes.  
 4 MR POTTS: So it is common ground on the Gross v Racking  
 5 point that the affairs of both are matters to which your  
 6 Lordship can have regard.  
 7 We have set out, in relation to unfairness, the  
 8 O'Neill v Phillips decision.  
 9 MR JUSTICE NUGEE: I have read that, yes.  
 10 MR POTTS: I think the Saul D Harrison quote that we have  
 11 given is more pithy. What we are talking about, as  
 12 I have said, it's breaches of the commercial bargain and  
 13 that includes observation of fiduciary duties and it  
 14 might, in an appropriate case, in a quasi partnership  
 15 case, it might include promises which may not, if you  
 16 like, have the full panoply of contractual promises, but  
 17 are binding in conscience and those are --  
 18 MR JUSTICE NUGEE: Understandings.  
 19 MR POTTS: Understandings, but again, the understandings  
 20 are -- if you like it is an agreement. It may not be  
 21 a contractually enforceable one, but it is part of the  
 22 commercial bargain between the incorporators in relation  
 23 to the affairs of the company. So that is unfairness.  
 24 In relation to part of that, the position on  
 25 fiduciary duties, which, in a sense, is an aspect of

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1 that, we have dealt with at paragraph 262 onwards. And  
 2 your Lordship will see that we have set out the relevant  
 3 provisions of the Act and also, I think your Lordship  
 4 asked a point about the position between the common law  
 5 and codification.

6 There is, in fact, quite a helpful -- paragraph 270,  
 7 there is a reference to Hansard and Lord Goldsmith in  
 8 relation to the debate as to what was considered to be  
 9 in mind at 172, and in particular, the highlighted  
 10 points, which is that:

11 "The aim is not to make it possible for a director  
 12 acting in good faith to be held liable for a process  
 13 failure where it could not have effected the outcome."

14 Which is a helpful observation.

15 MR JUSTICE NUGEE: Yes. Sorry, that's a quote from Hansard?

16 MR POTTS: Yes.

17 MR JUSTICE NUGEE: In what sense can I look at that? For  
 18 what purpose can I look at that?

19 MR POTTS: Hansard is as an aid to construction in relation  
 20 to that.

21 MR JUSTICE NUGEE: Aid to construction of what?

22 MR POTTS: Of section 172.

23 MR JUSTICE NUGEE: What is the point of construction that it  
 24 goes to?

25 MR POTTS: As to what the scope of the obligation is under

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1 172, which is the point about it's what the directors  
 2 believe, not what the court believes and so on, which is  
 3 the existing common law. And my Lord, I'm not  
 4 suggesting your Lordship is bound to follow it.

5 MR JUSTICE NUGEE: Well, it's only admissible at all under  
 6 Pepper v Hart if there is some ambiguity in the section,  
 7 isn't it?

8 MR POTTS: I think there was some uncertainty at some point  
 9 and I think the point may have been rather clarified now  
 10 about the development of the law as to what the position  
 11 was between the common law and the effect of the  
 12 statute, indeed the point which your Lordship raised  
 13 with me on the first day.

14 MR JUSTICE NUGEE: I'm looking at section 172, which is set  
 15 out at paragraph 263 of your submissions.

16 MR POTTS: Yes.

17 MR JUSTICE NUGEE: "To act in the way he considered in good  
 18 faith would be most likely to promote the success of the  
 19 company for the benefit of its members as a whole."

20 MR POTTS: Yes.

21 MR JUSTICE NUGEE: I don't see in that an ambiguity which  
 22 requires recourse to Hansard to resolve.

23 MR POTTS: My Lord, if that's the case, so be it. I'm  
 24 not --

25 MR JUSTICE NUGEE: But I don't think one can just -- if one

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1 is being precise about these things, which I think one  
 2 has to be, one can't just look at Parliament -- what's  
 3 recorded in the speeches in Hansard of what people said  
 4 in Parliament as a general source of understanding of  
 5 the law.  
 6 There is a general prohibition on looking at what's  
 7 said in Parliament, save for the Pepper v Hart  
 8 exception, which is dependent upon there being  
 9 a particular ambiguity which the Hansard helps resolve.  
 10 MR POTTS: My Lord, if your Lordship doesn't consider there  
 11 to be any ambiguity, I won't persist with the point.  
 12 MR JUSTICE NUGEE: Well, I'm not quite sure at the moment  
 13 what the purpose is of citing this.  
 14 MR POTTS: My Lord, I'll come back to it because in fact, my  
 15 position is, of course, that it is a reflection of what  
 16 the law actually is, and perhaps your Lordship may find  
 17 it more helpful if I try and assist your Lordship as to  
 18 what the law actually is.  
 19 Howard Smith v Ampol. It sounds like your Lordship  
 20 has read --  
 21 MR JUSTICE NUGEE: I have read that as well.  
 22 MR POTTS: The important point in terms of the issues your  
 23 Lordship raised yesterday, and which my friend  
 24 addressed, and I respectfully say I think he gave your  
 25 Lordship the opposite of the correct answer, which is

1 that the issue is it is predominant purpose; the  
 2 improper purpose is the test.  
 3 MR JUSTICE NUGEE: Yes.  
 4 MR POTTS: And your Lordship gave an example of mixed motive  
 5 or consequences in relation to dividends and I think my  
 6 friend -- I don't agree with the answer that my learned  
 7 friend gave in that regard.  
 8 My Lord, I haven't addressed the issue of prejudice  
 9 separately in the written closing, but I think it's  
 10 common ground, my Lord, that really -- and I'll your  
 11 Lordship to one authority, which is already before the  
 12 court. But we are talking about financial loss in this  
 13 case, particularly in this context.  
 14 Could your Lordship have our supplemental  
 15 authorities bundle, the decision of Sunrise Radio --  
 16 sorry, it's in our main authorities bundle, sorry. It's  
 17 volume 2 of the authorities bundle, tab 21.  
 18 MR JUSTICE NUGEE: 21, yes, thank you.  
 19 MR POTTS: The short summary of the point at paragraph 4 of  
 20 the judgment, right at the beginning. The point is made  
 21 that there must be prejudice and unfairness.  
 22 We dealt with prejudice, and:  
 23 "Prejudice will most often be established by  
 24 reference to conduct having a depressive value, actual  
 25 or threatened, on the value of the petitioner's

1 shareholding."  
 2 And then we have the reference to unfairness, some  
 3 breach of the articles and so on, which is the  
 4 commercial bargain.  
 5 So my Lord, the prejudice in this case -- and that's  
 6 particularly the case here because what your Lordship is  
 7 faced with is a trial of allegations that, it is said,  
 8 are such as should warrant an adjustment to the price  
 9 payable. So we are looking at impact. As I think it  
 10 was said before, this is all about money, this trial.  
 11 MR JUSTICE NUGEE: Well, yes, in the sense that the only  
 12 relief which is sought is money.  
 13 MR POTTS: Yes.  
 14 MR JUSTICE NUGEE: But to describe it as all about money in  
 15 circumstances where Ms Birdi --  
 16 MR POTTS: I wasn't intending to be flippant about  
 17 Ms Birdi's case but -- firstly, that makes it clear that  
 18 we are talking about matters having an adverse financial  
 19 impact on the value of shareholdings.  
 20 MR JUSTICE NUGEE: Yes.  
 21 MR POTTS: And that is indeed the case which is being run.  
 22 My friend has run a case for --  
 23 MR JUSTICE NUGEE: These six issues are all said to have  
 24 a financial consequence which warrants an adjustment to  
 25 the price.

1 MR POTTS: Yes.  
 2 MR JUSTICE NUGEE: So in that sense, it's about money.  
 3 MR POTTS: And it's a bridge, which is a jurisdictional  
 4 requirement --  
 5 MR JUSTICE NUGEE: But presumably you accept that acts which  
 6 take value out of the company --  
 7 MR POTTS: May be prejudicial.  
 8 MR JUSTICE NUGEE: Are prejudicial. They may not be unfair,  
 9 they may be entirely proper, but every time money is  
 10 paid as an expense of the business, it's reduces the  
 11 profits of the business and is therefore prejudicial, in  
 12 the sense of it has a financial effect on the value of  
 13 shareholding.  
 14 MR POTTS: Yes, I accept that. Obviously, one also has to  
 15 have the unfairness.  
 16 MR JUSTICE NUGEE: Of course.  
 17 MR POTTS: But your Lordship asked. That's prejudice.  
 18 I think that's quite a short point.  
 19 Quasi partnership, my Lord, is an issue. I have to  
 20 say I'm not quite sure whether that is still being  
 21 proceeded with.  
 22 MR JUSTICE NUGEE: I think it is. There is the implied term  
 23 in the shareholders' agreement which is alleged at,  
 24 I think, paragraph 8 of the points of claim which, as  
 25 I understand it, is based on an allegation that the

1 nature of the relationship between the shareholders --  
 2 that is, not only between the two A shareholders but  
 3 between the A shareholders and SOG in its capacity as  
 4 B shareholder -- is one of personal relationship giving  
 5 rise to duties of mutual quasi partnership-type duties.  
 6 MR POTTS: Well, in fact, the allegation as to the duty  
 7 which is implied is the one which is set out in the  
 8 pleading, which is the implied term.  
 9 MR JUSTICE NUGEE: Yes.  
 10 MR POTTS: But just in relation to that my Lord, briefly,  
 11 paragraph 280, we have set out the principles in  
 12 relation to the case law. The leading decision is that  
 13 of Westbourne Galleries.  
 14 MR JUSTICE NUGEE: That's not actually a 459 case at all.  
 15 MR POTTS: It wasn't, no.  
 16 MR JUSTICE NUGEE: It's just an equitable -- but it's picked  
 17 up later by O'Neill v Phillips.  
 18 MR POTTS: I don't think there is any debate that that's the  
 19 sort of issue that we are talking about.  
 20 MR JUSTICE NUGEE: Yes.  
 21 MR POTTS: We say that it this doesn't really have any of  
 22 the characteristics at all, and we have set that out at  
 23 283. There is no evidence of the personal relationship  
 24 and indeed, she is expressly referring repeatedly to the  
 25 terms of the shareholders' agreement, the articles and

1 so on. The particular points are set out at 283.  
 2 It cannot be said that this is some pre-existing  
 3 personal relationship. This is hardly surprising given  
 4 the nature of Specsavers as a group. This was  
 5 a commercial arrangement. The suggestion of mutual  
 6 trust and confidence, I have to say it seems somewhat  
 7 difficult to suggest that as being the case here.  
 8 MR JUSTICE NUGEE: Well, you say that, Mr Potts, but one of  
 9 the grounds on which Ms Birdi was dismissed was  
 10 a breakdown of the relationship of mutual trust and  
 11 confidence, not only as between her and Mr Singh, but as  
 12 between her and SOG.  
 13 MR POTTS: My Lord, I think that's in relation to the  
 14 position as an employee.  
 15 MR JUSTICE NUGEE: But she is not an employee of SOG.  
 16 MR POTTS: No, but SOG is a member of the board of that  
 17 company. Of Visionplus.  
 18 MR JUSTICE NUGEE: Well, what's that got to do with it?  
 19 MR POTTS: My Lord, the way it is framed is the language of  
 20 employment, which is that if the basic relationship  
 21 between the employer and the employee --  
 22 MR JUSTICE NUGEE: But the employer is Visionplus; it's not  
 23 SOG.  
 24 MR POTTS: No, my Lord, but one also has to have regard to  
 25 who are the controllers of that company, and that is the

1 reality, that SOG is a fellow board member. And we say  
 2 that is put in the terms of the employment relationship.  
 3 So we respectfully say that that is --  
 4 MR JUSTICE NUGEE: That would tend to suggest that SOG saw  
 5 itself as employing Ms Birdi, and that's one of her  
 6 complaints, that she is treated as if SOG was somehow in  
 7 control of her.  
 8 MR POTTS: I don't think that's fair. The realities of the  
 9 relationship are that there are a number of directors  
 10 together and the reality of the fact that Ms Birdi is  
 11 alleging -- formed the view that there is  
 12 a conspiracy -- obviously, of course, if your Lordship  
 13 was to find that indeed there was a conspiracy against  
 14 her -- but it's hardly surprising to say that there has  
 15 been a breakdown in the relationship if the director  
 16 considers that there is a conspiracy against her by the  
 17 other directors. That's the point which is made in  
 18 Mrs McIntyre's findings, that that just makes the  
 19 relationship, the employment relationship,  
 20 unsustainable.  
 21 That's the some other substantial reason, which is  
 22 a ground of dismissal in employment law.  
 23 MR JUSTICE NUGEE: Where do I find Mrs McIntyre's decision?  
 24 MR POTTS: It is in E14.  
 25 MR JUSTICE NUGEE: Yes.

1 MR POTTS: 4011 at the bottom of the page: {E/1041/4011}  
 2 "... complete breakdown of the working relationship  
 3 between you (both in your capacity as Director and  
 4 senior employee) and your fellow Joint Venture Partners  
 5 at DVL and the mutual trust and confidence necessary for  
 6 the continuance of an employment relationship between  
 7 you and DVL has irretrievably broken down."  
 8 And at the top of the page, there is no evidence of  
 9 the conspiracy. And again, in the middle of the page:  
 10 "... your working relationships with KS and SOG has  
 11 completely broken down, and that the trust and  
 12 confidence necessary for the continuance of an  
 13 employment relationship between you and Dartford  
 14 Visionplus Limited has irretrievably broken down."  
 15 MR JUSTICE NUGEE: Yes, but if you look at 4010, two  
 16 paragraphs up from the bottom: {E/1041/4010}  
 17 "It is also vital for the sustained success of the  
 18 business that each A director has a relationship of  
 19 trust and confidence with the B director and SOG (SOG  
 20 being the major shareholder in the Dartford business and  
 21 major trading partner) in each other. The evidence  
 22 leads me to conclude that this relationship does not  
 23 exist between you and SOG."  
 24 MR POTTS: Yes.  
 25 MR JUSTICE NUGEE: How is that consistent with your

1 submission that there is no suggestion of a relationship  
2 of mutual trust and confidence between her and SOG?  
3 MR POTTS: Well, obviously to some extent directors of  
4 a company have to work together. So to that extent, of  
5 course, one has to have some trust and confidence in  
6 your fellow directors and if you think that they are  
7 dishonest -- that doesn't lead to the imposition of  
8 obligations which are akin to the obligations of  
9 partners. And the obligation which is imposed where  
10 quasi partnership arises is you get obligations akin to  
11 the obligations of partners of utmost good faith;  
12 personal obligations to your fellow partner.  
13 Just because it's said, well, we need to be able to  
14 get on as directors, that doesn't lead to the imposition  
15 of a quasi partnership, because if that were the case,  
16 it would apply in relation to any commercial entity.  
17 MR JUSTICE NUGEE: What does this mean then, when  
18 Lord Wilberforce says in Ibrahimi that:  
19 "An association formed or continued on the basis of  
20 a personal relationship involving mutual confidence ..."  
21 What is that, over and behalf what you have just  
22 described as the relationship that has to exist between  
23 any directors of any company?  
24 MR POTTS: The point is, it's not just that, because what we  
25 are talking about in quasi partnership is actually the

1 finding -- because there has been criticism of the use  
2 of the term "legitimate expectations", but that's  
3 usually -- that's why you plead quasi partnership  
4 because it's therefore said that there are some  
5 unwritten agreements and understandings which are not  
6 reflected in the constitution. And that's why  
7 Lord Hoffmann talks about the commercial bargain in the  
8 articles -- the fiduciary duties, but there may be  
9 equitable understandings and agreements --  
10 MR JUSTICE NUGEE: I understand entirely that, when one  
11 reads what Lord Hoffmann said, both in the Court of  
12 Appeal in whatever the name of that case was --  
13 MR POTTS: Saul D Harrison.  
14 MR JUSTICE NUGEE: Yes, Saul D Harrison and in O'Neill v  
15 Phillips, that the starting point for an assessment of  
16 whether something is unfair so as to bring it within  
17 section 994 is a breach of the articles or the  
18 shareholders' agreement, although he quite clearly says  
19 you don't need to find a breach of contract and indeed,  
20 the Jenkins Committee got away from the idea you needed  
21 a technically, legally -- something legally wrong, and  
22 that not every company, large or small, is one that has  
23 these superadded equitable obligations. There needs to  
24 be something more.  
25 MR POTTS: There needs to be something more.

1 MR JUSTICE NUGEE: When you ask, what is the something more,  
2 you go and look at what Lord Wilberforce says in  
3 Ibrahimi.  
4 MR POTTS: Yes.  
5 MR JUSTICE NUGEE: But one of the things that  
6 Lord Wilberforce says is a relationship of mutual  
7 confidence.  
8 MR POTTS: Yes.  
9 MR JUSTICE NUGEE: And here we have Ms McIntyre relying on  
10 a breakdown of a relationship of mutual trust and  
11 confidence, using those words: {E/1041/4010}  
12 "It is ... vital ... that each A director has a  
13 relationship of trust and confidence with the B director  
14 and SOG (SOG being the major shareholder)..."  
15 MR POTTS: Yes.  
16 MR JUSTICE NUGEE: And my question to you is why -- given  
17 that that's what your client, in the shape of  
18 Ms McIntyre, has said is one of the grounds of  
19 dismissal, why do I dismiss out of hand the suggestion  
20 that this is a company where there is one of the  
21 elements of quasi partnership? This is what I'm  
22 struggling with.  
23 MR POTTS: My Lord, I'll address that point. It's not  
24 a sort of -- it's any one of the four points.  
25 MR JUSTICE NUGEE: No, no, it's not a tick box, but what one

1 is trying to do is identify what distinguishes the quasi  
2 partnership type of company from the ordinary company,  
3 where people are basically limited to the rights they  
4 have signed up to in the articles and the shareholders'  
5 agreement, and it doesn't matter whether it's a big  
6 company or a small company. It is a company. Those are  
7 your rights.  
8 MR POTTS: Yes, my Lord --  
9 MR JUSTICE NUGEE: But one can see that there are companies  
10 which have something more and give rise to these  
11 equitable obligations.  
12 MR POTTS: My Lord, the point -- if I can work back.  
13 MR JUSTICE NUGEE: Yes.  
14 MR POTTS: The issue is, why you plead quasi partnership is  
15 because you are seeking to say that there are agreements  
16 and understandings which are outside --  
17 MR JUSTICE NUGEE: Yes.  
18 MR POTTS: -- the written documents, and the reason why it  
19 is said that those should be binding in conscience and  
20 enforced by the court is because of the nature of the  
21 relationship, so that what one is saying is that this is  
22 a relationship where the parties -- there was an  
23 agreement and understanding that they would not be bound  
24 to -- or that they would or would not enforce their  
25 legal rights in a particular way.

1 MR JUSTICE NUGEE: Let's take an example. One of the  
2 examples Lord Hoffmann gives is if you invest capital in  
3 one of these quasi partnerships, there may well be an  
4 expectation, agreement or understanding you will take  
5 part in management.

6 MR POTTS: Yes.

7 MR JUSTICE NUGEE: Suppose there are four equal  
8 shareholders. For the other three to gang up and vote  
9 you off the board may be entirely in accordance with the  
10 articles and the shareholders' agreement, which may say  
11 nothing about it, but it's still something you can  
12 complain of as being unfairly prejudicial.

13 MR POTTS: Indeed, because there is an agreement and  
14 understanding and you have to plead out the basis of the  
15 agreement and understanding. You say there was  
16 a discussion, et cetera, et cetera, and we agreed that  
17 this is how it was going to work. And because of the  
18 nature of the relationship, because, let's say, for  
19 example, they have been in partnership together, in all  
20 the circumstances it is right to hold people to that  
21 obligation.

22 My Lord, just to read out a tiny bit from  
23 Westbourne Galleries, which is consistent with that:  
24 "The words ..."  
25 It's about "just and equitable":

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1 "The words are a recognition of the fact that a  
2 limited company is more than a mere legal entity, with a  
3 personality in law of its own: that there is room in  
4 company law for recognition of the fact that behind it,  
5 or amongst it, there are individuals, with rights,  
6 expectations and obligations inter se which are not  
7 necessarily submerged in the company structure."

8 So that's the point. And so what we are looking at  
9 here is: is this the nature of the way that the company  
10 is set up, the way it is operated -- is there sufficient  
11 to say that there is an informal agreement or  
12 understanding which is not set out in the detailed  
13 documents, such as to impose on conscience the operation  
14 of parties' legal rights.

15 We say, firstly, the nature of the set-up -- and of  
16 course that is a point -- it's not a question of the end  
17 of the relationship; we are talking about the formation  
18 of the relationship and the operation of the  
19 relationship. What we say here is that this isn't sort  
20 of three former partners getting together. This is  
21 Specsavers, the largest opticians in the UK.

22 MR JUSTICE NUGEE: It can't depend on the size of  
23 Specsavers, can it?

24 MR POTTS: I'm not saying it's the only factor, but it is  
25 a factor. If you are talking about a personal

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1 relationship, that's between individuals, and it's --

2 MR JUSTICE NUGEE: Actually, I got the impression from your  
3 witnesses that they went to some length to try and  
4 cultivate personal relationships between individuals in  
5 Specsavers, people like Mr Rowe and so on, and the  
6 JV partners, and that Specsavers did pride itself on  
7 trying to give practical support, rather than just being  
8 a remote, external --

9 MR POTTS: My Lord, I'm not suggesting that Specsavers is an  
10 automaton. They plainly care about their JVPs and the  
11 business model is aimed to try and produce profit.

12 MR JUSTICE NUGEE: Yes, for everybody.

13 MR POTTS: For everybody. All I'm saying is that to say  
14 that the typical quasi partnership --

15 MR JUSTICE NUGEE: This is not a typical set-up; I think  
16 I have got that.

17 MR POTTS: Yes, but the other point is that this is a case  
18 where -- the typical example of quasi partnership is  
19 where the parties haven't gone to any trouble, they are  
20 individuals -- I know this is not that case, but the  
21 parties are individuals; they just have standard  
22 articles; they don't bother documenting their  
23 relationship because they trust each other and they have  
24 informal agreements and understandings, and they are  
25 happy to go with that. This is not that case. In fact,

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1 it's way beyond that case.

2 MR JUSTICE NUGEE: You say that Ms Birdi wasn't entitled to  
3 trust SOG to support it and be -- I mean, Mr Stuart  
4 pointed to some very high-sounding phrases written by  
5 Mr Perkins in brochures, which said, "This is our  
6 culture".

7 MR POTTS: Yes.

8 MR JUSTICE NUGEE: You know, "We give you support. This is  
9 a mutually beneficial supportive environment."

10 And I'm sure that that is on the whole true. The  
11 complaint is that in this case, she hasn't had what she  
12 expected from the relationship. She hasn't had.

13 Are you saying that she should have gone into this  
14 in the understanding that she wasn't able really to  
15 trust SOG to do anything else than what it had put its  
16 name to in the shareholders' agreement?

17 MR POTTS: My Lord, no. Obviously one has a working  
18 relationship but the question is -- my learned friend is  
19 contending for an implied term.

20 MR JUSTICE NUGEE: Yes.

21 MR POTTS: And it's not a wider -- they haven't behaved very  
22 well-type point.

23 MR JUSTICE NUGEE: No, it's an implied term.

24 MR POTTS: Yes. The issue, my Lord, is, as we have set out  
25 in 283(3), that the relationship of the parties -- if

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1 the parties have gone to the trouble of -- which often  
 2 is not the case with quasi partnership. They don't go  
 3 to the trouble of documenting their relationship and so  
 4 the court is then left with having to determine what the  
 5 equitable constraints are.  
 6 Where parties -- privity is king and contract is  
 7 king. If the parties have gone to the trouble of  
 8 setting out exhaustively a detailed shareholders'  
 9 agreement -- and I accept the point about implied terms  
 10 and entire agreement clauses and so on -- but where the  
 11 parties have got bespoke articles, bespoke shareholders'  
 12 agreement, detailed service contracts -- and I'll come  
 13 back to how they fit together in a moment -- the  
 14 decision of ex parte Schwarz (No 2), which we have cited  
 15 out there, is that where it's difficult to see that  
 16 there are some unwritten understandings and agreements,  
 17 the court is going to be much more reluctant to infer  
 18 those than where the parties have gone to the trouble to  
 19 draft -- it's the same point on implied terms.  
 20 Parties are generally thought to -- if they have  
 21 gone into detailed drafting, one generally expects that  
 22 the agreement sets out the agreement. So in a sense,  
 23 it's not really that different to that.  
 24 The reference to the fact that they refer to each  
 25 other as joint venture partners or partners doesn't

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1 somehow make it a quasi partnership. The issue is, what  
 2 we have here are detailed agreements which set out the  
 3 basis of the parties' rights and obligations and in  
 4 Schwarz it was said:  
 5 "Nor can I see how any legitimate expectations could  
 6 otherwise even arguably have arisen. There is simple no  
 7 room for the arising of any legitimate expectation.  
 8 Parties are not left ... the basis that their  
 9 relationship only for the articles which were adopted as  
 10 part of the transaction whereby the group was acquired,  
 11 but has spelt out in detailed agreements all the matters  
 12 that were to govern their relationship. Not  
 13 surprisingly so, given that the majority hold ... to  
 14 have a non-executive role."  
 15 So that's the point which arises here, we say.  
 16 MR JUSTICE NUGEE: Can I ask you a different question about  
 17 this. I have understood that what is being argued for  
 18 is an implied term in the shareholders' agreement.  
 19 MR POTTS: Yes.  
 20 MR JUSTICE NUGEE: But actually, the term which is sought to  
 21 be implied amounts to little more than saying that you  
 22 are going to use your powers as director for the  
 23 purposes of the company, and not for your own interests.  
 24 So to what extent does it add anything?  
 25 MR POTTS: My Lord, I agree. It's a point we have made in

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1 our closing submissions.  
 2 MR JUSTICE NUGEE: Yes, but we are spending a bit of time on  
 3 this, which is largely my fault because I'm trying to  
 4 understand what the limits of this quasi partnership  
 5 doctrine are, but is there any practical significance in  
 6 whether this term is implied or not?  
 7 MR POTTS: It depends on -- well, my Lord, that's not a good  
 8 reason for implying it.  
 9 MR JUSTICE NUGEE: No, no, but it's a good reason for my not  
 10 spending too much effort trying to understand whether it  
 11 should be implied or not.  
 12 MR POTTS: Well, my Lord, if my friend is saying -- and  
 13 I think I have made this point --  
 14 MR JUSTICE NUGEE: You have made this point, yes.  
 15 MR POTTS: -- fairly. If the point is said -- let me just  
 16 see -- if I may just turn up the implied term itself.  
 17 MR JUSTICE NUGEE: I notice the time, Mr Potts. Shall we do  
 18 this in five minutes' time?  
 19 MR POTTS: My Lord, yes.  
 20 MR JUSTICE NUGEE: I'll take a break for five minutes.  
 21 (11.45 am)  
 22 (Short break)  
 23 (11.50 am)  
 24 MR JUSTICE NUGEE: Yes, Mr Potts.  
 25 MR POTTS: My Lord, implied terms.

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1 MR JUSTICE NUGEE: Yes.  
 2 MR POTTS: Paragraph 271 of our skeleton.  
 3 MR JUSTICE NUGEE: Yes.  
 4 MR POTTS: The implied term contended for is to use any  
 5 powers conferred upon on it purely to advance its own  
 6 interest at the expense of the other without just cause.  
 7 My friend refers to the Yam Seng decision.  
 8 MR JUSTICE NUGEE: That's Mr Justice Leggatt?  
 9 MR POTTS: Yes. My Lord, just in relation to the Yam Seng,  
 10 we have set out subsequent cases, just to put that in  
 11 context at 277.  
 12 MR JUSTICE NUGEE: Yes, I saw that.  
 13 MR POTTS: I'm not going to take your Lordship to those.  
 14 Could I just take your Lordship briefly to Lewison,  
 15 which is in our supplemental authorities bundle at  
 16 tab 18.  
 17 MR JUSTICE NUGEE: Yes.  
 18 MR POTTS: At paragraph 606 there is -- I accept, my Lord,  
 19 that the test is put in a number of ways and so on and  
 20 so forth, and it is said that the criteria are not  
 21 conditions, which is said in the footnote, but these are  
 22 helpful guidelines.  
 23 MR JUSTICE NUGEE: Yes.  
 24 MR POTTS: "It must be reasonable and equitable. It must be  
 25 necessary to give business efficacy to the contract and

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1 so that no term will be implied if the contract is  
 2 effective without it."  
 3 We say that certainly, you don't get there on that:  
 4 "It must be so obvious that it goes without saying."  
 5 I have to say reading -- I struggle to see how that  
 6 language can be so obvious that it goes without saying.  
 7 MR JUSTICE NUGEE: It's not the language; it's the concept.  
 8 MR POTTS: Or even the concept, my Lord. So we are saying  
 9 to use any power purely to advance its own interest --  
 10 it just begs so many questions.  
 11 What powers are we talking about? Advancing its  
 12 interests at the expense of another without just cause;  
 13 what does that go to? And it must be capability of  
 14 clear expression. Now, with respect, I don't think that  
 15 is clearly expressed.  
 16 My Lord, if your Lordship is saying, well, actually,  
 17 okay, the fiduciary duties on a director to act bona  
 18 fide --  
 19 MR JUSTICE NUGEE: Insofar as it's referring to powers qua  
 20 director --  
 21 MR POTTS: Yes, it adds nothing.  
 22 MR JUSTICE NUGEE: That's rather my view. All duties of  
 23 directors exercised qua directors must be exercised for  
 24 the benefit of the company. That's trite law.  
 25 MR POTTS: It is. But that is not a reason for implying it

1 into a contract.  
 2 MR JUSTICE NUGEE: No, you don't need it.  
 3 MR POTTS: You don't need it.  
 4 MR JUSTICE NUGEE: You don't need it.  
 5 MR POTTS: Exactly. So it is necessary to give business  
 6 efficacy, so it fails on that basis.  
 7 MR JUSTICE NUGEE: But insofar as it refers to powers under  
 8 the shareholders' agreement, you say that it's  
 9 unjustifiable. What's the basis for it?  
 10 MR POTTS: It's not clear what powers they are talking  
 11 about. I'm perfectly happy, my Lord -- and we have  
 12 proceeded in my closing submissions to make the point,  
 13 I think, in relation to the allegations, where this is  
 14 referred to -- that in terms of the test, given the case  
 15 that is advanced is one of malice, it adds --  
 16 MR JUSTICE NUGEE: But everything that's done is done on  
 17 behalf of the company. It's Visionplus which has  
 18 investigated Ms Birdi, suspended her, engaged the  
 19 services of Mr McAlindon's managers, paid for security  
 20 cameras, raised the bonuses of the employees. It's  
 21 Visionplus which has done all those things. Everything  
 22 which SOG has done has been done in the name of and on  
 23 behalf of Visionplus. So they are all fiduciary powers.  
 24 MR POTTS: My Lord, yes. I think, again, to wind back to  
 25 where we started, it is important to identify what it is

1 that the complaint is in relation to. Now, I accept  
 2 that where the allegations are of malicious breach of  
 3 fiduciary duties by directors --  
 4 MR JUSTICE NUGEE: Leave aside malice at the moment.  
 5 MR POTTS: Fine, breach of --  
 6 MR JUSTICE NUGEE: Everything that is complained of --  
 7 I think I'm right in saying all the six issues which are  
 8 complained of are complained of as actions by SOG which  
 9 affect the business of Visionplus and thereby depress  
 10 the value of Visionplus's shares and the shares in  
 11 Dartford which Ms Birdi has, and are done as part of the  
 12 conduct of the affairs of Visionplus and Dartford by  
 13 SOG, and that can only be fiduciary powers.  
 14 MR POTTS: Yes.  
 15 MR JUSTICE NUGEE: There is no complaint of anything done  
 16 qua shareholder, is there?  
 17 MR POTTS: That's the point, my Lord; it's not specific.  
 18 Powers -- in fact, of course, there are matters under  
 19 the shareholders' agreement which deal with -- the clue  
 20 may be in the word "shareholders". It governs  
 21 relationship as shareholders as well.  
 22 MR JUSTICE NUGEE: The only thing done as shareholder was to  
 23 call EGMs which appointed Mr Singh as --  
 24 MR POTTS: My Lord, what about the ability to sell your  
 25 shares?

1 MR JUSTICE NUGEE: I don't think there is any complaint  
 2 about the sale of the shares. The complaint is the  
 3 terms on which the sale took place to Mr Patel involved  
 4 a waiving of Visionplus's right to sue Mr Patel for his  
 5 thefts.  
 6 MR POTTS: My Lord, I think that's where it ends up --  
 7 I don't think that's quite right. I think complaints  
 8 are made which suggested that there was an obligation to  
 9 consult in relation to who the shares were sold to, for  
 10 example. There is an obligation -- it's suggested that  
 11 -- I don't think it's put certainly as high as a veto  
 12 right, but that's a property right in relation to the  
 13 sale of shares.  
 14 My Lord, in a sense we may be, not quite dancing on  
 15 a pinhead because it's important to understand the scope  
 16 of the issues. My position is that if my friend is  
 17 saying this is all about fiduciary duties, firstly it is  
 18 wrong to imply this term because there is no proper  
 19 basis for its implication under the test for the  
 20 implication of a term. If my friend is actually making  
 21 the allegation of breach of fiduciary duty qua director,  
 22 which is that this was done as is pleaded, as a breach  
 23 of fiduciary duty because there is --  
 24 MR JUSTICE NUGEE: I do regard this at the moment as being  
 25 something which -- I don't quite understand what the

1 practical import of this is. The allegations which you  
 2 are facing are all allegations of improper conduct of  
 3 the affairs of the company, exercising powers for  
 4 purposes for which they weren't given.  
 5 MR POTTS: Powers as directors?  
 6 MR JUSTICE NUGEE: Yes, that's what I understand it to be.  
 7 I don't think there is any doubt that if the facts are  
 8 established, you would accept that you have behaved --  
 9 MR POTTS: In breach of duty.  
 10 MR JUSTICE NUGEE: Yes.  
 11 MR POTTS: My Lord, yes. I don't know -- maybe --  
 12 MR JUSTICE NUGEE: It may be this point doesn't go anywhere.  
 13 MR POTTS: My Lord, I have to address it.  
 14 MR JUSTICE NUGEE: Of course you have to address it.  
 15 MR POTTS: I totally accept, my Lord, and as we have said,  
 16 I think in the closing submissions, it doesn't go  
 17 anywhere. My friend's case is one of malicious breach  
 18 of fiduciary duties.  
 19 MR JUSTICE NUGEE: Yes.  
 20 MR POTTS: If he gets home on that, great.  
 21 MR JUSTICE NUGEE: You accept that you are liable; yes.  
 22 MR POTTS: Yes. But I don't accept there is -- it's wrong  
 23 in law -- it goes nowhere. There is no direct duty.  
 24 The implied term is -- it doesn't go without saying,  
 25 it's not necessary for business efficacy, it doesn't

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1 meet any of the requirements by which terms have  
 2 traditionally been implied, and also there is a very  
 3 detailed shareholders' agreement. So I don't know if  
 4 you need any further assistance on the point.  
 5 MR JUSTICE NUGEE: No, okay.  
 6 MR POTTS: That's director duty. Causation.  
 7 MR JUSTICE NUGEE: This is quite a significant point.  
 8 MR POTTS: It is, my Lord, yes. We have dealt with it at  
 9 paragraph 296 to 303 of our closing submissions and in  
 10 my learned friend's it's at paragraph 248. I think  
 11 there in his closing submissions, he was saying that we  
 12 are liable to compensate for loss suffered as a result  
 13 of breach of duty, which I agree.  
 14 He appeared to resile from that yesterday,  
 15 suggesting that the onus is on the defendant to show  
 16 that the outcome would have been the same by way of  
 17 defence, and he gave the analogy of, like any breach of  
 18 contract case, it was on the defendant to show that on  
 19 the balance of probabilities, it would have made no  
 20 difference.  
 21 Firstly, just addressing that on contract, that is  
 22 just not right. That's not the law of contract.  
 23 Causation is an important element if you are seeking to  
 24 claim demands in contract. But in relation to unfair  
 25 prejudice, as your Lordship pointed out, the burden is

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1 on the petitioner to show unfairness, prejudice, which  
 2 is loss. So that's just in terms of jurisdictional --  
 3 MR JUSTICE NUGEE: Yes, but I think his point is a simpler  
 4 one, which is this -- let's take a specific example.  
 5 The suspension of Ms Birdi as employee. He says that's  
 6 not day-to-day management.  
 7 MR POTTS: Yes.  
 8 MR JUSTICE NUGEE: Look at the shareholders' agreement, it  
 9 has to be decided at a board meeting. There wasn't  
 10 a board meeting.  
 11 MR POTTS: Yes.  
 12 MR JUSTICE NUGEE: Therefore, the suspension was prima facie  
 13 in breach of contract because it wasn't done in  
 14 accordance with the process.  
 15 MR POTTS: Yes.  
 16 MR JUSTICE NUGEE: That suspension caused the appointment of  
 17 Mrs Slark and hence it caused Visionplus to spend £440  
 18 a day while Mrs Slark was there. So he has established  
 19 that it has caused loss because if the suspension hadn't  
 20 happened and the suspension was a breach of contract,  
 21 Mrs Slark would not have been charging the store.  
 22 And he says, "I only have to prove those facts and  
 23 I have made out my case". And it then becomes a matter  
 24 of defence for you to say, "Well, it doesn't matter that  
 25 it was a breach of contract because even if the contract

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1 hadn't been broken, you would have been in the same  
 2 position because there would have been a board meeting  
 3 and it would have --"  
 4 MR POTTS: I don't accept that. Can I take your Lordship to  
 5 Target v Redfern in the context --  
 6 MR JUSTICE NUGEE: I'm quite familiar with Target v Redfern  
 7 but it's a rather different type of case.  
 8 MR POTTS: With respect, I'm not sure it is, my Lord. My  
 9 friend is contending that there should be an adjustment  
 10 to the valuation because the company has suffered loss  
 11 as a result of breaches of duty. That's his case.  
 12 MR JUSTICE NUGEE: Yes.  
 13 MR POTTS: Target v Redfern, what the House of Lords  
 14 affirmed is that in the case of equitable compensation,  
 15 which is really -- we are not stuck with the rule in  
 16 Foss v Harbottle under 994, but what we are dealing with  
 17 is a look-through as to whether this is a breach of  
 18 fiduciary duty such as to give rise to a claim for  
 19 compensation.  
 20 Can I just show your Lordship very briefly. I'm not  
 21 going to go through the facts because your Lordship  
 22 obviously is very familiar with them, but just in terms  
 23 of what was said as to what the test is. It's at tab 5.  
 24 MR JUSTICE NUGEE: Of the first one?  
 25 MR POTTS: Sorry, I have got the wrong --

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1 MR JUSTICE NUGEE: Supplemental?  
 2 MR POTTS: Yes, tab 5. Firstly just the headnote:  
 3 "Although in the event of breach of trust  
 4 a beneficiary was entitled to be compensated for any  
 5 loss he would not have suffered but for the breach, once  
 6 the transaction had been completed there was no  
 7 obligation to reconstitute the fund."  
 8 Obviously, on the facts, the point was that they  
 9 obtained the security. But what is interesting is at  
 10 439.  
 11 MR JUSTICE NUGEE: Yes.  
 12 MR POTTS: At the top of the page, there is a discussion of  
 13 the authorities in Canson(?):  
 14 "This is good law. Equitable compensation for  
 15 breach of trust is designed to achieve exactly what the  
 16 word 'compensation' suggests to make good a loss in fact  
 17 suffered by the beneficiaries and which using hindsight  
 18 ... can be said to have been caused by the breach."  
 19 Then over the page in terms of the burden of proof,  
 20 at G:  
 21 "I reach the conclusion that on the facts, which  
 22 must be assumed, Target ..."  
 23 That's the claimant:  
 24 "... has not demonstrated that it is entitled to any  
 25 compensation for breach of trust. Assuming that monies

1 would have been forthcoming, it obtained what it ..."  
 2 Bargained for, effectively. So there is no  
 3 compensatable loss. And that is what we say is the case  
 4 here. My friend has to show prejudice. He has to show  
 5 loss. The burden is in terms of the statutory  
 6 jurisdiction and indeed on the law in relation to  
 7 proving loss.  
 8 In the present case, obviously, if my friend shows  
 9 malice, then causation is satisfied because this is not  
 10 a breach of duty which is capable of ratification. The  
 11 majority position would make no difference.  
 12 But if he is just dealing with the procedural point  
 13 on its own, as a stand-alone point, saying you didn't  
 14 hold --  
 15 MR JUSTICE NUGEE: You didn't hold a board meeting.  
 16 MR POTTS: You didn't hold a board meeting. The first point  
 17 is I have shown your Lordship the Sunrise Radio point.  
 18 Maybe your Lordship isn't so keen on Hansard, but  
 19 I think we have referred to the Sunrise Radio dicta in  
 20 relation to procedural matters, that 994 is not about  
 21 showing procedural breaches; it's substantive matters  
 22 which have caused loss.  
 23 Gwembe. I won't take your Lordship to Gwembe, but  
 24 Gwembe is to the same effect as Target. That was a case  
 25 of dishonesty, but there, even though he had acted

1 dishonestly in not disclosing an interest, he wasn't  
 2 held liable to pay because the breach of duty had not  
 3 been proven by the claimant to have caused loss to the  
 4 company.  
 5 Here, I would say, my Lord, there are two points.  
 6 There is a burden point and then there is a reality  
 7 point. The burden point is, I would say that the burden  
 8 does lie on my friend to show all the elements of the  
 9 statutory requirements, and that includes prejudice, and  
 10 as the case is framed, as indeed the issues are framed  
 11 for the court, the question is whether he has shown  
 12 loss. And that is a burden which lies on him, not on  
 13 me.  
 14 MR JUSTICE NUGEE: I understand that and I think I accept  
 15 that. But I think what he says is: look, the company  
 16 has less money, £86,000 in this example, than it would  
 17 have had, had you not suspended Ms Birdi.  
 18 MR POTTS: Yes.  
 19 MR JUSTICE NUGEE: So he has established the loss and then  
 20 he says the suspension of Ms Birdi was a breach of  
 21 contract.  
 22 MR POTTS: No, my Lord. He has to establish a breach of  
 23 contract but he also then has to establish that breach  
 24 of contract has caused loss. So he has to establish  
 25 that had you held a board meeting --

1 MR JUSTICE NUGEE: No, it's a question of what you are  
 2 comparing it with. Are you comparing the actual state  
 3 of the company with the state of the company that there  
 4 would have been if there had been no suspension, or are  
 5 you comparing the actual state of the company with the  
 6 state that there would have been if there had been  
 7 a suspension decided on a properly convened and quorate  
 8 board meeting. Why is it the latter, rather than the  
 9 former?  
 10 MR POTTS: If you are looking at it as the contract  
 11 suggested, it is the loss of bargain, and what's the  
 12 loss that has been suffered from the loss of bargain.  
 13 The bargain here is, you would have held a board  
 14 meeting.  
 15 MR JUSTICE NUGEE: No, the bargain is: you won't suspend me  
 16 unless you hold a board meeting. You have suspended me  
 17 without a board meeting. I have got something which  
 18 I shouldn't have had.  
 19 MR POTTS: No, my Lord. I respectfully say that the issue  
 20 is what loss has been suffered by issue of not holding  
 21 a board meeting and the loss is -- if he is saying --  
 22 MR JUSTICE NUGEE: I think this is quite difficult. Can I,  
 23 while we are on this point, raise another point which  
 24 has troubled me, and that's this: SOG is a director of  
 25 Visionplus.

1 MR POTTS: Yes.  
 2 MR JUSTICE NUGEE: My understanding of the law is that prima  
 3 facie, a director or any other fiduciary is not entitled  
 4 to profit from its office unless there is a proper  
 5 authority for it to do so. So it can't just vote itself  
 6 some money. There has to be something in the articles  
 7 or in a general meeting or something which authorises it  
 8 to take any money at the expense of its beneficiary.  
 9 And I have at the back of my mind Guinness plc v  
 10 Saunders in which the House of Lords said something  
 11 along those lines. So what you look for is the  
 12 authority in the company's constitution for the  
 13 fiduciary to benefit itself.  
 14 So when Mr McAlindon sends in a bill to Visionplus  
 15 and, yes, it's in the name of SOS, but SOS is a  
 16 subsidiary of SOG, so it is a way of SOG being benefited  
 17 at the expense of the company, what is the authority  
 18 which entitles SOG to pay out of Visionplus's money for  
 19 its own benefit? And the answer, you say, is: ah, well,  
 20 it was a proper expense because we, as shareholder and  
 21 majority shareholder and chairman of the board, could  
 22 have held a board meeting in which we had voted that  
 23 contract.  
 24 MR POTTS: Yes.  
 25 MR JUSTICE NUGEE: But you didn't. So why, like

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1 Guinness plc v Saunders, can't the company say, it  
 2 doesn't matter that you could have gone through the  
 3 right hoops to justify payment to yourself, but you  
 4 didn't do it, so any payment out of the funds of the  
 5 company of which you are a fiduciary, to yourself or  
 6 your subsidiary, is a breach of fiduciary duty. What's  
 7 wrong with that?  
 8 MR POTTS: Well, a number of points, my Lord. Firstly,  
 9 there isn't a prohibition in this company. You are  
 10 entitled to be interested in a transaction; you are  
 11 entitled to vote.  
 12 MR JUSTICE NUGEE: Where do I find that?  
 13 MR POTTS: I'll check the point over lunch but it's in the  
 14 articles, my Lord, I believe. I'll check that.  
 15 MR JUSTICE NUGEE: Yes, but that doesn't entitle you to  
 16 award yourself a contract without going through the  
 17 proper procedure, I don't think. If the articles say  
 18 a director may vote on a contract in which he is  
 19 interested, that means may vote on it at a properly  
 20 convened and quorate board meeting, not can do it  
 21 without a board meeting.  
 22 MR POTTS: Well, there are a number of points, my Lord.  
 23 Firstly, that's not the case that's put. It is not  
 24 suggested that there is a breach of --  
 25 MR JUSTICE NUGEE: No, but it's tied up with the case that's

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1 put. There is a process fault: This should have been  
 2 done at a board meeting and you haven't done it.  
 3 MR POTTS: My Lord, the other -- the first point. The  
 4 second point is the case is run on an equitable  
 5 compensation basis, loss. There is no claim for  
 6 an account of profits, and the case would be put in  
 7 quite a different way and it would be run by my clients  
 8 in quite a different way, if it was running that case.  
 9 MR JUSTICE NUGEE: Yes, understood.  
 10 MR POTTS: So that's not the case. The issue is  
 11 compensation. So we are looking at loss, and I have  
 12 referred your Lordship to Gwembe. That was a failure to  
 13 disclose an interest, no equitable compensation.  
 14 Causation is the issue here. So we would say the same  
 15 applies here, and we say that the issue -- just to get  
 16 away from the burden point because either way there is  
 17 an issue for the court to determine as to who bears the  
 18 evidential burden of that. It's still an issue. I say  
 19 it is on my learned friend, but what my friend is  
 20 saying -- I think he says that Dame Mary Perkins would  
 21 have sided with him.  
 22 MR JUSTICE NUGEE: He might have done and there is no  
 23 evidence. There's a complete vacuum of evidence as to  
 24 what might have happened at a putative board meeting.  
 25 That's what he says.

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1 MR POTTS: My Lord, just to answer that, the evidence is  
 2 that in fact Mary Perkins -- there are a number of  
 3 things that she did and, unsurprisingly, she votes with  
 4 SOG: She is appointed under the shareholders' agreement  
 5 by SOG; she signs the Patel suspension; there is no  
 6 suggestion that she ever did anything different by SOG.  
 7 At the board meeting she attended on 25 June 2008, where  
 8 there was opposition in relation to the appointment of  
 9 Mr Singh, she voted with SOG and against Birdi in the  
 10 face of Ms Birdi's submission. Likewise, at later  
 11 meetings, when Specsavers appointed -- there were  
 12 alternative directors appointed to her, all the  
 13 alternates voted in favour of SOG, and indeed  
 14 Linda Weaver -- criticism was made -- and indeed the  
 15 predictability of how Ms Weaver would vote in her  
 16 capacity as an alternate for Dame Mary Perkins was  
 17 criticised by my learned friend. And lest we forget,  
 18 this is the same Dame Mary Perkins who my learned friend  
 19 says is a party to a conspiracy to defraud her.  
 20 So there is strong evidence on the passage of time  
 21 that Dame Mary Perkins and her alternate has always  
 22 voted with the other Specsavers representatives. There  
 23 is no evidence of any prospect of her voting in  
 24 a different way.  
 25 MR JUSTICE NUGEE: Should I not assume that she would vote

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1 in accordance with her duty; that is, to form a view  
 2 herself, not just to follow someone else's view, as to  
 3 what was bona fide in the interests of the company?  
 4 MR POTTS: My Lord, of course. The fact is your Lordship  
 5 has seen that the way Specsavers operates is that they  
 6 don't just turn up at a meeting and just sort of go with  
 7 the -- of course, one has to respond to events at  
 8 a meeting, but they take legal advice, they consider the  
 9 matter in advance. It's just unreal to suggest that  
 10 there is no evidence to suggest that Dame Mary Perkins  
 11 would vote -- of course you should expect that she would  
 12 vote in accordance with her fiduciary duty, that's  
 13 a given, but the history of voting throughout --  
 14 MR JUSTICE NUGEE: You were coming close to saying I should  
 15 assume that she would just do what she was told to do  
 16 without thinking for herself, and that can't be right.  
 17 MR POTTS: My Lord, if that's the impression I'm giving,  
 18 that's not right, but in terms of the commercial  
 19 decisions, there is no reason to form -- and history  
 20 suggests that she has not formed -- a different view  
 21 from the senior executives on the board and her fellow  
 22 board member, Mr Dyson, and so on, that she has suddenly  
 23 gone off on a frolic of her own, and, frankly, it would  
 24 be extraordinary to expect that she would, and we say  
 25 that there is strong evidence, and there is evidence on

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1 which -- if your Lordship -- if there is some issue as  
 2 to where the burden lies -- and I have to say I don't  
 3 accept there is. The burden applied under the statute  
 4 is -- and indeed her contract or an equitable  
 5 compensation for breach of fiduciary duty is -- on the  
 6 party to show loss, and --  
 7 MR JUSTICE NUGEE: As I say, I have already accepted that  
 8 the burden is to show loss.  
 9 MR POTTS: Yes, fine.  
 10 MR JUSTICE NUGEE: But the question is what is it --  
 11 MR POTTS: Well, the loss is that --  
 12 MR JUSTICE NUGEE: -- that establishes loss --  
 13 MR POTTS: And I say that the loss is that the outcome would  
 14 have been different.  
 15 MR JUSTICE NUGEE: Yes, you say the outcome would have been  
 16 different had there been a board meeting. Mr Stuart  
 17 says the outcome is different from what it was before  
 18 the unauthorised act, the suspension which wasn't  
 19 authorised.  
 20 MR POTTS: I would suggest that we are sort of getting close  
 21 to the mountaineer's knee. You have got to say what's  
 22 the effective cause. The effective cause of the matters  
 23 being -- is --  
 24 MR JUSTICE NUGEE: Is the failure to hold the board meeting.  
 25 MR POTTS: Is what the outcome is, yes, and what the result

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1 of that board meeting would be. That's the issue. And  
 2 my friend -- to suggest that if the -- that would  
 3 suggest -- my friend would say, well, actually if the  
 4 outcome would have been the same, that he is still  
 5 entitled to claim loss? That just can't be right and  
 6 it's contrary to authority.  
 7 So, my Lord, I don't know if I can assist further on  
 8 causation.  
 9 MR JUSTICE NUGEE: No, but the Guinness v Saunders point, if  
 10 I can label it that -- your answer to that is that's not  
 11 the claim that's being brought?  
 12 MR POTTS: It's not.  
 13 MR JUSTICE NUGEE: Yes.  
 14 MR POTTS: My Lord, a couple of other points of law to mock  
 15 up. The A director point --  
 16 MR JUSTICE NUGEE: Yes.  
 17 MR POTTS: -- if we can call it that. The issue was raised  
 18 as to who were the A directors while Specsavers owned  
 19 the A shares. Paragraph 157 to 158 of my friend's  
 20 written closing suggests we are not an A director  
 21 because we failed to sign a deed of adherence. That's  
 22 what was put in my friend's submissions. With respect,  
 23 that's not right. Specsavers was a party to --  
 24 MR JUSTICE NUGEE: It's already a party to the deed of  
 25 adherence, yes.

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1 MR POTTS: It's already a party.  
 2 MR JUSTICE NUGEE: Yes.  
 3 MR POTTS: You don't need to sign up to something you are  
 4 already a party to.  
 5 MR JUSTICE NUGEE: Incidentally, deed of adherence --  
 6 Mr Singh signed a deed of adherence.  
 7 MR POTTS: He did.  
 8 MR JUSTICE NUGEE: Which is drafted as between him and  
 9 Ms Birdi. Is there any evidence Ms Birdi ever signed  
 10 it?  
 11 MR POTTS: If Ms Birdi signs it? My Lord, I don't believe  
 12 there is a requirement under the shareholders' agreement  
 13 which requires her to.  
 14 MR JUSTICE NUGEE: No, but it's signed as a deed between the  
 15 parties, one of the parties being Ms Birdi.  
 16 MR POTTS: Can I have a look at that, my Lord, over the  
 17 short adjournment?  
 18 MR JUSTICE NUGEE: Of course.  
 19 MR POTTS: That's not a --  
 20 MR JUSTICE NUGEE: That's not a point you had anticipated?  
 21 MR POTTS: It's not a point I had anticipated. I'm not  
 22 objecting on that basis alone. If your Lordship has the  
 23 shareholders' agreement, D1. {D/15/177}  
 24 MR JUSTICE NUGEE: Yes. I'm beginning to get reasonably  
 25 familiar with its terms.

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1 MR POTTS: My Lord, yes. I had previously submitted that  
 2 the terms are exhaustive. It may be that your Lordship  
 3 feels that --  
 4 MR JUSTICE NUGEE: Exhausting as well.  
 5 MR POTTS: Exhausting as well. 178. Just the definitions:  
 6 {D/15/178}.  
 7 MR JUSTICE NUGEE: Yes.  
 8 MR POTTS: A directors is, "all the registered holders."  
 9 MR JUSTICE NUGEE: Yes.  
 10 MR POTTS: We say that it is. Just on the point, my Lord,  
 11 your Lordship looked at, I think, in D1 at 197. Just  
 12 for clarity. The annual return -- 196 -- shows that  
 13 this is the annual return as at 25 June. {D/17/196} Do  
 14 you see that, just above the first hole punch?  
 15 MR JUSTICE NUGEE: Yes. At that date --  
 16 MR POTTS: Not just that, my Lord; there is an additional  
 17 point I was going to make, which is if you look --  
 18 obviously, at 197 you see that we are the holder as at  
 19 22 June.  
 20 MR JUSTICE NUGEE: June.  
 21 MR POTTS: That's the snapshot. But if you go over the page  
 22 in relation to Mr Patel, number 3, you see there that he  
 23 disposed of in the period on 20 February. {D/17/198}  
 24 MR JUSTICE NUGEE: Yes.  
 25 MR POTTS: So that assists in terms of --

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1 MR JUSTICE NUGEE: Well, going back to "registered", I asked  
 2 Mr Stuart whether "registered" meant registered at  
 3 Companies House or registered in the books of the  
 4 company. Which does it mean?  
 5 MR POTTS: My Lord, it's the register of members, I accept  
 6 that, but it has never been contended that we were not  
 7 the registered member. It has never been asserted that  
 8 we were not on the register of members.  
 9 MR JUSTICE NUGEE: But there is only an annual return.  
 10 MR POTTS: But this is evidence that the company has  
 11 effected those changes.  
 12 MR JUSTICE NUGEE: On 27 June?  
 13 MR POTTS: No, no, my Lord. The annual return --  
 14 MR JUSTICE NUGEE: The annual return -- you have to send in  
 15 an annual return.  
 16 MR POTTS: Yes, and that is a snapshot as to who the  
 17 directors are and who --  
 18 MR JUSTICE NUGEE: Once a year?  
 19 MR POTTS: Once a year. What this documents indicates is,  
 20 obviously, the snapshot, but you also have evidence that  
 21 the disposal -- and if you dispose of shares, they  
 22 usually go -- well, they go to someone else. There is  
 23 also evidence in 198 that Mr Patel disposed of those  
 24 shares when they were transferred on 20 February.  
 25 {D/17/198} So it's evidence --

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1 MR JUSTICE NUGEE: Does a company, in addition to making an  
 2 annual return, make a return every time there is  
 3 a change in the shareholders?  
 4 MR POTTS: No, it doesn't.  
 5 MR JUSTICE NUGEE: No, that's what I thought.  
 6 MR POTTS: You used to do a return on allotments, when fresh  
 7 shares are created, but otherwise --  
 8 MR JUSTICE NUGEE: Yes, but every time a shareholder sells  
 9 his shares, the company doesn't send a return to  
 10 Companies House?  
 11 MR POTTS: No.  
 12 MR JUSTICE NUGEE: So when you said that it meant register  
 13 of members, that's the company's own books?  
 14 MR POTTS: Yes.  
 15 MR JUSTICE NUGEE: You can't register under the articles of  
 16 this company until you have got an authority of the  
 17 board meeting.  
 18 MR POTTS: My Lord, I think what happened was it was done  
 19 and then it was later ratified, but the point is it's an  
 20 administrative act in this case. There is no  
 21 suggestion -- it hasn't been contended -- there is no  
 22 case against me that this was improperly registered or  
 23 there hadn't been an effective registration. Membership  
 24 of a company is someone who has agreed to become  
 25 a member and is entered on the register of members.

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1 MR JUSTICE NUGEE: My understanding is that, just as with  
 2 land, there is a difference between the legal title and  
 3 the equitable title to shares.  
 4 MR POTTS: There are two points, yes.  
 5 MR JUSTICE NUGEE: And the legal title depends, when you  
 6 have got an existing shareholding, as opposed to a newly  
 7 created shareholding, on there being not only  
 8 a transfer, which is the equivalent of conveyance, but  
 9 that being completed by the company entering it in the  
 10 register of members. Is that right?  
 11 MR POTTS: My Lord, yes.  
 12 MR JUSTICE NUGEE: And until then, although money may have  
 13 been paid and the share transfer may have been executed,  
 14 the transferor remains on the books and remains the  
 15 legal owner of the shares.  
 16 MR POTTS: Yes, I think so far I agree.  
 17 MR JUSTICE NUGEE: So you only become the registered holder  
 18 of the shares when the company puts you on the register.  
 19 MR POTTS: It's actually when your name appears on --  
 20 MR JUSTICE NUGEE: Yes, physically on the register.  
 21 MR POTTS: Yes.  
 22 MR JUSTICE NUGEE: Do I have any evidence as to when SOG's  
 23 name appeared on the register?  
 24 MR POTTS: There are two points, my Lord. There is no  
 25 evidence and no contention that we weren't on the

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1 register of members by the other side, and you do have  
 2 evidence here --  
 3 MR JUSTICE NUGEE: There is evidence that the transfer of  
 4 the shares was only authorised by the company in a board  
 5 meeting --  
 6 MR POTTS: I'll check the point, my Lord. I think it was  
 7 a ratification.  
 8 MR JUSTICE NUGEE: A ratification.  
 9 MR POTTS: So the point is, in fact, it has already  
 10 happened; the administrative act has already happened,  
 11 and if it's suggested a rectification of the register,  
 12 because it was done because the administrative act was  
 13 performed too early, that's not contended and frankly it  
 14 would be unmeritorious. I will check but I think it was  
 15 a ratification of something and it's not suggested that  
 16 the name wasn't on the register and indeed, this  
 17 document -- I accept it's not conclusive evidence, but  
 18 it's certainly persuasive evidence that the company has  
 19 sorted it out internally, because certainly by  
 20 25 June --  
 21 MR JUSTICE NUGEE: Yes.  
 22 MR POTTS: -- we are. So it has never been suggested that  
 23 there is some problem over the registration.  
 24 MR JUSTICE NUGEE: The board meeting took place after June  
 25 anyway, didn't it? It must have taken place after

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1 Ms Birdi came back into --  
 2 MR POTTS: Yes, my Lord, yes. It was 25 June and it  
 3 formally notes and ratifies the transfer. That's  
 4 in June 2008 in fact. So it's a year later. So your  
 5 Lordship is right, but it's a ratification of something  
 6 that has already happened.  
 7 MR JUSTICE NUGEE: Right. So you say you were the  
 8 registered holder.  
 9 MR POTTS: Yes.  
 10 MR JUSTICE NUGEE: Therefore, you were A director as  
 11 defined.  
 12 MR POTTS: Yes.  
 13 MR JUSTICE NUGEE: Does that put you on the board in any  
 14 sense?  
 15 MR POTTS: Well, can I deal with just another couple of  
 16 points?  
 17 MR JUSTICE NUGEE: Yes.  
 18 MR POTTS: My Lord, the first point is, yes. The agreement  
 19 is clear, all the registered holders are A directors.  
 20 We are already a director.  
 21 MR JUSTICE NUGEE: Yes, you can't be a director --  
 22 MR POTTS: Twice.  
 23 MR JUSTICE NUGEE: -- twice.  
 24 MR POTTS: No.  
 25 MR JUSTICE NUGEE: As a matter of corporate governance.

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1 MR POTTS: No.  
 2 MR JUSTICE NUGEE: No.  
 3 MR POTTS: I'm not suggesting we have got two votes.  
 4 MR JUSTICE NUGEE: No.  
 5 MR POTTS: No. Can I just deal with a couple of points, my  
 6 Lord, because I think it ties in a little bit with my  
 7 point earlier about there being the same directors for  
 8 both companies, and develop that.  
 9 MR JUSTICE NUGEE: Yes.  
 10 MR POTTS: 3.1.1, which deals with the delegation of the  
 11 powers: {D/15/180}  
 12 "Day to day management of the business of the  
 13 Company and any Subsidiary to the A directors."  
 14 There was some concern about, how does that work;  
 15 are you delegating the management of the subsidiary's  
 16 day-to-day.  
 17 MR JUSTICE NUGEE: Yes.  
 18 MR POTTS: I think that may become clearer. If you look at  
 19 2.1.1. {D/15/179}  
 20 MR JUSTICE NUGEE: Yes.  
 21 MR POTTS: As to the preliminary steps.  
 22 MR JUSTICE NUGEE: The directors become directors of the  
 23 company and any subsidiary.  
 24 MR POTTS: It's the appointment of the A directors and the  
 25 B directors as the directors of the company and the

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1 subsidiary. My point is that there are A directors and  
 2 B directors in both.  
 3 MR JUSTICE NUGEE: Yes.  
 4 MR POTTS: That's clear, and what's also clear is that 2.1.5  
 5 talks about:  
 6 "The execution by the Company or any Subsidiary of  
 7 Service Contracts with each of the A Directors."  
 8 So we say -- and I'll come on to it because this  
 9 overlaps a little bit with the suspension point, but  
 10 what one is doing is the service contract that Ms Birdi  
 11 has is a service contract with her as an A director.  
 12 And she is an A director, in fact, of both companies,  
 13 but the service contract is by Dartford Visionplus.  
 14 My Lord, in relation to the suspension point, this  
 15 is dealt with at our closing submissions at  
 16 paragraph 259.  
 17 MR JUSTICE NUGEE: Yes.  
 18 MR POTTS: There is some overlap here. If you go back to  
 19 the service agreement at D1, page 18, {D/3/18} 12.2  
 20 deals with the power to suspend from duties and one has  
 21 to remember this is not a fiduciary -- this is an  
 22 employment contract.  
 23 MR JUSTICE NUGEE: Yes.  
 24 MR POTTS: Then if you go back to the beginning of the  
 25 contract, my learned friend took you, I think, to

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1 paragraph 2: {D/3/16}  
 2 "... such duties and exercise such powers as shall  
 3 from time to time be assigned to him by the company's  
 4 board of directors."  
 5 3 is of some interest, I think:  
 6 "The executive shall use his best endeavours to  
 7 promote the interests of the company and those of any  
 8 subsidiary and associated companies for the time being."  
 9 So an associate company includes the parent company.  
 10 So that's Dartford. And the obligation is to spend the  
 11 whole of his time and attention and abilities in the  
 12 performance of those duties.  
 13 So if one looks at that in terms of the scope of the  
 14 obligations and if one then also reads that together  
 15 with the shareholders' agreement, which makes it clear  
 16 what the delegation is, what is clear is that the powers  
 17 and duties that are delegated are the day-to-day  
 18 management of the business, which is what accords with  
 19 the difference between an executive director and  
 20 a non-executive director.  
 21 So the day-to-day, spending your time doing the  
 22 day-to-day, that's executive, and the suspension, we  
 23 say, is clear, that this operates to suspend her from  
 24 executive powers, which includes day-to-day management.  
 25 And that's the point which we developed at

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1 paragraph 259.  
 2 MR JUSTICE NUGEE: Just tell me, because I have always found  
 3 this difficult: a non-executive director is appointed to  
 4 the board, is not expected to devote his or her full  
 5 time to the board's affairs but is expected to turn up  
 6 at board meeting and bring his or her judgement to bear  
 7 on the matters put before him or her at a board meeting.  
 8 MR POTTS: Yes.  
 9 MR JUSTICE NUGEE: An executive director is, in addition to  
 10 being a director, also an employee. What is the  
 11 interface between what they do qua employee and what  
 12 they do qua director?  
 13 MR POTTS: My Lord, it's a question of delegation, because  
 14 the powers of management of the company's affairs,  
 15 usually, under most articles, are delegated by the  
 16 company --  
 17 MR JUSTICE NUGEE: The company in general meeting entrusts  
 18 its management to the board of directors. That's the  
 19 whole purpose of having directors.  
 20 MR POTTS: I'm not sure -- I wouldn't --  
 21 MR JUSTICE NUGEE: That's what the articles say.  
 22 MR POTTS: No, it's not actually, my Lord. It's not  
 23 actually a company in general meeting at the top. It's  
 24 actually that there are separate organs of the company  
 25 and the constitution determines where --

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1 MR JUSTICE NUGEE: Where the powers lie.  
 2 MR POTTS: Where those powers lie, and there are two organs.  
 3 MR JUSTICE NUGEE: So table A has something --  
 4 MR POTTS: Yes, I think it's regulation -- 72 is it?  
 5 MR JUSTICE NUGEE: Incidentally you were going to let me  
 6 have a full copy of the relevant table A.  
 7 MR POTTS: My Lord, it's already there.  
 8 MR JUSTICE NUGEE: It's already there.  
 9 MR POTTS: My Lord, powers of management are delegated to  
 10 the board -- the usual article is:  
 11 "Subject to direction by special resolution."  
 12 I'm paraphrasing without the reference, which is  
 13 always dangerous. I don't have a copy of --  
 14 MR JUSTICE NUGEE: It's 70.  
 15 MR POTTS: 70, which I think is what I --  
 16 MR JUSTICE NUGEE: "The business of the company shall be  
 17 managed by the directors."  
 18 MR POTTS: Yes.  
 19 MR JUSTICE NUGEE: But that, as you say, is subject to any  
 20 directions given by special resolution.  
 21 MR POTTS: Yes. So that's the position, and beyond that, as  
 22 agents, directors are entitled to delegate amongst  
 23 themselves.  
 24 MR JUSTICE NUGEE: 72:  
 25 "They may delegate to any managing director or any

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1 director holding any other executive office such of  
 2 their powers as they consider desirable."  
 3 MR POTTS: Exactly, and subject to conditions, and that's  
 4 what's dealt with under the shareholders' agreement. We  
 5 have a delegation of executive powers and we say that is  
 6 subject to the employment contract --  
 7 MR JUSTICE NUGEE: None of this needs an employment -- you  
 8 can have an executive director under the articles  
 9 without having an employment contract at all, can't you?  
 10 MR POTTS: One could, but usually --  
 11 MR JUSTICE NUGEE: Why do you have an employment contract as  
 12 well? Why don't you just say: I'm appointing you as  
 13 director on these terms; namely that you devote your  
 14 full time to the business of the company? Why is the  
 15 practice to have employment contracts for executive  
 16 directors?  
 17 MR POTTS: My Lord, it can be dealt with in different ways,  
 18 in terms of the way remuneration is dealt with and  
 19 payments are dealt with in different ways, if they are  
 20 dealt with through that article or through the  
 21 appointment of a contract. And in this case, the case  
 22 we are dealing with, the executives are given an  
 23 employment contract and it's clear from the terms of the  
 24 contract that the delegation is pursuant as the board  
 25 delegates to you under the terms of the employment --

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1 MR JUSTICE NUGEE: As the board directs.  
 2 MR POTTS: As the board directs.  
 3 MR JUSTICE NUGEE: I don't think it has quite answered my  
 4 question, which is why do you bother to have a service  
 5 contract at all, and what is the relationship between  
 6 your duties as employee and your duties as director?  
 7 MR POTTS: The difference -- there is a number of issues.  
 8 The position is, as a director, your obligations are  
 9 fiduciary.  
 10 MR JUSTICE NUGEE: Yes.  
 11 MR POTTS: As an employee, you owe a duty of fidelity and  
 12 there may be some overlap but --  
 13 MR JUSTICE NUGEE: They are not identical.  
 14 MR POTTS: They are not identical. In terms of the  
 15 articles, the articles do operate as a contract inter  
 16 se.  
 17 MR JUSTICE NUGEE: Between the members and the company.  
 18 MR POTTS: Between the company and its members, and it may  
 19 be it could be said that you have got some terms that  
 20 could be implied into that, but you want to deal with:  
 21 this is going to be an employment relationship. You  
 22 don't want to have that set out in the articles.  
 23 MR JUSTICE NUGEE: But it's that statement:  
 24 "This is going to be an employment relationship."  
 25 I know this is what happens, but I haven't quite

1 understood why. You could, in theory, have the board  
 2 appointing in a contract one of its members to an  
 3 executive office as executive director and agreeing to  
 4 pay -- because there is a power to pay remuneration to  
 5 directors -- without creating the status of employee at  
 6 all.  
 7 MR POTTS: I think it probably would create -- I'm not an  
 8 employment lawyer.  
 9 MR JUSTICE NUGEE: No.  
 10 MR POTTS: But I think it probably would create it.  
 11 Depending on the functions that are actually carried  
 12 out, it will in fact create a contract of employment.  
 13 MR JUSTICE NUGEE: Right. But the reality is that senior  
 14 executives who are on the board are both employees and  
 15 directors, and that is absolutely standard. But does it  
 16 make any sense to say: this is what you are doing qua  
 17 director and this is what you are doing qua executive;  
 18 or is there a difference between what you are doing when  
 19 you are attending a board meeting and what you are doing  
 20 when you are sitting in your own office?  
 21 MR POTTS: No, because at a board meeting, matters may be  
 22 dealt with which are of an executive nature and it may  
 23 be that the role of -- of course, it's a question of --  
 24 it depends on the company and so on. But the role in  
 25 larger companies, the role of the non-executive is

1 usually one of overall supervision of the executives.  
 2 MR JUSTICE NUGEE: Yes.  
 3 MR POTTS: So the executives are left to get on and run the  
 4 business and there may be a reporting function at board  
 5 meetings, and board papers and so on, so that the  
 6 non-executives can see what's going on.  
 7 MR JUSTICE NUGEE: The practical consequence here is whether  
 8 one can realistically say the suspension of Ms Birdi as  
 9 an employee under clause 12.2 of her service contract  
 10 necessarily also suspends her from a delegation of the  
 11 day-to-day management provided from the shareholders'  
 12 agreement.  
 13 MR POTTS: My Lord, and the reason for that is, as I said,  
 14 one looks at the two together, see what we have. We  
 15 have got the delegation which is delegated to her of  
 16 executive matters. It's day-to-day management. So it's  
 17 the executive matters which are delegated under the  
 18 shareholders' agreement.  
 19 MR JUSTICE NUGEE: You say day-to-day management in the  
 20 shareholders' agreement means executive functions --  
 21 MR POTTS: Yes, it does.  
 22 MR JUSTICE NUGEE: -- as set out in your service contract.  
 23 MR POTTS: Yes.  
 24 MR JUSTICE NUGEE: Because there is no other sense in which  
 25 she has day-to-day management.

1 MR POTTS: Correct, and indeed it doesn't just go one way.  
 2 The service contract itself makes it clear that it's  
 3 subject to what is delegated and then you look to see in  
 4 the shareholders' agreement what is -- so it's the  
 5 service agreement that says what powers are delegated by  
 6 the board. You then look to the shareholders' agreement  
 7 and say, what is it that's delegated by the board;  
 8 answer, day-to-day management. So both points overlap.  
 9 MR JUSTICE NUGEE: You start with the articles, which  
 10 appoints a board, which says the board has the general  
 11 management.  
 12 MR POTTS: Yes, it's standard agency.  
 13 MR JUSTICE NUGEE: And then the board under Article 72 has  
 14 power of delegation to anybody holding executive office;  
 15 one or more of their number holding executive office.  
 16 MR POTTS: Yes.  
 17 MR JUSTICE NUGEE: Then under the shareholders' agreement,  
 18 the directors, who are SOG and the two JVPs -- but they  
 19 agree that they do, effectively under Article 72 of  
 20 table A, delegate their powers of management to the  
 21 A directors. Is that right?  
 22 MR POTTS: My Lord, it's not just -- in fact, what it  
 23 says -- Article 72 isn't just about executive -- it's  
 24 just standard agency principles. The directors may  
 25 delegate any of their powers to any committee of one or

1 more directors.  
 2 MR JUSTICE NUGEE: It's not a committee.  
 3 MR POTTS: No, well a committee can be one, actually. It's  
 4 one or more directors. So you can delegate to one. The  
 5 basic principle is agency.  
 6 MR JUSTICE NUGEE: The reason you need Article 72 is because  
 7 otherwise an agent -- a delegatus delegare, so otherwise  
 8 you have a problem with the directors having  
 9 a subdelegation, in effect.  
 10 MR POTTS: That's right. So it deals with that. It's  
 11 authorising the delegation. But that's what we have  
 12 here and so that is defined by both the shareholders'  
 13 agreement and the service agreement --  
 14 MR JUSTICE NUGEE: So clause 3.1 of the shareholders'  
 15 agreement.  
 16 MR POTTS: Yes.  
 17 MR JUSTICE NUGEE: Is an exercise by the board of each  
 18 company of its power of delegation in Article 72 of each  
 19 company's articles, technically.  
 20 MR POTTS: Yes.  
 21 MR JUSTICE NUGEE: And then you say you look at the service  
 22 contract to see --  
 23 MR POTTS: To see if it fits.  
 24 MR JUSTICE NUGEE: -- what the service contract employs the  
 25 executive director to do, and you say the service

1 contract employs the executive director to do whatever  
 2 the board delegates to her, and what the board delegates  
 3 to her is 3.1.1 of the shareholders' agreement and  
 4 therefore suspending her from her duties suspends her  
 5 from 3.1.1.  
 6 MR POTTS: Yes, your Lordship has put it much better than  
 7 I did myself, of course, but that's right.  
 8 There is one other point on suspension, my Lord,  
 9 which is a point, again, which is a criticism made, that  
 10 we should have consulted with her in relation to this.  
 11 It's a point which is developed, which is the sickness  
 12 point, which we have dealt with at paragraph 418 of our  
 13 submissions. This, I think, goes in relation to --  
 14 MR JUSTICE NUGEE: I'm not sure about this point. I think  
 15 if you are wrong on day-to-day management, one could  
 16 see -- take a concrete example. Ms Slark's new bonus  
 17 scheme. That, I think, is accepted to be a matter which  
 18 falls within the scope of day-to-day management and if  
 19 she were still responsible for day-to-day management but  
 20 sick --  
 21 MR POTTS: Yes.  
 22 MR JUSTICE NUGEE: -- one could see a letter to her at home  
 23 saying, "There is an issue which has come up. Ms Slark  
 24 has suggested a new bonus scheme. Do you feel well  
 25 enough to look at it, or are you happy for us to do it

1 without reference to you?"  
 2 I'm not sure that just not being well is in itself  
 3 an answer to the suggestion that these are matters of  
 4 day-to-day management which she should have been  
 5 consulted on.  
 6 MR POTTS: I think I would agree with that, my Lord. The  
 7 point I make, as we set out here, is that the tone of  
 8 the medical -- the documents are saying:  
 9 "I'm unfit to attend to any work-related matter ..."  
 10 MR JUSTICE NUGEE: That's because it's all very stressful,  
 11 yes.  
 12 MR POTTS: We would be damned if we do and damned if we  
 13 don't.  
 14 MR JUSTICE NUGEE: Yes, understood, yes.  
 15 MR POTTS: And the idea it is suggested that we should be  
 16 criticised for not having -- when we have these  
 17 statements saying, "I am very, very ill", to then sort  
 18 of ...  
 19 MR JUSTICE NUGEE: Yes.  
 20 MR POTTS: I think that would fit in with the harassment  
 21 suggestion, I think.  
 22 MR JUSTICE NUGEE: Yes.  
 23 MR POTTS: My Lord, that's the point on that.  
 24 I think those are the issues on the law. I don't  
 25 know if I have missed anything on the legal framework

1 points. I have tried to cover all the points that your  
 2 Lordship raised with my learned friend yesterday.  
 3 MR JUSTICE NUGEE: There is another point. It may be you  
 4 are coming to it later, which is remedy, because  
 5 Mr Stuart says if -- let's take an example, the £86,000.  
 6 If the £86,000 is unfair prejudice, then, as  
 7 I understood him, I should direct an adjustment to the  
 8 price of £43,000, being 50 per cent of the money which  
 9 has gone out of the company, as well as directing the  
 10 valuer to take account of that fact when valuing.  
 11 MR POTTS: Yes. I think I addressed this in opening.  
 12 MR JUSTICE NUGEE: You did, but it has become much clearer  
 13 to me in closing what it is that Mr Stuart is asking me  
 14 to do.  
 15 MR POTTS: I think he seems to be -- I think "cake and eat  
 16 it" is perhaps -- maybe I have misunderstood it. But,  
 17 my Lord, what we suggest that your Lordship should do  
 18 is -- the precise effect on valuation or the adjustment  
 19 to the shares, your Lordship has to determine the  
 20 factual --  
 21 MR JUSTICE NUGEE: Yes, I have obviously got to determine  
 22 the facts; I have obviously got to determine if it's  
 23 prejudice; I have obviously got to determine if it's  
 24 unfair, all that --  
 25 MR POTTS: And indeed that it is something that should

1 warrant an adjustment --  
 2 MR JUSTICE NUGEE: Yes, that's the first question. There is  
 3 a discretion, which is accepted by Mr Stuart, but if  
 4 I find -- let's take the £86,000. Suppose I were to  
 5 find that that was unfair prejudice because it was being  
 6 motivated by malice --  
 7 MR POTTS: Yes.  
 8 MR JUSTICE NUGEE: -- and not really designed for the  
 9 benefit of the company at all, but designed to extract  
 10 money from the company and damage Ms Birdi's interests.  
 11 That's putting the case at its highest.  
 12 MR POTTS: Yes.  
 13 MR JUSTICE NUGEE: In what circumstances -- I mean, what is  
 14 relevant to the exercise of a discretion? Does it not  
 15 really follow that if I find the malice case made out,  
 16 it does warrant some adjustment? That's the first  
 17 question.  
 18 Then the second question is: what actual adjustment  
 19 do I direct? What is it that the order looks like?  
 20 MR POTTS: Right. Well, my Lord, I think the answer to the  
 21 first question is, yes, you do; you say, yes, this is  
 22 something that it is fit for the accountant to take  
 23 account of when he does his magic of working out the  
 24 price for the shares.  
 25 MR JUSTICE NUGEE: In what circumstances then would I not

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1 exercise the discretion, having found an unfair  
 2 prejudice?  
 3 MR POTTS: I think the answer is prejudice.  
 4 MR JUSTICE NUGEE: Yes. Is there a de minimis point?  
 5 MR POTTS: I think my friend accepts that is there is.  
 6 MR JUSTICE NUGEE: Yes, but he put it at a very low figure.  
 7 MR POTTS: It seemed to get lower as he thought about it and  
 8 I don't criticise him for that. I think the answer is,  
 9 yes, there is.  
 10 MR JUSTICE NUGEE: Do you want me to give a figure? Do you  
 11 want to give me a figure?  
 12 MR POTTS: My Lord, I think it's a combination of things.  
 13 It may be a question of amount and it's also a question  
 14 of timing as well, because if it is a small amount  
 15 a long time ago, I would say that that starts to --  
 16 MR JUSTICE NUGEE: Well, that leads into the second  
 17 question, but, I mean, if all I'm doing is simply saying  
 18 to the valuer, "I find that £10 was paid out of the  
 19 company six years ago which should not have been paid  
 20 out, take such account of that as you think relevant in  
 21 valuing the shares in 2014", or 2012 or whatever it is.  
 22 I can assume that the valuer will say, "I have taken  
 23 account of that, it makes no difference at all".  
 24 MR POTTS: Yes.  
 25 MR JUSTICE NUGEE: That doesn't stop me from saying to the

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1 valuer, "This is something you should take such account  
 2 of as you think appropriate". I'm not telling him  
 3 whether it's going to make a difference. I'm leaving it  
 4 to him.  
 5 MR POTTS: Yes.  
 6 MR JUSTICE NUGEE: But Mr Stuart wants me to do something  
 7 else, which is to say there should be an addition to the  
 8 price of £5.  
 9 MR POTTS: That's where I differ from my friend.  
 10 MR JUSTICE NUGEE: Yes. What's wrong with what he says? If  
 11 the truth is that -- let's not take £10. That's the de  
 12 minimis point. Take the £86,000. I find that the  
 13 £86,000 was extracted from the company as part of  
 14 a malicious conspiracy to damage Ms Birdi and it should  
 15 never have been taken out of the company.  
 16 MR POTTS: Yes.  
 17 MR JUSTICE NUGEE: It follows that the profits of the  
 18 company for that year should have been £86,000 more and  
 19 had they been, £43,000 would have been available  
 20 ultimately, either then or later, as a dividend for  
 21 Ms Birdi.  
 22 Why shouldn't I say, under this very wide  
 23 jurisdiction under 994, that the appropriate adjustment  
 24 to the price, which is what Mr Registrar Briggs has  
 25 invited me to decide, is such as will compensate her for

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1 not having had the dividends she should have had?  
 2 MR POTTS: Yes.  
 3 MR JUSTICE NUGEE: That's how I understand the case to be  
 4 put. What's the answer to that?  
 5 MR POTTS: My Lord, the answer is that your Lordship should  
 6 stop at the first stage. Your Lordship should stop and  
 7 say, this is a matter which is appropriate to be taken  
 8 into account in fixing the price. Quite how it should  
 9 be taken into account, I would say that your Lordship is  
 10 not in a position -- because there is a number of  
 11 different ways -- and your Lordship isn't a share  
 12 valuer.  
 13 MR JUSTICE NUGEE: I'm glad to say.  
 14 MR POTTS: Indeed, because it is difficult. There is  
 15 a potential issue of double recovery because, for  
 16 example, if she was to say --  
 17 MR JUSTICE NUGEE: You said that in opening, but I'm not  
 18 convinced there is.  
 19 MR POTTS: She is saying, for example, on security example,  
 20 "I should have the money".  
 21 MR JUSTICE NUGEE: Yes.  
 22 MR POTTS: And, "I should have the benefit of a dividend --  
 23 the assets of the company should be swollen and should  
 24 be taken to have been greater and I should have  
 25 a dividend".

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1 And in a sense, she is getting the money and she is  
 2 saying it's a matter to be taken into account by the  
 3 valuer. I don't accept that, I don't think that  
 4 necessarily follows.  
 5 There is an additional point, my Lord --  
 6 MR JUSTICE NUGEE: I'm not sure it is double -- I just want  
 7 to run this point down. I'm not sure it is double  
 8 counting. Suppose the facts are that during that  
 9 year -- that's the year to September 2007 -- the  
 10 company, according to its audited accounts, made a loss  
 11 of £60,000. I can't remember what loss it was, but it  
 12 made a loss during that year.  
 13 I find that £86,000 of expenditure for that year was  
 14 improper and malicious. That has two consequences. One  
 15 is that the profits of the year, instead of being  
 16 a £60,000 loss, should have been a £26,000 profit.  
 17 MR POTTS: Yes.  
 18 MR JUSTICE NUGEE: And the other is that ultimately there  
 19 should have been £43,000 of dividend available to her  
 20 more than was in fact made available to her, because it  
 21 would ultimately feed through into retained profits.  
 22 MR POTTS: Yes, but --  
 23 MR JUSTICE NUGEE: So why can't she say, "Had that breach of  
 24 duty not taken place, I would have had more money in my  
 25 pocket in the way of dividend and the profit of the

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1 company for that year would have been greater, which  
 2 feeds through -- to the extent that it does -- into the  
 3 2012 valuation of the shares?"  
 4 MR POTTS: My Lord, I think the answer is there are  
 5 difficulties because I think there is a problem of  
 6 saying, well, either the company should be treated as  
 7 retaining an additional amount of assets or the company  
 8 is treated as having distributed --  
 9 MR JUSTICE NUGEE: Distributed.  
 10 MR POTTS: -- out, and I think there is a danger there of  
 11 double counting.  
 12 The third point, my Lord -- the answer to that  
 13 question is, that's a question which the accountant can  
 14 determine.  
 15 Secondly, it doesn't follow -- and your Lordship  
 16 isn't well placed to say, "Ah, well, I would have got  
 17 a dividend of this amount", because the question as to  
 18 whether a dividend would in fact have been paid in that  
 19 amount is not a straightforward issue. It's an  
 20 accounting question and it also involves an assessment  
 21 of the dividend policy; it involves an assessment of  
 22 cashflow; it involves an assessment as to whether -- it  
 23 doesn't follow, and your Lordship hasn't heard evidence  
 24 to say --  
 25 MR JUSTICE NUGEE: I'm very conscious that I have got no

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1 technical accounting evidence at all.  
 2 MR POTTS: You have got no technical accounting evidence as  
 3 to what the effect would be in terms of would there have  
 4 been a dividend. My friend is saying, "I would have got  
 5 a dividend of X and therefore I should have X by way of  
 6 compensation".  
 7 MR JUSTICE NUGEE: Yes.  
 8 MR POTTS: Your Lordship doesn't have the evidence on that.  
 9 MR JUSTICE NUGEE: Well, what I do have is a dividend  
 10 policy -- which is contractual, not just policy --  
 11 MR POTTS: No.  
 12 MR JUSTICE NUGEE: -- of distributing the maximum possible  
 13 by way of dividend to the A shareholders, combined with  
 14 the fact that by 2014, the company is in a position to  
 15 pay very substantial dividends and is making very  
 16 substantial profits.  
 17 I accept that it doesn't necessarily follow that if  
 18 it had made those profits in 2007, that cash would have  
 19 been available as well, but it's certainly something  
 20 that looks likely.  
 21 MR POTTS: My Lord, firstly on the dividend policy, just to  
 22 explain the dividend policy. The dividend policy has  
 23 a number of elements and it's dealt with in Mr Dyson's  
 24 evidence. There are a number of stages. First of all,  
 25 one looks at the P&L and then one looks at provisions

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1 and reserves.  
 2 MR JUSTICE NUGEE: There is a Companies Act point; you can't  
 3 distribute more than the distributable profits.  
 4 MR POTTS: There is a Companies Act point, but then there is  
 5 a number of steps, which your Lordship has heard  
 6 evidence on but it may be that -- your Lordship, with  
 7 respect, is probably not in a position to calculate.  
 8 MR JUSTICE NUGEE: No, it wasn't the focus.  
 9 MR POTTS: It's not the focus.  
 10 MR JUSTICE NUGEE: No.  
 11 MR POTTS: But it also involves a cashflow test and that's  
 12 not just a question of timing. It's a question of, we  
 13 either declare a dividend or we don't, and I took you to  
 14 one of the bottom line reports. But that then leads to  
 15 question of timing of declaration of dividends. Because  
 16 money has a time value and the question is whether  
 17 a dividend might be paid today or it might have been  
 18 paid three years ago; what the impact is then on the  
 19 rest of the company's affairs. Those are all accounting  
 20 questions which accountants are extremely good at  
 21 dealing with.  
 22 MR JUSTICE NUGEE: Sometimes.  
 23 MR POTTS: Sometimes, and if they don't, then it sometimes  
 24 comes back, but generally lawyers are extremely bad at  
 25 dealing with, and certainly not qualified.

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1 We would say that your Lordship just doesn't have  
 2 the evidence, doesn't have the experience and it's not  
 3 necessary -- it's not the scope of the issue.  
 4 MR JUSTICE NUGEE: Or really the submissions, to be honest.  
 5 MR POTTS: The submissions haven't been addressed that way.  
 6 The way I referred to your Lordship, the North Holdings  
 7 v Southern Tropics case, what your Lordship does -- your  
 8 Lordship does the job that your Lordship is eminently  
 9 suited to do.  
 10 MR JUSTICE NUGEE: You hope.  
 11 MR POTTS: One hopes, which is to determine the facts.  
 12 MR JUSTICE NUGEE: The facts.  
 13 MR POTTS: And the law.  
 14 MR JUSTICE NUGEE: And determine whether it's a breach of  
 15 this section 994 obligation.  
 16 MR POTTS: Yes. Thereafter it goes off to the accountant  
 17 and O'Neill v Phillips gives the reference as to what  
 18 should be in an offer. There is some reference to it  
 19 being slightly rough and ready, but it's a non-speaking  
 20 valuation and the idea is that that's what you get,  
 21 that's the sensible mechanism for the resolution of that  
 22 kind of valuation issue.  
 23 And that is what will happen. That's what the  
 24 parties have agreed. Both sides will have the right, my  
 25 Lord, to make submissions to the valuer, so it's not

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1 that my friend is going to be cut out.  
 2 MR JUSTICE NUGEE: So, going technically to what  
 3 Mr Registrar Briggs directed, there be a trial to  
 4 determine whether the various matters listed constituted  
 5 breaches of contractual or fiduciary duties such as to  
 6 warrant an adjustment to the price. You say I should  
 7 simply give an answer, yes or no?  
 8 MR POTTS: Yes.  
 9 MR JUSTICE NUGEE: Explaining what the breaches consist of?  
 10 MR POTTS: Yes.  
 11 MR JUSTICE NUGEE: Obviously, I'm going to have to decide if  
 12 it's £86,000 or £62,000 or nil. I don't just say, yes,  
 13 there was a breach; I try and quantify the extent to  
 14 which, if any, the prejudice has caused loss to the  
 15 company.  
 16 MR POTTS: If this is a factual matter --  
 17 MR JUSTICE NUGEE: I've got to decide the facts, but I don't  
 18 go beyond saying -- and then I have to exercise  
 19 a discretion: does this warrant an adjustment to the  
 20 price.  
 21 MR POTTS: Yes.  
 22 MR JUSTICE NUGEE: But realistically, I think you accept  
 23 that, subject to de minimis considerations, breaches of  
 24 duties which I find come within section 994 do warrant  
 25 an adjustment to the price, but I shouldn't specify what

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1 adjustment; I should just leave that --  
 2 MR POTTS: My Lord, yes. The language we say is helpful.  
 3 "Whether". It doesn't say what the adjustment should  
 4 be. It's "whether".  
 5 MR JUSTICE NUGEE: Yes, that was my point really. It's  
 6 a much shorter way of putting my point.  
 7 MR POTTS: That's the short answer. Perhaps I should have  
 8 made the short point first but anyway, better late than  
 9 never.  
 10 MR JUSTICE NUGEE: Yes.  
 11 MR POTTS: And the correspondence. I am not going to take  
 12 you through the correspondence.  
 13 MR JUSTICE NUGEE: No, no, and I'm not in the end going to  
 14 decide this on a textural construction of  
 15 Mr Registrar Briggs's direction.  
 16 MR POTTS: Of course.  
 17 MR JUSTICE NUGEE: But I think I do want to understand what  
 18 it is you say I should be doing before I do it, and to  
 19 what extent it's different from what Mr Stuart says  
 20 I should be doing, and why I should prefer what you say  
 21 rather than what he says. And in the end, it's not  
 22 really the textural question.  
 23 MR POTTS: I accept that. It's an assistance.  
 24 MR JUSTICE NUGEE: It's that I don't have the material;  
 25 I may not have the skills -- you suspect not, certainly

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1 not all lawyers have mathematical skills.  
 2 MR POTTS: My Lord, I have shown that.  
 3 MR JUSTICE NUGEE: Yes. And in any event, it's an  
 4 inappropriate part of the overall process of reaching  
 5 a value because that part of the process of reaching  
 6 a value or price, which may be different --  
 7 MR POTTS: Yes.  
 8 MR JUSTICE NUGEE: -- is a matter to be sent to the valuer,  
 9 and I think it's implicit in what you say that if the  
 10 valuer thought it appropriate, the valuer could take  
 11 into account that on my findings, profit should have  
 12 been in the company which the valuer thinks would have  
 13 led to earlier and larger dividends in calculating the  
 14 price.  
 15 MR POTTS: Absolutely.  
 16 MR JUSTICE NUGEE: In specifying the price.  
 17 MR POTTS: Quite how he does that -- my learned friend says  
 18 that's on a pound for pound -- I suppose it should  
 19 probably be on 50p, but anyway, it's on a pound for  
 20 pound basis, he says.  
 21 MR JUSTICE NUGEE: Yes.  
 22 MR POTTS: That may be one way of approaching it. Another  
 23 one may be to say, no, the shares are, if you like,  
 24 pregnant with profit and so maintainable earnings are  
 25 affected and so on and so forth. That's where I do have

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1 a concern, that the idea that the company is sort of  
 2 pregnant with profit which it has, but also has in  
 3 effect paid out that money, I'm just not convinced --  
 4 it's not an issue which I think your Lordship has to  
 5 determine. I think that will be a matter for  
 6 submissions to the valuer as to how, if -- of course,  
 7 this is premised on the fact that there will be  
 8 a valuation exercise anyway, but if there were findings  
 9 for matters which warrant an adjustment, there will be  
 10 submissions made, by accountants, no doubt, as to how  
 11 this should be reflected in the approach he takes.  
 12 And there are a number of ways of approaching  
 13 a valuation. One way -- I'm not saying that's  
 14 necessarily in this case -- but one way is to do it on  
 15 net asset valuation.  
 16 MR JUSTICE NUGEE: One wouldn't normally do with a going  
 17 concern.  
 18 MR POTTS: One normally wouldn't, but in fact, what usually  
 19 happens is it is done.  
 20 MR JUSTICE NUGEE: As an underpin.  
 21 MR POTTS: As an underpin. I'm not suggesting that. All  
 22 I'm saying is those are matters which are sensibly and  
 23 properly left to be dealt with by an expert share  
 24 valuer, not by your Lordship.  
 25 MR JUSTICE NUGEE: Is there any distinction between value

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1 and price?  
 2 MR POTTS: Well --  
 3 MR JUSTICE NUGEE: The price is what you actually pay but  
 4 I'm just wondering what it is the valuer is going to  
 5 decide, because O'Neill v Phillips talks about getting  
 6 a value.  
 7 MR POTTS: In the end, it is the price, because that's what  
 8 is paid. The valuation exercise takes place.  
 9 MR JUSTICE NUGEE: Yes, and then you pay --  
 10 MR POTTS: You pay what comes out. You put it all in at the  
 11 front and it all comes in at the end and you get  
 12 a figure and that's it. That's the order. So I don't  
 13 think there is a distinction at all.  
 14 MR JUSTICE NUGEE: Yes. Okay.  
 15 MR POTTS: And we have some parameters. It's a bona fide  
 16 purchase. It's at arm's length.  
 17 MR JUSTICE NUGEE: No discount --  
 18 MR POTTS: No discount for minority. There is no dispute  
 19 between us on that.  
 20 MR JUSTICE NUGEE: No, no. Yes. Thank you.  
 21 MR POTTS: My Lord, I don't know if --  
 22 MR JUSTICE NUGEE: Yes, that's probably --  
 23 MR POTTS: It's a good break, I think.  
 24 MR JUSTICE NUGEE: Yes, we will say 2 o'clock.  
 25 (12.59 pm)

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1 (The short adjournment)  
 2 (2.00 pm)  
 3 MR JUSTICE NUGEE: Yes, Mr Potts.  
 4 MR POTTS: My Lord, just one matter. The register of  
 5 members.  
 6 MR JUSTICE NUGEE: Yes.  
 7 MR POTTS: I recalled that actually we had pleaded the date  
 8 as to the date of the transcript, 19 March, in our  
 9 pleading, and I couldn't remember quite where it was.  
 10 We made an enquiry. We have got the copy of the  
 11 register of members and I don't know whether that could  
 12 be passed up to your Lordship.  
 13 MR JUSTICE NUGEE: Yes. (Handed)  
 14 MR POTTS: And it confirms the date of entry as being  
 15 19 March 2007.  
 16 MR JUSTICE NUGEE: That's very helpful, thank you.  
 17 MR POTTS: Just for completeness. It's the top entry, my  
 18 Lord. You will see date of entry, 19 March, just for  
 19 completeness.  
 20 That does accord with the date which we pleaded in  
 21 our defence.  
 22 MR JUSTICE NUGEE: What's the basis of altering the register  
 23 of members without the sanction of the board under the  
 24 articles; it's simply an assumption that in due course  
 25 the board will do what SOG wants it to?

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1 MR POTTS: My Lord, there is a right to -- the contractual  
 2 rights in relation to transfers is dealt with under the  
 3 shareholders' agreement, which is not -- so it's not  
 4 quite as flippant as that, my Lord. There is  
 5 a contractual right to transfer, and the rights of veto  
 6 in relation to transfers are dealt with under the terms  
 7 of the shareholders' agreement.  
 8 MR JUSTICE NUGEE: Yes. Does that preclude --  
 9 MR POTTS: No, my Lord, it's not a fetter on discretion.  
 10 MR JUSTICE NUGEE: Table A provides that the transfer of  
 11 shares -- it's a matter for the board of directors  
 12 whether they register it.  
 13 MR POTTS: I can't remember whether there is a discretion in  
 14 this case to refuse to register or not. Sometimes there  
 15 is, sometimes there isn't under the articles.  
 16 MR JUSTICE NUGEE: I rather thought that there was.  
 17 MR POTTS: There may be, my Lord. Let's assume that there  
 18 is.  
 19 MR JUSTICE NUGEE: Yes.  
 20 MR POTTS: The first point is that the administrative --  
 21 MR JUSTICE NUGEE: It's paragraph 7 of -- well, that's  
 22 Visionplus.  
 23 MR POTTS: Visionplus.  
 24 MR JUSTICE NUGEE: But that says:  
 25 "In their absolute discretion, decline to register

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1 any transfer."  
 2 MR POTTS: Yes.  
 3 MR JUSTICE NUGEE: And it appears from what Lord Wilberforce  
 4 said in Howard v Ampol that there are decisions on what  
 5 is a proper use of that power and what's an improper use  
 6 of that power, which is no more than one would expect.  
 7 MR POTTS: Yes.  
 8 MR JUSTICE NUGEE: But does the shareholders' agreement  
 9 preclude the directors qua directors from exercising  
 10 that power in any proper way they think fit?  
 11 MR POTTS: There is a number of points. The first answer is  
 12 that the issue of membership is not actually a question  
 13 of whether there has been an error in the process; it's  
 14 whether you are on the register.  
 15 MR JUSTICE NUGEE: Yes, understood.  
 16 MR POTTS: That's a complete answer. That's the answer to  
 17 the issue of the construction.  
 18 MR JUSTICE NUGEE: They were the registered holders.  
 19 MR POTTS: They were the registered holders. So that's it.  
 20 In terms of -- if your Lordship is raising a more  
 21 interesting point about the process, what I would say is  
 22 that in the first place, the articles may say that there  
 23 is a discretion. What you have is a shareholders'  
 24 agreement which is passed by all the incorporators. That  
 25 would amount to -- frankly, that's an informal -- if

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1 something has to be done by procedure, it's a duomatic  
 2 point there. There is also the point that -- so it's  
 3 not a fettering of discretion; the fact is they have  
 4 already agreed how it should be dealt with.  
 5 MR JUSTICE NUGEE: But all that the shareholders' agreement  
 6 says, isn't it, is you can't dispose of any of your  
 7 A shares unless they are approved by Specsavers as being  
 8 an acceptable transferee?  
 9 MR POTTS: Yes.  
 10 MR JUSTICE NUGEE: That doesn't by itself mean that the  
 11 directors qua directors are fettered in their power to  
 12 approve or not approve the transfer.  
 13 MR POTTS: No. Also, the fact is that this was subsequently  
 14 ratified by a later decision of a board meeting as well.  
 15 MR JUSTICE NUGEE: Yes. Thank you.  
 16 MR POTTS: My Lord, I was now going to just run through --  
 17 MR JUSTICE NUGEE: There was one other point left from this  
 18 morning, which was the deed of adherence not being  
 19 signed by Ms Birdi.  
 20 MR POTTS: Yes, your Lordship is right. There was a space  
 21 left on the document for Ms Birdi to sign and she didn't  
 22 sign it.  
 23 MR JUSTICE NUGEE: There is not only a space left, but there  
 24 is a covenant by the new party with the continuing  
 25 director. So it's clearly envisaged she shall be

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1 a contracting party.  
 2 MR POTTS: The new party. The covenants as to the new party  
 3 are Mr Singh; Mr Singh is the new party.  
 4 MR JUSTICE NUGEE: Yes, he's the covenantor, but the  
 5 covenantee -- one of the covenantees is the continuing  
 6 director, who is Ms Birdi.  
 7 MR POTTS: Yes, my Lord. My point on that is the  
 8 obligations under the shareholders' agreement are that  
 9 what the parties have agreed to, including Ms Birdi, is  
 10 that a new member may come in, subject to adhering to  
 11 the terms of the shareholders' agreement.  
 12 MR JUSTICE NUGEE: So you say it wasn't necessary for her --  
 13 MR POTTS: It wasn't necessary for her to be a party and the  
 14 issue is that he is giving the covenants to abide by the  
 15 shareholders' agreement. So it doesn't require her to  
 16 sign it.  
 17 MR JUSTICE NUGEE: Is that a Law of Property Act point, that  
 18 if you are named as a covenantee in a deed you don't  
 19 need to execute the deed to take the benefit of the  
 20 covenant, section 56?  
 21 MR POTTS: That's exactly the point I was thinking of, my  
 22 Lord. I would say that's right. The point which  
 23 I thought of is the point as to what the contract  
 24 requires and what Ms Birdi has signed up to.  
 25 MR JUSTICE NUGEE: Where does it say that --

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1 MR POTTS: Let me find ...  
 2 Yes, 15.1. An A director shall not transfer except  
 3 with approval. {D/15/186}  
 4 And it's:  
 5 "15.1.2 such person covenants with Specsavers in  
 6 a deed to perform and observe all the obligations and  
 7 conditions on the part of the relevant A director ...  
 8 contained in this agreement."  
 9 And he has complied with that. It doesn't require  
 10 Ms Birdi to --  
 11 MR JUSTICE NUGEE: No. Realistically, most of the  
 12 allegations are against SOG.  
 13 MR POTTS: Yes.  
 14 MR JUSTICE NUGEE: And it's irrelevant to those allegations  
 15 whether Mr Singh --  
 16 MR POTTS: I don't think there is any allegation of sort  
 17 of --  
 18 MR JUSTICE NUGEE: Contractual obligation, but insofar as  
 19 there are allegations against Mr Singh --  
 20 MR POTTS: Yes, he accepts that he is bound by --  
 21 MR JUSTICE NUGEE: -- you accept on his behalf that he is  
 22 bound by the shareholders' agreement?  
 23 MR POTTS: Absolutely.  
 24 MR JUSTICE NUGEE: In favour of Ms Birdi?  
 25 MR POTTS: Yes, indeed.

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1 MR JUSTICE NUGEE: So I need not worry that she didn't  
2 execute the deed. Thank you.  
3 MR POTTS: Yes, but my position is that she didn't need to.  
4 MR JUSTICE NUGEE: Yes. As I say, section 56 may mean that  
5 she didn't, but since you accept it, it doesn't matter.  
6 MR POTTS: My Lord, obviously we have dealt with the  
7 facts --  
8 MR JUSTICE NUGEE: You have.  
9 MR POTTS: -- fully, so I'm not proposing to canter through  
10 all of that.  
11 MR JUSTICE NUGEE: No.  
12 MR POTTS: I'll draw your Lordship's attention firstly, for  
13 assistance in terms of the references as to where  
14 paragraphs on both my friend's and my submissions are,  
15 and then there is a few points to draw out.  
16 MR JUSTICE NUGEE: Yes.  
17 MR POTTS: The first issue -- and I'm doing this by  
18 reference to the six issues, which we say -- I think  
19 it's common ground.  
20 MR JUSTICE NUGEE: I think it's common ground there are six  
21 issues.  
22 MR POTTS: Yes. My Lord, the first issue is the monies paid  
23 to Mr Patel and thefts not recouped. It's our closing  
24 305 to 323; my learned friend's closing 133 to 134.  
25 Firstly, on the additional sums paid to Mr Patel,

1 2 1

1 those are dealt with in 306 to 310. My Lord, just one  
2 point to draw out --  
3 MR JUSTICE NUGEE: Those are the little sums, yes?  
4 MR POTTS: They are the small sums, my Lord. There is one  
5 point you raised with me about the car.  
6 MR JUSTICE NUGEE: Yes.  
7 MR POTTS: E3. Can I take your Lordship to E3.  
8 MR JUSTICE NUGEE: Yes.  
9 MR POTTS: 637. {E/155/637}  
10 MR JUSTICE NUGEE: You are going to tell me I have  
11 misremembered the facts.  
12 MR POTTS: No, I wouldn't do that, my Lord, no, but just in  
13 terms of some context.  
14 Your Lordship said, why would this be done. This is  
15 a letter from Mr Fleming, the insurance services  
16 manager, and he talks about -- the second paragraph, he  
17 says:  
18 "Since the vehicle was, at the time of the incident,  
19 property of [SOG] and insured --"  
20 MR JUSTICE NUGEE: I see; I did misremember. It hadn't  
21 actually been given to him then?  
22 MR POTTS: No. So, with respect, the main point is this is  
23 not evidence of a conspiracy. These are business  
24 decisions and they may be good or bad ones, but they are  
25 business decisions. But just in relation to that one,

1 2 2

1 I thought it was right to deal with that.  
2 MR JUSTICE NUGEE: Thank you, yes.  
3 MR POTTS: Then the second issue is the thefts.  
4 MR JUSTICE NUGEE: Yes.  
5 MR POTTS: The recovery of the thefts. It's 311 to 323 of  
6 my document; it's 135 to 139 of my learned friend's.  
7 Firstly, just in terms of what doesn't seem to be being  
8 pursued, based on the document, there is no reference in  
9 my friend's closing to the, if I can call it, the  
10 £20,000 provision extrapolation point, which is the  
11 £50,000.  
12 MR JUSTICE NUGEE: You have dealt with that anyway.  
13 MR POTTS: I have dealt with it. My friend, I'm not sure --  
14 MR JUSTICE NUGEE: You say the provision was always  
15 a provision for putting people on the payroll.  
16 MR POTTS: It wasn't Mr Patel --  
17 MR JUSTICE NUGEE: Not Mr Patel stealing money.  
18 MR POTTS: Yes. So if it's pursued, that's our case on it.  
19 My Lord, then the other matter which is relied on is  
20 the valuation issue, that the shares in fact were  
21 worth -- that we knew it was thefts of over £100,000.  
22 MR JUSTICE NUGEE: Is there any evidence in documentary form  
23 before me at all that Mr Ryan's business transfer  
24 department valued the shares at £70,000?  
25 MR POTTS: It's in the --

1 2 3

1 MR JUSTICE NUGEE: In documentary form? It's in the witness  
2 statement but ...  
3 MR POTTS: It's not just in the witness statement, my Lord.  
4 I think there is also the evidence as to how it was  
5 entered into the asset register. Mr Dyson gave some  
6 evidence of that, that it was entered into the register  
7 at £70,000.  
8 MR JUSTICE NUGEE: Do I have that document?  
9 MR POTTS: No, I don't think you do, no.  
10 MR JUSTICE NUGEE: No.  
11 MR POTTS: But he has given evidence on it.  
12 MR JUSTICE NUGEE: Is there any evidence explaining why  
13 Mr Patel was persuaded -- I was going to say  
14 "induced" -- but he was persuaded to sign a letter  
15 asking SOG to allow the £15,000 and the £4,000 against  
16 the purchase price -- and at the time --  
17 MR POTTS: I'm not sure if it's necessary to say that it's  
18 against the purchase price.  
19 MR JUSTICE NUGEE: That is what he says.  
20 MR POTTS: Well, it's to be taken into account, certainly.  
21 MR JUSTICE NUGEE: Let's have a look at it. E2.  
22 MR STUART: 287.  
23 MR JUSTICE NUGEE: I'm very much obliged. Thank you:  
24 {E/42/287}  
25 "I would like to pay for ..."

1 2 4



1 MR POTTS: Yes.  
 2 MR JUSTICE NUGEE: £15,000 and £4,000.  
 3 MR POTTS: Yes.  
 4 MR JUSTICE NUGEE: "I would like to transfer my shares ...  
 5 and would ask that the above funds be deducted from the  
 6 share value."  
 7 So I read that as being, "I'm willing for you to  
 8 take £19,790 off the value".  
 9 MR POTTS: Yes.  
 10 MR JUSTICE NUGEE: Is there any evidence as to why, on the  
 11 figures that you are putting forward, in the event, it  
 12 was only £15,000 taken off a value of £70,000?  
 13 MR POTTS: Can I make -- evidence and then there is sort of  
 14 logic. Evidence as to what the proper set-off is: the  
 15 proper set-off would be because -- subject to the  
 16 SOG/SOS point -- the party which has incurred the  
 17 investigation costs is not the company.  
 18 MR JUSTICE NUGEE: No, that's one of the complaints, that --  
 19 well, it is. One of the complaints is the deal you did  
 20 with Mr Patel effectively said, "Give us your shares at  
 21 a discount and we will let you off any liability to  
 22 Visionplus", and I wanted to ask you whether that was  
 23 something --  
 24 MR POTTS: On the investigation costs, that's just a flow  
 25 through.

1 2 5

1 MR JUSTICE NUGEE: Yes.  
 2 MR POTTS: Because there is no loss there, because if -- and  
 3 I think my friend's skeleton seems to suggest there is  
 4 a claim for the £15,000 but I think -- I don't  
 5 understand -- I'm not sure that makes sense.  
 6 MR JUSTICE NUGEE: I will look at the evidence with some  
 7 care, but I don't think the evidence establishes that  
 8 the Dartford companies were ever charged the cost of the  
 9 investigation --  
 10 MR POTTS: So there is no loss there.  
 11 MR JUSTICE NUGEE: -- into Mr Patel.  
 12 MR POTTS: So all that there is there is -- I accept your  
 13 Lordship's different point, which is the evidential one  
 14 and I'll come on to that, but in terms of how the  
 15 set-off would work, that would be a proper set-off of  
 16 funds between --  
 17 MR JUSTICE NUGEE: It makes sense that Mr Patel should pay  
 18 SOS/SOG, whichever, the cost of investigating --  
 19 MR POTTS: Yes.  
 20 MR JUSTICE NUGEE: -- if it's not being charged to the  
 21 company. As I say, at the moment I don't think the  
 22 evidence is that it was charged to the company.  
 23 The same doesn't apply to the £4,000.  
 24 MR POTTS: No, I accept that; I accept that.  
 25 MR JUSTICE NUGEE: What should have happened, if they were

1 2 6

1 going to do it, is they should have taken £4,000 off the  
 2 price and paid it into the company.  
 3 MR POTTS: I accept that, my Lord, and the point I make  
 4 is -- obviously the first point is to deal with your  
 5 evidential point, my Lord. No, seven years after the  
 6 event, there isn't a clear evidential chain there in  
 7 relation to that issue.  
 8 What I say on that -- maybe I'll deal with that now.  
 9 This is a causation point. My friends made the point  
 10 about the tax indemnity point, if you remember.  
 11 MR JUSTICE NUGEE: Yes, this is £10,000 --  
 12 £9,000-and-something.  
 13 MR POTTS: Yes. It doesn't work on the timing. The  
 14 director's loan was written off; it was written off in  
 15 the year ended 30 September 2007; for your Lordship's  
 16 note it's D1/274 {D/20/274} in the accounts. That is  
 17 two years before the issue of the tax liability came up.  
 18 MR JUSTICE NUGEE: I don't have any evidence, I think, as to  
 19 why or when or in what circumstances or by whom that  
 20 loan was written off.  
 21 MR POTTS: Your Lordship is right, but what we would say is  
 22 that there is --  
 23 MR JUSTICE NUGEE: By the end of 2007, there has effectively  
 24 been a recovery of most of the theft?  
 25 MR POTTS: Exactly. It may be -- my Lord, who knows what

1 2 7

1 happened in the bowels of the business transfer  
 2 department in terms of the calculation.  
 3 MR JUSTICE NUGEE: Your client, I suspect, if anybody.  
 4 MR POTTS: If anybody does, seven years after the event --  
 5 I think Mr Ryan has retired.  
 6 MR JUSTICE NUGEE: Yes.  
 7 MR POTTS: He is no longer there and so on. It's very  
 8 difficult. But what we would say is Mr McAlindon's  
 9 evidence was he communicates the deal and he leaves it  
 10 to somebody else to sort it out.  
 11 MR JUSTICE NUGEE: Yes.  
 12 MR POTTS: The case that really is put is that this is  
 13 a machination -- that's the one word they don't use --  
 14 but it's a conspiracy, it's an inducement, it's an  
 15 improper payment to Mr Patel in order to produce  
 16 ammunition against Ms Birdi. That's the case we are  
 17 focused on and obviously my case is that it just doesn't  
 18 stack up.  
 19 This was a genuine decision. Whether they actually  
 20 sorted it out properly is not --  
 21 MR JUSTICE NUGEE: There are two aspects to that. There is  
 22 the financial -- did it all come out in the wash.  
 23 MR POTTS: The answer is yes, pretty much.  
 24 MR JUSTICE NUGEE: Apart from £3,500 or whatever, you say.  
 25 Mr Stuart says now there's this other £9,000 so you

1 2 8

1 didn't need to write off the thing, but you say that's  
 2 explained on the timing point?  
 3 MR POTTS: Yes. My Lord, finally on the tax indemnity  
 4 point, there is evidence which is unchallenged in  
 5 relation to the decision on the tax indemnity, which is  
 6 Mr Dyson's evidence. He says it's a commercial decision  
 7 taken, it's not worth pursuing.  
 8 MR JUSTICE NUGEE: Not worth pursuing.  
 9 MR POTTS: Not challenged. We don't have any complaints  
 10 about that.  
 11 MR JUSTICE NUGEE: I don't have any evidence as to what's  
 12 happened to Mr Patel, do I?  
 13 MR POTTS: No, my Lord.  
 14 MR JUSTICE NUGEE: No. Then the other aspect of which  
 15 complaint is made is Ms Birdi is told: we think we have  
 16 caught your co-director stealing; we are going to get  
 17 the evidence to establish it; we are then going to  
 18 investigate; we will confront him, and then you will be  
 19 involved, as director of Visionplus, in deciding where  
 20 we go from there. And actually, she doesn't get  
 21 involved at all.  
 22 MR POTTS: Yes.  
 23 MR JUSTICE NUGEE: Which doesn't necessarily have a direct  
 24 financial thing attached to it.  
 25 MR POTTS: No.

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1 MR JUSTICE NUGEE: But is relied on as supportive of: this  
 2 is all part of a plot.  
 3 MR POTTS: Yes. My Lord, yes. I suppose one could try and  
 4 run it that way. The evidence which your Lordship has  
 5 heard is that it was a business decision taken. The  
 6 view was taken that this was in the interests of the  
 7 company. If you go to tab -- obviously, it's open to  
 8 them -- the case which is in fact advanced is that  
 9 actually, this was not a business decision; it was an  
 10 inducement.  
 11 MR JUSTICE NUGEE: Yes. Yes.  
 12 MR POTTS: Your Lordship has heard the evidence and your  
 13 Lordship will make the assessment, of course, on the  
 14 evidence, but we say that the evidence just does not  
 15 stack up to that. You have heard live evidence from  
 16 Mr Dyson in relation to that, and indeed others, that  
 17 this was not an inducement.  
 18 Mr Dyson took a decision that it was expedient to  
 19 get Mr Patel out. It was in the interests of the  
 20 business and that's a decision which was taken. It's  
 21 a business decision.  
 22 My friend, of course, is entitled to run the case  
 23 that this is indicative of a conspiracy but we say the  
 24 evidence just doesn't get anywhere near to that. It  
 25 just doesn't get off the ground. That's the two

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1 dichotomies.  
 2 MR JUSTICE NUGEE: It might get a bit closer to -- and I'm  
 3 not sure this is the case you are facing -- but to an  
 4 assumption by SOG that when push comes to shove, they  
 5 can dictate what happens.  
 6 MR POTTS: That may be right and, my Lord -- I mean, in the  
 7 end, is there anything improper in accepting --  
 8 MR JUSTICE NUGEE: That's what I wanted to ask you about.  
 9 MR POTTS: My Lord, I think it's a sort of tail and dog  
 10 point. If the answer is that if they take the view: we  
 11 can do what we like and we can have no regard to the  
 12 interests of the company, but we can just push through  
 13 a malicious breach of duty so it doesn't matter, then of  
 14 course --  
 15 MR JUSTICE NUGEE: Or take decisions which are in our  
 16 interests, without regard to the interests of the  
 17 company.  
 18 MR POTTS: Yes. The issue is not the majority point; the  
 19 issue is whether you take the decision in the interests  
 20 of the company or not.  
 21 MR JUSTICE NUGEE: Whereas if SOG take the view: this is the  
 22 right thing for the company --  
 23 MR POTTS: And the reality is this is --  
 24 MR JUSTICE NUGEE: -- we are not going to bother to hold  
 25 a board meeting -- actually because we don't think about

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1 it, but had we thought about it, we could have held one  
 2 and it would have got to same result.  
 3 MR POTTS: Yes.  
 4 MR JUSTICE NUGEE: And you say that's neither really here  
 5 nor there for section 994 purposes?  
 6 MR POTTS: Exactly. That's right, my Lord. We are looking  
 7 at the substantive point, the malice allegation, and  
 8 I accept that that is a triable matter which is properly  
 9 before the court.  
 10 MR JUSTICE NUGEE: Yes.  
 11 MR POTTS: I'm not sure I would necessarily accept it meets  
 12 the threshold of a triable issue, but that's a different  
 13 issue; that's a burden point.  
 14 But, in terms of --  
 15 MR JUSTICE NUGEE: Just before we -- merely concluding that  
 16 people like Mr Dyson and Mr McAlindon and so on assumed  
 17 that in a situation like this, what SOG wanted to do was  
 18 what was going to happen, is not by itself --  
 19 MR POTTS: No, without more it's not of itself a matter  
 20 which gives rise to serious matters which your Lordship  
 21 should be concerned with.  
 22 MR JUSTICE NUGEE: Yes.  
 23 MR POTTS: My Lord, I need to just address the valuation  
 24 point, the idea that the thefts were worth -- I think on  
 25 this case it's £100,000 that has been stolen.

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1 MR JUSTICE NUGEE: I don't think you need to worry about the  
 2 discrepancy between the £55,000 or £70,000 and the  
 3 £175,000 that Ms Kaur was willing to offer. I don't  
 4 think I'm persuaded that it's a reasonable inference  
 5 that the difference is the quantum of the thefts. But  
 6 there is some evidence that Mr McAlindon stopped  
 7 investigating and never got to the bottom of what he had  
 8 stolen. There was the credit card point.

9 MR POTTS: Yes. For your Lordship's note, paragraph 321 of  
 10 my closing submissions deals with this. My friend  
 11 said he didn't actually have any evidence as to what the  
 12 thefts might have been, more than the £4,000. My point  
 13 is that in fact, your Lordship does have very good  
 14 evidence that that is the magnitude of the thefts  
 15 because firstly -- well, the points I have made.  
 16 Firstly the letter of resignation says that it's £4,180.

17 MR JUSTICE NUGEE: It doesn't, it says:  
 18 "I would also like to pay for ... stolen money  
 19 of --"

20 MR POTTS: Stolen money, yes.

21 MR JUSTICE NUGEE: He is not going to admit to more than he  
 22 knows that there's evidence of.

23 MR POTTS: My Lord, no, but there is a point that -- it's  
 24 not a point on its own. If I can build the point. The  
 25 first point is if you are going to say effectively the

1 3 3

1 allegation is -- the question is, is that a sham  
 2 document.

3 MR JUSTICE NUGEE: No, not a sham at all, but that  
 4 Mr McAlindon had caught out Mr Patel and had good  
 5 evidence of £4,180, which were the till refunds with  
 6 Mr Patel's number on. And what the CCTV evidence shows  
 7 is that it's not someone else using Mr Patel's number.

8 It's therefore a reasonable inference that any till  
 9 refund which is put through by Mr Patel is a fraudulent  
 10 one, and that's what he put to Mr Patel and that's what  
 11 he gets him to sign up to, which is where the £4,000 is.

12 I'm willing to infer that Mr McAlindon didn't have  
 13 any other evidence of that quality, but that doesn't  
 14 mean that -- by itself -- that he had investigated and  
 15 found that there was no other evidence.

16 MR POTTS: Your Lordship is right. A couple of points. The  
 17 first point, my Lord, is the record of interview shows  
 18 that there has been a transactional analysis going back  
 19 as far as they can, back to 2004. First point.

20 The second point is, you did hear from Mr McAlindon.  
 21 He gave what I would say was compelling and persuasive  
 22 evidence as to the thoroughness -- Mr McAlindon knows  
 23 his job. The evidence that your Lordship heard was that  
 24 he did in fact a thorough analysis. He recalled not  
 25 just the refunds but he did a thorough transactional

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1 analysis of all the -- Mr McAlindon knows, through  
 2 experience, lots of different ways that you can steal  
 3 money from the till.

4 MR JUSTICE NUGEE: Yes.

5 MR POTTS: And he didn't just do that one run of  
 6 transactions; he did a whole raft of impressively  
 7 sounding but credible checks as to understanding how the  
 8 money can be stolen, not just that, and this was the  
 9 only one that he found to have any legs.

10 So it wasn't just that. He did, in fact, a thorough  
 11 analysis and a thorough investigation. And there is no  
 12 evidence to suggest -- in fact, your Lordship said,  
 13 well, he accepted you might have a margin of  
 14 10 per cent, if you recall the evidence, but I would  
 15 commend that evidence as being honest and compelling and  
 16 thorough.

17 So your Lordship does have evidence as to the  
 18 quantum of the thefts. It was good evidence. It wasn't  
 19 challenged and what was also not challenged was -- it  
 20 wasn't put to any witness that Specsavers in fact  
 21 believed Mr Patel's shares to have any more value than  
 22 the £70,000 value. That evidence was not challenged.  
 23 That's unchallenged evidence and that is the key point  
 24 in terms of the allegation of malice which is made. We  
 25 have to actually believe that in fact he has stolen this

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1 vast amount of money and that we are giving him credit  
 2 for it by taking some sort of knockdown price, but in  
 3 fact, effectively giving him the gift of the  
 4 non-recovery of £100,000 worth of the thefts. The  
 5 evidence just doesn't get off the ground on that.

6 And then we have the evidence as to valuation and  
 7 I accept we don't have -- Mr Ryan has retired, he is not  
 8 here, but your Lordship did have evidence from Mr Dyson,  
 9 which is unchallenged evidence, as to the methodology  
 10 that Mr Ryan has adopted.

11 That wasn't challenged and your Lordship has seen  
 12 snippets of documentary evidence as to that methodology  
 13 being applied of this weighted average, usually 2 to 2.5  
 14 times.

15 You have also seen the manuscript on the Kaur letter  
 16 saying 4.5 times. Obviously we haven't heard any  
 17 evidence, but the fact is that that is inconsistent with  
 18 the valuation approach adopted by Specsavers, which is  
 19 unchallenged, as to the sort of appropriate P/E  
 20 multiples that Specsavers adopt.

21 Then you also have anecdotal evidence as to how the  
 22 company had been performing in the three years, which we  
 23 set out. It wasn't producing vast profits. I know my  
 24 friend says this is a goldmine and you just sort of turn  
 25 the handle and out pops 100 and -- whatever number he

1 3 6

1 has chosen. In fact, for the previous three years, it's  
 2 a loss of £58,000, it's a profit of £2,000 and it's  
 3 a profit of £25,000 over the previous three years.  
 4 So it doesn't suggest a track record that actually  
 5 this company is worth some vast sum. And indeed  
 6 actually -- I know it's at a later stage, but Mr Singh's  
 7 evidence in fact as to what he thought the company was  
 8 worth in a distressed state, and with history that he  
 9 had previously had dealings with SOG in relation to --  
 10 I think it was the East Ham store, which was at a much  
 11 lower level of consideration for the shares.  
 12 So the allegation that Specsavers consciously  
 13 decided -- it decided and viewed the shares had actually  
 14 been worth some hugely inflated price, and was prepared  
 15 to give up that price as some sort of set-off, as an  
 16 inducement for Mr Patel to make dishonest allegations  
 17 against Ms Birdi, which he could then use as part of the  
 18 conspiracy against her to drive her out of the business  
 19 based on a plot which in fact had started in late  
 20 2006 -- and that's Ms Birdi's case. It's incredible.  
 21 It lacks any credibility.  
 22 MR JUSTICE NUGEE: Do you want to say anything about the  
 23 unexplained valuation coming from Mr Glass on  
 24 the 16th --  
 25 MR POTTS: We have dealt with this, it's at subparagraph 8  
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1 on that paragraph, briefly. He is a junior member of  
 2 the team. There was some speculation about it, that he  
 3 might have had an awareness of an investigation and  
 4 started doing a valuation.  
 5 Mr McAlindon wasn't aware of anyone being instructed  
 6 to do one. The valuation -- actually it isn't very  
 7 clear as to the figures. We have referred to that. It  
 8 refers to the range that my friend says, of £82,000 to  
 9 £123,000, but actually, at the bottom of the page there  
 10 is some sort of calculation referable to "loan", but  
 11 there is a reference at the bottom of the page. It  
 12 says:  
 13 "Capital value as an indication of value of an  
 14 A shareholding of £48,000."  
 15 MR JUSTICE NUGEE: Yes, but that's for loan purposes.  
 16 MR POTTS: It does say capital value as an indication of the  
 17 value of the shares.  
 18 MR JUSTICE NUGEE: Yes, but that's not a valuation for  
 19 a share sale transaction; that's a valuation for loan  
 20 purposes.  
 21 MR POTTS: Maybe it is.  
 22 MR JUSTICE NUGEE: That's how I read it.  
 23 MR POTTS: Obviously, my Lord, yes, there are some different  
 24 figures.  
 25 MR JUSTICE NUGEE: When one is looking at lending capital  
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1 against a share, a bundle of shares, one is looking at  
 2 what dividends are likely to be available in order to  
 3 repay the loan, and that's what that calculation does.  
 4 MR POTTS: My Lord, it may be, but it's not entirely as  
 5 straightforward as that. I mustn't give evidence as to  
 6 Specsavers's approach, but Specsavers -- one approach  
 7 which might be possible in relation to this is that  
 8 Specsavers is taking on partners, and the fact that  
 9 there is a loan calculation there is indicative of the  
 10 sort of approach that Specsavers might take. I can't  
 11 put it higher than that; in fact I don't have  
 12 instructions that it does take -- your Lordship doesn't  
 13 have that evidence, which is that in setting valuations  
 14 for shares, it is concerned about affordability. It  
 15 doesn't want JVPs --  
 16 MR JUSTICE NUGEE: I understand that.  
 17 MR POTTS: -- taking on -- and that is a factor which it  
 18 takes into account on valuation as well.  
 19 So, it's a junior member of staff. There is no  
 20 evidence that anyone instructed it.  
 21 MR JUSTICE NUGEE: I'm not sure that I would think it likely  
 22 that a junior member of staff is going to start doing  
 23 calculations without instructions. I would have thought  
 24 it far more likely that someone said, "There might or  
 25 might not be something happening at Dartford, can you  
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 1 run the figures?" I think that's a far more likely  
 2 inference.  
 3 MR POTTS: I accept that as well, and that is also --  
 4 contingency -- you have had evidence about contingency  
 5 planning. That's not evidence of a conspiracy, but it's  
 6 certainly not, I would say -- the document does not  
 7 provide anything like sufficient evidence to suggest  
 8 that all the other witnesses should be disbelieved and  
 9 that this is a --  
 10 MR JUSTICE NUGEE: The truth is, I don't really have much  
 11 evidence.  
 12 MR POTTS: You don't really have much evidence on that.  
 13 MR JUSTICE NUGEE: Thank you.  
 14 MR POTTS: My Lord, I think that's everything on the first  
 15 issue, unless your Lordship has anything?  
 16 MR JUSTICE NUGEE: Yes.  
 17 MR POTTS: Second issue for your Lordship's note, our  
 18 closing 324 to 325, my learned friend's closing 145 to  
 19 146.  
 20 MR JUSTICE NUGEE: Just before you leave that, sorry, there  
 21 was one other question.  
 22 MR POTTS: Yes.  
 23 MR JUSTICE NUGEE: Do you say that -- this is  
 24 a counterfactual. Suppose that Ms Birdi's suspension  
 25 hadn't taken the months that it took but it took  
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1 a matter of a couple of weeks and at the end of a couple  
2 of weeks, everyone was satisfied that although she had  
3 failed to do various things, there was no attempt to  
4 extract money improperly and she had been reinstated and  
5 there had then been a board meeting at which the  
6 question was: what shall we do about pursuing Mr Patel.

7 Do you say that by that stage, Visionplus had given  
8 up any claims against Mr Patel in relation to the theft?  
9 This deal that was done on the 20th, does that preclude  
10 Visionplus from pursuing, if more evidence had come  
11 light of further thefts?

12 MR POTTS: Against Mr Patel?

13 MR JUSTICE NUGEE: Yes.

14 MR POTTS: Erm.

15 MR JUSTICE NUGEE: Because I think one of the allegations  
16 you are facing is that SOG took it upon itself to give  
17 up Visionplus's claims against Mr Patel.

18 MR POTTS: I think that is what is suggested. I mean, we  
19 say, and the evidence is, that there is a business  
20 decision effectively to continue the costs of  
21 investigation. Effectively, he has run the  
22 transactions; Mr McAlindon is satisfied there isn't  
23 anything else. If they are going to continue running  
24 those, that's going to cause increased costs and,  
25 remember, the costs are not just of investigation. It's

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1 also that Mr Patel is going to continue -- if he is not  
2 sacked, if effectively we are saying, "Well, we haven't  
3 formed a conclusion", he is going to continue to be paid  
4 a salary.

5 MR JUSTICE NUGEE: Yes, but that wasn't my question. Do you  
6 say the effect of the deal that was done with Mr Patel  
7 was to preclude Visionplus from pursuing him from any  
8 further thefts, had they come to light.

9 MR POTTS: I think, my Lord -- you know, this isn't a full  
10 settlement, a final settlement. There is no express  
11 term saying that this is a release of claims, rather  
12 than just an agreement not to pursue, but I think  
13 everyone has proceeded that -- the commercial effect is  
14 to draw a line.

15 MR JUSTICE NUGEE: Yes.

16 MR POTTS: I think that is the --

17 MR JUSTICE NUGEE: Can I ask you something else while we are  
18 talking about Mr Patel. It's not one of the six issues,  
19 but one of the things Ms Birdi complains about is that  
20 Mr McAlindon gets very heavy with her on a phone call  
21 when he thinks that she has been going round saying that  
22 Mr Patel has been sacked for stealing.

23 MR POTTS: Yes.

24 MR JUSTICE NUGEE: She says, "I didn't say that he was  
25 sacked. I said that he had to resign and I didn't say

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1 that he had been stealing."

2 And I have got evidence on both sides of that, which  
3 I will have to, if it's necessary, I'll have to resolve.

4 MR POTTS: You have got Ms Frondigoun's evidence on that  
5 before this court.

6 MR JUSTICE NUGEE: Yes. But on what basis is Mr McAlindon  
7 in a position to give her what he describes as  
8 a legitimate management instruction as to what she can  
9 and can't say about the circumstances of Mr Patel's  
10 departure?

11 MR POTTS: My Lord, I think the position is that --  
12 obviously, legal advice is -- the concern is that

13 Mr Patel has not been sacked. There has not been  
14 a finding of theft against him.

15 MR JUSTICE NUGEE: There has been an admission of theft. At  
16 one point, Mr McAlindon says in his case notes, "There  
17 is risk of us being sued for libel". The idea that  
18 Mr Patel was in a position to sue for libel if someone  
19 said he had been sacked for stealing, when in fact he  
20 has resigned because he has admitted stealing is  
21 nonsense. He is a thief and there is no getting around  
22 that.

23 MR POTTS: My Lord, I'm not trying to.

24 MR JUSTICE NUGEE: And there is a little bit of Mr McAlindon  
25 not really wanting to face up to that, which is one of

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1 the things that upsets Ms Birdi.

2 MR POTTS: My Lord, yes. Firstly, Mr McAlindon -- the steps  
3 that he takes are following advice in relation to  
4 concerns of opening exposure of the company to claims.  
5 It may be that your Lordship says -- and indeed it may  
6 be that the reality is that that's not in fact a very  
7 likely prospect, but the issue is --

8 MR JUSTICE NUGEE: I can see that there might well be -- in  
9 other cases people might be presented with evidence and  
10 given an option, "Well, you can resign now with no  
11 findings, or we will carry on investigating", and in  
12 those circumstances it might well be the safer thing to  
13 do, not to --

14 MR POTTS: Your Lordship may be right that in terms of  
15 actually what the realistic prospects are that,  
16 actually, looking at it now, you might say -- he is  
17 complaining about how he can't get jobs as locums and so  
18 on and so forth, and obviously there are disputes about  
19 whether that was said by Ms Birdi or not. She denies it  
20 and that's not an issue for your Lordship. But the  
21 question is: was that genuinely believed by him, based  
22 on, perhaps, advice that he had received, to be a risk  
23 and a potential problem for the company.

24 The answer, I would respectfully say, is that there  
25 is no reason to believe that he didn't genuinely believe

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1 that and indeed, it wasn't put to him that he didn't.  
 2 MR JUSTICE NUGEE: Yes, but that wasn't --  
 3 MR POTTS: That's the start of the point.  
 4 MR JUSTICE NUGEE: It wasn't quite my question.  
 5 MR POTTS: I know it wasn't, but your Lordship was saying to  
 6 me that actually, there wasn't a real prospect --  
 7 MR JUSTICE NUGEE: I think the risk of being sued for libel  
 8 was nil but --  
 9 MR POTTS: But it was honestly -- if there was a belief that  
 10 it gave rise to potential problems and that was  
 11 genuinely believed ... so that's the starting point. So  
 12 this isn't some malicious point. It's to deal with what  
 13 is considered to be a genuine and possible problem.  
 14 Your Lordship today may take a different view, but  
 15 that's not the issue.  
 16 MR JUSTICE NUGEE: Yes.  
 17 MR POTTS: Mr McAlindon is communicating the views of  
 18 Specsavers in that regard to her and he is entitled to  
 19 do so, and that is the view of the majority, the  
 20 controlling directors.  
 21 We are coming back to your Lordship's point about --  
 22 MR JUSTICE NUGEE: It's coming back to this idea that SOG  
 23 really thinks that when the chips are down, what it says  
 24 goes.  
 25 MR POTTS: My Lord, yes.

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1 MR JUSTICE NUGEE: And whether there is anything wrong with  
 2 that, because it's clearly one of the things which has  
 3 upset Ms Birdi.  
 4 MR POTTS: My Lord, yes. It may be that Ms Birdi -- the  
 5 reality is, of course, for example -- to take a more  
 6 extreme example, if Ms Birdi decides that she wants to  
 7 go and make a complaint to the police, she can make  
 8 a complaint to the police. There's nothing -- there's  
 9 no --  
 10 MR JUSTICE NUGEE: Could she be sacked for doing so?  
 11 Suppose Mr McAlindon had said, "We have done this deal  
 12 with Mr Patel, you are not to complain to the police or  
 13 to the General Optical Council because it will  
 14 prejudice --"  
 15 MR POTTS: Firstly, I don't think that's what he said.  
 16 MR JUSTICE NUGEE: No, it's not what he said.  
 17 MR POTTS: The evidence he gave was that if she had raised  
 18 some particular issue in relation to the message that he  
 19 communicated, it would have been passed back and it  
 20 would have been dealt with by someone beyond his pay  
 21 grade. That's the short answer to the point.  
 22 MR JUSTICE NUGEE: Yes.  
 23 MR POTTS: But your Lordship has seen that Specsavers -- her  
 24 duties in the shareholders' agreement do include -- of  
 25 course, it's to promote the interests of the company,

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1 but that also has regards to the interests of the brand  
 2 as a whole. Specsavers is entitled to have -- it's  
 3 legitimate to have regard to -- it's not having regard  
 4 to her personal private interest, but the concern is  
 5 that they legitimately believe that this may be exposing  
 6 the company to a potential risk of complaint. That's  
 7 a bona fide business decision.

8 It is the controlling director. If it genuinely  
 9 believes that to be the case -- and it wasn't put that  
 10 it wasn't -- that's not a malicious view. It may be  
 11 that Ms Birdi may feel upset that she would like more --  
 12 she says now that she would like more consultation in  
 13 relation to that, but it doesn't give rise to an  
 14 actionable claim under -- firstly, there is no loss, but  
 15 it doesn't give rise to an issue of unfair prejudice  
 16 here.

17 MR JUSTICE NUGEE: Suppose I conclude, as Ms Birdi invites  
 18 me to conclude, that Mr McAlindon was intimidating and  
 19 threatening in that telephone call, is that something  
 20 which is relevant to section 994?

21 MR POTTS: No, my Lord, I don't think it is, because this is  
 22 just sort of day-to-day running of the business. If  
 23 every matter which could have been done in a different  
 24 way --

25 MR JUSTICE NUGEE: That was what I was trying to get at.

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1 It's not appropriate behaviour for Mr McAlindon to be  
 2 overly intimidating.  
 3 MR POTTS: No, obviously a discussion can be had and it may  
 4 be that people's impressions of the discussions may be  
 5 different. I think Mr McAlindon accepted that, you  
 6 know --  
 7 MR JUSTICE NUGEE: I think "robust" was his own word.  
 8 MR POTTS: Yes.  
 9 MR JUSTICE NUGEE: There is not a great deal of difference  
 10 between "robust" and "intimidating", but --  
 11 MR POTTS: There may be in the intent.  
 12 MR JUSTICE NUGEE: There may be in the intent. I probably  
 13 don't have to -- this is what I'm trying to explore. To  
 14 what extent do I have to resolve these sort of things?  
 15 MR POTTS: You don't.  
 16 MR JUSTICE NUGEE: But suppose I found that Mr McAlindon had  
 17 used grossly inappropriate language and so on. Would  
 18 that be relevant at all to an assessment of the  
 19 allegations which I'm dealing with?  
 20 MR POTTS: Well, my Lord, obviously, there are issues of  
 21 credibility of witnesses, and I accept that.  
 22 MR JUSTICE NUGEE: Yes.  
 23 MR POTTS: And your Lordship has to accept the question of  
 24 the allegation of malice and conspiracy. So to say  
 25 that, of course, it has got absolutely nothing to do

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1 with that, I can't go that far, but do I think it really  
 2 takes the matter really any further forward in any  
 3 meaningful way? The answer is no, it doesn't, and  
 4 certainly it's not unfairly prejudicial conduct.  
 5 MR JUSTICE NUGEE: That's what I was trying to get at.  
 6 Improper behaviour by Mr McAlindon in his relations with  
 7 Ms Birdi is not in itself unfairly prejudicial and --  
 8 MR POTTS: No, it is not a breach of fiduciary duty.  
 9 MR JUSTICE NUGEE: No. It's not really conducting the  
 10 affairs of the company.  
 11 MR POTTS: It's not conducting the affairs of the company,  
 12 it's having a conversation with somebody. There is  
 13 authority -- I think it's a decision of  
 14 Mr Justice Harman who says actually, stealing money out  
 15 of the company safe is not conduct of the affairs of the  
 16 company. I think that may be said these days to be  
 17 a slightly over-strict decision. It's one of the Re a  
 18 Company -- they are all Re a Company in the 70s and 80s,  
 19 but it is one the those. I'm not suggesting that but it  
 20 is important to bear them in mind.  
 21 It's the point I made at the outset, my Lord. You  
 22 go into business with somebody. They may do a good job,  
 23 they may do a bad job. That's not part of the  
 24 commercial bargain. You can expect that they will  
 25 honour their fiduciary duties as a director. The

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1 general law requires that. The general law does not  
 2 require you to be polite to each other.  
 3 MR JUSTICE NUGEE: I think it does require you not to  
 4 threaten people --  
 5 MR POTTS: Well -- my Lord, yes, okay.  
 6 MR JUSTICE NUGEE: And not improperly to threaten people.  
 7 Yes, I think we have probably discussed that enough.  
 8 I have a clear idea of your submissions.  
 9 MR POTTS: My Lord, yes. I think that's theft.  
 10 Security expenses. I have given your Lordship the  
 11 references. The issue here is again, the allegation is  
 12 one that the suspension and charging was motivated by  
 13 a desire to force her out of the company. That's the  
 14 allegation and it's confirmed in my learned friend's  
 15 closing at paragraph 146 of his closing. And the  
 16 charging is part of the secret agenda, paragraph 153.  
 17 The overall point is -- the short answer is -- that  
 18 your Lordship has heard live evidence as to what  
 19 people's motivations were, and I say that your Lordship,  
 20 on a sensible assessment of that evidence, will find  
 21 that was not the motivation. You heard from Mr Dyson;  
 22 you heard from Mr Raines; you heard from Mr Rowe, and  
 23 indeed then, at a later stage --  
 24 MR JUSTICE NUGEE: Mr Rowe is not involved in this aspect.  
 25 MR POTTS: You are right, and you heard from Mr McAlindon.

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1 MR JUSTICE NUGEE: It's Mr Dyson and Mr Raines really, and  
 2 Mr McAlindon --  
 3 MR POTTS: Plus Mr McAlindon.  
 4 MR JUSTICE NUGEE: I thought I got the impression  
 5 Mr McAlindon thought she was lucky to get away with  
 6 Mr Raines's decision.  
 7 MR POTTS: My Lord, yes, and your Lordship heard from  
 8 Mr Raines as to his thought process in relation to that.  
 9 MR JUSTICE NUGEE: He was impressed by her companion.  
 10 MR POTTS: My Lord, yes. Just on -- I'll come back to that  
 11 because I think it is interesting. Firstly, that was  
 12 honest evidence. I commend it to your Lordship as  
 13 honest evidence and it was real --  
 14 MR JUSTICE NUGEE: You have to point out that it's a curious  
 15 conspiracy where there is an opportunity to dismiss  
 16 someone and you don't take it.  
 17 MR POTTS: There is that. It's not just that. Because  
 18 Mr Raines has a part at a later stage as well.  
 19 Mr Raines -- there is a pattern of his conduct. You can  
 20 see it here, where he gives her the benefit of the  
 21 doubt. But throughout, at the later stage, if there is  
 22 this conspiracy to get rid of her, it seems to be a very  
 23 drawn-out affair, because Mr Raines -- matters are  
 24 passed to do -- so that she will do things. That is not  
 25 taken forward. She is asked, "Will you change your

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1 mind?"  
 2 MR JUSTICE NUGEE: Yes, it's not: We have got the resolution,  
 3 snap, you are out. We have got the resolution and  
 4 then --  
 5 MR POTTS: Will you think about it again?  
 6 MR JUSTICE NUGEE: Let's go to mediation.  
 7 MR POTTS: Let's go to mediation.  
 8 MR JUSTICE NUGEE: And so on.  
 9 MR POTTS: And the timing of all of that. It just doesn't  
 10 stack up.  
 11 Mr Raines's evidence in relation to the first  
 12 matter, I think is very illustrative as to his general  
 13 approach to Ms Birdi. And his general approach is, he  
 14 believes in the partnership. He believes -- he wants it  
 15 to succeed and he was genuinely upset and frustrated  
 16 that it hadn't been able to succeed. And that's  
 17 a similar approach that Mr Rowe had in relation to the  
 18 relationship. And it's certainly not indicative,  
 19 I would submit, of a conspiracy.  
 20 These are genuine business decisions, taken -- some  
 21 things may be better than others, but they are genuine  
 22 decisions. They are not taken with the intent of  
 23 driving her out of the business.  
 24 For example, in the suspension, my Lord, we have  
 25 looked at the -- well, you have got the investigation

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1 report by Mr Hamilton. But the issue, for example in  
2 relation to -- just in terms of the seriousness of the  
3 allegations. What is important also to bear in mind,  
4 which I think did come out in the evidence, is that  
5 apart from the fact that my learned friend put a whole  
6 series of points as to the timing, which was just all  
7 wrong, but it's not just a matter of the witnesses being  
8 questioned on an incorrect basis. But it's actually one  
9 of the fundamental issues which was a concern in  
10 relation to that, because your Lordship saw -- I don't  
11 want to turn it up unless your Lordship finds it  
12 helpful, but the table of the payments between the  
13 various family members.  
14 MR JUSTICE NUGEE: Yes.  
15 MR POTTS: There is a pattern there.  
16 MR JUSTICE NUGEE: You say there was something worth  
17 investigating.  
18 MR POTTS: Mr Raines gave evidence about that in terms of  
19 what were the killer points. It was that pattern of  
20 payments. It doesn't make sense as being indicative of  
21 payments for the actual services being provided. There  
22 is a symmetry there which suggests artificiality and he  
23 said that.  
24 But as your Lordship said, he was impressed by the,  
25 if you like, plea in mitigation, but what Mr Raines was  
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1 concerned about was: has the relationship -- has the  
2 partnership broken down? Is there a way forward from  
3 this?  
4 So he considers that a final written warning --  
5 which is to give a second chance, turn it around. And  
6 he gives that and that's a genuine decision; that is not  
7 indicative of a plot. If anything, it's -- well, it is  
8 giving the benefit of the doubt.  
9 MR JUSTICE NUGEE: Yes.  
10 MR POTTS: And it may be that Mr McAlindon -- I think  
11 Mr McAlindon, it may be your Lordship doesn't agree or  
12 does agree with Mr McAlindon. It doesn't matter. But  
13 he's entitled -- he may genuinely feel that view, but it  
14 doesn't mean that he is a conspirator.  
15 You may think that Mr Raines was --  
16 MR JUSTICE NUGEE: A bit soft.  
17 MR POTTS: -- a bit soft. That's a business decision as  
18 well.  
19 So, that's the suspension. This was a substantial  
20 matter. And it wasn't just that, my Lord. Of course,  
21 there is also a complete absence of -- even at the  
22 outset there is a complete absence of employment  
23 documentation and their files, they're are not on rotas.  
24 There is no evidence -- that's all evidence which  
25 certainly shows a case to answer.  
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1 And Mr Hamilton's report, which was subject to  
2 criticism. We say that there plainly was --  
3 MR JUSTICE NUGEE: Can you, incidentally, point me to where  
4 it says in the documents I have got that minor works to  
5 the back of the store require SOG's approved  
6 contractors? Perhaps your junior can do it while you  
7 carry on talking.  
8 MR POTTS: We will have a look, my Lord. My guesses are  
9 that there might be something in the shareholders'  
10 agreement.  
11 MR JUSTICE NUGEE: I don't think so.  
12 MR POTTS: If not, it may be the manual, which we don't  
13 have, the computerised --  
14 MR JUSTICE NUGEE: The entire --  
15 MR POTTS: The entire manual.  
16 MR JUSTICE NUGEE: I mean, she did admit it.  
17 MR POTTS: She accepted it.  
18 MR JUSTICE NUGEE: She did accept it, but I'm not sure  
19 I have seen it anywhere.  
20 MR POTTS: I'm not sure your Lordship will have done, but  
21 there is no issue over this, it is accepted.  
22 My Lord, I have addressed in some detail the issues  
23 of the complaints about the interviews with  
24 Ms Frondigoun and so on. The only point to develop,  
25 which is a new point which has emerged in my friend's  
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1 closing, so I need to address it, is the suggestion at  
2 paragraph 35.1 of my learned friend's closing that  
3 Mr McAlindon has altered the timing. Do you remember we  
4 had the meta data?  
5 MR JUSTICE NUGEE: That wasn't put to him.  
6 MR POTTS: No, my Lord, that's my point. It wasn't put to  
7 him.  
8 MR JUSTICE NUGEE: Yes.  
9 MR POTTS: And your Lordship heard, we say --  
10 MR JUSTICE NUGEE: I have no technical evidence at all and  
11 I'm going to be reluctant to draw inferences as to what  
12 I can take from the technical data without --  
13 MR POTTS: -- without it being put.  
14 MR JUSTICE NUGEE: Yes.  
15 MR POTTS: My Lord, I agree.  
16 Then we have got Mr Raines's disciplinary, which  
17 I think I have sort of addressed. In the closing, it  
18 seems to be said that he has done a poor job in relation  
19 to it. That seems to be how it is put at paragraph 79,  
20 which is not the allegation which I have to meet. The  
21 allegation is that, you know, it's said it's a sham and  
22 dishonest. I respectfully say -- and indeed that's the  
23 idea of this -- in fact it was a set-up for later  
24 dismissal, which was Ms Birdi's case. There is a slight  
25 difficulty with that in relation to -- he wasn't even  
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1 aware of the letter, he gave evidence, which her  
 2 solicitors wrote and it's not the sort of letter --  
 3 I can see why Ms Birdi feels that she has a difficulty  
 4 in -- and I'm not suggesting that this is deliberately  
 5 dishonest evidence, but in terms of her case, her  
 6 theory, she has a difficulty in saying this is  
 7 a conspiracy to get rid of me because they didn't. And  
 8 so we have the grasping at straws of that letter, but it  
 9 is grasping at straws.  
 10 My Lord, entitlement to charge. The starting point  
 11 is if your Lordship is convinced that it's a genuine  
 12 decision to suspend; it's a genuine concern that these  
 13 are serious issues -- your Lordship has heard evidence  
 14 of concern that suspension is appropriate in order to  
 15 ensure that matters are properly investigated,  
 16 investigation is not polluted, and your Lordship accepts  
 17 that.  
 18 Then the issue of the charging is -- well, there are  
 19 two points. First, I need to address the entitlement to  
 20 charge point. That there is no entitlement --  
 21 MR JUSTICE NUGEE: Just before we get there, do you accept  
 22 that the decision to suspend, not being a matter of  
 23 day-to-day management, should have been made at  
 24 a properly convened and quorate board meeting?  
 25 MR POTTS: Yes, I do.

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1 MR JUSTICE NUGEE: Yes, under the shareholders' agreement?  
 2 MR POTTS: Yes.  
 3 MR JUSTICE NUGEE: So this is an example of where you accept  
 4 there has been a failure of process, but you say had  
 5 that been done, it wouldn't have made any difference?  
 6 MR POTTS: Correct, yes. And indeed I don't think --  
 7 I thought the evidence was that Ms Birdi also accepted  
 8 that the decision to suspend was a genuine business  
 9 decision by Mr Dyson but maybe --  
 10 MR JUSTICE NUGEE: I'll look and see what she says, yes.  
 11 MR POTTS: Well, of course, I would also make the point, my  
 12 Lord, maybe -- I mean -- she did accept -- I mean she  
 13 may have not been very happy about it but she did go off  
 14 on suspension.  
 15 MR JUSTICE NUGEE: What else can you do, realistically?  
 16 MR POTTS: I accept that, my Lord, maybe that's not my best  
 17 point, my Lord. I'll move on.  
 18 The entitlement to charge.  
 19 MR JUSTICE NUGEE: So there are two points. There is  
 20 a construction of a shareholders' agreement.  
 21 MR POTTS: Yes, then there is the allegation of excessive  
 22 charging.  
 23 MR JUSTICE NUGEE: Yes.  
 24 MR POTTS: The first point. It's dealt with at  
 25 paragraph 362 of my submissions onwards. The first

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1 point, it's not the complaint which was actually made at  
 2 the time. This is --  
 3 MR JUSTICE NUGEE: No, it's a new point.  
 4 MR POTTS: It's a new point, and there is quite a few new  
 5 points -- sometimes new points are good ones.  
 6 I mentioned one yesterday. It doesn't make them a bad  
 7 point. But in this case it's not just a point of law;  
 8 this is actually a genuine point. The fact that there  
 9 is no complaint about this suggests that there was no  
 10 belief at the time that there was a problem or lack of  
 11 entitlement to do this. So that is the first point.  
 12 The second point, my Lord, is in relation to -- as  
 13 I said, it only emerges in paragraph 40 of the skeleton  
 14 argument; it's not even pleaded -- is this the  
 15 management fee under 5.1. I hesitate to take your  
 16 Lordship back to the agreement. I think your Lordship  
 17 probably has a good mental picture of it.  
 18 MR JUSTICE NUGEE: Supporting services, I think.  
 19 MR POTTS: Yes.  
 20 MR JUSTICE NUGEE: And consideration of, and return for.  
 21 MR POTTS: It's not exhaustive. It's not designed to cover  
 22 every service provided by Specsavers, and indeed, there  
 23 is a whole raft of other charges which are referred to  
 24 elsewhere in the shareholders' agreement.  
 25 MR JUSTICE NUGEE: Yes.

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1 MR POTTS: And we have set some of those out.  
 2 MR JUSTICE NUGEE: I don't want to take up too much time  
 3 with this point, but suppose I find as a matter of  
 4 construction that 5.1 obliges Specsavers to provide all  
 5 the services and support that might be required in  
 6 return for the management fee. How does that feed into  
 7 the 994 analysis, because unless it's said that SOG knew  
 8 that it shouldn't be charging, does it go anywhere?  
 9 MR POTTS: I don't think it does, my Lord, no.  
 10 MR JUSTICE NUGEE: It might be a breach of contract, but I'm  
 11 not trying --  
 12 MR POTTS: You are not trying a claim for breach of  
 13 contract.  
 14 MR JUSTICE NUGEE: For damages for breach of contract.  
 15 MR POTTS: No, you are not.  
 16 MR JUSTICE NUGEE: But in any event.  
 17 MR POTTS: But in any event it's just a bad point of  
 18 construction.  
 19 MR JUSTICE NUGEE: Well, that's your submission, yes.  
 20 MR POTTS: That's my submission. And I mean, really, my  
 21 Lord, the point is -- the parties' understanding is that  
 22 the sort of day-to-day support is provided. We provide  
 23 the stock lists, we provide the accounting systems and  
 24 so on. That's the day-to-day support. Exceptional  
 25 services are chargeable separately, and that's the

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1 way --

2 MR JUSTICE NUGEE: You are not going to point me to any

3 brochure which explains this to potential JVP --

4 MR POTTS: My Lord, no. Interesting, but an idea of the

5 services -- the answer is, yes, a bit. Your Lordship

6 saw that rather nice glossy document about Specsavers,

7 lots of nice pictures of people with glasses on, and

8 there was a list of what Specsavers does and, actually,

9 there is a list of the support -- I'll try and see if we

10 can find the document, but the sort of -- documents in

11 terms of "What we do for you" is it's the day-to-day

12 stuff which is listed there. So we will try and find

13 that. But your Lordship may have at least recollection

14 of the document. I'm afraid I can't quote the matters.

15 But -- oh, sorry, I can quote the matter.

16 MR JUSTICE NUGEE: You can?

17 MR POTTS: It's paragraph 366. It's the "Success Through

18 Partnership" document: {E/1122/4368}

19 "... aim to provide opticians with the business

20 support services they require, so they are freed to give

21 their patients the highest degree of professional care

22 and customer service.

23 "[They] include business planning, accounting

24 facilities, IT implementation, marketing services,

25 buying and merchandising, operational guidance and

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1 support."

2 It doesn't say, "Emergency management cover when you

3 are suspended". So I do rely on that, my Lord.

4 MR JUSTICE NUGEE: Yes.

5 MR POTTS: And these are provided on an ad hoc basis, and if

6 you think about it, it would seem a bit odd that

7 providing that at a cost to -- that costs money to

8 Specsavers. There is a bit of an issue as to why some

9 stores should get that for free.

10 MR JUSTICE NUGEE: Well, because they need it. One

11 doesn't -- I wouldn't press that point too hard. SOG

12 has an interest, as you yourself said not that long ago,

13 in the brand.

14 MR POTTS: Yes.

15 MR JUSTICE NUGEE: It's in SOG's interests that all the

16 stores work well, and if there is a problem at one of

17 the stores, it's in SOG's interest that the problem

18 sorted out.

19 MR POTTS: I accept that. I won't push the point, but

20 business sense is saying: right, well, you get your

21 basic charges --

22 MR JUSTICE NUGEE: No, I understand.

23 MR POTTS: Everything on top is charged for and that appears

24 to be the understanding -- commonly held as the

25 understanding at the time because there was no complaint

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1 about it on that basis.

2 My Lord, the allegation of excessive charging is

3 dealt with at 371 to 380 of our --

4 MR JUSTICE NUGEE: Yes.

5 MR POTTS: The allegation that was put is that this was

6 defrauding the business in order to -- defrauding the

7 business in order to drive her out of the business.

8 I think that's the way the case --

9 MR JUSTICE NUGEE: Or drive down the value of her --

10 MR POTTS: Or drive down -- as well.

11 MR JUSTICE NUGEE: -- value of her shares, which is

12 a slightly different way of putting it. But it's sort

13 of saying: sooner or later we are going to exit her, or

14 even, possibly: there is a good chance we might exit her

15 and it's in our interests -- nothing to do with the

16 interests of the company -- to load the company with

17 costs so as to drive down the value of the shares.

18 MR POTTS: Let's start looking at it from the right end of

19 the telescope. The right end of the telescope is the

20 decision taken at the time of suspension. What the

21 evidence was: Mr Dyson is faced with an issue.

22 MR JUSTICE NUGEE: Yes: do you put emergency cover in at

23 all.

24 MR POTTS: Or do you shut the store.

25 MR JUSTICE NUGEE: Yes. I think Mr Stuart suggested that

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1 you could have just let the employees run it themselves.

2 MR POTTS: I'm going to come on to that. It's not a point

3 that he raises in his closing submissions and it's

4 a point that's raised by Ms Birdi for the first time in

5 her third witness statement. It wasn't raised at the

6 time. Again, I suggest it's one of those thought-up

7 arguments which seems a good idea to a lawyer shortly

8 before trial, but it doesn't reflect the commercial

9 realities at the time and I would ask your Lordship to

10 reject that. It wasn't a matter which was considered.

11 MR JUSTICE NUGEE: Do I have any evidence as to how much

12 day-to-day management is required?

13 MR POTTS: I think the short answer is Mr Dyson considers:

14 a lot. This is a business, it's running a million pound

15 plus turnover it has got up to 20 staff. There are

16 health and safety issues, there are clinical issues,

17 regulatory issues and so on. His business view is that

18 it requires proper supervision.

19 MR JUSTICE NUGEE: And it's not for me to sit in judgment on

20 appeal of a business decision.

21 MR POTTS: Judgment on Mr Dyson -- a businessman who is

22 highly experienced.

23 MR JUSTICE NUGEE: All I really have to do is decide whether

24 that was a genuinely held view or whether this is

25 a cover for a plot to throw expense on to the store.

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1 MR POTTS: My Lord, yes.  
 2 MR JUSTICE NUGEE: That's what it comes down to.  
 3 MR POTTS: In terms of the charging, that's a genuine  
 4 decision. In terms of the charging, they don't know at  
 5 the time --  
 6 MR JUSTICE NUGEE: How long it's going to be.  
 7 MR POTTS: That's the problem. With the benefit of  
 8 hindsight, yes, I accept it looks --  
 9 MR JUSTICE NUGEE: If you had known she was going to be out  
 10 from March to October, you would have employed somebody  
 11 for six months.  
 12 MR POTTS: Who knows. It may be that something different  
 13 would have been done. With the benefit of hindsight,  
 14 yes, of course, you look at it today and your Lordship  
 15 sees a large number. I accept that. But the question  
 16 is you have got to look at it at the time. Firstly,  
 17 it's a genuine business decision to do it. Secondly, in  
 18 terms of the charging, the evidence is ignored that this  
 19 was a standard charge. Your Lordship heard --  
 20 MR JUSTICE NUGEE: I think issue is taken with that.  
 21 MR POTTS: Fine, but it doesn't stop me from saying what in  
 22 fact your Lordship heard, which is your Lordship heard  
 23 evidence from two live witnesses.  
 24 MR JUSTICE NUGEE: You have also got that table.  
 25 MR POTTS: And the table, the documents. So the idea that

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1 this is some sort of malicious plot to --  
 2 MR JUSTICE NUGEE: Deliberately overcharge.  
 3 MR POTTS: It just doesn't --  
 4 MR JUSTICE NUGEE: That's fine, up until you get to the  
 5 stage at which Mr McLaughlin is charging £200 a day and  
 6 he is still being charged out at £440 a day.  
 7 MR POTTS: Yes, for -- I got the maths wrong.  
 8 MR JUSTICE NUGEE: It's not a very long period but it's not  
 9 nothing. It's from October to January, or something  
 10 like that.  
 11 MR POTTS: My Lord, I accept that -- no, it's not  
 12 until January, my Lord, no, because at a later stage,  
 13 until the suspension he then carries on, but he is  
 14 invoicing at £200 and he is invoicing the store  
 15 directly.  
 16 MR JUSTICE NUGEE: Oh, right.  
 17 MR POTTS: And Ms Birdi approves the invoices.  
 18 MR JUSTICE NUGEE: Yes, so it's just the latter bit up to  
 19 October.  
 20 MR POTTS: I think it's a few weeks.  
 21 MR JUSTICE NUGEE: Yes.  
 22 MR POTTS: 35 days is the period. But that doesn't give  
 23 rise to a conspiracy.  
 24 MR JUSTICE NUGEE: Not by itself, but it's that rather  
 25 unattractive, from your point of view, email from

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1 Mr McAlindon, which --  
 2 MR POTTS: My Lord, the evidence on that -- I'll give your  
 3 Lordship the evidence.  
 4 MR JUSTICE NUGEE: You don't need to give me the references;  
 5 I remember.  
 6 MR POTTS: 375 to 377.  
 7 MR JUSTICE NUGEE: But the explanation that he gave in  
 8 evidence wasn't an explanation which struck me as the  
 9 most obvious explanation, when one looks at the wording  
 10 of the email.  
 11 MR POTTS: My Lord, well, the first point is you are looking  
 12 at it from the wrong end of the telescope, as I said, in  
 13 terms of what the overall intention is. So how he feels  
 14 at the end of the process is, in a sense -- of course,  
 15 it might be, it might be some evidence in support of  
 16 a conspiracy, if one takes that view. His view on it is  
 17 that actually he is concerned -- and it may be it could  
 18 be said, actually, he doesn't want someone to get the  
 19 benefit of something; he wants it to be properly  
 20 accounted for. He wants to ensure that the value  
 21 properly reflects the costs that the company has  
 22 properly incurred. That was his evidence, I think, in  
 23 summary to your Lordship.  
 24 MR JUSTICE NUGEE: It was, but he doesn't say in the email,  
 25 "Of course, the problem is we can reduce the costs now

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1 but it just means there is a cost there later and it  
 2 will just get charged later".  
 3 It's not written with a view to forensic  
 4 examination.  
 5 MR POTTS: It's not written with a view to  
 6 cross-examination. It's a commercial document by  
 7 Mr McAlindon who runs the Loss Prevention department,  
 8 who is not an accountant either, but he is concerned --  
 9 he expressed -- you got a flavour of the issue that he  
 10 had, that there seems to be some tension between him and  
 11 Mr Lunn as to how charging was to be accounted for.  
 12 My respectful submission on that is that it doesn't  
 13 denote a conspiracy. It does suggest that he had an  
 14 issue with Mr Lunn about how things should properly be  
 15 accounted for. It wasn't aimed at Ms Birdi. It was  
 16 that he had a view that things should be properly  
 17 charged for to the company so that valuations were  
 18 carried out on a proper basis. And his business view is  
 19 that they should properly reflect the charges that had  
 20 been incurred based on -- and you have to then go back  
 21 to the decision as to the basis upon which the rate had  
 22 been set.  
 23 The rate had been set some time historically which  
 24 is a blended rate based on -- the fact is they have  
 25 taken a policy decision, a management decision, as to

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1 how they are going to do this charging; not to do it by  
 2 reference to actually going through and working out  
 3 every subsistence cost, working out what the employee  
 4 costs are, the travel costs.  
 5 MR JUSTICE NUGEE: The problem with this, Mr Potts -- and  
 6 this is what Mr Stuart put to him -- is he doesn't say,  
 7 "The reason I propose to charge £440 is because, as you  
 8 know, Derek, this is the blended rate and covers all our  
 9 various costs and it's artificial just to look at the  
 10 £200 that Mr McLaughlin is charging".  
 11 What he says is:  
 12 "There are two reasons. Firstly, I need an income,  
 13 and secondly, more importantly, it will lower the  
 14 price."  
 15 Not, "It will mean the price reflects the true value  
 16 of the company", but, "It will lower the price".  
 17 Why don't I infer from that that what he envisaged  
 18 at that date was that Ms Birdi was likely to be found  
 19 guilty, likely to be exited, and it was in the interests  
 20 of SOG to pay less for her shares. That's the inference  
 21 that Mr Stuart invites me to draw, as opening a little  
 22 window into a hidden secret agenda.  
 23 MR POTTS: I say in making your assessment as to the agenda  
 24 -- well, I have made the point that this isn't  
 25 a document written forensically for the benefit of

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1 cross-examination. It's an exchange between people who  
 2 have their own knowledge and awareness.  
 3 MR JUSTICE NUGEE: Yes, but Mr Stuart would say --  
 4 MR POTTS: And of course, you may say that the knowledge and  
 5 awareness is a conspiracy. Of course, I accept that,  
 6 but what I am saying is that your Lordship should view  
 7 it in the totality of the evidence which your Lordship  
 8 has heard, and once -- well, it's one piece of document  
 9 which is open to interpretation and I say that having  
 10 heard the balance of the evidence, your Lordship, it  
 11 doesn't get close to showing the conspiracy.  
 12 MR JUSTICE NUGEE: Okay.  
 13 MR POTTS: Yes. I mean, I should say, of course,  
 14 Mr McAlindon's view is not conduct of the affairs of the  
 15 company; he is not --  
 16 MR JUSTICE NUGEE: No, but it's relied on as revealing the  
 17 truth.  
 18 MR POTTS: Yes, indeed. But also one has to remember  
 19 Mr McAlindon's involvement. His involvement -- of  
 20 course, yes, he arranges some cover, but in terms of  
 21 actually all the later stage, he has involvement at the  
 22 earlier stage in the 2007 investigation. He is not the  
 23 decision-maker. In terms of directing minds and will,  
 24 if you like, for the company in relation to the  
 25 decisions that we are dealing with at this stage, the

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1 directing mind and will of the company in relation to  
 2 the decision to suspend, the decision to investigate,  
 3 the decision to terminate -- what your Lordship can be  
 4 very confident of is that the directing mind and will is  
 5 not Mr McAlindon.  
 6 MR JUSTICE NUGEE: No, it's Mr Dyson who makes the decision  
 7 to carry on charging at £440, is it not?  
 8 MR POTTS: My Lord, yes, and --  
 9 MR JUSTICE NUGEE: Isn't that what Mr Lunn says:  
 10 "I have spoken to Derek and it will stay with you  
 11 until --"  
 12 MR POTTS: And Mr Dyson has given evidence that that is the  
 13 business decision that has been taken as to how that  
 14 charging should be done.  
 15 So, my Lord, I have dealt with the procedural  
 16 issues.  
 17 MR JUSTICE NUGEE: Just before you leave that, what happens  
 18 if I come to a conclusion that the idea that there was  
 19 a grand plot to get her out failed, but that Mr Dyson  
 20 did think -- because he has spoken to Mr McAlindon, who  
 21 thought this -- that she was probably guilty of some  
 22 pretty poor conduct and did think it was likely that she  
 23 would go, and that the value of her shares should  
 24 reflect what he thought was a lower, rather than  
 25 a higher value?

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1 MR POTTS: My Lord, that's not -- my Lord, I say, firstly,  
 2 we are looking at the telescope through the wrong end.  
 3 MR JUSTICE NUGEE: Yes.  
 4 MR POTTS: Because the decision to put management cover in  
 5 is taken back at the time of the suspension.  
 6 MR JUSTICE NUGEE: Yes, but there is another decision which  
 7 is to carry on paying £440 -- which is raised by Mr Lunn  
 8 and the decision is to leave it at the £440.  
 9 MR POTTS: We are back in 2007 here. The decision -- no, my  
 10 Lord, I don't see that. The decision is taken to -- the  
 11 question is: is there a management decision on charging.  
 12 Answer: Yes, it's a set policy. It's the same charge  
 13 that is charged to every other store.  
 14 MR JUSTICE NUGEE: No, no, understood.  
 15 MR POTTS: So in a sense, what your Lordship is suggesting  
 16 is that, no, no, there should be a decision taken to  
 17 depart from what is done in relation to every other  
 18 store.  
 19 MR JUSTICE NUGEE: There is a decision taken as a result of  
 20 Mr Lunn's email. Mr Lunn says: are we going to carry on  
 21 charging this amount because it's really coming off my  
 22 bottom line, and Mr McAlindon explains why he is doing  
 23 it, but as he explained to me in evidence, it's not his  
 24 decision and it's Mr Dyson's decision.  
 25 MR POTTS: Yes.

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1 MR JUSTICE NUGEE: Then there is an email from Mr Lunn  
 2 saying, "I have spoken to Derek" -- unless I have  
 3 misremembered all this.  
 4 MR POTTS: I think your Lordship is right. I mean, the  
 5 question is whether -- well, is your Lordship going to  
 6 conclude on the totality of Mr Dyson's evidence that he  
 7 is motivated by this kind of malice and intention  
 8 towards Ms Birdi?  
 9 MR JUSTICE NUGEE: No, I think you haven't quite got my  
 10 question. My question is: suppose I concluded that, in  
 11 relation to this particular thing.  
 12 MR POTTS: I see. So forget all the facts and the evidence.  
 13 Your Lordship takes a view on the facts and the evidence  
 14 that this was all improper.  
 15 MR JUSTICE NUGEE: No, that this decision -- what I'm  
 16 looking at is E4/802. You have there Mr Lunn saying to  
 17 Mr McAlindon: {E/191/802}  
 18 "... I would like to discuss the Loss Prevention  
 19 charges ... as they will effectively be reducing SOG  
 20 income..."  
 21 That means "my income", because half of it is; it's  
 22 a shared venture:  
 23 "Can we please agree that Sean McLaughlin charges  
 24 the store directly ..."  
 25 Mr McAlindon passes it on to Mr Dyson: I'm charging

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1 £440 and this is why. The more the store is charged,  
 2 the lower the value. What do you want me to do?  
 3 And I accept his evidence that he wasn't making  
 4 a decision, he is leaving it to Mr Dyson. And then on  
 5 the next page, Mr Lunn writes back to Mr McAlindon:  
 6 {E/191/803}  
 7 "I understand from Derek ..."  
 8 So he has obviously spoken to Mr Dyson:  
 9 "... that at the point where SOG own 100 per cent of  
 10 the shares that the loss prevention involvement will  
 11 cease and ... the charging arrangements will be left  
 12 with me."  
 13 That seems to me to be material from which I can  
 14 infer that Mr Dyson has decided that until that happens,  
 15 until SOG own 100 per cent of the shares, Mr McAlindon  
 16 will be responsible for charging and will continue to  
 17 charge £440 a day.  
 18 MR POTTS: Yes.  
 19 MR JUSTICE NUGEE: You say that's a perfectly proper  
 20 business decision made for lots of perfectly proper  
 21 reasons.  
 22 MR POTTS: Yes.  
 23 MR JUSTICE NUGEE: I have that submission. Suppose I reject  
 24 that and decide that that decision on that day, whenever  
 25 that was, some time between 1 and 4 September, was

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1 motivated by a belief that SOG were likely to acquire  
 2 Ms Birdi's shares, because she was likely to be found  
 3 guilty and dismissed, and a desire to pay less for the  
 4 shares in those circumstances?  
 5 MR POTTS: Can I just take instructions, my Lord? I just  
 6 want to remember one point on the evidence.  
 7 MR JUSTICE NUGEE: Yes.  
 8 MR POTTS: The first point is -- and I'm afraid my memory  
 9 is --  
 10 MR JUSTICE NUGEE: I don't pretend to remember all the  
 11 evidence.  
 12 MR POTTS: My Lord, my first point is I'm not sure --  
 13 I don't recall whether that point was actually -- I'm  
 14 not saying it wasn't but I am not sure that point was  
 15 actually put to Mr Dyson.  
 16 MR JUSTICE NUGEE: I think some questions were asked --  
 17 MR POTTS: I think some questions were asked about this.  
 18 MR JUSTICE NUGEE: I will look at see.  
 19 MR POTTS: We will have to have a look at that. That's the  
 20 first point.  
 21 So the premise is, your Lordship finds that there  
 22 was an improper motive in directing these charges to be  
 23 charged with the predominant purpose of depressing the  
 24 share price.  
 25 MR JUSTICE NUGEE: In the expectation -- not that a decision

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1 had been made to exit her, but in the expectation that  
 2 the outcome of Mr McAlindon's investigation would be  
 3 likely -- or at any rate it was a real possibility that  
 4 she would be dismissed and they would be acquiring her  
 5 shares.  
 6 MR POTTS: I think, my Lord, if the position is in law -- if  
 7 on Howard Smith v Ampol -- if the decision was taken  
 8 with the predominant purpose of doing so, it may have  
 9 been that -- I think that probably is offside, yes.  
 10 MR JUSTICE NUGEE: Yes, I think it probably is.  
 11 MR POTTS: Yes.  
 12 MR JUSTICE NUGEE: Shall we take a five-minute break?  
 13 MR POTTS: Yes.  
 14 (3.14 pm)  
 15 (Short break)  
 16 (3.20 pm)  
 17 MR JUSTICE NUGEE: Yes, Mr Potts.  
 18 MR POTTS: My Lord, I was going to move on to the next  
 19 issue, the staff salaries and bonuses in 2007.  
 20 MR JUSTICE NUGEE: Yes.  
 21 MR POTTS: My Lord, for your Lordship's note, it's  
 22 paragraphs 386 to 421 of our closing, 157 to 164 of my  
 23 friend's. Again, the allegation: a malicious motivation  
 24 to garner support from the staff and the suggestion that  
 25 this was -- specific allegations that this was an

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1 inducement for them to give, in fact, dishonest  
 2 evidence. We have got the reference to the June 2010  
 3 letter; Ms Birdi makes that allegation.  
 4 MR JUSTICE NUGEE: Yes.  
 5 MR POTTS: In terms of the motivation, the first point is  
 6 that the malicious motivation -- as far as I can  
 7 recall -- was not an allegation which was put to any  
 8 witness, not to Mr McAlindon, not to Mr Dyson. And  
 9 indeed Mr Dyson's evidence and his explanation for  
 10 authorising this as a business decision was not even  
 11 challenged in cross-examination. So on that basis alone  
 12 the allegation should be rejected.  
 13 My Lord, in relation to the salaries and bonuses,  
 14 the issue is not whether it was a great scheme on the  
 15 bonuses. The salaries, I am not sure the extent to  
 16 which it is actually said that the salary increases  
 17 which were given were excessive at all, and if that is  
 18 still in issue, your Lordship has the evidence both of  
 19 Mr Dyson and indeed of the documents themselves to show  
 20 that this was a genuine decision.  
 21 MR JUSTICE NUGEE: Yes.  
 22 MR POTTS: The genuineness of that decision helps bolster  
 23 the other issue as to the bonuses as well, that this was  
 24 a genuine business decision. Your Lordship has seen the  
 25 documentary evidence as to this being a scheme which

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1 Ms Slark believed was being operated in other stores.  
 2 Mr Dyson gave evidence as to how he understood the  
 3 matter which he authorised to work. It may be that with  
 4 the benefit of hindsight, people may take differing  
 5 views as to whether that was a great scheme or not.  
 6 MR JUSTICE NUGEE: You describe it more than once in your  
 7 submissions as self-financing, but it doesn't seem to me  
 8 to require very much investigation to see that it is not  
 9 necessarily self-financing.  
 10 MR POTTS: I can see, my Lord -- whether it's a great scheme  
 11 or not, and the perfect scheme, isn't --  
 12 MR JUSTICE NUGEE: The question is whether it has been put  
 13 in place to drive the profits down.  
 14 MR POTTS: Yes.  
 15 MR JUSTICE NUGEE: Yes.  
 16 MR POTTS: And my Lord, the evidence is that there is no --  
 17 well, no, I don't think that is the allegation, my Lord,  
 18 actually. I don't think they did say that it was done  
 19 to drive the profits down. No, in fact it's the  
 20 opposite -- sorry, not the opposite. The allegation  
 21 is --  
 22 MR JUSTICE NUGEE: -- is to get the staff on side.  
 23 MR POTTS: I think it's even more than getting the staff on  
 24 side. It's that improperly that they will support  
 25 Specsavers -- well, in fact, give evidence against

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1 Ms Birdi. It's a very strong allegation, actually.  
 2 I should say, of course, it's not allegation which was  
 3 made.  
 4 Not only was it not put to Mr McAlindon or Mr Dyson,  
 5 it wasn't put to the staff either.  
 6 MR JUSTICE NUGEE: Yes. In general, the salary level of  
 7 staff, as opposed to directors, is a matter for the  
 8 A directors as day-to-day -- I mean, they can employ  
 9 people, subject to complying with the law, at whatever  
 10 rates they think appropriate, can't they?  
 11 MR POTTS: I think there are some --  
 12 MR JUSTICE NUGEE: If it's more than £10,000, yes.  
 13 MR POTTS: Yes, but, my Lord, obviously, this is the issue  
 14 where the day-to-day point, I think, does come in and  
 15 the point that I have already addressed your Lordship on  
 16 in terms of --  
 17 MR JUSTICE NUGEE: She is suspended from --  
 18 MR POTTS: She is suspended from -- exactly. On the  
 19 procedural side -- I mean, there is a bona fide point.  
 20 MR JUSTICE NUGEE: There is a bona fide point.  
 21 MR POTTS: And the procedural point is one which I have  
 22 already addressed already, so I don't propose to go back  
 23 to that again.  
 24 MR JUSTICE NUGEE: On the bona fides, I think one of the  
 25 things Mr Stuart relies on is Mrs Slark's email, as she

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1 says:  
 2 "I have been very generous here!"  
 3 With an exclamation mark. What business is it of  
 4 hers to be very generous with someone else's money?  
 5 MR POTTS: My Lord, there is a question as to -- Ms Slark.  
 6 I think the evidence was, well, that's her language, and  
 7 she uses -- it's not a criticism but her turn of phrase  
 8 is somewhat flamboyant. As to the inference which  
 9 should be drawn, one has to say, actually, when she is  
 10 talking about the pay rises, giving a 5 per cent pay  
 11 rise when there hasn't been a pay rise -- there is an  
 12 exclamation mark. I have to say there might be reason  
 13 to say it's not actually meant as it's said; it's  
 14 sarcastic, it's not actually that generous at all.  
 15 MR JUSTICE NUGEE: Oh, I see. That wasn't how I had read  
 16 it, but --  
 17 MR POTTS: I would suggest that actually, agreeing to give  
 18 people a 5 per cent pay rise when they haven't had a pay  
 19 rise for years -- according to her; there is an issue  
 20 whether it's two or three years -- it doesn't sound very  
 21 generous at all. So that's the first point.  
 22 The second point is, even if she is being generous,  
 23 unless it's being done improperly, ie she said, "Well,  
 24 I think actually a good bonus, a generous bonus scheme,  
 25 which is aimed at incentivising staff" -- and your

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1 Lordship heard evidence from Mr Dyson about the  
 2 importance of bonus schemes in terms of Specsavers  
 3 considers bonus schemes are very important in terms of  
 4 incentivising staff and getting happy employees and  
 5 getting them -- so that they perform well and the  
 6 feeling was that the existing bonus scheme wasn't doing  
 7 that.  
 8 MR JUSTICE NUGEE: Yes, it was a bit opaque.  
 9 MR POTTS: It was opaque and so on. So generosity, the  
 10 question is: generosity for what reason? If it's  
 11 generous in order to get the staff to give dishonest and  
 12 untruthful evidence in support: yes, offside.  
 13 MR JUSTICE NUGEE: It's improper, yes.  
 14 MR POTTS: If it is generous because, "I think actually the  
 15 staff have been underpaid, they are demotivated,  
 16 actually giving a decent bonus scheme which I believe is  
 17 self-financing is actually the way to incentivise them",  
 18 which is actually what appears on the face of that  
 19 document and indeed the other documents and indeed the  
 20 evidence that you heard: that is not offside. That is  
 21 a business decision, and it's --  
 22 MR JUSTICE NUGEE: It's in the interests of --  
 23 MR POTTS: -- legitimate and it's what she considers to be  
 24 the interests of the company.  
 25 MR JUSTICE NUGEE: It comes back to is it bona fide -- well,

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1 it's not her decision --  
 2 MR POTTS: No, it's Mr Dyson's decision.  
 3 MR JUSTICE NUGEE: It's Mr Dyson's decision, but it comes  
 4 back to was it bona fide in the interests of the  
 5 business. And paying people more money can well be in  
 6 the interests of the business if it makes them work  
 7 harder. Or there is less turnover, or all the other  
 8 reasons why people are paid anything at all: in order to  
 9 get them to do the work.  
 10 MR POTTS: You could pay all the staff minimum wage. But is  
 11 that going to be a very clever idea? Maybe not.  
 12 MR JUSTICE NUGEE: And it comes back to: it's a commercial  
 13 decision, and what I really have to decide is whether it  
 14 was genuinely a commercial decision, in which case  
 15 whether it's a good one or not is irrelevant, or whether  
 16 it's evidence of a malicious or improper motive and it's  
 17 as simple as that.  
 18 MR POTTS: It's as simple as that, yes, I think it is.  
 19 MR JUSTICE NUGEE: Thank you.  
 20 There was one other point, and I think I know what  
 21 the answer is going to be. It didn't seem that Mr Dyson  
 22 understood what the details of the bonus scheme were.  
 23 There is a memo from Mrs Slark to the employees, which  
 24 explains how you take the one day average over six days  
 25 and so on. So she understood how it was going to work,

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1 even if she may not have understood the financial  
 2 consequences.  
 3 Mr Dyson didn't seem to have understood that. He  
 4 thought it was just done on the week, when it would be  
 5 self-financing. Is that -- unless I think that that's  
 6 indicative of not caring --  
 7 MR POTTS: Exactly.  
 8 MR JUSTICE NUGEE: -- because it's not really designed --  
 9 yes, then it's irrelevant.  
 10 MR POTTS: Yes.  
 11 MR JUSTICE NUGEE: It might or might not be competent, but  
 12 it's not relevant to malice.  
 13 MR POTTS: Yes.  
 14 MR JUSTICE NUGEE: Unless I think it's evidence of malice.  
 15 MR POTTS: And I think to be fair to Mr Dyson, I think he  
 16 also said in fact that actually you have to look at --  
 17 he gave some evidence about bonus schemes generally and  
 18 I know your Lordship has taken the view about, actually,  
 19 if you do it on a daily basis, you can do well if you  
 20 work certain days and not others.  
 21 MR JUSTICE NUGEE: I think it's worse than that. I think  
 22 the evidence I have, which is not surprising, is you  
 23 take more money on a Saturday than the rest of the week.  
 24 MR POTTS: Yes.  
 25 MR JUSTICE NUGEE: So if you are taking £18,000 a week,

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1 that's the equivalent of £3,000 a day. But actually,  
 2 you are going to take £5,000 on a Saturday. If you do  
 3 exactly the same the next year, you are still going to  
 4 take £5,000 on a Saturday, which is bound to be  
 5 50 per cent more than the previous year you are going to  
 6 give everybody £50 bonuses. As soon as you understand,  
 7 it's a ridiculous way to do a bonus scheme, to be  
 8 honest, but that's not the question. The question is  
 9 whether I think that's evidence of --  
 10 MR POTTS: Mala fides.  
 11 MR JUSTICE NUGEE: Yes.  
 12 MR POTTS: That's the case which I have to meet.  
 13 MR JUSTICE NUGEE: Thank you.  
 14 MR POTTS: My Lord, the next issue is Mr Singh's salary  
 15 which is paragraph 422 on 478 of my closing and 165 to  
 16 172 of my learned friend's.  
 17 MR JUSTICE NUGEE: Yes.  
 18 MR POTTS: The pleaded case, again, is that this is --  
 19 MR JUSTICE NUGEE: It's all part of an inducement.  
 20 MR POTTS: -- malice, desire to drive her out of the  
 21 business, he is the man on the inside, recruited, and  
 22 this is the inducement for him to ... et cetera, et  
 23 cetera.  
 24 My learned friend -- well, the issue is "business  
 25 decision". Mr Dyson gives the evidence on that. At

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1 paragraph 450 he says this is a business judgement.  
 2 It's consistent with the salary Mr Singh is getting --  
 3 the first point is it's a business decision.  
 4 MR JUSTICE NUGEE: It's the same point.  
 5 MR POTTS: It's the same point.  
 6 MR JUSTICE NUGEE: Is it really a commercial decision that:  
 7 This is what we need to pay to get Mr Singh and we think  
 8 it's a good thing for the business to get Mr Singh in --  
 9 MR POTTS: Yes.  
 10 MR JUSTICE NUGEE: -- and I genuinely think this is the best  
 11 thing for the business? In which case, whether it was  
 12 a good decision or not or whether it was necessary or  
 13 not or whether he would work for £30,000 --  
 14 MR POTTS: -- is irrelevant.  
 15 MR JUSTICE NUGEE: -- is irrelevant; or is this evidence  
 16 from which I can infer a secret agenda, a malicious  
 17 intent, an improper purpose? In which case it really  
 18 doesn't matter whether he was worth £42,000 or not.  
 19 MR POTTS: No.  
 20 MR JUSTICE NUGEE: The fact is, it was done for wrong  
 21 purposes.  
 22 MR POTTS: My Lord, yes. Just in terms of -- my learned  
 23 friend says this is a sort of -- he picks up at a later  
 24 stage that this sort of excessive remuneration point is  
 25 a common allegation in unfair prejudice claims.

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1 MR JUSTICE NUGEE: I imagine it's much more commonly alleged  
 2 than proved.  
 3 MR POTTS: My Lord, yes. It is worth remembering the case  
 4 law. It may be that of course, the cases all turn on  
 5 their facts and the way the allegation is put. But  
 6 usually, this is run by -- usually you prove it by --  
 7 one of the elements is to prove by objective criteria  
 8 that it's outside of the range of what you would pay to  
 9 get someone of comparable experience to be carrying out  
 10 that job.  
 11 Firstly, there is no expert evidence, but even on  
 12 the evidence that you do have, the suggestion it is not  
 13 outside the range. Mr Singh in fact is proof of the  
 14 issue himself, because he himself was getting the  
 15 similar salary for doing that. It's --  
 16 MR JUSTICE NUGEE: I don't have any very clear evidence as  
 17 to how at Grays his salary -- the last iteration of his  
 18 service contract was 30-something-thousand -- got up to  
 19 £42,000 by the time he left.  
 20 MR POTTS: I think you have got the period from April.  
 21 MR JUSTICE NUGEE: The last five months, I think.  
 22 MR POTTS: But it's some evidence. You have also got the  
 23 evidence -- you had Mr Parham, as to what his salary was  
 24 as a retail director at the time. There's notice to  
 25 admit of that.

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1 MR JUSTICE NUGEE: I'm not sure -- I don't think I picked  
 2 that up.  
 3 MR POTTS: Okay, well, my Lord, this was put in as  
 4 evidence -- let me find the reference. A, tab 16.  
 5 There is a notice to admit. Yes, the first page. It's  
 6 page 308. {A/16/308} It's in my closing submissions,  
 7 450(4).  
 8 In fact, your Lordship heard some evidence from  
 9 Mr Singh on that. The notice to admit was that  
 10 Mr Parham, who was the retail -- this was a point which  
 11 had been put in by my learned friend, who wanted to rely  
 12 on Mr Parham, who was -- is the -- in one of the other  
 13 outlets.  
 14 MR JUSTICE NUGEE: This is a notice to admit --  
 15 MR POTTS: Of the salary.  
 16 MR JUSTICE NUGEE: -- of 17 October?  
 17 MR POTTS: Yes, just before trial. And the second point:  
 18 As at 6 April the salary of Mr Parham by Uckfield  
 19 Specsavers as retail director was £42,000 per year.  
 20 MR JUSTICE NUGEE: Right.  
 21 MR POTTS: Mr Singh gave you some evidence under  
 22 cross-examination. He pointed out that Mr Parham wasn't  
 23 even a dispensing optician and had less years'  
 24 experience than Mr Singh. And indeed you will see in  
 25 fact that his salary also increased as well, and indeed,

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1 there was quite a lot of evidence as to the range of  
 2 salaries as to what Mr Dyson considered the acceptable  
 3 range. Your Lordship had that, and just in terms of  
 4 that it was the range, there are two examples. You have  
 5 got Mr Singh and Mr Parham as two examples, but the fact  
 6 is that Mr Dyson gave, I would commend to your Lordship,  
 7 clear and honest evidence in relation to the commercial  
 8 decision that he made in relation to it.

9 We would say that that is business judgement and  
 10 that's a business judgement. The fact that Mr Singh was  
 11 getting paid a comparable salary is a matter which goes  
 12 into the mix and Mr Dyson said, you know, "Mr Singh has  
 13 a track record, we need to drive the business forward,  
 14 he has got the necessary skills", and so on.

15 And in fact, of course, my friend takes a point that  
 16 it wasn't us who proposed the £42,000, it was Mr Singh,  
 17 and he says that's a point against us. I would say  
 18 that's a point for us because it shows that if we had  
 19 had the intent to induce, well, you kind of think the  
 20 first offer might have been the high one. It suggests  
 21 that there is some genuine give and take there, in  
 22 relation to Mr Singh says, "This is what I want", and he  
 23 takes a point; he says, well, the company is not  
 24 performing. Mr Dyson says he takes the view that  
 25 actually it could be some time before dividends are

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1 going to be payable. That's a commercial decision.  
 2 MR JUSTICE NUGEE: If that's genuine.  
 3 MR POTTS: If it's genuine.  
 4 MR JUSTICE NUGEE: What it all comes down to is: do I accept  
 5 the evidence that this is genuinely what was going on.  
 6 MR POTTS: I do say of course that in making that  
 7 assessment -- of course, if the evidence as to the fact  
 8 was that Mr Singh was in fact being paid £200,000, that  
 9 might help make it easier for your Lordship to say that  
 10 this isn't a genuine business decision.  
 11 MR JUSTICE NUGEE: Absolutely.  
 12 MR POTTS: I'm not going to go over the procedural points.  
 13 I think I have dealt with those.  
 14 Issue 5, costs of investigation. The first point,  
 15 my Lord, is that we are talking about £17,000 of costs  
 16 in terms of -- not an issue of now, but in terms of  
 17 proportionality, it's unfortunate.  
 18 The pleaded allegations and the witness evidence.  
 19 My learned friend's case is that Mr Raines, Mr Rowe,  
 20 Mr Clark and Mrs McIntyre and Mr Dyson are all dishonest  
 21 in relation to this and the investigation, and these are  
 22 allegations which are repeated by my learned friend in  
 23 his closing submissions, and I say that the short answer  
 24 to this is the one which is in my submissions, which is  
 25 if your Lordship takes the view that they are not, then

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1 that's the end of the allegation.  
 2 A couple of points, just to pick up in terms of some  
 3 of the detail. The idea of -- the one day testing by  
 4 Mr Singh, which my friend ran, doesn't seem to have made  
 5 it into the closing submissions. We have dealt with it.  
 6 MR JUSTICE NUGEE: There was a question whether that was  
 7 Mr McGonagle's suggestion or whether it was something  
 8 Mr Singh agreed to. I'll look at the evidence on that.  
 9 MR POTTS: Yes. Then the testing resolution, my Lord, there  
 10 is a point of construction of it which is now taken. My  
 11 friend says, paragraphs 179 and 104, that it wasn't an  
 12 imperative.  
 13 MR JUSTICE NUGEE: You haven't found the chairman's briefing  
 14 pack?  
 15 MR POTTS: No -- the January document? No, my Lord, no. If  
 16 we had it, we would have disclosed it.  
 17 MR JUSTICE NUGEE: Well, of course, but it is a bit  
 18 surprising that a board meeting, which I think was  
 19 only -- well, less than six years ago certainly and  
 20 considerably less than six years ago at the time when  
 21 these proceedings were launched -- has disappeared.  
 22 MR POTTS: Yes, we have the evolution of the document. Your  
 23 Lordship saw those manuscript notes and some matters  
 24 were agreed.  
 25 MR JUSTICE NUGEE: Yes.

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1 MR POTTS: You saw the manuscript as to what each person's  
 2 role was. So you do get some clues as to -- obviously,  
 3 of course, my friend hasn't -- this is an agreed  
 4 document between Ms Birdi and my client. She hasn't  
 5 disclosed it either.  
 6 MR JUSTICE NUGEE: I imagine that she didn't necessarily  
 7 take all her documents with her when she finally left  
 8 the store. She has not been physically in the store and  
 9 she hasn't been for a long time.  
 10 MR POTTS: No, but we have heard evidence as to the files  
 11 being maintained or held at home.  
 12 MR JUSTICE NUGEE: Well, anyway...  
 13 MR POTTS: I'm not making any allegation about that.  
 14 MR JUSTICE NUGEE: No.  
 15 MR POTTS: I am just saying that -- yes, this is not  
 16 an electronic document which has been, as I understand  
 17 it -- it's a hard copy and obviously searches have been  
 18 undertaken and it hasn't been disclosed and your  
 19 Lordship has seen the extent of our disclosure and the  
 20 cost of our disclosure files. I don't think there is  
 21 a suggestion --  
 22 MR JUSTICE NUGEE: No, no, I just find it slightly  
 23 surprising that something which is actually referenced  
 24 in the resolution, which in the end assumes quite  
 25 considerable importance, has not been preserved.

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1 MR POTTS: Yes. Although I think to be fair, in a sense,  
 2 I'm not sure -- obviously, I haven't got the document so  
 3 I don't know if it goes to the issue, but it doesn't  
 4 appear as if it's probably going to cast much light on  
 5 the testing issue anyway.  
 6 MR JUSTICE NUGEE: No, but what it might have said -- this  
 7 is now all speculation, but it might have said it's the  
 8 role of Ms Birdi to test, and then when you read that  
 9 with the second bit of the resolution -- she has  
 10 committed to four days -- one might read that together  
 11 as being -- since the first part of the resolution says  
 12 the parties are to do the roles described in the roles  
 13 and responsibilities document -- but it's all meant to  
 14 be read together.  
 15 MR POTTS: That might be a helpful point for me, my Lord.  
 16 MR JUSTICE NUGEE: Yes, yes.  
 17 MR POTTS: Your Lordship does get a clue of that. Do you  
 18 remember the manuscript document?  
 19 MR JUSTICE NUGEE: Do you want to show me that, because I'm  
 20 not sure I have that clearly in mind.  
 21 MR POTTS: It's in September 2007.  
 22 MR JUSTICE NUGEE: No, it won't be September 2007; 2008,  
 23 I would have thought.  
 24 MR POTTS: 2007, I think. E7/1694. {E/492/1694}  
 25 MR JUSTICE NUGEE: Yes. I do remember this.

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1 MR POTTS: "We agree, we agree". It only goes so far but it  
 2 certainly deals with Mr Singh:  
 3 "KB: Retail director, role not as sight testing,  
 4 hence many responsibilities. Not here as an optom.  
 5 I will test as and when I feel is necessary...  
 6 "KB: We agreed.  
 7 "SB: Okay."  
 8 The flip of that -- and she says:  
 9 "SB: ... she will remove herself from DO/dispensing,  
 10 and will do it as required."  
 11 So by default one would think that if she is not  
 12 doing the retail, she is not doing the dispensing, what  
 13 is left is the testing.  
 14 But I accept it's not the document; I accept that.  
 15 It's not the final version.  
 16 MR JUSTICE NUGEE: Yes, I see.  
 17 MR POTTS: My Lord, in terms of this -- I think the  
 18 construction of the resolution as not being an  
 19 imperative, this was -- the point is -- well --  
 20 MR JUSTICE NUGEE: I have got the point that it was  
 21 understood at the time as an imperative. Ms Birdi's  
 22 point wasn't, "It doesn't tell me what to do", but, "You  
 23 have got no right to tell me what to do".  
 24 MR POTTS: I think my learned friend's point on the  
 25 construction is that it doesn't.

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1 MR JUSTICE NUGEE: No, but Ms Birdi's point is that testing  
 2 is --  
 3 MR POTTS: Day-to-day.  
 4 MR JUSTICE NUGEE: -- day-to-day management, so it's not for  
 5 the board to decide.  
 6 MR POTTS: Yes.  
 7 MR JUSTICE NUGEE: What's your submission on that?  
 8 MR POTTS: My Lord, the reference is paragraph 508 of my  
 9 submissions. I accept that the sort of general  
 10 day-to-day matters are delegated but you see this -- in  
 11 fact it's picked up in Mrs McIntyre's report as well --  
 12 that this wasn't just a sort of day-to-day matter; this  
 13 had ceased to be a day-to-day issue.  
 14 The first point is we say there was actually an  
 15 agreement. This wasn't just a day-to-day matter; there  
 16 had been an agreement. There is obviously --  
 17 MR JUSTICE NUGEE: There is a dispute about that.  
 18 MR POTTS: There is all of that and I really don't want to  
 19 go through all of that.  
 20 MR JUSTICE NUGEE: No.  
 21 MR POTTS: The first point is there is an agreement. It  
 22 ceases to be a day-to-day. It's actually an agreement  
 23 which is then being breached, so that is not day-to-day  
 24 management.  
 25 Secondly, as your Lordship saw on some of those

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1 manuscript notes, the A directors themselves accepted  
 2 that where they couldn't agree on something, it begs the  
 3 question: how are we going to sort this out? They  
 4 themselves accept that where a matter can't be agreed  
 5 between the two of them, it is referred to Specsavers.  
 6 MR JUSTICE NUGEE: So as a matter of interpretation of the  
 7 shareholders' agreement, possibly an inclination, where  
 8 it says:  
 9 "We as directors delegate the day-to-day management  
 10 to the A directors."  
 11 There are only two A directors. They are of  
 12 equal -- they have one vote each.  
 13 MR POTTS: Yes.  
 14 MR JUSTICE NUGEE: If they can't agree, does that mean that  
 15 by default it goes to the board? Can the board --  
 16 MR POTTS: It depends -- I think it might depend on the  
 17 question of degree, my Lord.  
 18 MR JUSTICE NUGEE: Yes.  
 19 MR POTTS: If it's a question about shall we buy --  
 20 MR JUSTICE NUGEE: A coffee machine.  
 21 MR POTTS: I was going to say paper clips. Shall we buy  
 22 paper clips and one says yes and the other says no.  
 23 Probably not. If it's a matter which is fundamental to  
 24 the operation of the business and they can't agree --  
 25 MR JUSTICE NUGEE: It has become a bone of contention,

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1 I think that's your point.  
 2 MR POTTS: Yes, it has not just become a bone of contention;  
 3 it's affecting the staff, it's affecting the whole  
 4 relationship. That's not day-to-day management -- quite  
 5 apart from the issue of the agreement point, it has  
 6 ceased to become just sort of ongoing matters to gets on  
 7 with.  
 8 MR JUSTICE NUGEE: Do you say that as a matter of law, the  
 9 board, whatever it has delegated, can always take stuff  
 10 back itself and decide matters, or is it something  
 11 that --  
 12 MR POTTS: Well, it depends on the terms of the agreement.  
 13 I think generally, yes.  
 14 MR JUSTICE NUGEE: I mean, the fact that I appoint an agent  
 15 to do something doesn't mean I lose the power to do it  
 16 myself.  
 17 MR POTTS: I think here we have got contractual terms which  
 18 do go further than that.  
 19 MR JUSTICE NUGEE: I see that.  
 20 MR POTTS: And I accept that, that the general commercial  
 21 bargain is --  
 22 MR JUSTICE NUGEE: It will be left to the A directors.  
 23 MR POTTS: You are in the store, you generally get on and  
 24 run the business -- subject, of course, to the manual,  
 25 to the protection.

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1 Yes -- okay, interesting, yes. 3.2.15 of the  
 2 shareholders' agreement provides that non-day-to-day  
 3 management: {D/15/180}  
 4 "the revocation variation or modification of the  
 5 delegation of powers ... in 3.1..."  
 6 So in fact you could -- this isn't forever and  
 7 a day. That's interesting, I hadn't picked that up.  
 8 MR JUSTICE NUGEE: No, nor had I. So there is formal power  
 9 under the shareholders' agreement.  
 10 MR POTTS: There is formal power, yes.  
 11 MR JUSTICE NUGEE: But in order to do that, you ought to  
 12 revoke or vary or modify the delegation powers. I see.  
 13 MR POTTS: You need a board resolution to do so.  
 14 MR JUSTICE NUGEE: Yes, okay.  
 15 MR POTTS: It might be said we have had one, but this isn't  
 16 just sort of mundane matters. This is beyond that.  
 17 So, my Lord, that's --  
 18 MR JUSTICE NUGEE: That's the resolution.  
 19 MR POTTS: My Lord, that's the resolution. And then we set  
 20 out the details in extenso in relation to the  
 21 decision-making and so on.  
 22 Serious criticisms have been made in relation to the  
 23 honesty and integrity of individuals, Mr Clark,  
 24 Mrs McIntyre.  
 25 MR JUSTICE NUGEE: Mr Raines.

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1 MR POTTS: Mr Raines.  
 2 MR JUSTICE NUGEE: I think the one document on this is  
 3 Mr Raines's day book. I would like to hear what you say  
 4 about that, because quite a lot of reliance is placed on  
 5 that.  
 6 MR POTTS: Yes. My Lord, the first point is I don't believe  
 7 that it was put to Mr Singh. If you are going to say  
 8 that there was some impropriety in relation to  
 9 a discussion, which is, I think, the allegation that's  
 10 being made -- Mr Raines said he didn't speak to  
 11 Mr Singh.  
 12 MR JUSTICE NUGEE: I think he said he couldn't remember.  
 13 I will have a look.  
 14 MR POTTS: I think that may have been where -- it ended up  
 15 with -- he was fairly firm that he hadn't had  
 16 a conversation. Your Lordship will look at the  
 17 evidence. I think that he said that --  
 18 MR JUSTICE NUGEE: He has written down his mobile number  
 19 with "Action", with a circle round it, next to it. In  
 20 the absence of other evidence, I would infer that he did  
 21 what he told himself to do.  
 22 MR POTTS: Well...  
 23 MR JUSTICE NUGEE: Yes, I'll look at it.  
 24 MR POTTS: Well, there is no evidence -- if you are going to  
 25 put that point, you kind of would think that you would

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1 put it to the person with whom the call has apparently  
 2 taken place.  
 3 MR JUSTICE NUGEE: Mr Stuart said he did, and I can't  
 4 remember every word of the evidence.  
 5 MR POTTS: No, I can't remember every word. We have had  
 6 a think about that. We don't believe it was but I'm  
 7 not --  
 8 MR JUSTICE NUGEE: I will have a look.  
 9 MR POTTS: Secondly, this point about one hearing. It  
 10 wasn't put to anybody, this point that somehow it's one  
 11 hearing. But --  
 12 MR JUSTICE NUGEE: I think it was put to Mr Raines, was it  
 13 not, that his day book revealed the true agenda?  
 14 MR POTTS: Yes, and he denied it.  
 15 MR JUSTICE NUGEE: Which was that Ms Birdi was heading for  
 16 disciplinary and Mr Singh was not.  
 17 MR POTTS: Yes.  
 18 MR JUSTICE NUGEE: That's the gravamen of it. I don't think  
 19 you need to put points of construction to it.  
 20 MR POTTS: No, okay. The short point is that Mr Raines,  
 21 I would commend to your Lordship, was an honest witness  
 22 and he said that that wasn't his intention. He didn't  
 23 have any -- there was no plot. And the evidence of all  
 24 the other parties who are part of that process was that  
 25 they didn't either, and in a sense, they are the ones --

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1 of course one has to look at the evidence in totality as  
 2 to whole in relation to the allegations, but your  
 3 Lordship has got --  
 4 MR JUSTICE NUGEE: What do you say I should find Mr Raines  
 5 was doing when he wrote those words in his day book?  
 6 This is at a stage before any investigation has been  
 7 carried out. Mr Clark is to do the investigation.  
 8 There is going to be a suspension and Mr Clark is to do  
 9 the investigation. Why is he at that stage  
 10 contemplating a disciplinary hearing? What do you say  
 11 I should find on the evidence?  
 12 MR POTTS: If you remember, my Lord, there already had been  
 13 a resolution passed in relation to the testing  
 14 resolution.  
 15 MR JUSTICE NUGEE: The testing resolution, yes.  
 16 MR POTTS: So it's hardly surprising that he has in mind  
 17 that there has already been a breach of a board  
 18 request --  
 19 MR JUSTICE NUGEE: Instruction.  
 20 MR POTTS: -- instruction to do that. So it's hardly  
 21 surprising.  
 22 MR JUSTICE NUGEE: You are saying there is nothing improper  
 23 about him, before Mr Clark's investigation, thinking it  
 24 a likelihood that there will be a disciplinary outcome?  
 25 MR POTTS: Yes. It doesn't mean that that means that it's

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1 pre-determined. The fact is that he has been a party to  
2 some of the previous matters; he knows that this has  
3 been determined and it has not been complied with. On  
4 the face of it, that would appear to be a serious breach  
5 of lawful instruction. So it's hardly surprising. He  
6 is the one who is taking the decisions, of course.  
7 MR JUSTICE NUGEE: Well, no, but on the conspiracy theory,  
8 it doesn't matter who actually sits in the room and  
9 writes the letter.  
10 MR POTTS: Of course, because they are all puppets --  
11 MR JUSTICE NUGEE: Yes, they are all doing it together.  
12 They all know the outcome and they are going through the  
13 motions.  
14 MR POTTS: Yes, absolutely. So we say it's not open -- of  
15 course one can interpret -- and indeed Ms Birdi has  
16 interpreted a number of documents in a sinister way, but  
17 it's not necessary to interpret that in a sinister way  
18 considering that he may take a view that it is likely  
19 that there is going to be some kind of disciplinary  
20 process in relation to the testing.  
21 MR JUSTICE NUGEE: What about:  
22 "Off the record with Kam."  
23 MR POTTS: Sorry, my Lord, can I just have one ...  
24 My Lord, in fact, I am reminded -- the board meeting  
25 in February, the resolution was, "Authority to initiate  
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1 disciplinary procedure". So it's --  
2 MR JUSTICE NUGEE: It all flows from that.  
3 MR POTTS: It has all been done.  
4 MR JUSTICE NUGEE: But if Mr Clark's investigation had come  
5 back and said, actually, having looked at it, I think  
6 it's six of one and half a dozen of the other --  
7 MR POTTS: Yes.  
8 MR JUSTICE NUGEE: I think it's six of one and half a dozen  
9 the other and I don't think Ms Birdi is any more to  
10 blame than Mr Singh?  
11 MR POTTS: Of course, Mr Clark isn't dealing with the  
12 testing issue either.  
13 MR JUSTICE NUGEE: No, he is not dealing with the testing  
14 issue.  
15 MR POTTS: The fact is there has already been a resolution  
16 passed for disciplinary procedure in relation to --  
17 MR JUSTICE NUGEE: In relation to the testing issue.  
18 MR POTTS: Yes.  
19 MR JUSTICE NUGEE: I see. Although it does say that there  
20 will be a hearing to deal with breakdown plus testing.  
21 MR POTTS: Well, okay, maybe, but there's -- I still think  
22 that deals with the --  
23 MR JUSTICE NUGEE: What about "Off the record with Kam"?  
24 What innocent explanation -- I have had put to me  
25 a non-innocent explanation; what innocent explanation do  
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1 you put forward for my consideration?  
2 MR POTTS: My Lord, the first point is, Mr Singh, it wasn't  
3 suggested to him that he had had a conversation. So if  
4 you are going to draw an inference of impropriety,  
5 I would say that the matter has not been properly put to  
6 the participants in it to allow you do draw that  
7 inference.  
8 The second thing is Mr Raines is an honest witness.  
9 He accepted that it would have been improper for him to  
10 have an improper conversation, and I would say that --  
11 it may be that he has been thinking about it, but it may  
12 be that advice was taken; who knows?  
13 But I would say that he is an honest witness.  
14 I would say that he acted with propriety throughout.  
15 I would also say that Mr Raines -- the evidence is that  
16 he has been fair and seeking to give the benefit of the  
17 doubt to Ms Birdi and is not animated by malice towards  
18 her. It's not his character.  
19 And the issue is -- the allegation which I have to  
20 meet is: was there a conspiracy to get rid of her? And  
21 I would suggest that Mr Raines's evidence to your  
22 Lordship does not indicate that he was intent on  
23 a dishonest plot.  
24 MR JUSTICE NUGEE: No, but, Mr Potts, let's be realistic  
25 about this. The way one tests the veracity and honesty  
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1 of witnesses is by looking at the contemporaneous  
2 documentation and seeing what people did at the time, to  
3 see whether that fits with the evidence they give in the  
4 witness box.  
5 MR POTTS: Yes.  
6 MR JUSTICE NUGEE: So I have to look at those words, which  
7 Mr Stuart invites me to interpret in a very sinister  
8 way, and decide whether they do. And if they do, then  
9 it means I will necessarily have to reject Mr Raines's  
10 evidence.  
11 MR POTTS: Yes. Obviously, it begs the questions as to what  
12 the off the record is.  
13 MR JUSTICE NUGEE: Yes. What might it be?  
14 MR POTTS: Or what might it be, because we don't know --  
15 MR JUSTICE NUGEE: What might it properly be? That's the  
16 problem that Mr Stuart points to. He says you couldn't  
17 properly have an off the record conversation with one of  
18 the JVP partners, who had both been suspended, and not  
19 the other.  
20 MR POTTS: The short answer -- well, firstly Mr Singh wasn't  
21 asked about whether he had a conversation at all.  
22 Secondly, Mr Raines doesn't recall having  
23 a conversation, or says he didn't; one of the two or  
24 possibly both, I don't know.  
25 But, my Lord, there might be a number of -- one  
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1 might say that there might be -- it would be wrong to  
 2 a degree, an off the record conversation, which is,  
 3 "Don't worry, we are just going through the motions, she  
 4 is on the way out and you are going to be fine".  
 5 MR JUSTICE NUGEE: You will be fine.  
 6 MR POTTS: And you will be fine.  
 7 MR JUSTICE NUGEE: That would be improper. It would be  
 8 indicative --  
 9 MR POTTS: Indicative of the malice, yes.  
 10 MR JUSTICE NUGEE: Yes.  
 11 MR POTTS: On the other hand, at a different level, one  
 12 might say an off the record to say, "You need to come  
 13 into the store because matters are going to be taking  
 14 place, for example, and you should come into the store  
 15 because -- I can't tell you why but you need to come  
 16 into the store because there are matters which need to  
 17 be dealt with", that is --  
 18 MR JUSTICE NUGEE: Okay.  
 19 MR POTTS: -- is not. And there is a whole range of matters  
 20 which I don't think were put and it doesn't indicate  
 21 that -- at one extreme, I accept it would be evidence to  
 22 infer malice, but that's not how the evidence was  
 23 developed. Does that -- I don't know if...?  
 24 MR JUSTICE NUGEE: Yes, thank you.  
 25 MR POTTS: And, my Lord, yes -- I mean, obviously the

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1 allegation in relation to the various reports, various  
 2 criticisms, we have gone at great length and the point  
 3 is that --  
 4 MR JUSTICE NUGEE: Again, it comes down to the same point.  
 5 Is it indicative of just going through the motions or  
 6 malice or whatever, or is it just things which, it can  
 7 now be said, could have been done better and  
 8 differently.  
 9 MR POTTS: Yes. My Lord, the final point, distributions.  
 10 It's dealt with at 603 of our submissions onwards.  
 11 MR JUSTICE NUGEE: Yes.  
 12 MR POTTS: Your Lordship has seen how the matter is put in  
 13 the evidence. It's defrauding, theft, et cetera.  
 14 Disguised distributions. "Conspired together to cheat  
 15 and defraud me", is how the evidence is put.  
 16 MR JUSTICE NUGEE: Yes.  
 17 MR POTTS: The evidence of Mr Dyson, Mr Rowe and Mr Singh  
 18 was that the salary increases were thought to be  
 19 justified and a reward for working performance and  
 20 incentivisation. It's a bit like Mr Singh's initial  
 21 salary; there is a similar sort of exercise.  
 22 MR JUSTICE NUGEE: Well, not quite, because there is  
 23 that letter from Mr Singh, saying:  
 24 "I have been advised it needs to go through as  
 25 employment remuneration rather than profits."

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1 MR POTTS: Yes. On that letter, your Lordship has heard --  
 2 we have Howard Smith v Ampol. Mr Singh's evidence was  
 3 that he deserved a pay rise.  
 4 MR JUSTICE NUGEE: He wanted £84,000.  
 5 MR POTTS: That's the point I was going to take, my Lord.  
 6 On that letter, he says, "I want £82,500". He doesn't  
 7 get it.  
 8 MR JUSTICE NUGEE: No.  
 9 MR POTTS: In fact, he gets a 5 per cent pay rise.  
 10 MR JUSTICE NUGEE: Yes. Plus another 8 per cent fairly  
 11 shortly afterwards, yes.  
 12 MR POTTS: Sure, but to say that this is the predominant  
 13 purpose, to -- and of course -- sorry, just to deal with  
 14 that, this is also at a time when the company is facing  
 15 an ET claim, and it's not just a question of costs,  
 16 because it's actually the potential exposure to an ET  
 17 award, which one has to have regard to in terms of  
 18 dividends.  
 19 MR JUSTICE NUGEE: No, that's a separate point: why weren't  
 20 dividends declared. This point is: we have decided to  
 21 reward Mr Singh. Instead of allowing him to take half  
 22 the profits -- which isn't uttered to anyway -- by  
 23 boosting his salary, not because we think that that's an  
 24 appropriate thing to do in the interests of the company,  
 25 but because it's a disguised way of getting money out to

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1 him without Ms Birdi getting the same.  
 2 MR POTTS: Exactly, but a sinister interpretation is given  
 3 to some of the internal documents about, "This must be  
 4 his employment". I would say it's the opposite. There  
 5 is no sinister intention. It shows actually that there  
 6 has been an appreciation that you have to ask yourself  
 7 the right question, which is: is he being paid for  
 8 services for employment, or is this actually shifting  
 9 disguised distribution?  
 10 So the fact is they are aware of the issue and  
 11 that's indicative, firstly, by the evidence your  
 12 Lordship heard about Mr Dyson and Mr Singh, and indeed  
 13 also I think even Mr Rowe in relation to salary and  
 14 bonuses; but it's also shows that they have got in mind  
 15 that one has to do this properly. Not just for the sake  
 16 of the sham, but the fact is we would say that Mr Dyson  
 17 gave genuine evidence and honest evidence as to what he  
 18 believed. It was a commercial decision.  
 19 The fact is he wasn't given £82,500. If he had  
 20 been, that might support -- start to look more offside  
 21 and give rise to a greater prospect of drawing the  
 22 inference, but the fact is that he was given a salary  
 23 which is in the range of salaries that Specsavers  
 24 considers is appropriate, and again, this is in  
 25 circumstances where Mr Singh is running the store by

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1 himself. And I know it's said: oh, well, that doesn't  
 2 mean any more work. Well, Mr Dyson and Mr Singh  
 3 certainly thought it did, and that's their business  
 4 judgement.  
 5 Unless it's to be said that they are lying to your  
 6 Lordship and the evidence was untruthful, that's their  
 7 evidence and that's a business decision by them.  
 8 MR JUSTICE NUGEE: If it's a mixed motive? People don't  
 9 usually just have single motives. Suppose they thought  
 10 Mr Singh did deserve it and suppose they did think they  
 11 didn't particularly want Ms Birdi to benefit from it?  
 12 MR POTTS: That's Howard Smith v Ampol.  
 13 MR JUSTICE NUGEE: It's dominant motive.  
 14 MR POTTS: Dominant, yes. And indeed, I think in Howard  
 15 Smith v Ampol an example is given that if the  
 16 predominant motive is good but it actually gives you  
 17 a result which you want as well, incidentally, well  
 18 that's fine too. That's not offside.  
 19 MR JUSTICE NUGEE: Yes.  
 20 MR POTTS: So it's Howard Smith v Ampol.  
 21 Finally, my Lord, the 8,705 -- oh, no, sorry,  
 22 I should say the beneficial ownership point, I raised --  
 23 mentioned yesterday.  
 24 MR JUSTICE NUGEE: Yes.  
 25 MR POTTS: Just to be clear what my position is on this, I'm

1 suggesting the agreement is 30 July 2012.  
 2 MR JUSTICE NUGEE: That's when the correspondence -- yes.  
 3 So you are not relying on the exercise of your option?  
 4 MR POTTS: No, no.  
 5 MR JUSTICE NUGEE: Yes.  
 6 MR POTTS: Secondly -- certainly at the latest. I'm not  
 7 saying that it wasn't a valid exercise, but for this  
 8 purpose.  
 9 MR JUSTICE NUGEE: No, no.  
 10 MR POTTS: I make it clear I'm not seeking a claim for  
 11 repayment of dividends which have already been paid.  
 12 That's not the purpose of me running this point.  
 13 MR JUSTICE NUGEE: I don't think that was obvious from your  
 14 submissions.  
 15 MR POTTS: My Lord, I'm happy to clarify that.  
 16 MR JUSTICE NUGEE: Thank you.  
 17 MR POTTS: Because I can see that one might get into --  
 18 MR JUSTICE NUGEE: There might be an estoppel.  
 19 MR POTTS: There is a factual issue about restitution,  
 20 estoppel, whatever. That's not the point; I'm not  
 21 seeking that. The reason I raise this is for two  
 22 purposes. One is, it goes to the issue of the extent of  
 23 the valid complaint. And the second point is, my  
 24 Lord -- and my learned friend has made submissions as to  
 25 valuation date.

1 Now, your Lordship is going to have to, at some  
 2 point, deal with -- unless there is agreement as to the  
 3 date of valuation. It is going --  
 4 MR JUSTICE NUGEE: Is that one of the issues which is --  
 5 MR POTTS: My friend has made submissions on it in his  
 6 written closing as to what the valuation date should be;  
 7 it's in his written closing.  
 8 MR JUSTICE NUGEE: Yes, but there are lots of things in the  
 9 closing which I am expecting to say this is all very  
 10 interesting but I don't have to decide.  
 11 MR POTTS: The reality is, my Lord, that if it's not now --  
 12 MR JUSTICE NUGEE: It will have to be some time.  
 13 MR POTTS: It will have to be some time and it will probably  
 14 be at judgment. Your Lordship will have to -- because  
 15 the date of valuation --  
 16 MR JUSTICE NUGEE: The valuer has got to --  
 17 MR POTTS: The date of valuation is not a valuer's point.  
 18 MR JUSTICE NUGEE: No, it's not. He needs to know what to  
 19 do.  
 20 MR POTTS: If your Lordship takes the view that you feel you  
 21 want to have further submissions on that point, and  
 22 sometimes the date of valuation is dealt with at  
 23 judgment, so be it.  
 24 MR JUSTICE NUGEE: My concern at the moment is it doesn't  
 25 seem to me to fall within Mr Registrar Briggs'

1 directions.  
 2 MR POTTS: No.  
 3 MR JUSTICE NUGEE: Nor have I heard any evidence, or really  
 4 any oral submissions.  
 5 MR POTTS: I'm not sure your Lordship needs to hear evidence  
 6 on the point, but I think it's right to say that your  
 7 Lordship might want to hear --  
 8 MR JUSTICE NUGEE: It would benefit from argument.  
 9 MR POTTS: -- some further argument. My friend has put some  
 10 in. I am making this point, and I developed the point  
 11 with your Lordship yesterday, just some of the points as  
 12 to ... and so on.  
 13 MR JUSTICE NUGEE: Yes.  
 14 MR POTTS: So, my Lord, those are the two points. I make it  
 15 clear, if there is any uncertainty, it may be I didn't  
 16 make the point -- I didn't have time yesterday to make  
 17 the point about the dividends, but that's why I run it.  
 18 It does go to the extent of the valid complaint.  
 19 MR JUSTICE NUGEE: Because your point is that if you are  
 20 right on this, from 30 July 2012, it's completely  
 21 irrelevant to her whether money is paid by way of  
 22 salary, bonuses or dividends.  
 23 MR POTTS: Correct. It's a short point.  
 24 MR JUSTICE NUGEE: Because she doesn't get any of it anyway.  
 25 MR POTTS: It's a very short point, my Lord, yes.

1 MR JUSTICE NUGEE: It follows from that, I think, that you  
 2 accept that if the valuation date is 30 July 2012,  
 3 the valuer should take into account as matters then  
 4 stood, including the fact that the company is pregnant  
 5 with profits which have not been distributed by  
 6 dividends. Is that right?  
 7 MR POTTS: Yes, I think so. It's a question for the valuer.  
 8 He will take whatever course he thinks; yes.  
 9 MR JUSTICE NUGEE: Yes.  
 10 MR POTTS: Absolutely.  
 11 My Lord, the final point the £8,075. Two points.  
 12 We have developed this. It's paragraphs 642 to 653.  
 13 MR JUSTICE NUGEE: You say it was never agreed.  
 14 MR POTTS: Never agreed. Firstly, your Lordship took the  
 15 point about employment -- it is a bonus point. There  
 16 are really two points. You said, is it qua employee?  
 17 I would say, yes, it is, if it's put that way, but the  
 18 additional point is, what was common ground, was  
 19 accepted, was that the payment of this kind of bonus was  
 20 dealt with by reference to the distribution policy.  
 21 MR JUSTICE NUGEE: Yes. You have to have the cash  
 22 available.  
 23 MR POTTS: Yes, not just the cash. You have got to go  
 24 through all the --  
 25 MR JUSTICE NUGEE: Net current assets plus three months'

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1 balance; yes.  
 2 MR POTTS: -- all the magic that the department dealt with.  
 3 We have looked at the bottom line report. We say it  
 4 didn't show that the company didn't tick the boxes for  
 5 having -- for meeting that --  
 6 MR JUSTICE NUGEE: There is some evidence, which I'll do  
 7 resolve, as to whether the company ever went back to  
 8 Mr Patel and Ms Birdi and says, "Fine, you can have it".  
 9 MR POTTS: Yes, there is a conflict of evidence --  
 10 MR JUSTICE NUGEE: There is a dispute about that, yes.  
 11 MR POTTS: There is a dispute about that.  
 12 MR JUSTICE NUGEE: But let's assume they didn't.  
 13 MR POTTS: Let's assume they didn't.  
 14 MR JUSTICE NUGEE: Let's assume they didn't. It doesn't  
 15 wipe out her claim to be equalised, does it?  
 16 MR POTTS: My Lord, no, because the point is that there is  
 17 no right under the shareholders' agreement; there is no  
 18 right under the shareholders' agreement in relation to  
 19 equalisation.  
 20 MR JUSTICE NUGEE: I think I have heard quite a lot of  
 21 evidence on both sides as to a practice of -- whether  
 22 it's in the shareholders' agreement or not -- if  
 23 director A gets something, director B is entitled to be  
 24 equalised.  
 25 MR POTTS: My Lord, the point is on a distribution, the

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1 distribution must be approved by Specsavers. And either  
 2 it was or it wasn't -- well, there is a couple of  
 3 points.  
 4 The first one is there is the evidential dispute as  
 5 to whether it was approved or not. We say not. We have  
 6 also got the evidence to suggest that the company wasn't  
 7 in a position -- to bolster that as to why it wasn't  
 8 approved at the time is because of --  
 9 MR JUSTICE NUGEE: Yes, I don't think -- Mr Potts, sorry to  
 10 interrupt you. I don't think it is said that the board  
 11 of Visionplus or the board of Dartford -- I don't even  
 12 know which board it is.  
 13 MR POTTS: Dartford, I think it would be.  
 14 MR JUSTICE NUGEE: "The board of Dartford declared  
 15 a dividend and it hasn't paid me." I think what's said  
 16 is the expectation and understanding was that if  
 17 Mr Patel was paid something, "I would get a dividend and  
 18 SOG hasn't cooperated in declaring it."  
 19 MR POTTS: I'm not sure that's right, my Lord, because the  
 20 way it is put is she said, "No, no, Specsavers have  
 21 approved this."  
 22 MR JUSTICE NUGEE: Well, you may be right but even if that's  
 23 wrong and they haven't approved it, there is  
 24 a reiterated complaint throughout 15 files that  
 25 Specsavers just isn't addressing this question of the

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1 £8,700.  
 2 MR POTTS: That's the next point, my Lord, which I'll come  
 3 to. The first point is, if it's accepted that the  
 4 dividend procedure applies to this, then it doesn't have  
 5 to be approved. That's what the agreement says.  
 6 Ms Birdi, I think, accepted that it wasn't just  
 7 a question of sending the papers off; it did actually  
 8 have to be approved. It had to have complied with the  
 9 dividend policy. There's two points that then flow on  
 10 from that. The first one is that actually there is  
 11 evidence of this being genuinely investigated thereafter  
 12 and, where sums are due and payable, they are paid, but  
 13 this one wasn't, and I have set it all out. It has gone  
 14 through a number of people and I would respectfully say  
 15 that it shouldn't be found that they didn't genuinely  
 16 look at it. You had Mr Ryan, you had --  
 17 MR JUSTICE NUGEE: What happens if I look at it and I take  
 18 the view that she should have been paid it but I don't  
 19 take the view that the failure by Mr Ryan and the others  
 20 to find it was evidence of malice, they just didn't look  
 21 carefully enough or they have got it wrong?  
 22 MR POTTS: I would say that's not unfairly prejudicial  
 23 conduct.  
 24 MR JUSTICE NUGEE: No.  
 25 MR POTTS: And what's more, my Lord, there is another point,

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1 which is the expert determination provision in relation  
 2 to this. I haven't actually addressed you on the law on  
 3 that but it's covered.  
 4 MR JUSTICE NUGEE: No, you haven't.  
 5 MR POTTS: The point is about fairness -- it's about holding  
 6 people to a commercial bargain. If the commercial  
 7 bargain is that you have agreed --  
 8 MR JUSTICE NUGEE: If there's any dispute --  
 9 MR STUART: Dispute resolution is by expert determination,  
 10 it's not open to you to --  
 11 MR JUSTICE NUGEE: But the dispute provision is 4.2, which  
 12 is dispute as to the amount of profits available for  
 13 distribution --  
 14 MR POTTS: Yes.  
 15 MR JUSTICE NUGEE: -- or the maximum level of cash  
 16 dividend --  
 17 MR POTTS: That may be right, yes.  
 18 MR JUSTICE NUGEE: It's not whether --  
 19 MR POTTS: There is some separate agreement --  
 20 MR JUSTICE NUGEE: -- there are matters which need  
 21 equalising.  
 22 MR POTTS: Yes. I accept that, my Lord, but, my Lord, I say  
 23 that the way it was put is, "No, no, we accept it has  
 24 got to be through the contribution thing, it has got to  
 25 be agreed." That's what she is saying now; Ms Birdi is

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1 saying that it was agreed and we say it wasn't, and we  
 2 say the evidence shows that it wasn't.  
 3 My Lord, can I just take instructions?  
 4 MR JUSTICE NUGEE: Yes.  
 5 MR POTTS: My Lord, those are my submissions.  
 6 MR JUSTICE NUGEE: Do you want to say anything about the "go  
 7 native" email? Again, Mr Stuart places a great deal of  
 8 reliance, as indeed you point out Ms Birdi did in  
 9 evidence, on the "go native" email.  
 10 MR POTTS: Yes.  
 11 MR JUSTICE NUGEE: Do you want to say anything about that?  
 12 You have said something in your written submissions, but  
 13 it is one of the points on which Ms Birdi places a great  
 14 deal of reliance.  
 15 MR POTTS: My Lord, all I'm commended -- the natural and  
 16 ordinary meaning that my learned friend put on it --  
 17 MR JUSTICE NUGEE: Everybody seems to know what it means  
 18 naturally but nobody seems to agree. What do you say it  
 19 naturally means?  
 20 MR POTTS: My Lord, it means what the witnesses said it  
 21 means and it doesn't mean what my learned friend says it  
 22 means, and I have set out that -- I'm conscious of  
 23 allowing my friend some time.  
 24 I have dealt with it in the skeleton, my Lord. It  
 25 doesn't bear the meaning -- we have given your Lordship

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1 the references for it. We will try and see if we can  
 2 find it. But I don't think I could improve orally on  
 3 what we have said in writing. We have given your  
 4 Lordship the references to it.  
 5 MR JUSTICE NUGEE: I think --  
 6 MR POTTS: Your Lordship has to see the evidence.  
 7 MR JUSTICE NUGEE: -- in summary it came down to, "We don't  
 8 want Mr Singh to spend his energy and time --  
 9 MR POTTS: Yes, getting diverted into --  
 10 MR JUSTICE NUGEE: Into historic matters.  
 11 MR POTTS: Yes. It's not sinister. It doesn't mean, "No,  
 12 no, he must stick with the plan and don't decide to  
 13 run --  
 14 MR JUSTICE NUGEE: Don't take Ms Birdi's side.  
 15 MR POTTS: And don't run the business as Ms Birdi would like  
 16 to in a -- just run -- he mustn't be diverted from the  
 17 plot to just getting on with the business, and it's not  
 18 sinister.  
 19 MR JUSTICE NUGEE: Yes, thank you very much, Mr Potts.  
 20 MR POTTS: It's 473 to 477.  
 21 MR JUSTICE NUGEE: Yes, thank you.  
 22 Submissions in reply by MR STUART  
 23 MR STUART: My Lord, obviously I'm restricting this to  
 24 a short reply only in respect of legal matters and/or --  
 25 MR JUSTICE NUGEE: Yes, or entirely new points.

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1 MR STUART: -- any entirely new points. So the fact that  
 2 I don't deal with any number of things --  
 3 MR JUSTICE NUGEE: No, no.  
 4 MR STUART: -- which I know my client would no doubt like to  
 5 carrying on arguing about -- but we are not going to do  
 6 that. I'm just going to deal with the crucial new  
 7 matters.  
 8 MR JUSTICE NUGEE: I think I have a pretty clear idea of  
 9 your client's case.  
 10 MR STUART: I'm going to deal with them in the order in  
 11 which they were raised by Mr Potts.  
 12 First of all, can I just answer your Lordship's  
 13 question of yesterday, which is how do I say you should  
 14 deal with the Hildyard judgment.  
 15 MR JUSTICE NUGEE: Yes, if there is one.  
 16 MR STUART: If there is one. And my answer really is if  
 17 there is one. So I will commend to you the wait and see  
 18 and allow us the opportunity each to put in written  
 19 submissions, frankly (inaudible) hearing about it, if  
 20 the point arises.  
 21 MR JUSTICE NUGEE: You will know before I know --  
 22 MR STUART: Yes.  
 23 MR JUSTICE NUGEE: -- when a draft judgment comes and  
 24 a judgment is going to be handed down.  
 25 MR STUART: That's right.

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1 MR JUSTICE NUGEE: So in the time between getting the draft  
 2 judgment and the judgment being handed down, I will give  
 3 liberty to both you to put in written submissions,  
 4 submitting what I should do in terms of looking at the  
 5 judgment and any reliance or not that I can place on it.  
 6 I think I have made my views fairly clear already --  
 7 MR STUART: Yes.  
 8 MR JUSTICE NUGEE: But do take up that opportunity if the  
 9 point arises.  
 10 Yes, thank you.  
 11 MR STUART: So that deals with that. My learned friend  
 12 dealt with the -- he raised matters about this severance  
 13 dividend and I'm not going to go back over matters but  
 14 he made a submission that there is no severance  
 15 dividend.  
 16 MR JUSTICE NUGEE: I have some evidence that there is, and  
 17 it seems perfectly good sense.  
 18 MR STUART: I don't accept that he can make that submission  
 19 in the light of page E7/1775 {E/540/1775}. This is his  
 20 client's document.  
 21 MR JUSTICE NUGEE: Yes, yes, I remember that.  
 22 MR STUART: Top right-hand corner. Do you remember, my  
 23 Lord, we did go to it in the evidence.  
 24 MR JUSTICE NUGEE: Yes.  
 25 MR STUART: What is a severance dividend and how is it --

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1 MR JUSTICE NUGEE: Final set of management accounts.  
 2 MR STUART: "A severance dividend is paid when a store  
 3 director sells shares in the business. It is paid to  
 4 all directors shortly after the seller has left the  
 5 business. A final set management accounts ... is  
 6 prepared and the accumulated profits over and above the  
 7 previously agreed [profits] ..."  
 8 And the last sentence is crucial because Mr Potts  
 9 made a submission that certainly if there isn't cash in  
 10 the account, there couldn't be any question of the  
 11 severance dividend, whereas the provision is:  
 12 "The severance dividend may still be subject to a  
 13 loan back arrangement if there is insufficient cash in  
 14 the business to distribute the full amount."  
 15 It's part of the Specsavers system.  
 16 He then dealt with this constructive  
 17 trusteeship/30 July 2012 --  
 18 MR JUSTICE NUGEE: Yes, this is a point which you hadn't  
 19 anticipated?  
 20 MR STUART: Absolutely.  
 21 MR JUSTICE NUGEE: It's not pleaded.  
 22 MR STUART: No.  
 23 MR JUSTICE NUGEE: I'm going to give you liberty to file  
 24 written submissions on that if you want to. I'm not  
 25 encouraging you to do so.

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1 MR STUART: Well, I make take you up on that. Can I just  
 2 make a very short oral submission, which is this: now  
 3 that he has refined his argument away from the notice,  
 4 the purchase notice --  
 5 MR JUSTICE NUGEE: Well, he hasn't abandoned that but he  
 6 says he is prepared to treat it as 30 July because it's  
 7 only three months.  
 8 MR STUART: Yes, so what he is saying is that the agreement  
 9 that he says is the agreement for the sale of shares,  
 10 which gives rise to the beneficial interest in the  
 11 dividends -- he is now saying that agreement is the  
 12 agreement which led to Registrar Briggs's decision.  
 13 MR JUSTICE NUGEE: Yes.  
 14 MR STUART: I have a major problem in even addressing this  
 15 argument in the absence of a pleading, and the reason is  
 16 this: my first question is what agreement? This is to  
 17 be a specifically enforceable agreement. In order for  
 18 him to come within his own --  
 19 MR JUSTICE NUGEE: Yes.  
 20 MR STUART: -- suggestion, we need a specifically  
 21 enforceable agreement for the purchase and sale of  
 22 shares --  
 23 MR JUSTICE NUGEE: Yes.  
 24 MR STUART: -- as giving rise to -- where those shares are  
 25 in a private company, not on the stock market, as giving

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1 rise to this constructive trusteeship or -- et cetera.  
 2 The agreement that -- not 66, I am sorry, my Lord,  
 3 I have given you the wrong reference there. The  
 4 reference is 33, half of 66 -- the agreement that he is  
 5 referring to, being what Mr Marsh, who is the solicitor  
 6 at Taylor Wessing -- there is a witness statement from  
 7 him which went into the Briggs hearing and said that  
 8 an agreement has been reached on everything but the  
 9 issue of the costs and therefore we can have this order,  
 10 and this is the order that got made.  
 11 The agreement that is relied upon, if that is what  
 12 it is, starts with this offer at 33. Does your Lordship  
 13 have it? {F/13/33}  
 14 MR JUSTICE NUGEE: Yes.  
 15 MR STUART: 17 April. And your Lordship will see there the  
 16 important parts of the offer:  
 17 "Our client agrees to purchase the 50 A shares at  
 18 50p each in the capital of the company registered in the  
 19 name of your client at a price to be determined by an  
 20 independent valuer, who shall be experienced in valuing  
 21 shares ... (the valuer) ... who shall ... "  
 22 Et cetera. (iii):  
 23 "The valuer shall value the shares ..."  
 24 Not the price:  
 25 "... value the shares on the basis:

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1        "(a) of a sale of the shares at arm's length ...  
2        "(b) that the company is and will continue to carry  
3        on the business ...  
4        "(c) that the shares of capable of being transferred  
5        without restriction;  
6        "(d) that the shares are valued as a rateable  
7        proportion of the total value of all the issued shares  
8        of the company ... "  
9        It's a rateable percentage.  
10       And then over the page -- this is important. So it  
11       starts with the word "of": {F/13/34}  
12       "The valuer shall value the shares on the basis ...  
13       "(e) Of taking into account ..."  
14       Taking into account:  
15       "... such matters as are set out in paragraph 5  
16       below as the court determines constituted breaches of  
17       contractual and/or fiduciary duties on the part of our  
18       client, which ought to be taken into account of in  
19       determining the value ..."  
20       The value:  
21       "... of your client's shares."  
22       So part of the valuation by the valuer of the  
23       percentage of the whole company --  
24       MR JUSTICE NUGEE: Yes.  
25       MR STUART: -- is he must take account such matters as you

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1        have determined in 5. Because you will see, my Lord,  
2        it's 5 where we get to the Briggs order and why we are  
3        here. 5 is: {F/13/34}  
4        "There shall be a separate trial before the  
5        High Court of Justice in London (Chancery Division,  
6        Companies Court) to determine whether the matters set  
7        out in paragraphs ... "  
8        You see the numbers that we have got:  
9        "... involved breaches of contractual and/or  
10       fiduciary duties on the part of our client such as to  
11       warrant an adjustment to the price payable ... "  
12       The "price payable". So the adjustment is to the  
13       price payable --  
14       MR JUSTICE NUGEE: Yes.  
15       MR STUART: -- not to the percentage value of the whole  
16       company:  
17       "... the price payable for your client's  
18       shareholding and the value of those claims."  
19       So I do --  
20       MR JUSTICE NUGEE: But that's not what actually found its  
21       way into Mr Registrar Briggs's order, those last  
22       six words?  
23       MR STUART: Registrar Briggs's order. My Lord, we are in  
24       bundle A, tab 3. {A/3/23}  
25       MR JUSTICE NUGEE: It stops after:

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1        "... such as to warrant an adjustment to the price."  
2        MR STUART: Yes.  
3        MR JUSTICE NUGEE: I don't think it matters because I will  
4        specify in detail in what respects I think that there  
5        has been --  
6        MR STUART: And the value of the claim, yes.  
7        MR JUSTICE NUGEE: -- breaches, but, yes.  
8        MR STUART: So this goes to two issues that my learned  
9        friend and I have to reply on, namely the scope of what  
10       your Lordship is going to do at the end of this trial.  
11       MR JUSTICE NUGEE: Yes.  
12       MR STUART: But I'm taking you to this because of his  
13       constructive trusteeship point, because, of course, he  
14       needs a specifically enforceable contract for the sale  
15       of shares.  
16       MR JUSTICE NUGEE: Yes.  
17       MR STUART: And in my submission a contract for the sale of  
18       shares which depends upon a valuation being done by  
19       a valuer is not specifically enforceable, and I'll put  
20       in some written submissions which explain that.  
21       Secondly, if your Lordship goes down to paragraph 10  
22       of the offer:  
23       "Completion of the sale and purchase of the shares  
24       shall take place on such date as shall be agreed but in  
25       any event no later than 28 days after the date on which

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1        the decision of the valuer is sent to our respective  
2        firms."  
3        It is clear from the structure of this offer that we  
4        are going to have a trial first, then your Lordship's  
5        determination is going to be sent off to the valuer, the  
6        valuer is going to be instructed, there is going to be  
7        a valuation, and only then is Ms Birdi going to sell her  
8        shares.  
9        MR JUSTICE NUGEE: No, only then is it going to be  
10       completed.  
11       MR STUART: Yes, only then is it going to be completed.  
12       This is not a case where Specsavers say, "We offered  
13       to buy your shares," she says, "I agree, you can buy my  
14       shares," specifically enforceable contract --  
15       enforceable by specific performance at that date; it's  
16       not that sort of contract.  
17       So for those two reasons -- that is, because the  
18       price is to be determined by an independent expert and  
19       at a later date and because it is expressly envisaged  
20       that the completion of this --  
21       MR JUSTICE NUGEE: But I don't think the constructive  
22       trusteeship which attaches to a vendor of specifically  
23       enforceable property only attaches at the date fixed for  
24       completion. If I contract to sell you my house, I can't  
25       go round taking out the fittings and fixtures between

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1 contract and completion.  
 2 MR STUART: That's right, and the case law is, if I'm  
 3 selling you a tree, I have the tree with the fruit that  
 4 is ripening on that tree.  
 5 MR JUSTICE NUGEE: Yes.  
 6 MR STUART: But if I'm selling you a tree -- shares are  
 7 a tree -- which has annual dividends and that sale is  
 8 going to be completed at a date beyond the years of  
 9 those dividends -- the fruit has ripened -- and should  
 10 have been paid, that is not a case where it is implicit  
 11 that you are going to get the distributions. It's not  
 12 implicit at all.  
 13 MR JUSTICE NUGEE: Well, I will have to have submissions on  
 14 that if the issue is going to be something which I have  
 15 to resolve. It does sound as if it's an issue which  
 16 I will have to resolve because it's being put forward  
 17 now, albeit unpleaded, as a defence to the allegation of  
 18 bonuses and excessive salaries post July.  
 19 MR STUART: That's right and it's not pleaded. That  
 20 defence, that argument, the whole argument, is  
 21 absolutely not even --  
 22 MR JUSTICE NUGEE: No, I understand that.  
 23 MR STUART: -- not even an inkling of it in the full  
 24 pleading.  
 25 MR JUSTICE NUGEE: Understood.

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1 MR STUART: And, as I say, if I'm going to face an argument  
 2 based upon a specifically enforceable contract --  
 3 because it's only specifically enforceable contracts --  
 4 MR JUSTICE NUGEE: Of course.  
 5 MR STUART: -- that give -- then I'm entitled to know what  
 6 is the contract. What are the terms of that contract?  
 7 Which contract is it? The contract that's in my learned  
 8 friend's skeleton argument, which is, "Oh, we served  
 9 a notice on you and we are entitled to the shares from  
 10 you in March," or some form of contract, the terms of  
 11 which I say are not sufficiently clear, because, my  
 12 Lord, how can you specifically enforce a contract where  
 13 we don't even know what the date of valuation is? And  
 14 that's agreed between us; Mr Potts and I both agree that  
 15 there is no date of valuation.  
 16 MR JUSTICE NUGEE: Do you say I should decide the date of  
 17 valuation?  
 18 MR STUART: Someone is going to have decide the date of  
 19 valuation.  
 20 MR JUSTICE NUGEE: It's not a valuer's point, is it?  
 21 MR STUART: No.  
 22 MR JUSTICE NUGEE: Is there any prospect of you and Mr Potts  
 23 agreeing what the date of valuation should be?  
 24 MR STUART: Possibly.  
 25 MR JUSTICE NUGEE: I think I'm not going to, in the course

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1 of writing my judgment, go into the issue of the date of  
 2 valuation.  
 3 MR STUART: I don't invite you to.  
 4 MR JUSTICE NUGEE: I don't think either of you do. It may  
 5 be that you can both agree it. It may be that that's  
 6 a pious hope, in which case, when eventually judgment is  
 7 handed down, we can discuss how to deal with that point  
 8 then, because it seems to me it's a point that will have  
 9 to be dealt with at some stage.  
 10 MR STUART: I agree it will have to be dealt with and it's  
 11 not a point that is to be determined under Deputy --  
 12 MR JUSTICE NUGEE: No.  
 13 MR STUART: -- Registrar Briggs's order, and it is something  
 14 that the parties are going to have to grapple with  
 15 because the offer letter doesn't say what date --  
 16 MR JUSTICE NUGEE: No.  
 17 MR STUART: -- is offered and no --  
 18 MR JUSTICE NUGEE: I imagine there may be some authority on  
 19 what date you value shares or any other property if the  
 20 contract doesn't say so.  
 21 MR STUART: Well, there is certainly authority under the 994  
 22 remedy --  
 23 MR JUSTICE NUGEE: Yes, but this is not necessarily --  
 24 MR STUART: Exactly, this is a contract.  
 25 MR JUSTICE NUGEE: Yes.

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1 MR STUART: This is not --  
 2 MR JUSTICE NUGEE: That's what I understood.  
 3 MR STUART: This is not you determining what should be the  
 4 right date. It's has there been a date agreed. If  
 5 there hasn't been a date agreed, there does remain  
 6 an issue in the petition that needs to be determined by  
 7 the court. That's if there is no agreed date.  
 8 MR JUSTICE NUGEE: Maybe. Okay.  
 9 MR STUART: But, yes I can see that there may be arguments  
 10 as to what was implicit from the terms of the agreement,  
 11 and it's a construction point, if you like.  
 12 MR JUSTICE NUGEE: Yes.  
 13 MR STUART: My Lord, that's that. So I'm now on to this  
 14 morning's submissions. My learned friend suggested in  
 15 relation to the RCS invoices -- and for your Lordship's  
 16 reference, it's today's transcript.  
 17 MR JUSTICE NUGEE: Don't worry about giving the transcript  
 18 reference.  
 19 MR STUART: No, but it's today 's transcript, page 34.  
 20 {Day19/34:8} He said that in paragraph 85 of our  
 21 submissions we said various things. I would ask your  
 22 Lordship to look carefully at paragraph 85 and note that  
 23 we don't say the things he says.  
 24 MR JUSTICE NUGEE: Of course I'll look carefully at all your  
 25 paragraphs, Mr Stuart, but what is it that you say about

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1 the --

2 MR STUART: Well, at page 34 of today's transcript your

3 Lordship will see that he says as follows. On another

4 point, another allegation which is being noted is the

5 RCS camera invoices:

6 "At paragraph 85 of my friend's submissions, he

7 makes an allegation of fraud and sham in relation to

8 invoices. He said that they were concocted invoices..."

9 That's true, I do use the word "concocted":

10 "... and that RCS is a branch of SOG."

11 I don't actually say that.

12 MR JUSTICE NUGEE: You say a department of SOS.

13 MR STUART: No, I say, on the one hand, those behind RCS.

14 MR JUSTICE NUGEE: "Who", so it's not "which", it's --

15 MR STUART: It's the people who appear to be a department of

16 SOS, and he goes on to say in his assertion to you I do

17 that in my submission with no evidence referred to.

18 My Lord, you have to go back to paragraph 82 of our

19 submission, where we set out in great detail all of the

20 evidence as to these invoices, from which you can see

21 that the position is that, despite what Mr McAlindon

22 told you in his evidence, which was that he would have

23 received hard copies in the post to his home, actually

24 the documents concerned are xls format documents, ie

25 generated on an Excel spreadsheet, and that those

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1 spreadsheet documents were created by Mr Gutteridge,

2 Les Gutteridge, who is one of Mr McAlindon's -- and last

3 modified by Mr McAlindon himself.

4 MR JUSTICE NUGEE: Yes.

5 MR STUART: So we do explain precisely why we say the

6 members of the Loss Prevention team are behind those

7 documents and we do --

8 MR JUSTICE NUGEE: Yes.

9 MR STUART: Yes. "Concocted" is perhaps strong but, given

10 Mr McAlindon's evidence, which was, "Oh, no, no, no,

11 just receiving the hard -- post from RCS," we say that's

12 not right, and I did put all of this to him, as you can

13 see from the extract.

14 MR JUSTICE NUGEE: Yes.

15 MR STUART: I don't accept that as a fair criticism. My

16 learned friend says that Ms Birdi -- the Riyaz Rajan

17 report -- he made the point of how unfair it was of

18 Ms Birdi to make her allegation at the time and

19 subsequently, when she hadn't read the Riyaz Rajan

20 report.

21 MR JUSTICE NUGEE: Yes.

22 MR STUART: The evidence to your Lordship was that she was

23 not sent the Riyaz Rajan report. And you will find that

24 in the evidence.

25 My Lord, on the legal issue as to the trust and

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1 confidence term --

2 MR JUSTICE NUGEE: I'm right in thinking that you seek to

3 imply it into the shareholders' agreement?

4 MR STUART: Yes, qua shareholder --

5 MR JUSTICE NUGEE: Insofar as it --

6 MR STUART: -- which is a layer on top of the mere

7 director --

8 MR JUSTICE NUGEE: Yes. You don't need it insofar as it's

9 fiduciary powers qua director?

10 MR STUART: Correct.

11 MR JUSTICE NUGEE: So it's only exercising powers qua

12 shareholder?

13 MR STUART: That's right, and the reason I need to at least

14 argue it is because, when they are exercising all these

15 powers as directors -- and I say doing it wrongly,

16 et cetera -- the answer given back is "Oh, well, we had

17 control of shares anyway, didn't we, so we could have

18 ratified, or we did ratify, what we were doing as

19 directors."

20 MR JUSTICE NUGEE: I see. I see.

21 MR STUART: Hold on, if you're going to assert that you can

22 exercise your power as controlling shareholders,

23 majority controlling shareholder, that is a power you

24 have, you are the majority shareholder, but insofar as

25 you are exercising that power, that's --

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1 MR JUSTICE NUGEE: I rather thought that shareholders don't

2 have a right to manage the business of a normal company.

3 They can sack the directors and appoint new ones but

4 when the business of the company is entrusted to the

5 directors, the shareholders can't intervene. Am I wrong

6 about that?

7 MR STUART: I agree they can't intervene but what is being

8 said against that is "Ah, well, what we could have done

9 is ratify by exercising our chairmanship."

10 MR JUSTICE NUGEE: Of the board?

11 MR STUART: Of the board, which we have because we are the

12 majority.

13 MR JUSTICE NUGEE: Well, I entirely understand that the

14 evidence, I think, from Mr Dyson, was that various

15 things he thought were being done by SOG because it was

16 B shareholder, majority shareholder, but I took that to

17 be shorthand for, "We were entitled to call a board

18 meeting at which we would sit as chairman of the board

19 and have a casting vote, so we could have passed things

20 through the board." But that's an exercise of fiduciary

21 powers.

22 MR STUART: That itself would be, yes.

23 MR JUSTICE NUGEE: Yes.

24 MR STUART: The overarching control here is because they

25 have shareholder control between the three of them.

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1 MR JUSTICE NUGEE: Yes.  
 2 MR STUART: Between the 75 per cent of them, I should say.  
 3 MR JUSTICE NUGEE: Yes, yes.  
 4 MR STUART: Finally on that, just two page references, just  
 5 to deal with two points made by my learned friend. 4011  
 6 in E14. I think your Lordship went to Ms McIntyre's  
 7 decision. {E/1041/4011}  
 8 MR JUSTICE NUGEE: Yes.  
 9 MR STUART: I think you were looking at 4010. {E/1041/4010}  
 10 MR JUSTICE NUGEE: I was.  
 11 MR STUART: I'm not going to repeat that because it is only  
 12 a point of reply. But it's 4011, the penultimate  
 13 paragraph. Does your Lordship see it? {E/1041/4011}  
 14 "I also consider that even if you were not summarily  
 15 dismissed by DVL for gross misconduct ... "  
 16 And, of course, this is the material decision  
 17 because she wasn't dismissed for gross misconduct. It  
 18 is this that was the actual basis of her dismissal.  
 19 MR JUSTICE NUGEE: Yes.  
 20 MR STUART: And it goes on:  
 21 "... for 'some other substantial reason' is in any  
 22 event warranted for the reasons set out above, ie that  
 23 there has been a complete breakdown of the working  
 24 relationship between you (both in your capacity as  
 25 director and senior employee) and your fellow joint  
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1 venture partners at DVL and the mutual trust and  
 2 confidence necessary for the continuance of an  
 3 employment relationship between you and DVL ... "  
 4 So there is reference to the relationship with the  
 5 joint venture partners --  
 6 MR JUSTICE NUGEE: Yes.  
 7 MR STUART: -- not merely the employment relationship.  
 8 The final one on that was E15/4368. {E/1122/4368}  
 9 MR JUSTICE NUGEE: Yes.  
 10 MR STUART: My learned friend sought to argue to you that  
 11 there is no mutual trust relationship here and yet your  
 12 Lordship --  
 13 MR JUSTICE NUGEE: Well, I remember it.  
 14 MR STUART: -- has this already.  
 15 MR JUSTICE NUGEE: I remember this, yes.  
 16 MR STUART: But this is the document which is sent out to  
 17 prospective shareholders and invites them to join the  
 18 relationship and -- I'm not going to read it all out --  
 19 MR JUSTICE NUGEE: No, I'm pleased.  
 20 MR STUART: Your Lordship has, it I'm sure. We went to that  
 21 at the time.  
 22 MR JUSTICE NUGEE: Yes.  
 23 MR STUART: I have dealt with that.  
 24 I think your Lordship has my point, that I didn't  
 25 sort of repeat again, in relation to the ambit of what  
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1 you are going to do at the end of this.  
 2 MR JUSTICE NUGEE: Yes.  
 3 MR STUART: And I think you have agreed -- you haven't  
 4 agreed anything but you have taken on board my  
 5 submission, which is that there is a two-stage process  
 6 and you are going to provide a determination which is  
 7 then fed into the valuation by the valuer but also has  
 8 the price issue, and you are valuing items of claim, as  
 9 it's put.  
 10 MR JUSTICE NUGEE: Yes.  
 11 MR STUART: And that's --  
 12 MR JUSTICE NUGEE: And you want --  
 13 MR STUART: I think you understand what I'm inviting you to  
 14 do, whether you agree with it or not.  
 15 MR JUSTICE NUGEE: In relation to the £86,000, you invite me  
 16 to say that the valuation should take account of the  
 17 fact that the £86,000 was, assuming I accept your case,  
 18 improper, and you invite me to direct that the price be  
 19 increased by £43,000 to take account of the 50 per cent  
 20 dividend which you say should flow from that.  
 21 MR STUART: Yes. I think the way I would put it is your  
 22 primary task is the six issues --  
 23 MR JUSTICE NUGEE: Yes.  
 24 MR STUART: -- and arriving at a figure, so the second of  
 25 the things you have mentioned: If the price payable  
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1 should be adjusted by £43,000 to take account of the  
 2 fact that my client didn't get the £43,000 that would  
 3 have been available to her. I think, obviously, it  
 4 would be £43,000, we would say, plus interest.  
 5 So that's the primary task. Once you have  
 6 determined that and the value of that claim, that item,  
 7 that's going to the price payable as an adjustment, that  
 8 also feeds then into the valuer as part of (e), of the  
 9 things that he has to also take account of when he is  
 10 valuing the valuation of the whole company, and we get  
 11 a percentage of the whole company, 25 per cent of the  
 12 A shares.  
 13 You have that already.  
 14 Yes. Now, my Lord, I have to deal with this issue  
 15 about -- can I take you to bundle A, the pleading.  
 16 I know we are not taking serious pleading -- or mere  
 17 pleading -- points here but would you go to page 56,  
 18 which is in the defence. {A/6/56}  
 19 MR JUSTICE NUGEE: Yes.  
 20 MR STUART: And if I can take you to paragraph 32. I'm  
 21 dealing now, my Lord, with my learned friend's  
 22 submissions about these increased overheads and the  
 23 issue about the A shareholder.  
 24 MR JUSTICE NUGEE: Yes.  
 25 MR STUART: Your Lordship, I think, already has my  
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1 submission that the question of the A shareholder point,  
 2 the day-to-day management/A shareholder, really only  
 3 goes to this one of the issues because all of the other  
 4 items, I think, we are all pretty much agreed, are not  
 5 day-to-day management anyway. So it's just the lack of  
 6 board meetings that is what's complained of --  
 7 MR JUSTICE NUGEE: Yes.  
 8 MR STUART: -- and my lack of -- et cetera.  
 9 It's, therefore, in relation to this allegation and  
 10 claim that -- the issue of, "Were they an A director at  
 11 the time, were they the A director, who could then take  
 12 the day-to-day management decisions, because they say  
 13 I was suspended as an employee. But Mr Potts argued that  
 14 the suspension as an employee also suspends me from the  
 15 ability to carry out the day-to-day management."  
 16 If your Lordship sees paragraph 32 of the defence,  
 17 the way it's put there -- and has always been put -- is:  
 18 "It's admitted that modest increases in the salaries  
 19 and bonuses paid to the staff would ordinarily have been  
 20 a matter of day-to-day management. Following the  
 21 departure of Mr Patel, February 2007, and the suspension  
 22 of the petitioner from work, the third respondent had no  
 23 ..."  
 24 The third respondent is --  
 25 MR JUSTICE NUGEE: Vision --  
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1 MR STUART: Visionplus. Sorry, no, it's not.  
 2 MR JUSTICE NUGEE: No, it's Dartford, actually.  
 3 MR STUART: It's Dartford.  
 4 MR JUSTICE NUGEE: Yes.  
 5 MR STUART: It's Dartford:  
 6 "... had no A director ..."  
 7 MR JUSTICE NUGEE: No, it is Visionplus -- it doesn't  
 8 matter.  
 9 MR STUART: Sorry, Visionplus, Visionplus -- no, it must be  
 10 Visionplus because it's Visionplus who were operating  
 11 the actual business in the store. So:  
 12 "... the third respondent had no A director present  
 13 in store to manage the day-to-day running of the store  
 14 at that time."  
 15 It does not say, "We, the first respondent, were the  
 16 A director." It doesn't say that, and there is good  
 17 reason for that, my Lord, which is that, as I understand  
 18 it, SOG, the Guernsey company, which is the  
 19 first respondent, doesn't want to be an A director with  
 20 the power of day-to-day management of an English shop,  
 21 which has profits and which has to pay taxes in England.  
 22 So there is every good reason for SOG not to want to be  
 23 the A director at that time, or at all, in any shop in  
 24 England.  
 25 So:  
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1 "... the third respondent had no A director  
 2 present, so, accordingly, responsibility for the  
 3 day-to-day management, including the decision to  
 4 increase the salary and bonuses paid to staff, was  
 5 delegated by the first respondent, acting in its  
 6 capacity as both director and chairman of the board of  
 7 the company ... "  
 8 So they are not saying, "Because we are the only  
 9 A director left, we have the day-to-day management."  
 10 They are saying that what they did here was they did it  
 11 as director and chairman of the board of the company;  
 12 that is, of Dartford Specsavers. And that's how it's  
 13 pleaded. So I simply don't accept that merely having  
 14 the benefit of a contract for the sale of shares from  
 15 Mr Patel constitutes them an A director and nor do  
 16 I accept that that's how they have ever pleaded it.  
 17 MR JUSTICE NUGEE: It wasn't just the contract for the sale;  
 18 they had signed a share transfer form, I think.  
 19 MR STUART: Yes, yes. I'm not saying they didn't purchase  
 20 the shares. I don't necessarily accept that they were  
 21 registered at the time either because there is a board  
 22 meeting. Your Lordship already has the point.  
 23 MR JUSTICE NUGEE: I have got that point.  
 24 MR STUART: The 2008 board meeting, which is long after the  
 25 event, in the material respect it actually authorises  
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1 them to make a registration --  
 2 MR JUSTICE NUGEE: Yes.  
 3 MR STUART: -- in the relation to the Singh transfer.  
 4 MR JUSTICE NUGEE: Yes.  
 5 MR STUART: That's how late it is; there is no board  
 6 resolution until after Mr Singh has actually acquired  
 7 the shares off them. So there is a long period of time  
 8 where there is no apparent registration.  
 9 So that's the short point there.  
 10 I have dealt with the day-to-day management.  
 11 My Lord, just finally on that point about suspending  
 12 as an employee suspends you from your --  
 13 MR JUSTICE NUGEE: Yes.  
 14 MR STUART: -- director's duties. If it's being suggested  
 15 that it goes beyond the A directors' duties -- and I'm  
 16 not sure whether that is being said, but if it is, that  
 17 can't be right because Ms Birdi was suspended on  
 18 8 June 2010 and yet was (a) invited to and (b) required  
 19 to attend board meetings of Dartford Specsavers  
 20 thereafter.  
 21 MR JUSTICE NUGEE: Yes. But I think it's accepted she  
 22 remained a director.  
 23 MR STUART: Yes, with the powers --  
 24 MR JUSTICE NUGEE: The distinction is drawn between  
 25 executive functions, day-to-day management, which are  
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1 governed by the service contract, and attendance at  
 2 board meetings, which is a directorial function.  
 3 MR STUART: So it is only in relation to the one issue then?  
 4 MR JUSTICE NUGEE: I think it is.  
 5 MR STUART: Because there is only one day-to-day management  
 6 issue that I'm complaining about and that's --  
 7 MR JUSTICE NUGEE: I think it is.  
 8 MR STUART: My Lord, that's fine.  
 9 On the question of remedy, my learned friend, when  
 10 you mentioned, "Well, is there a difference between  
 11 value and price?" he sort of raised his eyebrows as if  
 12 to say, "I wonder whether that's an issue." I suggest  
 13 that it is.  
 14 If your Lordship goes back to F1 -- and I suggest  
 15 that he knows all about this already -- we had this  
 16 argument at the Arnold hearing, and it was the very  
 17 reason why the amendment that I will take to you in  
 18 a moment took place, but the reason it arose has been  
 19 ongoing. Your Lordship will find at page 66 -- it  
 20 starts with 66. 5 October from Taylor Wessing. Does  
 21 your Lordship have it? {F/25/66}  
 22 MR JUSTICE NUGEE: Yes.  
 23 MR STUART: Just between the hole punches, number 1,  
 24 paragraphs 2 and 3:  
 25 "The issue of whether the proposed share purchase  
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1 will take place effectively as a result of relief made  
 2 available due to presenting the petition or pursuant to  
 3 the purchase notice served by our client in accordance  
 4 with its rights under the shareholders' agreements falls  
 5 outside the specific matters identified in the order  
 6 and, more importantly, has no effect on the valuation of  
 7 your client's shares."  
 8 MR JUSTICE NUGEE: Yes.  
 9 MR STUART: So that's how my learned friend's solicitors put  
 10 it in October 2012. He now says it does have an effect.  
 11 He seeks to say it does have an effect. But our  
 12 response to that is at page 69. {F/29/69}  
 13 MR JUSTICE NUGEE: Yes.  
 14 MR STUART: Just above the second hole punch in point 2:  
 15 "Again the issue of repudiation ..."  
 16 Et cetera. The important part is this:  
 17 "There is a difference between the valuation of the  
 18 shares and the price payable. The shares will be valued  
 19 by the valuer. The price payable, which will constitute  
 20 the valuation then adjusted to take account of all the  
 21 matters determined at the trial, will be determined by  
 22 the court."  
 23 So we had raised that. Can I then take you back to  
 24 bundle A and the order of Mr Justice Arnold in tab 4,  
 25 and specifically paragraph 3 of that order, {A/4/26}  
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1 because it was pointed out that this issue about the  
 2 price paid wasn't clear from the original version of the  
 3 pleading and so it had to be amended, and you find that  
 4 amendment, my Lord, in tab 5. It's the last paragraph.  
 5 MR JUSTICE NUGEE: Yes.  
 6 MR STUART: On page 40: {A/5/40}  
 7 "The price to be paid for the petitioner's shares  
 8 ought to be adjusted to take account of the ..."  
 9 Et cetera, et cetera. So this issue about the  
 10 difference between price paid and value of valuation,  
 11 where the valuer is just valuing the whole company and  
 12 then we get a percentage of that, has been raised, was  
 13 decided in my favour by Mr Justice Arnold and led to  
 14 that amendment, and so I say it's not open to my learned  
 15 friend to suggest that I would know the price paid is  
 16 the same as the value.  
 17 MR JUSTICE NUGEE: Yes.  
 18 MR STUART: He said, as to the dividend, it's just  
 19 a cashflow issue and you have no evidence as to when the  
 20 company was -- this is on the £86,000 point.  
 21 MR JUSTICE NUGEE: Yes.  
 22 MR STUART: -- as to when that dividend would become  
 23 payable. That's not right, my Lord, because you do have  
 24 evidence. You will recall it, that there were these  
 25 discussions in 2010, before my client was dismissed,  
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1 long before, when Mr Singh wanted a dividend and there  
 2 was an argument about it and in the end a £50,000  
 3 dividend was declared, or a £55,000 bonus was declared,  
 4 as available.  
 5 So by 2010, early 2010, the company was able to pay  
 6 £55,000 already. So it's not right to say that it's  
 7 only in 2014 or some later period -- or 2012 -- that the  
 8 company reached a positive state, positive enough to  
 9 distribute dividend.  
 10 MR JUSTICE NUGEE: No, but I think the point is more  
 11 difficult than that because, had there been another  
 12 £86,000 --  
 13 MR STUART: Yes.  
 14 MR JUSTICE NUGEE: -- one can see that the money was there  
 15 in 2010, but does it necessarily follow that all of the  
 16 dividends that are in fact declared would have been  
 17 declared?  
 18 MR STUART: The point, my Lord, is this: the £86,000 was  
 19 taken out of the company in 2007.  
 20 MR JUSTICE NUGEE: Yes.  
 21 MR STUART: It was literally paid out because Specsavers had  
 22 control of the bank account, so they were able to pay  
 23 themselves, SOS, their department, the £86,000. So  
 24 £86,000 left the company in 2007, and do you remember  
 25 I took --  
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1 MR JUSTICE NUGEE: Yes.  
 2 MR STUART: -- various of the witnesses through the accounts  
 3 and we could see these very large sums in the accounts  
 4 for those years.  
 5 MR JUSTICE NUGEE: Yes.  
 6 MR STUART: That's just pure expenditure, which, if that  
 7 expenditure had not been expended, it would still have  
 8 been in the company. The company would then have got to  
 9 a stage of being able to pay dividends much earlier than  
 10 2010, but certainly by 2010 its balance sheet would have  
 11 been £86,000 better if £86,000 hadn't been paid away in  
 12 2007.  
 13 MR JUSTICE NUGEE: What about corporation tax?  
 14 MR STUART: I accept that we are potentially looking at the  
 15 net of tax benefit.  
 16 MR JUSTICE NUGEE: How do I deal with that?  
 17 MR STUART: Erm ...  
 18 MR JUSTICE NUGEE: I don't have any evidence at all as to  
 19 what the difference of the cash position of the company  
 20 would be if the profits had been £86,000 larger.  
 21 MR STUART: You certainly have within all of the years'  
 22 accounts -- for 2007, 2008, 2009 -- the point where  
 23 profits were made and corporation tax was deducted, and  
 24 it appears in the accounts, the amount, as a percentage  
 25 of the profits.

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1 MR JUSTICE NUGEE: Well, I remember the accounts, but  
 2 company accounts don't usually explain how tax has been  
 3 calculated.  
 4 MR STUART: No, but there is a line in these accounts  
 5 showing the tax.  
 6 MR JUSTICE NUGEE: It shows the figure for tax; it doesn't  
 7 give me any information as to what the corporation tax  
 8 rate was, and in any event it changes from year to year.  
 9 MR STUART: It does. In 2008 --  
 10 MR JUSTICE NUGEE: Mr Stuart, I'm very reluctant to start  
 11 inviting you to give me evidence on --  
 12 MR STUART: I do understand that, my Lord, and, look, I do  
 13 understand that if, in your value, you don't feel able  
 14 to net off tax or deal with those sorts of issues and  
 15 you consider that it's appropriate that somebody else  
 16 should do that, an accountant, for example, then I would  
 17 say that, as part of the remedy, you could certainly  
 18 say, "Well, the value is gross £86,000 but I direct that  
 19 the appropriate adjustment to the price payable should  
 20 be the net of corporation tax sum and I direct that that  
 21 amount shall be calculated by the independent valuer as  
 22 part of his valuation," or something along those lines.  
 23 There must be a way of fashioning that remedy --  
 24 MR JUSTICE NUGEE: Yes, okay.  
 25 MR STUART: -- if that's the point you reach.

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1 Finally, my Lord ... (Pause)  
 2 Yes, finally, my Lord, absolutely finally, I just  
 3 need to clarify what I'm saying about the February 2007  
 4 exclusion from the discussions with Mr Patel.  
 5 MR JUSTICE NUGEE: Yes.  
 6 MR STUART: Because your Lordship made the perfectly proper  
 7 point, which was that, "Well, that's not formally  
 8 pleaded and it doesn't seem formally to go into one of  
 9 the six issues very clearly."  
 10 The way in which I sought to put it earlier, and  
 11 I want to clarify now, is this: your Lordship might find  
 12 that up to 20 February 2007 there was no plan against  
 13 Ms Birdi. Indeed, she seemed to be being on the inside,  
 14 if you like, with Mr McAlindon, who had sent her text  
 15 messages, let her know what was going on, et cetera.  
 16 But what happened on 20 February 2007 and then her  
 17 complaints thereafter, in my submission, appears to have  
 18 been a turning point in the relationship between them,  
 19 and your Lordship may, therefore, find that it is highly  
 20 relevant to the question of whether, from that point  
 21 onwards -- and of course, it's only after that point  
 22 this all of our six issues start arising; none of the  
 23 points I'm raising go behind 20 February --  
 24 MR JUSTICE NUGEE: Apart from the failure to pick up  
 25 Mr Patel's extra thefts.

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1 MR STUART: No, that's on 20 February.  
 2 MR JUSTICE NUGEE: Yes.  
 3 MR STUART: That's on 20 February and even that -- it only  
 4 goes so far.  
 5 MR JUSTICE NUGEE: Because you can't quantify it?  
 6 MR STUART: Because I can't quantify it, and the £15,000 --  
 7 that's a point I should make clear: there is  
 8 a concession there.  
 9 MR JUSTICE NUGEE: You are not claiming the £15,000.  
 10 MR STUART: Ms Birdi conceded in her evidence that, although  
 11 it appears that SOG intended to charge the company --  
 12 MR JUSTICE NUGEE: They never did?  
 13 MR STUART: -- they never actually did and therefore it  
 14 doesn't feed through financially. So, my Lord, what  
 15 I say is the 20 February issue is important but it's  
 16 probably more important in trying to find --  
 17 MR JUSTICE NUGEE: Assessing the overall plot.  
 18 MR STUART: Assessing whether there came a point where the  
 19 motivation of SOG towards my client was no longer  
 20 a partnership, a friendly relationship, it was  
 21 a malicious one, in the sense of adverse to her, adverse  
 22 to her, and they took a view for whatever reason, and  
 23 the reason may well be the events of 20 February and  
 24 shortly thereafter.  
 25 Can I take just one minute?

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1 MR JUSTICE NUGEE: Of course. (Pause).  
 2 MR STUART: It's a one-sentence point. My learned friend  
 3 took you to evidence in relation to the salary, £42,000.  
 4 MR JUSTICE NUGEE: Yes.  
 5 MR STUART: He took you to Mr Parham, which I don't think we  
 6 ever really got on to.  
 7 MR JUSTICE NUGEE: Uxbridge?  
 8 MR STUART: Uckfield.  
 9 MR JUSTICE NUGEE: Uckfield?  
 10 MR STUART: Uckfield. I remember it well. And his  
 11 submission to you is that there is evidence,  
 12 therefore -- you've have got the Singh, his own matter,  
 13 in Grays and you have got the Parham in Uckfield.  
 14 My Lord, the simple point is this: the evidence is  
 15 that both of those stores were run by a husband and wife  
 16 team. It's Mr and Mrs Parham are the two A shareholders  
 17 in Uckfield, Mr and Mrs Singh were at that stage the two  
 18 A shareholders in their store. Thus, because those  
 19 A shareholders were entitled to all the profits of the  
 20 company anyway, they have a much greater ability to set  
 21 salary levels where they want to, as between themselves,  
 22 whereas what was happening here was a new JVP going into  
 23 a store where there is not a husband and wife  
 24 relationship, they are not sharing the money anyway  
 25 between them and there is a genuine setting of a proper

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1 level.  
 2 I think those are all my submissions, my Lord.  
 3 Thank you very much for sitting so late.  
 4 MR JUSTICE NUGEE: Well, no, thank you both very much for  
 5 all your assistance and I'm sorry to have asked so many  
 6 difficult -- well, they may not be difficult, but so  
 7 many questions, and, as will come as no surprise,  
 8 I shall take some time to consider my judgment. You  
 9 will have it in due course.  
 10 Just to clarify, Mr Stuart, if you want to put in  
 11 written submissions on the question of the constructive  
 12 trust of a dividend, I'll give you liberty to do that.  
 13 When do you think you might be able to let me have them?  
 14 MR STUART: Could I do it by Friday, my Lord?  
 15 MR JUSTICE NUGEE: Yes, we will say 4 pm on Friday, and both  
 16 of you, when Mr -- if Mr Justice Hildyard produces  
 17 a draft judgment --  
 18 MR POTTS: I hope it's if. Sorry, yes, I hope it's when.  
 19 MR STUART: You hope it's when.  
 20 MR POTTS: I hope there is no doubt over if.  
 21 MR JUSTICE NUGEE: Nothing is certain, Mr Potts.  
 22 MR POTTS: My Lord, no.  
 23 MR JUSTICE NUGEE: He might fall under a bus tomorrow and  
 24 then you would have to start again.  
 25 I'll give both of you liberty to make written

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1 submissions as to what, if any, attitude I should take  
 2 to that judgment, and you can do that before -- at any  
 3 time until the judgment is actually handed down, at  
 4 which stage, if I haven't heard anything, I think  
 5 I probably will look at it, as would be my normal course  
 6 in any event, not with a view to changing my mind about  
 7 anything in these proceedings, which will be based one  
 8 evidence I hear in these proceedings, but in case it is  
 9 of general or particular interest.

10 Is there anything else?

11 MR STUART: Just to mention we will be getting that local  
12 schedule of the profits.

13 MR JUSTICE NUGEE: That would be helpful.

14 MR STUART: I haven't got it yet but I will ensure that it's  
15 done.

16 MR JUSTICE NUGEE: That will be very helpful.

17 Thank you both very much, and your teams as well  
18 because it's evident that a great deal of work has gone  
19 on behind the scenes.

20 (4.59 pm)

21 (The court adjourned)

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