Neutral Citation Number: [2015] EWHC 2870 (Ch)

Case No: 11102 of 2011

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

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

Date: 13/10/2015

Before :

MR JUSTICE NUGEE

- -

Between :

MS SWARANDEEP BIRDI	**Petitioner**
- and -	
(1) SPECSAVERS OPTICAL GROUP LIMITED **(2) MR KAMALJIT SINGH** **(3) DARTFORD VISIONPLUS LIMITED** **(4) DARTFORD SPECSAVERS LIMITED**	**Respondents**

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James Stuart & Matthew Winn-Smith (instructed by **Akin Palmer LLP**) for the **Petitioner**
James Potts QC & Jack Rivett (instructed by **Taylor Wessing LLP**) for the **Respondents**

Hearing dates:
23 & 24 Oct; 27-31 Oct; 3-7 Nov; 10-14 Nov; 18-19 Nov, 2014

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Approved Judgment

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

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MR JUSTICE NUGEE

Mr Justice Nugee:

Introduction

1. This is the trial of certain issues arising on an unfair prejudice petition brought under s. 994 of the Companies Act 2006 in relation to the affairs of the 4th Respondent, Dartford Specsavers Ltd (**"Dartford"**).

2. Dartford has a share capital of £100 divided into 100 'A' shares of 50p each and 100 'B' shares of 50p each. The Petitioner, Ms Swarandeep Birdi (**"Ms Birdi"**), holds 50 of the A shares; the 2nd Respondent, Mr Kamaljit Singh (**"Mr Singh"**) holds the other 50 A shares; and the 1st Respondent, Specsavers Optical Group Ltd (**"SOG"**) holds the 100 B shares.

3. In the Petition Ms Birdi complained that SOG and Mr Singh had conducted Dartford's affairs in an unfairly prejudicial manner, and among other relief sought an order that they purchase her shares at a fair valuation. As explained in more detail below, it is now common ground that SOG will purchase her shares at a fair value determined by an independent valuation, and by Order dated 30 July 2012 Deputy Registrar Briggs directed that there be a trial whether the matters set out in particular paragraphs of the Petition constituted breaches of contractual or fiduciary duties on the part of SOG and Mr Singh such as to warrant an adjustment to the price payable for Ms Birdi's shareholding.

4. Those paragraphs give rise to 6 specific issues, which I will call **"Issue 1"**, **"Issue 2"** etc, and which I will describe in due course.

Outline facts

5. I give here an outline of the facts, without attempting at this stage to deal with the detailed facts that are relevant to each of the 6 Issues or resolve any of the contentious matters.

6. SOG, a Guernsey company, is the principal trading company of the Specsavers Group, a highly successful and prominent national and international supplier of optical services. The group has over 700 stores in the UK and Republic of Ireland and a further 775 stores in other countries worldwide. There are various companies in the group apart from SOG; one of the others is its wholly owned subsidiary Specsavers Optical Services Ltd (**"SOS"**), which is incorporated in England and Wales and is the head office for the group in the UK. Save where the context makes it appropriate to identify the particular company concerned, I will use **"Specsavers"** to refer to the group generally.

7. This litigation concerns the Specsavers store in Dartford, Kent. Specsavers stores are generally run as joint ventures between Specsavers and individuals who are known as 'joint venture partners' (**"JVPs"**). There is a separate 'store company' for each store, typically divided, as in the case of Dartford, into A shares, held by the JVPs and B shares, held by SOG. The relationship between the parties is governed by the articles of association, a shareholders' agreement, and service agreements. The usual, although not universal, model is to have one ophthalmic optician (**"OO"**) JVP and one other JVP (either a dispensing optician (**"DO"**) or a retailer). This reflects the

fact that there are two sides to the business: optics – that is, carrying out eye tests, something that has to be done by an ophthalmic optician, and sales. In very simple terms, the JVPs as A shareholders are entitled to a salary and also to the profits of the business by way of dividends, and as directors are responsible for the day to day running of the business; SOG as B shareholder does not receive dividends but does receive a management fee based on a percentage of turnover, and is also entitled to appoint the chairman of the Board of directors, with a casting vote, and so controls the Board.

8. Ms Birdi is an optometrist registered with the General Optical Council. She graduated in 1991 and joined Specsavers in 1994, initially as an employed optometrist in a Specsavers store in Bradford. She was interested in becoming a director and in 2000 she was told that there was an opportunity to do so at Dartford as the two JVPs were selling their interests. She was introduced by Specsavers to Mr Nimesh Patel (“**Mr Patel**”) as someone who was also interested in the store, and it was suggested they meet to see if they were compatible. They met and agreed to do business together. They each paid £125,000 to acquire 50 A shares, and on 20 March 2000 signed a shareholders’ agreement with SOG (later replaced by one dated 17 July 2000) (**“the Shareholders’ Agreement”**).

9. Ms Birdi also entered into a service agreement dated 29 March 2000 with the 3rd Respondent, Dartford Visionplus Ltd (**“Visionplus”**), a subsidiary of Dartford. It is common (although not universal) for Specsavers stores to be operated using a ‘dual company’ structure with not only the store company (here Dartford) but also a ‘service company’ (here Visionplus). I give further explanation of this practice, which was adopted for VAT purposes, below, but it is sufficient here to note that for most practical purposes it is not necessary to distinguish between Dartford and Visionplus: between them they operated the store.

10. I will have to set out the terms of the Shareholders’ Agreement in more detail in due course but in outline it provided for the 2 A shareholders to be A directors of Dartford and Visionplus, for SOG to nominate 2 B directors (in the event SOG itself and Dame Mary Perkins, who with her husband founded Specsavers), and for the day to day management of the business to be delegated to the A directors, with a list of matters that were not to be regarded as day to day management (and which were to be decided at a Board meeting).

11. Nothing of direct relevance to these proceedings took place between 2000 and 2006, during which time Ms Birdi accepts that her relationship with Specsavers was very good. In late 2006 however Ms Birdi was contacted by Specsavers and was told that they suspected that someone was stealing from the Dartford store and further suspected that it was Mr Patel.

12. Specsavers has a number of departments. One of these is SOS’s Loss Prevention and Audit Department (**“Loss Prevention”**) which, among other things, assists stores to avoid and detect theft. Loss Prevention was then run by Mr Mel McAlindon, and, after further investigation, he and Mr Phil Barnes (another Loss Prevention employee) came to the Dartford store on 20 February 2007 and interviewed Mr Patel. In the course of the meeting Mr Patel admitted theft. Having consulted Mr Derek Dyson (who was then Specsavers’ Retail Director and on the Board of SOG), Mr McAlindon proposed to Mr Patel that if he resigned, Specsavers would purchase his shares at fair

value less the sums he had stolen from Dartford and the costs of the investigation. Mr Patel accepted the proposal, resigned as employee and as director of Dartford and Visionplus, and sold his A shares to SOG. The shares were transferred on 19 March 2007, the price paid being £55,000. Specsavers says that this represented the fair value of £70,000 less £15,000 for the costs of the investigation, and that the amount which Mr Patel admitted stealing (£4,180) was largely recovered by offsetting £3,752.62 owed to Mr Patel on his loan account.

13. Ms Birdi complains about these arrangements and some minor costs paid to Mr Patel and this is Issue 1.

14. In the course of his interview Mr Patel made a number of off the record allegations against Ms Birdi, the principal allegations being that she had put her husband Mr Mushtaq Rehman and her father on the payroll but neither had done work such as to justify the amount paid them; and that she had had work done at the Dartford store without complying with Specsavers' practices and procedures.

15. That led to Ms Birdi being suspended on 27 March 2007 to allow the allegations to be investigated. After investigation, and an interview by Mr Neil Hamilton (a Retail Development Consultant in Specsavers' Retail Support Team) in July 2007, disciplinary proceedings were commenced against her. A disciplinary hearing was held on 20 September 2007 and conducted by Mr Mark Raines (then Director of Retail Development at SOS). He found some (but not all) of the allegations against Ms Birdi proved, and considered that her behaviour could amount to gross misconduct warranting summary dismissal from her employment; but in the light of her unblemished record and length of service, he issued her instead with a final written warning. Ms Birdi's suspension was lifted on 3 October 2007.

16. Ms Birdi appealed against Mr Raines' decision. The appeal was heard by Mr John Perkins (Dame Mary Perkins' son and then Joint Managing Director and Group Finance Director of Specsavers). By letter dated 12 December 2007 he upheld Mr Raines' decision.

17. During Ms Birdi's suspension there was no A director to run the Dartford store on a day to day basis (as Mr Patel had resigned and Ms Birdi was suspended). Specsavers therefore arranged for temporary managers to come in and run the store. Specsavers levied substantial charges against Dartford during this period, amounting to some £86,000, the majority of which consisted of charges levied by Loss Prevention for emergency management cover. Ms Birdi complains about these charges (which reduced Dartford's profits and hence her entitlement to dividends) and this is Issue 2.

18. One of the managers running the store during Ms Birdi's suspension was Mrs Carol Slark (formerly Carol Groves). In May 2007 she proposed that the salaries of the staff working in the store be increased and that a new bonus scheme for staff be introduced. Ms Birdi complains of these decisions, which increased the costs of the Dartford store and so again reduced its profits and her dividends, and this is Issue 3.

19. After Ms Birdi's suspension was lifted and she was back running the store, she raised a formal grievance against Mr McAlindon, largely in relation to the way in which he had dealt with the investigation into Mr Patel and its aftermath. This grievance was raised on 27 February 2008; it was considered by Mr David Clark (Director of

Business Performance at SOS); and he dismissed it in a letter dated 16 June 2008.

20. Specsavers was meanwhile looking for a new JVP to introduce into the store. In the event they decided on Mr Singh, against Ms Birdi's opposition. SOG sold him the A shares that they had acquired from Mr Patel, and he was formally appointed director of Dartford, and employed under a service contract with Visionplus, on 17 July 2008, starting work at the store on 23 July 2008. His starting salary was £42,000. Ms Birdi complains that this was in excess of what his role reasonably demanded, and this is Issue 4.

21. The relationship between Mr Singh and Ms Birdi was never very good and deteriorated rapidly. After numerous disputes between them, in July 2009 Mr Singh raised a formal grievance against Ms Birdi, complaining among other things that she was not doing 4 days of ophthalmic testing a week, something which Mr Singh said she had agreed to do. On 13 August 2009 Ms Birdi raised her own formal grievance against Mr Singh, complaining that he had been working in another Specsavers store in Grays, Essex. The complaints were discussed at a board meeting of Dartford on 20 August 2009 (which Ms Birdi did not attend); among other things this Board meeting passed a resolution recording that Ms Birdi had agreed in September 2008 to 4 full days ophthalmic testing per week (**"the Testing Resolution"**).

22. The Board also resolved that SOG be authorised to carry out an investigation of both complaints (so far as not already resolved) and this was carried out by Mr Alan Goddon, a Retail Development Consultant in Specsavers' Retail Support Team. He issued a report in November 2009; so far as Ms Birdi's complaint was concerned, he largely did not uphold it (but did in some minor respects). Ms Birdi appealed this decision; the appeal was heard by Mr Paul Frewin (another Retail Development Consultant in the Retail Support Team) and dismissed.

23. Ms Birdi remained adamant that she had never agreed to unqualified 4-day testing. In December 2009 she was told by Mr Raines that refusal to comply with the Testing Resolution would result in disciplinary proceedings; in February 2010 a Board meeting of Dartford resolved that SOG be authorised to initiate disciplinary proceedings against Ms Birdi for failure to comply with the Testing Resolution; and in May 2010 (after the possibility of mediation had been raised but not proceeded with) Mr Raines said at a Board meeting of Visionplus that he considered that the company had no choice but to put into effect disciplinary procedures against Ms Birdi.

24. There were further problems in the store. In May 2010, an employee, Ms Jas Khunkhuna, raised a complaint against Mr Singh, accusing him of sexually inappropriate conduct. Another member of staff, Ms Fatima Gulamali (or Khan), complained that Mr Singh had extended her probationary period. The complaints were investigated by Mr Riyaz Rajan (another Retail Development Consultant in the Retail Support Team), who in the event upheld neither complaint. On 1 June 2010 Ms Khan resigned; Ms Birdi supported her reinstatement, at which Mr Singh wrote to Specsavers saying that 5 of the 8 retail staff had threatened to resign if she were reinstated.

25. In this situation Specsavers initiated an investigation into both Mr Singh's and Ms Birdi's conduct and their working relationship; and suspended them both on 8 June 2010. The investigation was carried out by Mr Clark: he interviewed most of the staff

at the store and concluded that Mr Singh was not the cause of the problems at the store. Mr Singh's suspension was therefore lifted on 1 July 2010.

26. However Mr Clark decided that further investigation was needed in relation to Ms Birdi and she remained suspended. On 22 July 2010 he completed his investigation report, recommending that disciplinary proceedings be taken against Ms Birdi to consider whether she should be dismissed for gross misconduct or for some other substantial reason. A Board meeting of Visionplus on 8 August 2010 accepted Mr Clark's recommendations and resolved to instigate disciplinary proceedings against Ms Birdi, with her remaining suspended.

27. The disciplinary hearing was held by Mrs McIntyre in October 2010. In her decision letter dated 14 December 2010 Mrs McIntyre found that Ms Birdi had repeatedly refused to follow the Testing Resolution for no good reason, that she was responsible for the irretrievable breakdown in relationship between Ms Birdi and Mr Singh, and that she had been guilty of gross misconduct that would justify summary dismissal. She recommended however that Ms Birdi be dismissed instead for 'some other substantial reason' (in which case she would receive 10 weeks' pay in lieu of notice).

28. At a Board meeting of Visionplus on 21 December 2010 the Board accepted Mrs McIntyre's recommendations and resolved that Ms Birdi be dismissed for some other substantial reason. Ms Birdi appealed that decision; this was considered, and rejected, by Mr Dyson, on 17 March 2011.

29. Ms Birdi has taken proceedings for unfair dismissal in the Employment Tribunal. I was told that those proceedings were currently stayed and I am not concerned with them. In these proceedings however Ms Birdi complains of the costs of the investigation, suspension and disciplinary proceedings, and this is Issue 5.

30. After losing her employment, and position as director, Ms Birdi nevertheless remained the owner of the A shares in Dartford. As such she remained entitled to share in the profits of the store by way of dividend. She complains however that no dividends were declared and that instead the profits of the store were given to Mr Singh by artificially increasing his salary and awarding him bonuses. This is Issue 6.

The main documents

31. Before coming to the detailed facts I should refer to the main documents governing the relations between the parties.

32. Dartford was incorporated on 22 June 1994 with a share capital of £100, divided into 100 A shares of 50p each and 100 B shares of 50p each. By Article 5 of its Articles of Association the A shares carry the right to receive that part (including the whole) of the profits of the company which the Directors should from time to time determine to distribute as dividend; the B shares carry no right to dividend but confer the right to appoint the Chairman of the Board of Directors and of the general meeting of the Company. The Articles incorporated Table A under which (by reg 88) the Chairman of the Board has a second or casting vote, as does (by reg 50) the Chairman of the general meeting. At all times SOG was the holder of all the B shares and therefore able to appoint the Chairman of the Board and of general meetings.

33. Visionplus was also incorporated on 22 June 1994. Its share capital was £100 divided into 200 shares of 50p each. At all material times 199 of the shares were held by Dartford, and the remaining share held jointly by Dartford and SOG as nominee for Dartford, so that it was a wholly-owned subsidiary of Dartford. Its Articles also incorporated Table A, which (by reg 93) provided that a resolution in writing signed by all the directors entitled to receive notice of a meeting should be as valid and effectual as if passed at a meeting duly convened and held; and article 20(a) provided that in the case of a corporate director the signature of a director or secretary should be sufficient for these purposes. By reg 91 of Table A the directors might appoint one of their number to be chairman of the board; SOG acted as chairman, although I do not think I had any evidence as to when it was appointed.

34. The Shareholders' Agreement was initially made between SOG, Ms Birdi (described as "Optician"), Mr Patel (described as "Dispenser") and Dartford itself, and dated 17 July 2000. So far as material it provided as follows:

(1) The particulars recorded the parties' shareholdings, namely 50 A shares each for Ms Birdi and Mr Patel, and 100 B shares for SOG.

(2) Clause 2 provided for the steps to be taken on company formation. These included the appointment of 'the A Directors' and 'the B Directors' as the directors of Dartford and any subsidiary (which in practice meant Visionplus), the A Directors being the registered holders of the A Shares (ie Ms Birdi and Mr Patel), and the B Directors being any persons (including SOG) nominated by SOG from time to time so that there would always be an equal number of A and B Directors. In practice at all material times the B Directors (both of Dartford and of Visionplus) were SOG itself and Dame Mary Perkins; SOG was also the Company Secretary of both Dartford and Visionplus.

(3) Clause 3.1.1 contains a delegation by the Directors to the A Directors of all their powers of:

> "day to day management of the business of [Dartford and Visionplus]."

This is a provision on which Ms Birdi places some reliance because her case is that certain matters should have been decided by the A Directors (including her) and were not.

(4) Clause 3.1.1 is supplemented by Clause 3.2 which contains a long list of matters that are agreed not to be matters of day to day management including (by clause 3.2.8) the employment or dismissal of officers or staff at salaries or rates of pay in excess of £10,000 pa (increased annually in line with RPI); and (by clause 3.2.14) the variation or waiver of the terms of the Service Contract of any A Director or the payment of any bonus or the provision of any other benefit to any A Director.

(5) One of the other matters on the list is (by clause 3.2.7) the carrying on of any business by Dartford or any subsidiary other than that of retail opticians under the trade name "Specsavers" and in accordance with the Specsavers Manual. The Specsavers Manual is defined as the written specification of methods,

processes, techniques, systems and schemes devised by Specsavers to be observed by Dartford and any subsidiary in operating its business. In this slightly oblique way, the Shareholders' Agreement effectively provides that the business is to be run in accordance with the Manual.

(6) Clause 3.1.2 contains a delegation by the Directors to the B Directors of all their powers of:

> "signing all cheques bank or group treasury mandates transfers of funds and other instructions to the bankers of [Dartford and Visionplus] or the group treasury to the B directors."

In fact I was told by Mr Stuart that Dartford did not have a bank account in its own name, and that all payments in and out were done through the group treasury system: indeed clause 9.1 required any payments received to be immediately credited to accounts nominated by SOG, and clause 9.2 required all cheques and mandates drawn on any account to be signed by SOG or its nominee. Taken together these provisions therefore enabled SOG to keep a tight control of the finances of the store. By clause 9.3 SOG warranted that:

> "all monies drawn from the accounts of [Dartford or Visionplus] shall only be applied to meet their respective direct business expenses and to meet capital expenditure authorised by resolution of the Directors."

(7) Clause 3.3 provided that all matters save those expressly delegated under clause 3.1:

> "shall be determined at a duly convened meeting of the board of Directors or general meeting of [Dartford or Visionplus] in accordance with the Articles of Association of that company."

This again is a provision on which Ms Birdi places reliance as she complains that decisions which should have been taken at Board meetings were not.

(8) Clause 3.4 provided that any dispute as to the extent of delegation of powers in clause 3.1 or as to whether a matter constituted day to day management should be referred to an independent expert.

(9) Clause 4.1 provided for Dartford's dividend policy as follows:

> "If in respect of any accounting period [Dartford] shall have profits available for distribution (as defined in the Companies Act 1985) and all the Loans have been repaid in full the Shareholders shall procure that all such profits shall be applied in the payment of cash dividends to the maximum level to the holders of the A shares after making any transfers to reserves consistent with normal commercial requirements of businesses similar to those carried on by [Dartford and Visionplus]."

The reference to Loans has no application in the case of Dartford as the Shareholders' Agreement records that there were no Loans. Clause 4.2 provided for any dispute as to the amount of the profits available for

distribution or the maximum level of cash dividend in respect of any accounting period to be referred to an independent expert. Clause 4.1 is significant because it is the provision which entitles the A shareholders to receive the profits of the business. It can be seen that SOG has no right to share in profits.

(10) Instead, clause 5.1 entitles SOG to a management fee based on turnover, as follows:

> "In return for the services and support supplied by [SOG] to [Dartford and Visionplus] [Dartford] shall pay in respect of each Accounting Month the Management Fee together with VAT thereon (if any) within one month of the end of each month to which the Management Fee relates."

The Management Fee was 6.5% of Gross Sales (as defined in clause 5.2).

(11) Clause 15 prevented an A Director from transferring or disposing of any of his A shares (other than pursuant to a purchase notice under clause 16) except to a person first approved by SOG as an acceptable transferee. It provided that such approval would not be unreasonably withheld if:

> "15.1.1 such person is an individual who is registered with the General Optical Council or any body replacing it as an ophthalmic optician or if the A director in question is a dispenser as a dispensing optician or if the A Director in question is described in this Agreement as a retailer such person who [SOG] reasonably considers to possess the appropriate retailing skills and
>
> 15.1.2 such person covenants with [SOG] in a deed to perform and observe all the obligations and conditions on the part of the relevant A Director (either alone or with others) contained in this Agreement."

The reference to the A Director being described as a 'retailer' reflects the fact that in some stores instead of an ophthalmic optician and a dispensing optician, the model was to have an ophthalmic optician and a person who was not a qualified optician but had skills in retailing.

(12) Clause 16 enabled SOG to serve a Purchase Notice requiring an A Director to sell his or her shares to SOG at fair value in certain circumstances including if the A Director was an employee and ceased to be employed for any reason.

35. In June 2008 a Deed of Adherence was prepared to adhere Mr Singh to the Shareholders' Agreement. As drawn, it was to be made between SOG, Mr Singh, Ms Birdi and Dartford but Ms Birdi never executed it and it was executed by SOG, Mr Singh and Dartford alone, and dated 25 June 2008. Its operative provisions contained, among other things, a covenant by Mr Singh, expressed to be made separately with each of SOG, Ms Birdi and Dartford, to observe and be bound by the Principal Agreements as defined (that is the Shareholders' Agreement and certain ancillary

agreements). It might be thought doubtful whether Ms Birdi was technically in a position to enforce this covenant, having not executed the Deed, or whether indeed there was ever any contractual relationship between Mr Singh and Ms Birdi at all (other than that constituted by the Articles of Dartford of which they are both members), but Mr Potts QC, who appears for the Respondents, took no point on this and accepted in terms that Mr Singh was bound by the Shareholders' Agreement in favour of Ms Birdi.

36. The final document which I should refer to at this stage is Ms Birdi's Service Contract. This was dated 20 March 2000 and made between Visionplus (referred to as "the Company") and Ms Birdi (referred to as "the Executive"). Relevant provisions are as follows:

(1) Clause 1 provided that Visionplus should engage Ms Birdi as optician director for an initial period of 2 years and should continue to do so thereafter subject to the terms of the agreement.

(2) Clause 2 provided that:

> "The Executive shall perform such duties and exercise such powers as shall from time to time be assigned to him by the Company's Board of Directors ("the Board")."

(3) Clause 9.2 permitted Visionplus to terminate the agreement with immediate effect in the event, inter alia, of gross misconduct.

(4) Clause 10.2 provided that on her employment terminating for any reason Ms Birdi should resign any office of Visionplus or associated company (ie Dartford) without compensation for loss of office.

(5) Clause 12.2 provided:

> "If the Company considers that the Executive may have been guilty of any misconduct or breach of duty which if established would justify his dismissal under the terms of this Agreement (whether with or without notice) then the Company shall be entitled to suspend the director from his duties on full pay for so long as may be reasonably necessary to complete such investigation and to hold a disciplinary hearing."

The reference to matters justifying dismissal with notice is unexplained as there does not appear, unless I have missed it, to be any express provision specifying the circumstances in which Visionplus is entitled to terminate the Agreement with notice.

(6) Clause 12.3 provided:

> "The Executive should refer in writing any grievance about his employment hereunder or any disciplinary decision relating to him to any member of the Board and the reference will be dealt with by discussion and a majority decision of those present at the relevant Board Meeting at which the grievance is discussed."

37. Mr Singh also entered into a service contract with Visionplus, in his case dated 17 July 2008. It is in a different form, but it is not I think necessary to refer to its provisions.

Relationship between Dartford and Visionplus

38. I referred above to the dual company structure, which was adopted at Dartford, as at many of Specsavers' stores, for VAT purposes. The precise details do not matter but a simplified account is as follows. The role of the store company (Dartford) is to buy goods such as frames and lenses (from Specsavers) and sell them on wholesale to its subsidiary services company (Visionplus); none of Dartford's business is exempt from VAT with the result that it can recover 100% of its input VAT. The role of the services company (Visionplus) is to buy goods wholesale from Dartford, operate the store, administer eye tests and sell goods retail to the public; part of this business (such as supplying eye tests) is exempt from VAT, and hence Visionplus can only recover part of its VAT.

39. This dual structure can be seen reflected in the respective accounts of the companies. Taking the year to 30 September 2009 as an example (both companies made up their accounts to 30 September in each year), Dartford's accounts describe its principal activity as "supplier of ophthalmic goods" and show purchases of £273,489 and turnover of £360,385; Visionplus's accounts describe its principal activity as that of "ophthalmic opticians" and show purchases of £360,385 and turnover of over £1.2m. It can be seen therefore that Dartford's entire turnover consists of sales to Visionplus (and from the detailed profit and loss accounts it can be seen that they consist of frames, lenses, contact lenses, accessories etc), whereas Visionplus's turnover consists not only of sales of these items to the public but also of eye tests. The respective profit and loss accounts show that certain expenses are charged to Dartford (such as rent, advertising and SOG's management fee), but other expenses are charged to Visionplus (most notably directors' and other staff salaries); there are also intercompany charges.

40. The practical effect is that for most purposes it is not necessary to draw a distinction between the two companies and their respective businesses. No doubt it was important to distinguish between them for accounting and VAT purposes, and also for certain technical purposes: for example it was Visionplus not Dartford that employed Ms Birdi under her service contract, and where there is a formal Board meeting, it is a Board meeting of one or other company not of both. But the directors of each company were the same; and in commercial terms the two businesses were simply two parts of the single enterprise of running the store and can in effect be treated as a single business.

41. Moreover for the purposes of looking at the performance of the store it makes more sense to look at the consolidated accounts rather than the accounts of the individual companies. Thus for the year ended 30 September 2009, the accounts of Dartford show a modest profit (before taxation) of £26,260 and the accounts of Visionplus show a healthier figure of £284,582. These figures however are apt to mislead as the profit for Dartford takes account of a dividend of £170,000 from Visionplus. The consolidated accounts give the profit before taxation as £140,842 (which, as can be seen, is the sum of £284,582 and £26,260, less the intercompany dividend of £170,000 which would otherwise be counted twice); and this is a better indicator of the profitability of the store for the year than either of the unconsolidated accounts.

Procedural position

42. It is not necessary for me to detail the procedural history of the claim, but I should explain what it is that I am trying. On 20 December 2011 Ms Birdi issued a petition under s. 994 of the Companies Act 2006 (**"the Act"**), which provides that a member of a company may apply to the Court for an order under Part 30 (ss. 994 to 999) of the Act on the ground that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of the members generally or some part of its members. Her petition alleged that the actions of SOG and Mr Singh were in a number of respects breaches of their duties as directors, fiduciary duties and the terms of the Shareholders' Agreement.

43. Under s. 996 of the Act, the Court has wide-ranging powers to make such order as it thinks fit for granting relief in respect of the matters complained of, and as issued Ms Birdi's petition sought various alternative relief, including an order requiring SOG and Mr Singh to resign as directors. But she also sought in the alternative an order that they purchase her shares at a fair value, and as I have already referred to, it is now agreed by both sides that her shares will be purchased at a fair value to be determined by an independent valuer. There has however been some argument before me as to what relief might be appropriate were I to find breaches of duty by the Respondents, and since it may have a bearing on this question, I should set out, as briefly as possible, the process by which the parties have got to the present position, as follows.

44. As already referred to, clause 16 of the Shareholders' Agreement entitled SOG to require a shareholder in Dartford to sell his or her shares to it in certain circumstances, including (by clause 16.2.5) in the event that a shareholder who had been an employee of Dartford or any subsidiary ceased to be employed. On 14 March 2012 SOG exercised or purported to exercise this right (on the ground that Ms Birdi had ceased to be employed by Visionplus) by serving a Purchase Notice on her. The effect of that was to require her to sell her shares to SOG at a 'fair value' which, in default of agreement, was (by clause 16.5) to be referred to an independent expert to determine on various assumptions and on the basis that the shares should be valued at a rateable proportion of the total value of all the issued shares in Dartford without a minority discount.

45. On the same day Taylor Wessing (SOG's solicitors) wrote to Akin Palmer (Ms Birdi's solicitors) referring to the Petition and the Purchase Notice. Recognising that the allegations in the Petition might not be suitable for an expert to determine, they made an offer to buy Ms Birdi's shares at a price to be determined by an independent expert on the basis set out in the Shareholders' Agreement but also (by para 3(3)) on the basis of:

> "taking into account such matters as are set out in paragraph 5 below as the Court determines constituted breaches of fiduciary duty on the part of our client which ought to be taken account of in determining the value of your client's shares."

Paragraph 5 then provided that there should be a trial before the Companies Court to determine whether matters set out in specified paragraphs of the Petition:

> "involved breaches of fiduciary duty by our client as a director of the

Company such as to warrant an adjustment to the price payable for your client's shareholding, and the value of those claims."

46. There was then considerable correspondence between the parties on various aspects of this proposal, the details of which it is not necessary to set out. Akin Palmer wanted the ambit of paragraph 5 to be wider and to include allegations of breach of contract, which Taylor Wessing agreed to, and by 17 April 2012 all disagreements had been resolved save for who was to bear the costs of the Petition to date: Akin Palmer thought that the Respondents should, but Taylor Wessing thought that it should be left to the judge trying the issues. On 17 April therefore Taylor Wessing restated the offer, which, so far as material, was in largely similar form to their original offer: paragraph 3(e) was the same save that it now referred to "breaches of contractual and/or fiduciary duties" and paragraph 5 was expanded to refer to more of the allegations in the Petition as follows:

> "There shall be a separate trial before the High Court of Justice in London (Chancery Division, Companies Court) to determine whether the matters set out in paragraphs 17, 25, 26, 27, 28, 33(vi)(a), 36(a), 36(c), 36(d) and 37(a) of the Petition involved breaches of contractual and/or fiduciary duties on the part of our client such as to warrant an adjustment to the price payable for your client's shareholding, and the value of those claims."

On 18 April Akin Palmer wrote confirming that "the only issue between us is the costs of the Petition."

47. SOG made an application to the Court which came before Deputy Registrar Briggs on 30 July 2012. He made an order directing the trial of issues in the terms agreed between the parties, namely:

> "There be a trial to determine whether the matters set out in paragraphs 17, 25, 26, 27, 28, 33(vi)(a), 36(a), 36(c), 36(d) and 37(a) of the Petition constituted breaches of contractual and/or fiduciary duties on the part of [SOG] and/or [Mr Singh] such as to warrant an adjustment to the price payable for Ms Birdi's shareholding in [Dartford]."

He also directed that the costs of the Petition be determined by the Judge hearing the trial of the issues, thereby preferring the Respondents' position (and ordered Ms Birdi to pay the costs of the application).

48. The position that has been reached therefore is as follows:

(1) It is common ground that the parties are agreed that SOG will purchase Ms Birdi's shares at fair value to be determined by a valuation by an independent valuer, acting as an expert, and on the basis of the Shareholders' Agreement subject to adjustment in accordance with paragraph 3(e) of Taylor Wessing's offer.

(2) Neither side wished me to concern myself with precisely when or how that agreed position came about. The position of Mr Potts is that SOG was entitled to exercise, and has duly exercised, its contractual option under the Shareholders' Agreement but has agreed to the inclusion of paragraph 3(e) to

accommodate the fact that the issues in the petition are not really suitable for an accountant, being mixed questions of law and fact. Mr Stuart, who appears for Ms Birdi, was clear however that as far as he was concerned it was no part of my function to decide whether SOG has validly exercised the option; and Mr Potts for his part accepted that I was not concerned with quite how the parties got to an agreement.

(3) Nor did either party ask me to resolve when the parties reached agreement. This may be potentially relevant to one issue as I will explain later, but subject to that I am not concerned with it. Equally, although there was some debate about it, neither side asked me at this stage to determine the date at which the shares are to be valued.

(4) Rather the purpose of the present trial is to determine whether the matters complained of in the 6 specific issues which I have referred to (a) constituted a breach by SOG or Mr Singh of their contractual or fiduciary duties and (b) if so whether this "warrants an adjustment to the price payable" for her shares.

(5) Part (a) of this obviously requires finding the facts, identifying the relevant duty relied on, and then assessing whether there has been a breach, in the familiar way.

(6) Part (b) of this involves further, and rather different, considerations. Mr Potts submitted that the 6 issues were pleaded as instances of unfairly prejudicial conduct, and that as such Ms Birdi needed to satisfy me in each case of four things: (i) that the matters complained of constituted 'conduct' of the affairs of the relevant company; (ii) that that conduct was 'prejudicial' to the interests of the members generally or of some part of the members including herself; (iii) that the conduct or act was 'unfair'; and (iv) that the Court should in all the circumstances exercise its discretion to order an adjustment to the price. Mr Stuart accepted this statement of the position.

49. Two points arise from that which it is worth mentioning now. First, a very large number of factual issues were aired in the course of the proceedings. Some of them no doubt overlap with the Employment Tribunal proceedings. I do not see it as my task in this trial to resolve all the factual disputes which were raised in the course of the evidence, save insofar as it is necessary or helpful to do so to reach a conclusion on the 6 specific issues.

50. Second, there is an issue between the parties, to which I will have to return, as to the circumstances in which breaches do "warrant an adjustment to the price". Mr Stuart's position is that if, for example, I find that £10,000 of costs was wrongly charged to Dartford in breach of contract or breach of duty, I can direct an adjustment to the price of £5,000 on the simple basis that as holder of 50% of the A shares Ms Birdi was entitled to be paid 50% of the profits by way of dividend and if the profits should have been £10,000 higher, she should have received by way of dividend, and should now receive by way of adjustment to the price for her shares, £5,000. Mr Potts says that this is not so: I am not trying an action for damages for breach of contract or assessing compensation for breach of duty; I am determining whether any of the matters set out in the Petition are such as to justify an adjustment to the price and that requires me to find that they constitute unfair prejudice of the sort that has a

continuing effect on the value of the shares. This may be an issue of some potential significance, which I will return to after setting out my findings on the 6 issues.

The law

51. Before coming to those issues I should briefly refer to the law. I was helpfully referred to various authorities on s. 994 of the Act (and its predecessor, s. 459 of the Companies Act 1985). For the most part there was little dispute between the parties as to the principles.

52. Under s. 994 of the Act a member of a company may invoke the Court's jurisdiction on the ground that:

> "the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of the members generally or some part of its members (including at least [the petitioner])."

53. I propose to consider this under certain heads, the first of which is "conduct of the company's affairs". Since a petitioner must be a member of "a company" and can only complain of the conduct of the affairs of "the company", it is evident that "the company" here means the company of which the petitioner is a member. This is in the present case Dartford, of which Ms Birdi is undoubtedly a member. She is not a member of Visionplus, but the parties are agreed both that as a matter of law the conduct of a subsidiary can in an appropriate case be regarded as part of the conduct of the affairs of its holding company (see *Rackind v Gross* [2004] EWCA Civ 815 per Sir Martin Nourse at [26] saying that the expression "the affairs of the company" is one of the widest import); and that as a matter of fact the present is such an appropriate case. I agree that in the circumstances of this case, which I have already referred to, no sensible distinction can be drawn between conduct in relation to Visionplus and conduct in relation to Dartford as they are in practice complementary parts of a single business. So anything done in relation to Visionplus is something of which Ms Birdi can potentially complain.

54. Mr Potts also referred me to *Re Coroin Ltd* [2012] EWHC 2343 (Ch) at [626] where David Richards J referred to the fact that s. 994 is concerned with conduct of the affairs of *the company* and is not directed at the activities of shareholders as such; and at [627] where he rejected a submission that *Blackmore v Richardson* [2005] EWCA Civ 1356 demonstrated that dealings by shareholders concerning their shares might be part of the affairs of the company. Mr Potts said that this was relevant to Issue 1 which concerned the terms on which SOG acquired Mr Patel's shares. I will consider this when I come to Issue 1.

55. Nothing much need be said about the requirement for the conduct to be "prejudicial". Ms Birdi says that the acts she complains of have damaged her financially (by reducing the profits of the business and hence her entitlement to dividends) and it is not in doubt that prejudice certainly includes damage to the financial position of a member: *Re Coroin Ltd* at [630].

56. There is one point that it is worth noting however. The main thrust of Ms Birdi's case is (in brief summary) that Specsavers (and Mr Singh) used their powers not bona fide in the interests of the company but to benefit themselves at her expense, ultimately

with the aim of getting her out of the company. If this case is made out, there is no doubt that it was prejudicial conduct. In relation to some of the issues however Ms Birdi has a secondary case which is that decisions affecting the companies were not made in accordance with the agreed procedure in the Shareholders' Agreement, being unilaterally made by Specsavers when they should either have been decided by the A Directors as being day to day management or considered at a formal Board meeting. Mr Stuart accepted however that if I found that a Board meeting should have been held and was not, but that if it had been the same decision would have been made, then the mere failure to hold a Board meeting would probably not be prejudicial, and certainly not unfairly prejudicial, as no unfairness was caused by the failure to hold the Board meeting: see also *Re Sunrise Radio Ltd* [2009] EWHC 2893 (Ch) at [7] per HHJ Purle QC where he said that irregularities are likely to be ignored if the outcome would have been no different if the directors had scrupulously observed their duties. Mr Stuart submitted however both that the onus was on the Respondents to establish this, and that on the facts it could not be said that it would not have made any difference if the correct procedures had been gone through. I will consider these points as necessary in the context of the specific issues.

57. The conduct must also have been "unfairly" prejudicial. What this requires has been elucidated in two judgments by Lord Hoffmann, once as Hoffmann LJ in the Court of Appeal in *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 17-20 (see also the judgment of Neill LJ at 30-32), and again in the House of Lords in *O'Neill v Phillips* [1999] 1 WLR 1092 at 1098-1102. Since there is no dispute between the parties, it not necessary to cite extensively from these judgments, but the principles can be summarised as follows:

(1) The wording "unfairly prejudicial" is deliberately imprecise, which was chosen in contrast to the language of "oppressive" used in s. 210 of the Companies Act 1948 (which had been restrictively interpreted): *Harrison* at 17d. They are general words and should be applied flexibly: *Harrison* at 30e-g.

(2) It does not however enable the Court to do what the individual judge thinks to be fair; the concept must be applied judicially: *O'Neill* at 1098D.

(3) A company is a commercial relationship, the terms of which are set out in the articles of association, and sometimes collateral agreements between shareholders. Since fairness requires honouring agreements, the starting point is to ask whether the conduct complained of is in accordance with the rules which the shareholders have agreed; and a member of a company will not ordinarily be able to complain unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted: *Harrison* at 17i-18a, 31d-e, *O'Neill* at 1098G-1099A.

(4) This includes the principle that the powers which the shareholders have entrusted to the board are fiduciary powers which must be exercised for the benefit of the company as a whole. If the board act for an ulterior purpose they step outside the bargain between the shareholders and the company: *Harrison* at 18a-f, 31g-h.

(5) But not every trivial or technical breach is to be characterised as unfair; what

is required is some visible departure from the standards of fair dealing: *Harrison* at 18g-i (cf *Re Sunrise Radio Ltd* [2009] EWHC 2893 (Ch) at [7] per HHJ Purle QC where he said that "isolated trivial complaints" which had no impact on the value of the petitioner's shares or upon any realistic assessment of the objective assessment of the integrity and competence of the board, will not be visited by the threat of an unfair prejudice petition).

(6) Even outside breaches of the articles or a shareholders' agreement, or misuse of the fiduciary powers of the board, there may be cases where equitable considerations make it unfair for one party to rely on their strict legal rights: *Harrison* at 19a-h, 31h-32e, *O'Neill* at 1099A-H.

(7) But this is not so in all cases. By reference to what Lord Wilberforce said of the "just and equitable" winding up ground in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, it can be seen that in very many cases, even in small private companies, the association is a purely commercial one and it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more: *Harrison* at 19j-20b. What is generally required is some personal relationship or personal dealings between the parties; in a quasi-partnership company the limits will usually be found in the understandings between the members at the time they entered into the association: *O'Neill* at 1101D-G.

58. The next question is the duties owed by the Respondents, which can be divided into duties as directors and contractual duties. So far as duties as directors are concerned, by s. 170(1) of the Act the general duties owed by a director of a company are now those found in ss. 171 to 177. These sections came into force on 1 October 2007, and by s. 170(3) replace the common law and equitable principles that formerly applied to directors. Many of the events with which I am concerned took place after 1 October 2007 and the statutory duties therefore apply. But s. 170(3) and (4) provide that the general statutory duties are based on the common law rules and equitable principles formerly applicable, and are to be interpreted and applied in the same way as the corresponding common law rules and equitable principles; and it was common ground before me that in relation to events before 1 October 2007 I could proceed on the basis that the directors' duties were exactly the same as those now found in ss. 171 to 177.

59. These duties are in summary:

(1) a duty to act in accordance with the company's constitution (s. 171(a))

(2) a duty only to exercise powers for the purposes for which they were conferred (s. 171(b))

(3) a duty to act in the way in which the director concerned considers in good faith would be most likely to promote the success of the company for the benefit of its members as a whole (s. 172(1))

(4) a duty to exercise reasonable care, skill and judgment (s. 174(1))

(5) a duty to avoid conflicts of interest (s. 175(1))

(6) a duty not to accept benefits from third parties (s. 176(1)), and

(7) a duty to declare his interest in a proposed transaction or arrangement with the company (s. 177(1)).

There is also under s. 173(1) a duty to exercise independent judgment, but breach of this is not alleged.

60. Much of this is familiar and unexceptionable. The general duty of a director in s. 171(b) only to exercise powers for the purposes for which they are conferred is simply an illustration, applied to directors of companies, of a much wider principle applicable generally, which is trite law, that any power can be exercised only for the purpose for which it is conferred, and not for any extraneous or ulterior purpose; and the duty in s. 172 to act in the way that the director considers in good faith would be likely to promote the success of the company for the benefit of its members as a whole is I think itself essentially a facet of this duty, as the purpose for which powers are conferred on the directors of a company is self-evidently to enable them to act in the best interests of the company: it is not intended that they should use their powers for any other purpose.

61. Mr Potts however drew my attention to the well-established principle that the s. 172 duty is to act in the way that *the director believes* (not the way the Court believes) would be most likely to promote the success of the company. The duty is a subjective one, the question being whether the director honestly believed that his act was in the interests of the company (*Regentcrest plc v Cohen* [2001] 2 BCLC 80 at [120] per Jonathan Parker J); and even an unreasonable belief that a particular action was in the best interests of the company does not put a director in breach of duty if the belief is honestly held (*Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598 at [97] per Mr Jonathan Crow).

62. More generally, the role of the Court is not to second-guess management decisions if reached bona fide: see *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 832D-F where Lord Wilberforce said (a propos of a question whether a company was in fact in need of capital):

> "Their Lordships accept that such a matter as the raising of finance is one of management, within the responsibility of the directors: they accept that it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management's decision, on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at."

63. *Howard Smith v Ampol* is also instructive on the question whether directors are exercising a power for the purposes for which it was given. In that case the relevant power was the power of allotting shares, and the question was whether this had been done to raise capital or to dilute the power of the then majority shareholders so as to advantage a then minority shareholder. Lord Wilberforce said that the correct

approach to such a question is to start with a consideration of the power whose exercise is in question, define the limits within which it may be exercised, examine the substantial purpose for which it was exercised, and reach a conclusion whether that purpose was proper or not (at 835F-H). As this summary shows, if the purpose is held to have been an improper one, it does not matter that the directors bona fide thought it was in the interests of the company, so to this extent it is an objective assessment; but the identification of the directors' purpose is a question of fact as to what their motive was. Moreover if they had mixed motives, it appears that the relevant question is what their primary motive was.

64. So far as contractual obligations are concerned, for the most part these do not give rise to any difficulty, but there is one issue on which I heard some argument. Ms Birdi's pleaded case asserts (under the heading "Quasi-partnership") that she and SOG agreed to operate the business as a joint venture in the spirit of quasi-partnership, with an expectation that both parties would abide by the rules set out in the Shareholders' Agreement in the spirit of mutual trust and confidence, and that

> "neither party would seek to use any powers conferred upon it purely to advance its own interest at the expense of the other without just cause."

Dartford is said to be a quasi-partnership run as a joint venture formed on the basis of a personal relationship involving mutual confidence with an understanding that Ms Birdi and SOG would participate in the conduct of the business, and reference is made to Specsavers literature describing the joint venture arrangements as a partnership and referring to the Specsavers culture of a family business.

65. The references to "quasi-partnership … formed on the basis of a personal relationship" give the appearance of being intended to bring the case within the class of case where the legal rights of the parties under the articles and shareholders' agreement are overlain by equitable considerations, as referred to by Lord Hoffmann in *O'Neill v Phillips*. But Mr Stuart made it clear that what he was in fact contending was that the words I have quoted should be implied as a term into the Shareholders' Agreement. This was vigorously opposed by Mr Potts on the basis that the term did not satisfy the well-known requirements for the implication of terms.

66. I do not propose to consider this now: the term is unnecessary in relation to powers conferred on the parties in their capacity as directors as it is accepted that directors cannot exercise powers purely to advance their own interests, it being their duty to exercise such powers *bona fide* in what they consider to be in the interests of their company. That means that this implied term only adds anything in relation to other powers conferred on them, and the only sensible candidate is their powers as shareholders. But it is not clear to what extent Ms Birdi really complains about the use of SOG's actions in its capacity as shareholder as opposed to director, so it is not obvious that the question is of any practical importance. It is in any event a question that is likely to be difficult to answer in the abstract as the answer may well be that it depends on the particular power. In all the circumstances I propose to postpone discussion of this suggested implied term until it can be seen to arise and require answering.

67. With that introduction, I will now consider each of the 6 issues. In each case I will set out the relevant facts, and state my conclusions on whether there has been a breach of

contractual or other duties such as to constitute unfair prejudice. I will however postpone discussion of whether any adjustment to the price is warranted until after I have dealt with each of the issues.

Issue 1

68. Issue 1 is concerned with costs and payments incurred in connection with the departure of Mr Patel in February 2007. As pleaded in the Amended Points of Claim there were 3 specific matters complained of: (i) the costs of the investigation into the thefts which were thought to be the whole or part of a sum of £86,000 charged to Dartford; (ii) sums paid to Mr Patel after his departure; and (iii) the failure to recoup stolen monies from Mr Patel. In fact as appears below the sum of £86,000 had nothing to do with the investigation into Mr Patel and falls to be considered under Issue 2. The remaining issues under Issue 1 are therefore sums paid to Mr Patel after his departure, which are quantified by Mr Stuart at £1,575.61 (Ms Birdi's 50% share being £787.81) and the failure to recoup Mr Patel's thefts which Mr Stuart puts at up to £100,000.

69. The relevant events start in late 2006. By then Ms Birdi had been with Specsavers for over 12 years, and running the Dartford store with Mr Patel for over 6. Her relationship with Specsavers was good, and indeed in 2003 she had been invited to a special awards dinner for individuals in Specsavers showing outstanding commitment to quality eyecare and customer service. Her evidence was that her relationship with Mr Patel was also good, although there is evidence that Mr Patel and his wife subsequently expressed a very different view: I do not need to decide who is right about that.

70. As already referred to, Loss Prevention was then headed by Mr McAlindon, who gave evidence before me. One of the functions of that department is to monitor the store companies for suspicious activity. This involves routine periodic remote audits of the store companies. Among other things Loss Prevention reviews the pattern of refund activity in stores. Since a refund is an occasion when cash is taken out of the till, it provides an opportunity for theft by creating a fictitious refund. Although JVPs are generally aware that Loss Prevention carries out such analysis, Mr McAlindon explained that the remote audits do not need to be initiated by the JVPs at the particular store company concerned; very often nothing is found and the store company does not even know it has been audited. He regards himself as authorised to audit the stores by SOG – in the case of Dartford by Mr Dyson, who was then Retail Director of SOG.

71. In the course of a remote audit of Dartford one of Mr McAlindon's team in November 2006 identified a suspicious pattern of refund activity which suggested that the refunds might be fraudulent. The operator number used on the till for the refunds was Mr Patel's and although this did not mean it was him (someone else could have used his number, which was easily memorable) it obviously cast suspicion on him. The normal method of confirming if fraudulent transactions are being carried out, and by whom, is to install covert cameras. If an employee is suspected, Mr McAlindon would approach one or other of the JVPs, but given that Mr Patel was himself under suspicion, in this case he cleared the proposal with Mr Dyson.

72. Having done so, Mr McAlindon got in touch with Ms Birdi. He told her it was obvious someone was stealing from the store and on 19 November 2006 e-mailed her a list of

cash refunds from December 2005 onwards on which a number of transactions with Mr Patel's till operator number had been highlighted: they had a number of suspicious features such as being for round sums (£210, £220 etc), being for products with 'generic SKUs' (an SKU is a code that identifies a particular product; most products have their own SKUs and generic SKUs, used for products that did not have their own SKU, are relatively uncommon), and in several cases being attributed to the same patient. Ms Birdi said she wanted the thief caught and Mr McAlindon explained that covert cameras would be installed. They were installed shortly thereafter with Ms Birdi's co-operation, and in place for several weeks. Mr McAlindon kept an investigation log, and this records that by 20 December 2006 insufficient activity had been recorded and the decision was taken to extend the installation; that on 12 January 2007 Mr McAlindon was telling Ms Susannah Hart (a Retail Support Manager in the Communications department) that the investigation needed to run for another fortnight; and that on 6 February 2007 the evidence from the tapes was reviewed by Mr Les Gutteridge (another Loss Prevention employee) and Mr Patel was identified as putting refunds through the till, taking cash from it and putting it into his pocket.

73. Mr McAlindon concluded that this was sufficient evidence for his purposes. He contacted Mr Dyson and told him that he had now got the video footage which proved Mr Patel to have been the thief. Mr Dyson and he agreed that he would therefore go to the store in order to suspend Mr Patel. Mr Dyson explained in oral evidence that this decision was one that he made, and that he did not see it as necessary to consult, or even inform, Ms Birdi about it; he said that:

> "the process we adopt is always that we would go to the store and we would – knowing that we have got the evidence we would suspend the A director, and it's not normal practice to consult with the other A director while we are making that decision."

On 16 February 2007 (a Friday) Mr McAlindon therefore texted Ms Birdi saying he hoped to come to the store on Tuesday (20 February) and needed both her and Mr Patel available. This was not a convenient date for Ms Birdi as she was due to be interviewing that day but Mr McAlindon insisted.

74. There are two other documents dated 16 February which I should refer to. First, early in the morning, Mr McAlindon e-mailed Ms Emma Meagher, who was PA to Mr Dyson, as follows:

> "Could you ask Derek to give me a call re Dartford this morning… need to have a chat with him on how he wants to deal with this in case it does not go to plan. I will be speaking to Cristina first thing as well to get papers drawn for suspension, right to investigate etc, but want to know if Derek is prepared to go the whole hog with this or not (if we hit a brick wall, are we prepared to call the police on this or not, it is what we would do with a normal employee but as he is a Director not sure if the Board would agree to this)."

The reference to "Cristina" is to Ms Cristina del Grazia of SOG's Legal department. Both Mr Dyson and Mr McAlindon were asked about this e-mail and in particular what the 'plan' was. I come back to this below.

75. The second document is a one-page valuation, also dated 16 February, of the shares in

Dartford. It was produced by Mr Steve Glass, a junior employee in the Business Transfer Services department (**"Business Transfer"**), another of Specsavers' departments, which was at the time headed by Mr Michael Ryan (he has since left Specsavers) and which deals with the transfer of A shares in a store company, for example where a JVP wishes to sell or move. The valuation contains a calculation on the top half of the page which starts with the profit for the last 3 years (after adjusting for various items), derives a weighted average profit (taking 3 x the last year's profits, 2 x the previous year's and 1 x the first year's and dividing by 6), calculates a valuation range based on between 2 and 3 x the weighted average profit, and then calculates the value of the shares in question. In this case the figures were as follows: (i) adjusted profits for years ended 30 September 2006, 2007 and 2008: £178,534, £91,109 and £44,504; (ii) weighted average profit: £82,377; (iii) valuation range: £164,754 to £247,132; (iv) valuation of what the 'sale shares', being '50% of total A shareholding', would be worth: £82,377 to £123,566. Someone has noted this as £80k to £125k: Mr Dyson said he did not recognise the handwriting but it looks similar on the face of it to handwriting which he did identify on another document (a letter dated 6 November 2006 from Ms Niki Kaur to Mr Patel, which she copied to Specsavers) as probably Mr Ryan's.

76. On the lower half of the page is a separate calculation which shows the maximum capital value of a loan on various assumptions (that average profit remains at the current year's level, that corporation tax is 30%, that repayments of the loan are made from profits distributed as dividend, that "the buyer is prudent and puts aside that part of the dividend which will become payable as Income Tax", and that there is a fixed lending rate of 8%). This calculation starts with the current year's profits of £44,504 of which 50% (£22,252) is attributable to the 'the purchaser's A shareholding', and derives a net dividend after income tax of £11,682 and a capital value of £48,013, equating to a P/E ratio of 1.17. Mr Stuart at one stage in cross-examination suggested that this calculation was a calculation of a 'terminal dividend' (that is a dividend paid to an outgoing JVP on leaving the business to represent accrued profits); Mr Potts in closing submissions relied on it as showing that on one basis the shares were calculated as being worth under £50,000. Neither submission seems to me right: the document makes it clear that what it is is a calculation of the maximum capital value of a loan that could be provided to a person buying the shares if he or she were to repay the loan out of (net after tax) dividends. Again I come back below to what conclusions can be drawn from this document.

77. On 20 February Mr McAlindon came to the Dartford store with Mr Barnes. The events of the day were explored in great detail in the course of the trial: there was some confusion about the precise order of events, partly because the timings on the record of interviews (referred to below) did not make sense, partly because Mr McAlindon's original evidence was that the interviews took place over 2 successive days (he corrected this at the outset of his evidence saying that he had confused the case with another one), and partly because there were a number of conversations for which there was no written evidence (either because they were undocumented or, in the case of consultation with Specsavers' Legal department, were privileged) and the witnesses were therefore trying to reconstruct conversations over 7 years later and inevitably were unable to do so with accuracy.

78. It is not necessary to rehearse all the various inconsistencies in the evidence. There

were 3 significant developments which all took place during the course of the morning: (i) Mr Patel, confronted with the fact that he had been caught, admitted the thefts; (ii) Mr Patel made various allegations against Ms Birdi; and (iii) a deal was done whereby Mr Patel agreed to resign and sell his shares to SOG at a price which reflected the costs and losses he had caused the business. I find that the most probable course of events, having regard to the documentary record and the witnesses' oral recollections, was as follows:

(1) Mr McAlindon and Mr Barnes came to the store and met Ms Birdi in the morning before Mr Patel arrived.

(2) They brought with them a written resolution of the directors of Visionplus, already pre-signed by Dame Mary Perkins on 19 February 2007, and when Mr Patel turned up he and Ms Birdi were required to sign it, which they did. It was also signed by Ms del Grazia on behalf of SOG at some stage on 20 February (it is not clear precisely when), and so took effect as a unanimous written resolution under reg 93 of Table A. After noting that routine analysis of refund activity by SOG had revealed the high probability that Mr Patel was involved in financial misconduct, the resolution resolved to suspend Mr Patel from employment pending the outcome of a full investigation into the matter, and authorised SOG to hold any disciplinary hearings and effect any disciplinary award on behalf of Visionplus (save for dismissal which had to be reported back to the Board for approval).

(3) Ms Birdi was then asked to leave. Mr McAlindon also had with him a letter addressed to Mr Patel from SOG in its capacity as Company Secretary of Visionplus formally suspending him on full pay with immediate effect and requiring him to attend for interview with a member of the Loss Prevention Team, which he presented to Mr Patel. He told him that they had been monitoring the refund activity for a number of months using a covert camera, and Mr Patel confessed to the theft immediately.

(4) Mr McAlindon, with Mr Barnes present as an observer, then interviewed Mr Patel. Mr McAlindon typed up a record of the interview and got Mr Patel to sign it (countersigned by Mr McAlindon and Mr Barnes) as being a fair and accurate representation of what was said. Although the record says in its heading that the interview started at 09.20 and finished at 13.50, and at the end says that the interview terminated at 12.50, both these latter times are wrong. Mr McAlindon explained in oral evidence that he used an existing interview as a template and must have failed properly to correct it. I accept this evidence which is confirmed by the metadata which shows (i) that the document was first created on 24 January 2007 (and hence for some other purpose entirely; this is supported by the fact that Mr McAlindon also failed to remove a reference to a translator, Pauline Schenk of SIBV, which referred to an interview he had done in Holland, and which had no relevance to Dartford); and (ii) that the document was last modified at 09.48 on 20 February 2007.

(5) In the course of this interview, Mr Patel is recorded as saying that he had stolen "a couple of hundred pounds" a time and that the highest he had ever gone was probably £400. He was shown transactions from 2004, 2006 and 2007 which were cash refunds and accepted that he used two main patient files

in the names of S Coor and R Nash; that the cash refunds in the names of Nash and Coor were him, but he was not sure of the others; and that it was fair to say that if it was a large round amount it was him. He agreed the figure that could be easily attributed to him on Nash and Coor at £3,530. Mr McAlindon put to him that the total against his till operator number was £4,180, but he said he did not know. I see no reason to doubt that this is an accurate record of what was said.

(6) There was then a break after which there was a second interview with Mr Patel. Again there is a typed record, which indicates in the heading that the interview started at 10.50 and concluded at 11.21, and in the text that it terminated at 11.20: this timing is confirmed by the metadata which indicates that it was also based on the template dating from 24 January 2007 and was last modified (by Mr McAlindon) at 11.21. It was then printed out and signed by Mr Patel (and countersigned by Mr McAlindon and Mr Barnes) as being a fair and accurate representation of what was said; Mr McAlindon added in manuscript a time of 11.33 which he said (and I accept) was the time at which it had been signed.

(7) The record of interview begins with Mr McAlindon saying that "in our discussions you have made a number of comments about payroll and issues relating to your partner", and it then details a number of complaints by Mr Patel against Ms Birdi ranging from the fact that she only did eye-tests 3 days a week to her management style, but including allegations that members of her family (her husband Mr Mushtaq Rehman, and, until recently, her father), as well as Mr Patel's own wife, had been paid through the payroll.

(8) Again I see no reason not to accept the record as an accurate record of what was said. Mr McAlindon's recollection was that after the first interview was over, they had talked about why Mr Patel had done what he had, in the course of which he had explained his frustrations and started making the allegations. Although Mr McAlindon neither claimed to have, nor could realistically be expected to have, a detailed recollection of the unrecorded conversations, this accords with the evident fact that Mr McAlindon decided to record matters formally by way of interview only after Mr Patel had started saying things informally.

(9) At some stage during the morning – it is not clear exactly when but nothing I think turns on this – Mr McAlindon spoke to Mr Dyson and told him that Mr Patel had admitted to the thefts. Mr Dyson authorised him to put a proposal to Mr Patel that in the light of his admissions of theft, the simplest course would be for him to resign, following which SOG would buy his shares at a fair price (as determined by Business Transfer), but taking off the sums he had stolen and the costs of the investigation. The alternative would be to carry out a full-scale disciplinary process. Indeed it is possible – Mr McAlindon could not be sure – that Mr McAlindon had already explored this possibility with Mr Patel before ringing Mr Dyson.

(10) Mr Dyson accepted that this was a decision that he made on behalf of SOG and again without consulting Ms Birdi (or indeed Dame Mary Perkins). His evidence was that none of this had been pre-planned; it was a decision he

made only after Mr McAlindon had spoken to him and told him Mr Patel had confessed. In fact I find, as set out below, that this was a process regularly used by Specsavers as a means of "exiting" (Mr Dyson's word) an A partner in such situations, and that Mr McAlindon went to Dartford on 20 February expecting to put such a proposal to Mr Patel, having already discussed the possibility with Mr Dyson.

(11) Whenever the proposal was put to him – Mr McAlindon did not claim to remember but thought it more likely to have been after the second interview, but it may quite possibly have been in the hour between the two interviews – Mr Patel agreed to the proposal. He wrote out by hand (no doubt at Mr McAlindon's dictation), and signed, a note dated 20 February 2007 and addressed to the SOG Board which reads as follows:

> "SOG Board
>
> I wish to resign with immediate effect as employee and director of Dartford Visionplus Ltd and Dartford Specsavers Ltd
>
> I would also like to pay for
>
> Investigation costs of 15,610
>
> Stolen money of 4,180
>
> I would also like to transfer my shares to SOG and would ask that the above funds be deducted from the share value.
>
> I would like to sell my shares to SOG at a reasonable value."

The figure of £15,610 was supplied by Mr McAlindon who had with him details of the costs of the investigation (that is the costs of the covert cameras and a charge made for the time spent by Loss Prevention personnel on the case). The figure of £4,180 is that put by Mr McAlindon to Mr Patel in the interview which Mr Patel must have been persuaded to accept. It can be seen that at this stage Mr Patel's note does not name a figure for the value of the shares, but simply refers to his wish to sell at a reasonable value. It was no doubt explained to him that Business Transfer would come up with a figure. Mr McAlindon told him that it would take a bit of time to produce the paperwork.

(12) Mr McAlindon told Specsavers in Guernsey (probably Mr Dyson) that Mr Patel had agreed in principle, and this started a process involving Mr Ryan of Business Transfer putting a value on his shares and Ms del Grazia of the Legal department drawing up the documents. Mr Patel had also asked if he could keep his company car, and Mr McAlindon must have passed this on as well.

(13) At lunchtime Mr Patel went out to lunch. Ms Birdi went into the office where the interview had been held and was told by Mr McAlindon that Mr Patel had admitted everything and that he was going to sign over his shares at a loss to avoid being prosecuted and struck off by the General Optical Council. He told her that Mr Patel had agreed to resign and sign over his shares so as to be

allowed to walk away without conviction, and that as part of the deal he was going to be allowed to keep his company car. He said that they were waiting for documentation from Specsavers' Legal department.

(14) At 1.37 Ms Del Grazia e-mailed to the Dartford store a Share Sale Agreement, Stock Transfer Form and covering letter under which Mr Patel agreed to sell to SOG his 50 A shares in Dartford for £55,000 (with completion due the same day); the covering letter confirmed that his company car would be given to him ("gifted over to you and treated as a benefit in kind for taxation purposes"). No reliable evidence was given of how the £55,000 was arrived at. Mr Dyson's witness statement explained it as representing what Specsavers considered to be fair value for the shares (£70,000) less the £15,000 costs which Mr Patel had agreed to bear. But in cross-examination his evidence was that once Mr McAlindon had told him that he believed a deal could be done with Mr Patel, he had gone round to see Mr Ryan (who worked in a nearby office), asked him to value the shares and then had nothing more to do with it, leaving Mr Ryan to do the calculation and talk to Mr McAlindon. Since Mr Dyson disclaimed all responsibility for – or indeed knowledge of – the £55,000 figure, and neither Mr Ryan nor Ms del Grazia gave evidence and there are no relevant documents in evidence, I am left with no evidence explaining which individual on behalf of Specsavers signed off on the £55,000 or how it had been arrived at, or confirming Mr Dyson's assertion that it represented a discount of £15,000 from a valuation of £70,000. Indeed I have no evidence supporting the assertion that the fair value was taken at £70,000 at all: there is an oblique reference by Mr Dyson to the shares being entered in Specsavers' asset register at that figure but I have not seen the document or been given any explanation as to when, why, by whom, or on what basis that figure was entered.

(15) However it was calculated, Mr Patel accepted it. He signed the Share Sale Agreement the same day, witnessed by Mr McAlindon. He then left the store. Ms Birdi was not told anything about the details of what had happened, but was told that Loss Prevention would be in touch and that she was not to tell anyone that Mr Patel was a thief.

79. On 22 February 2007 Mr Ryan circulated a Business Transfer memo recording the sale of Mr Patel's shares and summarising "the deal" as being that Mr Patel sold his 50 A shares to SOG for £55,000 with a completion date of 20 February 2007, the company agreed to give the leased Mercedes to Mr Patel and the company agreed to repay Mr Patel his director's loan. In fact the loan does not appear to have been repaid to Mr Patel: I give the details below.

80. On 5 March 2007 Ms Birdi was sent two written resolutions for signature, one a resolution of the directors of Visionplus accepting Mr Patel's resignation as a director and employee, the other a resolution of Dartford accepting his resignation as a director and approving the transfer of his shares to SOG. She was unwilling to sign them.

81. Before coming to Ms Birdi's complaints under this Issue, I should deal with the two documents of 16 February (paragraphs 74 and 75 above). First, so far as Mr McAlindon's e-mail to Ms Meagher is concerned, what did Mr McAlindon mean by

everything "going to plan" ? Mr Dyson was asked what the plan was. He said he thought it was Mr McAlindon's plan to confront Mr Patel with the evidence; he resolutely denied that there had been any decision or plan at that stage to buy Mr Patel's shares. His evidence was that the question of buying Mr Patel's shares first came up on Tuesday 20 February after Mr McAlindon had told him that Mr Patel had admitted the thefts. However when later asked how the process of offering Mr Patel a price for his shares could be done so quickly, he accepted that *"this is the way we normally manage the process"*; that *"it doesn't happen a lot"* (less than 10 times a year), *"but it happens sufficiently enough times for people to be able to do those calculations and to come up with the valuations"*; and that *"there are a number of scenarios ... during the course of the year that will be investigated where partners are exited"* by this route, the *"non-formal route of Mr McAlindon offering to let them go"*, and that Mr McAlindon *"would have a process"* for it.

82. Mr McAlindon's own evidence confirmed that this was a familiar and tested method of dealing with A partners. In his witness statement he said that in most situations where JVPs admit serious wrongdoing SOG will offer them a way out without recourse to formal procedure, usually involving offering them an opportunity to resign and for SOG to offer to purchase their shares from them. In oral evidence he confirmed that this was the practice in cases where people admit serious wrongdoing when he first hit them with it; and said that the way he would always explain it to someone was that the findings were very clear because they were admitting everything, that there was an inevitability about the outcome, and that they could either continue down the formal process of disciplinary proceedings which would be fairly protracted or they could sort it out then and get a valuation for their shares.

83. In the light of this evidence, which is all consistent, I do not accept Mr Dyson's attempt to suggest that none of this was part of the plan for Dartford and that the question of buying Mr Patel's shares only came up on 20 February. No doubt it is true that a decision had not been finally made on 16 February to buy the shares, nor could it be until after it was known if Mr Patel would co-operate (by signing the written resolution, admitting the thefts when confronted with the evidence, and accepting the deal offered to him) but I find that Mr Dyson and Mr McAlindon both knew perfectly well that the plan was to confront Mr Patel with the evidence and then, assuming he confessed, use this tried and tested method to seek to exit him from the store, offering him a deal whereby he need not face disciplinary proceedings nor be dismissed, nor indeed reported to the police (Mr Dyson made a point of saying that he did not believe Specsavers was under any obligation to report the matter to the police); and that this would entail him selling his shares to SOG at a price determined by SOG to be fair value but allowing it to recoup the costs and losses that had been caused. When Mr McAlindon referred in the e-mail to "in case it does not go to plan", he was no doubt asking what he should do if Mr Patel refused to sign the written resolution, or, having done so, refused to admit his thefts. But if he did confess, the plan was to offer him the usual deal as a quick and easy way out.

84. Indeed it is telling that Mr McAlindon could not remember whether he had discussed the possibility of such a deal with Mr Patel before ringing Mr Dyson on 20 February or not. He said in oral evidence:

> *"I don't recollect whether I discussed it with Nimesh before I rang Derek. I may well have done because I could have indicated to Derek that in*

> *principle he wouldn't be averse to – he doesn't want to go down this process. So I may have done but I don't recollect it. But, equally, I may well have just gone straight outside and rang Derek and said "Look, this is the situation. It's pretty obvious. Do you want me to put it to him ?" I can't remember which one it was with the passage of time."*

I do not find it surprising that Mr McAlindon could not recall which of these it was, but this evidence rather neatly demonstrates that Mr McAlindon was expecting Mr Dyson to authorise him to put the offer to Mr Patel, so much so that he might have broached it with Mr Patel even before speaking to Mr Dyson – or if he did speak to Mr Dyson it was only to ask whether he should "put it to him".

85. As to the second 16 February document, the valuation carried out by Mr Glass, neither Mr Glass nor Mr Ryan gave evidence, and neither Mr Dyson nor Mr McAlindon, who did, knew why the valuation had been produced, so I received no (or rather no reliable) explanation of why it was carried out. Mr Dyson said that he had never seen it before and indeed was not familiar with calculations of this type, and had no explanation for it at all. Mr McAlindon said that he had no knowledge of the document and could only speculate; what he went on to speculate was that Mr Glass, a junior employee who was being trained up as Mr Ryan was coming up to retirement, might have taken it upon himself to do the valuation, being aware that an individual was being investigated and that the evidence looked probable that he had committed an act of gross misconduct, and in those circumstances thinking it prudent to act in advance and start getting the work together. Mr McAlindon explained that there was a so-called 'compliance group' within Specsavers who would be kept regularly updated as to ongoing investigations (historically by physical meetings but currently by a weekly telephone call) *"to keep a handle on where things are; where it's likely to go; when it's likely to go; who it is then going to"*; and that Business Transfer would be represented because it did have an effect on them, so the Business Transfer team would have known there was an investigation going on.

86. This is an interesting observation, not as direct evidence of whether Mr Glass did or did not decide to act off his own bat, something which I do not think Mr McAlindon was in any position to give evidence on; but as it showed that Mr McAlindon thought that even a junior employee in Business Transfer would have appreciated that where a JVP was suspected of serious wrongdoing, a valuation might very soon be needed. This accords with the evidence I have already referred to that the sort of deal offered to Mr Patel was a regular way of dealing with such situations. In fact I see no reason to conclude that Mr Glass was likely to have done this on his own initiative: in the absence of any other evidence, it seems to me that it is more likely that as a junior employee he did it because he was asked to, and the obvious person to have asked him is Mr Ryan, for whom he worked and who may well have annotated it.

87. It is evidently no coincidence that the calculation was done on the Friday before Mr McAlindon's meeting with Mr Patel on Tuesday 20 February. The obvious purpose of doing the calculation is to see what the shares were worth. I infer that Mr Ryan asked Mr Glass to do the calculation because he knew, just as Mr Dyson and Mr McAlindon did, that one possible outcome – and indeed Specsavers' preferred outcome – of Mr McAlindon's impending visit to Dartford was that Mr Patel would be persuaded to accept a deal whereby he would be selling his shares at a value determined by Business Transfer.

88. On that basis, it is interesting that the value range which Mr Glass's valuation comes up with is £82,377 to £123,566, or as noted by someone (which may well be Mr Ryan himself) "£80k" to "£125k". This provides no support for Mr Dyson's attempt to explain the £55,000 share price as having started from a fair value of £70,000. In the absence of any other evidence, I do not see why I should assume anything other than that Mr Ryan's valuation of Mr Patel's shares was between £80,000 to £125,000. Certainly Mr Dyson was at pains to explain in oral evidence that Mr Ryan was very experienced in doing such valuations – he had been doing the job for 15 or 16 years – and knew the methodology. In his witness statement he referred to the usual method of share valuation used by Specsavers being one that used a weighted average profits formula; and in oral evidence when asked if he understood the detail of the formula said:

> *"I know a high principle of what the formula is. It's the last three years of profitability and then he produces a P/E, so the profitability in terms of a number, and then he multiplies that either by 2 per cent or 2.5 per cent, which is the standard calculation, to value the shares."*

This is no doubt a bit garbled mathematically but confirms that Mr Dyson was aware that Mr Ryan used a standard formula, and by reference to Mr Glass's valuation one can see that what he was in fact referring to was applying a multiple of 2 or 2.5 (or in fact 3) to the weighted average annual profits. This would not produce a value for half the A shares of £70,000, which is a multiple of about 1.7 times (based on the weighted average profit being £82,377). I have no evidence to suggest that when Mr Ryan was asked to value Mr Patel's shares, he used any other basis than the standard multiple; and I find that Mr Glass's valuation was prepared for exactly such a scenario in accordance with Mr Ryan's standard formula. I have already said that there is nothing before me to support the suggested valuation of £70,000, and I find that Specsavers probably valued Mr Patel's shares at a minimum of £80,000.

89. As summarised above Ms Birdi has two complaints under this issue, the first relating to payments made to Mr Patel after his departure, and the second being the costs of his theft which have not been recouped to Dartford. I will take the latter first which is potentially the more significant.

90. Ms Birdi's pleaded case in her points of claim is the relatively simple one that SOG wrongly caused Dartford to fail to recoup the cost of the thefts found to be perpetrated by Mr Patel. SOG admits in its defence that a decision was taken not to pursue Mr Patel for repayment of any sums beyond those which he had admitted to have stolen, namely £4,180. In reply Ms Birdi advanced a more extensive allegation that SOG unlawfully substituted its own interest for that of Dartford by taking advantage of the evidence of Mr Patel's thefts to purchase his shares at a favourable price with a view to reselling them at a profit, thereby benefiting SOG while leaving Visionplus (and ultimately Ms Birdi) to bear the cost of Mr Patel's thefts. In her witness statement, Ms Birdi expanded on this allegation, putting forward her belief that SOG purchased the shares at a substantial discount to their market value, the discount representing the amount stolen by Mr Patel which should properly have been restored to the Dartford store.

91. She also said in her witness statement that Specsavers had used the pressure that Mr Patel was under not only to take his shares off him at a discount but also to do a deal

with him whereby he would be let off if he helped them to get her out of the Dartford store. This is part of a much more wide-ranging allegation that Specsavers had a secret agenda to get rid of her by one means or another.

92. There is an inevitable overlap between these various allegations but in order to keep them as distinct as possible I propose to address them as follows: (i) did Specsavers in February 2007 have a secret agenda to push Ms Birdi out of the Dartford store ? (ii) what loss was caused to the Dartford store by Mr Patel's thefts ? (iii) did SOG unlawfully benefit itself at Dartford's expense ?

93. So far as the secret agenda is concerned, Ms Birdi has become convinced that senior Specsavers personnel conspired to get rid of her because they wanted the store for themselves. This is a complex and multi-faceted allegation which I will have to return to at various stages in the history. At the moment however I can reduce it to the rather more simple question whether Specsavers had decided by (or on) 20 February 2007 to find a way to push Ms Birdi out, and enlisted Mr Patel's help to do so. I will say at once that my answer to this is there is no evidence to support Ms Birdi's suspicions, and I cannot find them proved.

94. Ms Birdi relied on a number of matters. One is a conversation that she said she had with Mr Chris Howarth, the Head of Professional Recruitment at SOS. The background to this is that Ms Birdi comes from Yorkshire: her family is in Yorkshire, she studied optometry at the University of Bradford, and she initially worked in Leeds, and then in Bradford. It was with some reluctance that she and her husband Mr Rehman, a pharmacist, re-located to the south to take up the opportunity of becoming a JVP at Dartford. Her evidence was that in October 2006 Mr Howarth called her out of the blue to tell her that Mr Patel was selling his shares. (In fact Mr Patel had written to SOG on 1 September 2006 to inform them that he was contemplating a sale of his shares). Ms Birdi says that Mr Howarth said that Specsavers was aware that she would prefer to move back north to be closer to her family and offered her the Specsavers store in Blackpool. She declined as it was too far north. In her witness statement she says that it is now clear to her that the real reason for Mr Howarth's offer was that Specsavers was thinking beyond Mr Patel's departure and had identified the Dartford store as a good target for a conversion into a 'shared venture' store. (In the terminology used by Specsavers a 'joint venture' store is one where the A shares are held by 2 JVPs and Specsavers itself only holds B shares; a 'shared venture' store is one where Specsavers holds some of the A shares itself and so has an interest in profits; and a 'group venture' store is one where Specsavers owns all the shares.) Ms Birdi's conclusion was that having failed in an attempt to persuade her to leave the Dartford store voluntarily, Specsavers decided to find another way to get her out.

95. Mr Howarth's evidence is that he had no recollection of calling Ms Birdi; that he would not have discussed the sale of Mr Patel's shares as he was responsible for finding potential new partners; that although Ms Birdi called him around this time saying that she wished to move to the north of England for family reasons, he did not recall ever making an offer, or seeking to persuade her, to buy shares in the Blackpool store; and that he understood that the shares in the Blackpool store had never been for sale. If asked about relocating, he would have said that she could not be considered for another position until she was well advanced in selling her existing shares. He denied being involved in any scheme to remove her from Dartford. In oral evidence he

explained the way in which his department worked with Mr Ryan in Business Transfer. Mr Howarth was responsible for recruiting a pool of potential new partners, possibly as many as 150 to 200 a year. Business Transfer was responsible for identifying vacancies in existing stores, and Mr Howarth had a very clear understanding with Mr Ryan that he would work to a vacancy only once Mr Ryan had identified that there was one. The same applied to the Business Development department, headed by Mr Ian Thomas (**"Business Development"**) which was responsible for new stores. Mr Howarth had enough work to do, and not the largest team to do it with, and did not want to be distracted into wasting resources on opportunities that were not going to ultimately materialise and so was always very keen that Business Transfer or Business Development had an actual vacancy before getting involved.

96. It is not necessary, nor really possible, to resolve the question of quite what was or was not said by Mr Howarth to Ms Birdi. There was evidently some discussion about her wishing to move north; but I am inclined to accept Mr Howarth's evidence that it was Ms Birdi who initiated this not him. Even if this were wrong, however, I am quite unpersuaded that any of Mr Howarth's dealings with Ms Birdi provide support for there being a plot or secret agenda in the autumn of 2006 to persuade Ms Birdi to give up her position in Dartford.

97. Ms Birdi also referred to the way that Business Transfer did handle the question of the sale of Mr Patel's shares in this period. The facts are as follows:

(1) On 1 September 2006 Mr Patel wrote to Specsavers informing them that he was contemplating a sale of his shares.

(2) On 6 November 2006 Ms Niki Kaur made a formal offer to Mr Patel to purchase his 50 A shares for £170,000. Ms Kaur is related to Mr Singh, who was then running the Specsavers store in Grays, Essex with his wife. Mr Singh had initially bought the shares in the Grays Specsavers company with his brother in 2003, his brother subsequently being bought out by Mr Singh's wife; Ms Kaur is the wife of Mr Singh's brother, and was in autumn 2006 working as a Manager in the Grays store.

(3) Ms Kaur copied her offer to Mr Ryan in Business Transfer, telling him that Mr Patel had verbally accepted his offer. Someone noted "= 4.5 x P/E" against the figure of £170,000 in the margin: Mr Dyson thought that this looked like Mr Ryan's handwriting.

(4) On the next day, 7 November, Mr Patel accepted the offer in writing, subject to SOG, and again copied in Mr Ryan (and also Mr Glass).

(5) Someone, again probably Mr Ryan, wrote on this "Write holding letter to both, Board considering … after caveats"; and on 27 November 2006 Mr Ryan wrote to both Ms Kaur and Mr Patel saying that under the terms of what he called Mr Patel's "Joint Venture Agreement" he was required to sell to a Dispensing Optician (which Ms Kaur was not) unless Specsavers and the other parties to the agreement agreed to waive the requirement, and that Specsavers was considering the matter and would let them know in due course.

(6) On 18 January 2007, Mr Ryan followed this up with a further letter telling Ms Kaur that the Board had decided not to waive the requirement for Mr Patel to sell to a Dispensing Optician, as they considered that replacing like for like represented the least risk to the business.

(7) On 22 January 2007, Mr Singh wrote to Specsavers with an alternative proposal, namely that he sell his shares in the Grays store company to Ms Kaur; and that he buy Mr Patel's shares in Dartford.

(8) This was addressed to Ms del Grazia for the SOG Board and on 13 February 2007 she replied by e-mail to the effect that she had passed it to the SOG Board and copied in Mr Ryan and added:

> "It appears that there are a number of high priority matters going through at present which may be causing some delay."

98. Ms Birdi suggested that Specsavers never intended to allow the sale to Ms Kaur to go through and it was using the time to gather evidence against Mr Patel to act on its own plan to acquire his shares. I agree that Mr Ryan's letter of 27 November 2006 was a stalling letter (or holding letter as he described it) and I infer that the likely reason is that he was by then aware that Loss Prevention was running an investigation into Mr Patel. The same applies to Ms Del Grazia's e-mail to Mr Singh of 13 February 2007. It was obvious that one possible outcome of the investigation was that it would indeed uncover sufficient evidence that Mr Patel had been stealing. In those circumstances it would be very likely that he would have to leave the Dartford store, either by resignation or, if he resisted, by disciplinary action and dismissal. I see nothing surprising in Specsavers wishing to reserve its position as to what was to happen to the management of the store when there was a real possibility that one of the existing JVPs was going to leave in such circumstances. I find for reasons already given that Mr Ryan (and later Ms del Grazia) appreciated that one possible, indeed quite probable, outcome would be that Specsavers would in due course acquire his shares. None of this however provides any support for Ms Birdi's belief that Specsavers had decided to get rid of her and find a way of acquiring her shares as well.

99. On behalf of Ms Birdi it was suggested to Mr McAlindon that he had got Mr Patel to make allegations against Ms Birdi, and that this was part of the discussions with Mr Patel when he was offered the opportunity of resigning. Mr McAlindon denied this and there is no evidence before me to suggest that this is what happened, or that Mr McAlindon went to Dartford with the intention or expectation of getting anything against Ms Birdi. He went to the store to deal with Mr Patel. What is suggested by the second interview is that after Mr Patel had admitted the thefts, Mr McAlindon asked him why he had done it and Mr Patel, having been caught red-handed and no doubt realising that one way or another that was the end for him at Dartford, used the opportunity to make allegations against Ms Birdi. It is not necessary to decide why he did so – perhaps he thought it might in some way excuse his actions, perhaps he was motivated by malice against Ms Birdi, or perhaps he genuinely felt hard done by – but what I am unable to find on the evidence is that Mr McAlindon put him up to it, or that it formed some part of a *quid pro quo* for the agreement to let Mr Patel resign and sell his shares rather than be dismissed. As I have already found, the method used by Mr McAlindon, authorised by Mr Dyson, to exit Mr Patel from the business and acquire his shares, was a familiar one that had its own advantages for both Specsavers

and Mr Patel, and there is no reason to think it was in any way linked to Mr Patel being put up to make allegations against Ms Birdi.

100. In her oral evidence Ms Birdi suggested that a later document in which an assessment was made of the possibility of Dartford becoming a shared venture suggested that Specsavers had this in mind all along; but this document dates from the end of August 2007 and I do not think it is of any assistance in considering what Specsavers had in mind in or before February 2007. There is no evidence that anyone at Specsavers had any reason to suspect Ms Birdi before Mr Patel made his allegations about her on 20 February 2007, and I find that there was no secret agenda to get rid of her in this period at all.

101. I have found above that when Mr McAlindon went to Dartford on 20 February Specsavers had in mind that they might well acquire Mr Patel's shares. I do not see this however as supporting the suggestion that Specsavers wished at that stage to turn the store into a shared venture store. There are two indications that Specsavers had made no decision to keep Mr Patel's shares but was at least contemplating selling them on. One is the fact that Mr Glass's valuation contains not only a valuation of what the sale shares would be worth, but also a separate calculation of what the maximum capital value of a loan would be, which assumes a buyer subject to income tax who might want to borrow to acquire the shares. None of this has any application if Specsavers intended to keep the shares itself, and suggests that what Specsavers was then contemplating was buying the shares and selling them on to a new JVP.

102. Second, on 8 March 2007 Ms Meagher sent an e-mail to Mr Howarth, as follows:

> "Derek [ie Mr Dyson] has asked for an update on your recruitment plans.
>
> Also can you advise him if you have any partners on the books who may want to work together in Dartford (this is very urgent)."

As already explained, Ms Meagher was PA to Mr Dyson and Mr Howarth was in charge of Professional Recruitment, and would normally only be approached if a specific vacancy was well advanced, so this e-mail reveals that Mr Dyson was already expecting that he might have vacancies for two JVPs at Dartford – in other words that Ms Birdi might be required to leave as well. I return to this below. But what is interesting for present purposes is that it shows that Mr Dyson is asking Mr Howarth for 2 new partners to work together. This is flatly contrary to any decision having been made at that stage that Specsavers wished to keep half the A shares for itself and turn Dartford into a shared venture store. I find that Specsavers had no such agenda in February 2007, and acquired Mr Patel's shares as a temporary measure with a view to reselling them to a new partner.

103. The next question is what loss was caused to the Dartford store by Mr Patel's thefts. As set out above, Mr Patel accepted the figure of £3,530 on the Nash and Coor transactions in interview, and the figure of £4,180 in his handwritten note offering to sell his shares.

104. The underlying material which formed the basis of these calculations has not been adduced in evidence, but there is a partial list of refunds which was that e-mailed by Mr McAlindon to Ms Birdi on 19 November 2006 (paragraph 72 above). This only

covers the period from December 2005 to November 2006, and it shows 8 round sum cash refunds of between £210 and £310, totalling £2,020, all except the first in the period from July 2006 onwards. This is consistent with the total over the period being of the order of £4,000; and I see no reason to doubt what is recorded as having been said in the interview.

105. Ms Birdi believes that very much more had been stolen by Mr Patel. It was suggested to Mr McAlindon that all that he had investigated were the cash refunds and that Mr Patel could have been stealing a lot more. Mr McAlindon's evidence was that identifying the thefts was not an exact science, but because of the nature of the transactions and the way Mr Patel was going about it, you could quantify it fairly well; that part of the investigation he carried out was to look at the entire transactional pattern to see if there was any evidence of Mr Patel using other methods to steal cash (for example by ringing up a no sale transaction on the till); that they reviewed all the video footage and the amounts they were seeing Mr Patel handle were consistent with the fraudulent refund transactions; and that there was no evidence that Mr Patel was using any other methodology. He concluded that it was improbable that he was using any other method to steal cash. I accept this evidence which seems to me inherently credible.

106. Ms Birdi said in her witness statement and orally that she believed that the amount stolen by Mr Patel was the difference between the actual value of his shares in February 2007 and what Specsavers paid for them. She thought Mr Patel's shares were worth the £170,000 that Ms Kaur had agreed to pay for them, and accepting that the amount paid by Specsavers could be regarded as £70,000 (ie taking the £55,000 actual price and allowing £15,000 for recoupment of costs), she deduced that the amount stolen was about £100,000. In closing submissions Mr Stuart attempted to support this argument, suggesting that perhaps the reality was that Specsavers applied a discount of £115,000 to the starting point which more closely resembled the £170,000 figure, and that if so, this reflected something more in line with the probable true combined cost of the investigation and the thefts.

107. However I do not accept either the premise or the conclusion. Although Mr Glass's valuation indicates that Specsavers put a value of between £80,000 and £125,000 on Mr Patel's shares, there is no evidence at all that it ever valued the shares at £170,000 or anything approaching it. But whatever value they put on the shares, I do not see that it follows that the discount from that value is any evidence of the level of Mr Patel's thefts. If Specsavers thought that they could show that Mr Patel had stolen more money, I see no reason why Mr McAlindon did not put that to Mr Patel and get him to agree to it. Mr Potts referred in his closing submissions to the 'skewed logic' of this suggestion by Ms Birdi, and I agree with this description of it. It is no basis for finding that Mr Patel stole more than Mr McAlindon had uncovered and put to him, namely £4,180.

108. Some reference was made in the course of Ms Birdi's cross-examination to a calculation which appeared to suggest that Specsavers had estimated the cost of the theft at £50,000; but Ms Birdi did not in the end seek to rely on it and I need say no more about it.

109. Ms Birdi also said in cross-examination that the level of bonus and dividends she and Mr Patel were taking in 2005 and 2006 was much reduced compared to previous

years, and that this might be because of the thefts; but no attempt was made before me to investigate the level of bonuses in earlier years or the possible reasons for the decline, and I do not think I can rely on this point.

110. Ms Birdi was unable to point to any other evidence that there were other thefts. The most that I think can be said is that having confronted Mr Patel and obtained his admission to theft, Mr McAlindon brought the investigation to a close and moved on to agreeing terms for Mr Patel to leave, and that if he had carried on with further investigations he might have uncovered further evidence. This is possibly so, although I have been given no reason to think that further investigation would be likely to have turned anything up; and this is too slender a basis on which to conclude that Mr Patel did commit any other thefts.

111. I conclude therefore that there is no reliable evidence that Mr Patel stole more than the £4,180 which he admitted.

112. The next question is whether Specsavers benefited itself at the expense of Dartford. I will proceed on the basis that the deal done with Mr Patel involved him selling his shares to Specsavers at £55,000 in return for Specsavers agreeing that that price took into account the costs he had caused to be incurred (agreed to be £15,610) and money he had stolen (agreed to be £4,180). Although not referred to in the share sale agreement (which is entirely silent on such matters) it is implicit in that that Specsavers agreed that he would not be pursued any further for the costs or losses.

113. Although Specsavers' case was that the £55,000 only represented a discount of £15,000, I have already said that there is no evidence before me to support the valuation of £70,000 which this depends on, and I have no reason to doubt that Specsavers applied the full discount of nearly £20,000. Indeed if, as I think likely, they proceeded on the basis that the shares were worth a minimum of £80,000, it looks as if they took off another £5,000 for good measure. Mr Patel, as a professional caught red-handed in acts of dishonesty, was in a very exposed position and was scarcely likely to argue the finer details of the settlement. I suspect he thought he was lucky to walk away from Dartford with as much as £55,000.

114. The complaint is that the costs and losses were suffered by Dartford (or Visionplus, which comes to the same thing) but it was Specsavers that took the benefit of this arrangement, without passing that benefit on to Dartford. There was plainly a potential conflict of interest between SOG's own interest and that of Dartford/Visionplus of which it was a director. In buying the shares, SOG was acting for itself. But SOG was also acting or purporting to act as director of Dartford/Visionplus. Mr Dyson in his witness statement said that SOG was acting "in its capacity as B shareholder/director of [Visionplus]", and justified the deal by saying that that SOG was acting in what it considered to be the best interests of Dartford; and he accepted again in oral evidence that he was making that "commercial decision" on behalf of Dartford/Visionplus. I agree that SOG was acting, or purporting to act, for Dartford or Visionplus: not only was the deal premised on the basis that Mr Patel could resign rather than be dismissed as an employee, but it was also agreed that he could keep his company car, and (implicitly) that he would not be pursued for the thefts. All these were matters for his employer, that is Visionplus, not matters for SOG in its personal capacity. This means that the principle that an unfair prejudice petition is only concerned with the Respondent's conduct of a company's affairs, and

that dealings by a shareholder with its shares are outside the scope of an unfair prejudice petition (paragraph 54 above) is not an answer to the complaint.

115. Given the obvious potential conflict of interest, one would have expected Specsavers to have appreciated the need to distinguish between its own interest and the interest of Dartford and Visionplus; and to have been scrupulously careful to ensure both that the correct corporate procedures were adopted, and that the accounting as between SOG and Dartford/Visionplus was demonstrably appropriate. In fact none of this happened.

116. So far as corporate procedures are concerned, the terms on which Mr Patel would leave Visionplus' employment were not a matter of day to day management. Under clause 3.3 of the Shareholders' Agreement, they should therefore have been determined at a duly convened meeting of the Board of directors of Visionplus. But not only was this not done, there was no attempt to obtain the agreement, formal or informal, of the other directors or even to keep them informed. Mr McAlindon (who is an ex-policeman and not a lawyer) made it clear that as far as he was concerned, he took his instructions from Mr Dyson; and Mr Dyson (who is not a lawyer either, but has been a senior executive for many years) made it clear that he did not consult, far less take instructions, from anybody: apart from Mr Patel and SOG itself, the directors of Visionplus were Ms Birdi and Dame Mary Perkins, but he made no attempt to consult or inform either of them. He was cross-examined at some length about this, and in the course of his evidence he accepted that he had made the decision entirely by himself; his understanding was that he had the authority to do it, but he could not answer the question how he had the power to make this commercial decision on behalf of Dartford and Visionplus; he accepted that he did not consciously think through the capacity in which SOG was acting; and, as the following exchange shows, accepted that he had effectively taken the view that SOG being the B shareholder with ultimate control of the Board could act without reference to others:

"Q And you therefore thought that, frankly, whatever you, on behalf of SOG, as the director of SOG, decided to do here – whether it be in relation to Mr Patel or in relation to putting in Mr McAlindon or other things that we are going to come to later – you thought that, frankly, since you were SOG and you had control over Dartford, you had the power to do what you considered was best?

A. In the best interests of the business.

Q. We will come back to that, as to whose interests you were looking after in a moment, but you just thought that you could do what you decided to do. So if you thought it was best to exit Mr Patel from the business, you thought that was a decision that you could make, you, Derek Dyson, SOG could make, there and then, without reference to anybody else. That's what you felt and thought at the time?

A. Correct.

Q. And if I suggest to you now that looking back on it, having now looked at the shareholder agreements and the directorships and the powers under the shareholders' agreement et cetera, would you agree that that

was not correct; you, Derek Dyson, didn't have the power to do what you decided – just entirely what you wanted/decided to do. You should and could have involved your fellow directors and shareholders in the decision-making process for and on behalf of the business?

A. Correct."

117. This was a lamentable failure to operate, or even to understand, the corporate structure which Specsavers had put in place. Having set up an elaborate joint venture structure with a separate store company and services company for each store, a carefully drawn shareholders' agreement and a careful distribution of powers between itself and the JVPs, Specsavers ought to have ensured that the correct procedures were adopted. I find that SOG (acting by Mr Dyson) put itself in a position of conflict of interest and made no serious attempt to avoid or manage that conflict, and that it was therefore in breach of the duty now found in s. 175(1) of the Act. (As explained above (paragraph 58) the Act was not then in force but it is not disputed that at the time the directors owed duties that were the same as those now in the Act). By s. 175(1):

"A director of a company must avoid a situation in which he had, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company."

Far from avoiding such a situation, SOG unilaterally created it. By s. 175(2) this applies in particular to the exploitation of any information or opportunity; in the present case SOG used the information that Mr McAlindon had sufficient evidence to prove Mr Patel's thefts, and the opportunity that gave them, to acquire Mr Patel's shares cheaply for itself. By s. 175(4)(b) the duty is not infringed if the matter has been authorised by the directors; but no attempt was made to obtain such authority. I also find that SOG was in breach of the agreement in the Shareholders' Agreement that matters that were not day-to-day management should be decided at a duly convened Board (or general) meeting of the company concerned.

118. So far as the costs are concerned, it was Specsavers' usual policy that the costs of non-routine investigations would be passed on to the store concerned, but it would obviously be wrong for Specsavers to recover payment for the cost of investigating Mr Patel from him (by reducing the price it would pay for his shares), but still charge Dartford the cost. One would therefore expect Specsavers to have ensured both that no such cost was passed on, and that this was readily demonstrable. In fact however the evidence on this was far from clear and came out in a confusing fashion piecemeal over several witness statements. But the final position was as follows:

(1) The covert cameras were supplied by Retail Covert Surveillance (**"RCS"**). This business is said by Specsavers to be partly owned by Mr Barnes of Loss Prevention, a fact which is not disclosed on the invoices and which has only recently come to light. Mr Dyson knew about it, as did Mr McAlindon, but Mr Paul Fussey, Specsavers' Chief Financial Officer, did not and wrote on 3 October 2014 to JVPs explaining the position, in the interests of transparency, and informing them that KPMG had been asked to review the position. Although casting an interesting light on Mr Dyson's approach to an obvious conflict of interest, it is not of direct relevance to the present question.

(2) RCS initially invoiced SOS for 2 cameras (one to cover the sales floor till and one to cover the back office cash storage area) on 22 November 2006; and subsequently for a 3rd camera (to cover the rear alcove) on 3 December 2006, each being charged at £1,500 per month. These invoices were never passed on to Dartford, but the evidence leaves it unclear if this was deliberate or an oversight.

(3) On 20 December 2006 RCS invoiced SOS for the first 2 cameras for a further month at £1,200 each. These costs, by contrast, were passed on by SOS to Dartford in an invoice raised by SOS for £2,400 dated 31 March 2007.

(4) There is no evidence that any other costs of the investigation into Mr Patel were passed on to Dartford by SOS.

(5) On 25 January 2008 SOS issued Dartford with a credit note in the sum of £7,837.50. Mr Dyson said that it had not been possible to ascertain precisely what the credit note related to; but the narrative on the credit note is "Retail Security Fees credit as first part of investigation SOG are picking up fees" and, as Mr Dyson himself points out, it is possible to match the figure of £7,837.50 with certain sums shown on an 'invoicing control file'. This lists the time spent by Loss Prevention personnel on both the investigation into Mr Patel and later into Ms Birdi, with the relevant hourly charge rate and the cost to be charged; and the cost of the time spent up to and including 20 February 2007 comes to precisely £7,837.50. Given the narrative on the credit note, there is I think no real doubt that this is what the credit note represents, and that it was intended to reverse the charge of these items to Dartford.

(6) Mr Dyson says however that Specsavers' Finance Department has confirmed that these costs were not charged to Dartford in the first place so the credit note should not have been issued. I have not seen anything which casts any doubt on this statement.

The net effect, more it would appear by happenstance than by design, is that far from Dartford being charged the cost of the investigation into Mr Patel, it was in fact charged only £2,400 and credited with £7,837.50, a net credit of £5,437.50. In these circumstances, SOG's breaches of duty have not in this respect caused Dartford or Ms Birdi any loss.

119. So far as the thefts are concerned, these were of course losses borne by Dartford – or more probably Visionplus – as they represented cash actually taken out of the business. Again it is obviously wrong for Specsavers to recover the money from Mr Patel (by way of adjustment to the price) but not to account for it to Dartford so that Dartford/Visionplus was left bearing the loss. Mr McAlindon was asked about this; he admitted that he was not an accounts person but *"somebody in accounts would have resolved that issue and accounted for it in the right way"*. In fact there is no evidence before me that any attempt was ever made to account for it in the right way, or at all.

120. Specsavers relies on the fact that in the event Dartford did not repay a director's loan which was owed to Mr Patel. Both Mr Patel and Ms Birdi were owed roughly similar amounts by Dartford by way of directors' loans, which were interest free and

repayable on demand. The amount shown in Dartford's accounts for the year ended 30 September 2006 as owing to Mr Patel was £3,753 (with £3,675 owing to Ms Birdi) and a more precise figure of £3,752.62 is given in the so-called 'Bottom Line' accounts (detailed monthly accounts provided by Specsavers' Accounts department for the JVPs) for February 2007. Mr Dyson said in his witness statement that Mr Patel agreed to write this off; but it was apparent from his oral evidence that he had no sufficient basis for making such a statement. In fact the documentary evidence is that under the deal as originally done with Mr Patel he was not asked to write off his loan: the Business Transfer memo of 22 February 2007 recording the deal (paragraph 79 above) referred to the loan as "to be repaid" and said "Company agrees to repay loan". I have no evidence before me that there was ever any subsequent agreement by Mr Patel to write off his loan. It is not suggested that it has in fact been repaid to him, and it is no doubt now likely to be statute-barred, but so far as the evidence before me goes, there is nothing to suggest anything other than that Mr Patel did not press the claim (for whatever reason), and I am not persuaded that there was any conscious decision by Specsavers to offset one against the other.

121. That would no doubt not prevent Specsavers from taking advantage of the fact that in practice Mr Patel had repaid £3,752.62 in this way if these were the only amounts owing on each side. But Mr Stuart pointed to the fact that there appeared to be at least one other amount due to Dartford from Mr Patel, namely a sum of £9,469, which in January 2010 Specsavers claimed to be due from him, but did not in the event pursue him for. This sum arose as a result of a VAT charge arising from the rate of cross-charging between the store companies such as Dartford and the service companies such as Visionplus which was agreed with HMRC for the dual company stores as a whole; in Dartford's case this gave rise to a VAT liability, and Specsavers claimed in a letter to Mr Patel of 21 January 2010 that this meant that he was in breach of a warranty that he had given at the time of selling his shares that Dartford's net assets were not less than £40,000. Under the terms of the agreement he had agreed to indemnify Dartford for any breach of the warranty and on that basis Specsavers claimed that he owed Dartford £9,469. Mr Dyson's evidence was that no response was received and a decision was probably made not to pursue it for commercial reasons. I agree with Mr Stuart that in these circumstances one cannot just look at the £4,180 lost by Visionplus, and say that it was largely recouped by the £3,752.62 director's loan not paid to Mr Patel; if this exercise is to be done at all, one must also bring into account the fact that Specsavers wrote off a further £9,469 owed by Mr Patel which more than outweighs the amount of directors' loan. I therefore find that Specsavers did not reimburse Dartford/Visionplus for the £4,180 stolen by Mr Patel.

122. However I have also found that Specsavers credited Dartford a net amount of £5,437.50. This is more than enough to cover the £4,180 (indeed £1,257.50 more). I see no reason why Specsavers cannot rely on this and say that overall the effect was that Dartford was more than reimbursed and hence did not end up bearing either the costs of investigating Mr Patel or the losses as a result of his thefts. I find therefore that although SOG was in breach of both its duties as director and the Shareholders' Agreement, this did not cause Dartford any loss, and that there is therefore no prejudice to Ms Birdi in this respect.

123. That leaves under Issue 1 the other amounts said to have been improperly paid to Mr

Patel. The sums involved are small, and I am very doubtful if they are more than 'trivial' and can properly found an allegation of unfair prejudice; in any event, as appears below, they are covered by the excess net credit of £1,257.50 which I have found. I will however set out my findings on the complaints.

124. The first relates to accountancy bills. It will be recalled that all payments were done through the group treasury system. On 2 July 2007 Specsavers paid out of Dartford's account £2,526.25 to THP Professional Services Ltd ("**THP**"). THP are accountants and the payment related to 5 bills rendered by THP between April 2006 and March 2007. 3 of them were addressed to Dartford, and charged a sum of £400 each (plus VAT) for reviewing management accounts: no complaint is now made of these. The remaining 2 were however addressed to Mr Patel at his home address, one for a "fixed price agreement" in the sum of £275 plus VAT, and the other for reviewing management accounts of optician practices at Brent Cross, Canterbury and Ashford in the sum of £700 plus VAT.

125. I accept that the latter invoice certainly (because of its subject matter) and the former invoice probably (because of being addressed to Mr Patel) were not business expenses of Dartford but were Mr Patel's personal liability. I agree with Mr Stuart that these payments should never have been made, and I find that SOG was therefore in breach of clause 9.3 of the Shareholders' Agreement under which it warranted that all monies drawn from Dartford's account would only be applied to meet its direct business expenses.

126. Authority to pay the bills was given by Mrs Slark on 28 June 2007. Ms Birdi was then suspended and Mrs Slark was running the store as temporary manager. She did not give evidence and Mr Dyson was unable to give any relevant evidence, so I am left without any explanation as to why she authorised payment of the bills. Mr Potts submitted that the bills were no doubt assumed to be business expenses, but there is no evidence to this effect and at the very lowest it shows Mrs Slark being careless with Dartford's money.

127. Mr Stuart claimed that the overpayment was £1,205.63. This is the amount on the face of the two bills which were for (i) £275 plus VAT or £323.13 and (ii) £700 plus VAT or £822.50. But this seems to me to be overstated. First, the bills were charged to Dartford which as explained above (paragraph 38) was able to recover 100% of its input VAT. I find therefore that the net cost to Dartford was the net of VAT figure. Second, Specsavers in fact only paid £250 for the first bill. I find that the net cost to Dartford of paying these 2 bills was therefore £950.

128. The other complaint relates to a sum of £369.98 which related to an invoice dated 3 July 2007 for repairs to Mr Patel's Mercedes following an incident on 23 April 2007. The facts are as follows:

(1) As set out above (paragraph 79) it was agreed on 20 February 2007 when Mr Patel resigned that the company car he used would be given to him.

(2) The car was at that time insured through Specsavers' Group policy, which was administered for them by Aon. On 22 February 2007 a Ms Heather Legg of Specsavers in Guernsey asked Aon to cancel any insurance for Mr Patel with effect from 20 February 2007. Aon telephoned Ms Birdi for confirmation, but

she said that it was a company car and although she believed Mr Patel was going to have it, she would have to get back to them. She contacted Specsavers in Guernsey who told her that Mr Patel was being allowed to take the car. It seems however that she was not told that it should be taken off the insurance, and she does not appear to have gone back to Aon asking for it to be cancelled. The car therefore remained insured on the Group policy.

(3) On 8 March 2007 a form requesting a distribution to Mr Patel in the shape of the gift of his existing company car was completed and sent to Specsavers' Financial Planning department. Although the form was designed to be signed by the partners of the store concerned, in this case there were no signatures but someone had written "Actioned by legal as per letter dated 20/02/07". The request was in due course processed by Financial Planning and on 26 April 2007 a Mr Danny Blondel circulated an e-mail to various departments confirming that approval had been given to "gift" the car to Mr Patel and asking for it to be disposed of at its written down value.

(4) In the meantime on 23 April 2007 Mr Patel's car was involved in an incident which meant it needed repairs. A claim was made on the insurance and on 7 June 2007 the claims handler at Aon, a Ms Teresa Fisher, wrote to Mr Patel at the Dartford store asking him to forward a copy of the receipt for the excess.

(5) On 8 June 2007 Mrs Slark replied to the letter saying that Mr Patel should have told Aon that he had resigned, that the claim going through should be stopped, and that the Dartford store should receive a refund of insurance policy payments. The repairs were put on hold while Aon asked for confirmation of the date ownership was transferred to Mr Patel.

(6) On 12 June 2007 Mr Richard Fleming, Specsavers' Insurance Services Manager, confirmed to Aon that the car should have been deleted from the policy with effect from 26 April 2007. Aon thereupon restarted the claim and the repairs process in the normal way, and Specsavers' insurers agreed to meet the costs. There was however a policy excess of £250 and a VAT charge of £119.98 which Mr Patel paid himself and which he sought reimbursement of.

(7) On 13 July 2007 Mr Fleming wrote to Mrs Slark saying that as the vehicle was Specsavers' property at the time of the incident and insured within the Group scheme, it was Dartford's responsibility to pay the excess and VAT, although he understood that all or part of the VAT might be reclaimed.

(8) Mrs Slark thereupon authorised the reimbursement to Mr Patel and sent him a cheque for £369.98.

129. It might be arguable whether it was appropriate for the car to be insured on Specsavers' group policy after 20 February 2007, when it had already been agreed that it would be given to Mr Patel; but it appears clearly from the history as set out above that the reason why the payment was authorised is because the gift was not processed until 26 April 2007, which happened to be after the accident, and the car in fact remained on cover. Ms Birdi accepted in cross-examination that she was not suggesting that Mrs Slark was acting for an improper purpose, and that this was just a genuine business decision that she made; given that Mrs Slark's initial reaction was to try and avoid

paying the claim and to seek a reimbursement of premiums (and in the event she secured a reimbursement of premium for the Dartford store for the period from 26 April onwards), I agree that there is no question of Mrs Slark deliberately loading costs on to the store improperly. Nor is there any suggestion that Mr Fleming, in authorising the payment, was doing anything other than treating the claim in the normal way. In the circumstances I do not think this amounts to unfairly prejudicial conduct of the affairs of Dartford.

130. In any event, I have no reason to think that the VAT was not reclaimable which means that the net cost to Dartford was probably £250. Taken together with the £950 for the THP invoices, this makes a grand total of £1,200. As stated above Specsavers had in fact given a credit to Dartford which, even after allowing for £2,400 for cameras and £4,180 for the thefts, left Dartford in credit in the sum of £1,257.50. In the circumstances, this is enough to cover the cost of the payments of which complaint is made.

131. I therefore find in respect of the matters of which Ms Birdi complains under Issue 1 that although SOG was in certain respects in breach of its duties, overall this caused no loss to Dartford, or prejudice to Ms Birdi.

Issue 2

132. Issue 2 concerns the costs charged to Dartford as a result of the investigation into, and suspension of, Ms Birdi during 2007. As pleaded in the Amended Points of Claim, Ms Birdi alleges that her suspension was not decided upon at a duly convened meeting of Dartford (in breach of the Shareholders' Agreement); and that SOG did not act in good faith in what it considered to be the best interests of Dartford, being motivated by malice and/or a desire to persuade Ms Birdi to leave the business because this suited its own interests. It is also alleged that the quantum of costs was excessive.

133. The pleaded case refers to a total of £86,000. A breakdown provided by Mr Potts identifies the following amounts being charged to Dartford:

(1) By far the largest item charged was the cost of emergency management cover charged by Loss Prevention to Dartford in a total sum of £65,120 (+ VAT). This was charged at a rate of £440 per day, and the monthly charges were as follows:

April 2007 (22 days)	9,680
May 2007 (21days)	9,240
June 2007 (22 days)	9,680
July 2007 (23 days)	10,120
August 2007 (20 days)	8,800
September 2007 (20 days)	8,800
October 2007 (20 days)	8,800

Total (148 days)	£65,120

However this only covers the amounts charged by SOS to Dartford for the management cover up to 26 October 2007. Thereafter Mr Sean McLaughlin charged Dartford directly at a rate of £200 per day. This continued until 21 December 2007 and in total he charged £7,700 for that period (38½ days).

(2) A total of £5,035.55 (+ VAT) was charged for the cost of various Specsavers personnel in relation to the investigation and hearing of the disciplinary process into Ms Birdi. These sums were charged to Visionplus, as follows:

Neil Hamilton (June 2007)	1,638.00
Neil Hamilton (July 2007)	1,027.95
Note taking	425.00
"	425.00
Mark Raines, Mike Rowe and travel and hotel costs	1,169.60
Dominic Savill	350.00
	£5,035.55

(3) Various sums were charged for the use of covert cameras. In addition to RCS' invoice of £2,400 for cameras during the investigation of Mr Patel which was passed on to Dartford (paragraph 118(3) above), a further £6,720 (+ VAT) in total was charged to Dartford as follows:

Purchase of hard drives	2,220.00
Camera to cover staff room area	1,500.00
2 cameras to cover safe and back office and till on sales floor	3,000.00
	£6,720.00

The latter two items relate to (i) an investigation in April 2007 following a theft from lockers, and (ii) an investigation in September 2007 following a suspicious refund transaction; neither was related to the investigation into Ms Birdi, and can be disregarded.

(4) An NHS audit fee of £330 was charged by Loss Prevention for a routine audit fee in June 2007. This was also unrelated to the investigation into Ms Birdi and can be disregarded.

134. In total therefore the amounts at issue are:

Management cover	65,120
Sean McLaughlin charged direct	7,700

Disciplinary investigation	6,720
Purchase of hard drives	2,220
	£81,760

As explained above these are the sums net of VAT. Most of the sums were charged to Dartford where there is no reason to think that it could not reclaim 100% of its input VAT so the net cost to it was of the figure exclusive of VAT. Visionplus as already referred to does not appear to have been entitled to recover all its input VAT but only a proportion of it; but I was not told what proportion.

135. The relevant facts are as follows. I have already said that Mr McAlindon went to Dartford on 20 February to deal with Mr Patel, not to obtain evidence against Ms Birdi, and that there is no evidence that anyone at Specsavers had any reason to suspect Ms Birdi up to that point. Mr Patel did however make allegations against her and these were recorded by Mr McAlindon in his second interview. As there set out the allegations were (i) that she had put her husband Mr Rehman on the payroll, that he had probably been on the books since 2001, that he did not work in the store, that the only work he had done for them was to produce a disc which was just an excel spreadsheet to help work out bonuses for which he was paid (Mr Patel could not remember the amount but thought £500 or £600); (ii) that her father Mr G Birdi was on the books from when they first started in March 2000 until he was taken off recently (Mr Patel thought in 2006), that he was paid £275 a month for some accounting work, but Mr Patel had never seen any set of accounts he had produced, he did no work in the store and to his knowledge did not do anything for the business; (iii) that Ms Birdi was paid overtime, sometimes through the payroll in her husband's name, including £4,000 during a refit in December 2005; and (iv) that she only tested 3 days a week and in various respects was unprofessional with the staff and with Mr Patel himself who said he felt he had been bullied for the last 7 years. Mr Patel added that his own wife (Dr Karina Patel) had also been paid £275 a month, but all she did was check through his corporate credit card statement and send the relevant receipts off to Guernsey once a month (which Mr Patel agreed would be about an hour's work a month).

136. In his investigation log Mr McAlindon noted certain other allegations. In January 2007 the store kitchen had been refurbished (with new cabinets and heaters and a kitchen sink), but there were no invoices for the work. Mr Patel said that Ms Birdi knew that the store could not afford the works and that Specsavers' Financial Planning department would either reject a request for the work to be done or would expect them to use approved contractors, and had used Polish immigrant workers who were paid in cash, the money being taken from the store by paying Karina Patel £750 through the payroll, with Mr Patel repaying Ms Birdi by a personal cheque for £536.41. He said that a number of other works (repair to the lab floor and refurbishment to the test room) had been carried out in a similar manner. He also said that Ms Birdi kept personal records of all payments in a blue A5 book which she kept on her; and that he could not locate any timesheets for the £4,000 payment for overtime in December 2005, a payment which he did not agree with and regarded as fraudulent.

137. The source for these later allegations appears to have been a "List of Investigation Matters" which was handwritten by Mr Patel. This is undated but Mr McAlindon's

evidence was that he told Mr Patel on 20 February that if he wanted to add anything he should put it in writing and send it into the centre. I accept this evidence; it was probably sent by Mr Patel to Guernsey shortly after 20 February, from where a copy was forwarded to Mr McAlindon. In it Mr Patel said he would forward copies of his wife's bank statement and the cheque for £536.41 when he had received them; in due course he did this as Mr McAlindon noted in his investigation log under "March 2007".

138. Mr McAlindon was not interested in the allegations that Ms Birdi had not been doing enough testing and had acted unprofessionally with staff, but he was very interested in the allegations of financial irregularity. On 25 February 2007 he bought from RCS 12 hard discs which contained the evidence from the covert cameras, at a cost of £2,220. His explanation in evidence for doing so was that one of Mr Patel's main allegations had been that payments had been made to Mr Rehman but he had not worked in the store; and he thought that if he had been working in the store there was a high probability that this would show up on the recordings from the cameras either covering the till (if he had been working on the sales floor) or the office. If he had continued to carry out the investigation, he would have interviewed Ms Birdi and her husband and asked for their accounts of his movements, which he would then have checked against the camera evidence. In the event Mr McAlindon was taken off the investigation and he did not know if anyone ever looked at the evidence; nor did he know what had happened to the discs which as far as he knew were last in the possession of a Loss Prevention employee, Mr Lew Samuel; Mr McAlindon had gone to Mr Samuel's house after Mr Samuel had died to retrieve any Specsavers property, but had not found the discs.

139. Ms Birdi did not know anything about Mr Patel's allegations. On 22 February she spoke to Mr Ryan in Business Transfer and asked him about the process for selling Mr Patel's shares. She was interested in the possibility of her husband acquiring them. She had already been in touch with Mr Howarth of Professional Recruitment back in November about Mr Rehman becoming a JVP, and he had sent Mr Rehman an information pack and application form which Mr Rehman had completed. Now she asked Mr Ryan about the input she would have in the selection of Mr Patel's replacement and about the possibility of her husband replacing him. Mr Ryan told her that ultimately she had no choice in the matter and would have to accept whoever Specsavers chose. As to Mr Rehman, he was not a dispensing optician and he understood that Specsavers would require a dispensing optician (as it had already decided in rejecting Ms Niki Kaur's application).

140. On 27 February 2007 Ms Birdi was at the store when she received a phone call from Mr McAlindon. He had spoken to Mr Patel who had complained to him that Ms Birdi had told the staff that he had been fired for stealing and told locum agencies that he had been dismissed. Mr McAlindon asked Ms Birdi if she had. She denied saying anything to locum agencies but accepted that she had told the staff that he had been forced to resign. Mr McAlindon berated her, accusing her (in his own words in an e-mail he wrote the same day reporting the conversation to Mr Dyson and Mr Ryan) of "a breach of confidentiality and a breach of a legitimate management instruction from myself." He told her that she was not to contact Specsavers head office in Guernsey but was to come to him with any operational issues; he also made it clear that Mr Patel's shares would not go to her husband and she should drop the issue of having

any input into the new JVP.

141. Ms Birdi's evidence is that Mr McAlindon was aggressive, threatening and intimidating in this call, shouting at her down the telephone. I accept this evidence. Mr McAlindon's own description in his e-mail is that "I have told her to back off" adding "hopefully she will quieten down for a while"; and in an entry in his investigation log for 27 March 2007 he referred to himself as having told her "in no uncertain terms" that she must not speak out of turn again and as having been "deliberately firm in his instructions". I have no doubt that he expressed his views very forcefully. He also recorded in his investigation log (wrongly dated to the week commencing 19 March 2007) that he had told her that her failure to follow a legitimate management instruction could have placed the reputation of the brand and company at risk in the event of a court case and the brand, company and herself at risk in the event of financial penalties being levied for libel; that her deliberate failure to follow a legitimate management instruction would be communicated to the SOG Board and that she must make no further comments along these lines.

142. I have not understood what justification Mr McAlindon had for any of this. Mr Patel had indeed effectively been forced to resign (although strictly speaking he was given an unpalatable choice between resigning and being dismissed after a formal disciplinary process); the evidence that he was a thief was indisputable, including as it did his own signed admission; and it is impossible to see that there was ever a realistic prospect of him bringing a libel action. But quite apart from this, I do not see what business it was of Mr McAlindon's to tell Ms Birdi what she could and could not say to the staff, or how he felt able to give her a "legitimate management instruction", or tell her off for not complying with it. He was not her employer, which was Visionplus; he had no authority to act for Visionplus in telling her what to do (the only authority delegated by the written resolution was authority for SOG to hold disciplinary hearings, and effect any disciplinary award short of dismissal, in relation to Mr Patel); he was not strictly even an employee of SOG, her fellow-director (being an employee of SOS), but even if he had been, SOG as one director had no right to tell Ms Birdi as another director what she could and could not say. Nor do I see that it was any business of Mr McAlindon's to tell Ms Birdi to stop contacting head office and only deal with him (in his words in his e-mail "she should come to me and not go off around the business"; in Ms Birdi's words in her written evidence "stop making pestering calls to head office, they were not appreciated"). It is true that Ms Birdi had been making a number of calls to head office, speaking to Mr Ryan, and to Mr Blondel in the Financial Planning department. But these were in relation to practical matters arising out of Mr Patel's departure (should his car remain insured, what was to happen to his shares, whether a so-called 'equalisation dividend' should be paid to her (an equalisation dividend or payment being a payment made to one JVP where the other had received some benefit from the business so as to equalise their share of profits)) and I cannot see anything which merited her being told not to speak to SOG (her co-director) about such matters – or that entitled Mr McAlindon to order her about in this way. Ms Birdi's description of the call was that it left her shocked as she had thought that she was a director and joint venture partner and not an ordinary employee, a reaction that I find entirely understandable.

143. Mr Dyson's reaction to Mr McAlindon's e-mail reporting on his conversation can be found in a brief e-mail sent the next morning in which he said "Thanks Mel, good

work" so he evidently saw nothing inappropriate in what Mr McAlindon had said to her. I can only conclude that Mr McAlindon felt able to treat her in the way he did because he understood that he had the backing of Mr Dyson, and regarded Mr Dyson as entitled (on behalf of SOG) to dictate what happened in the store.

144. Mr McAlindon ended his e-mail to Mr Dyson with the words:

> "I suspect we need to go back for a second stage investigation into the remaining payroll concerns."

Mr McAlindon maintained in his witness statement that at this stage he had no view on whether Mr Patel's allegations were accurate, but they were serious accusations and required investigating. I do not think this is right; I consider that he had already concluded that there was likely to be some truth in Mr Patel's allegations. In a March 2007 update to his investigation log he noted that Mr Patel had forwarded to him copies of his wife's bank statement and cheque (this was the cheque for £536.41, which was drawn by his wife in favour of Ms Birdi on 2 December 2006) and that it had been identified from payroll records that Dr Karina Patel had been paid a fixed amount each month, totalling over £24,000 over the years; and that Mr Rehman had been paid a total of £8,800 odd, and added:

> "However on SB's side of the family, prior to this, her father was paid the shortfall and he did no work either."

This does not seem like the comment of an impartial investigator with no view one way or the other. On 8 March 2007, Mr Dyson got his PA to ask Mr Howarth if he had any partners on the books who might want to work together in Dartford, describing it as very urgent (paragraph 102 above); the only plausible interpretation of this is that Mr Dyson was expecting that there would be, or at any rate might well be, a double vacancy in the very near future, which he can only have got from Mr McAlindon telling him that there was a real prospect of it being established that Ms Birdi had been guilty of misconduct with the result that she would be exited from the store as well. Moreover Mr Dyson authorised Mr McAlindon to carry out an investigation into Ms Birdi, and, as appears below, decided that she should be suspended pending the investigation. In cross-examination he was shown Specsavers' disciplinary procedures which permitted suspension of an employee "if you believe an act of gross misconduct has been committed" and asked if he did already believe that, to which he answered "Yes"; and when asked on what basis, said that on the information he had from Mr McAlindon, there was no evidence with regard to the building works, there were people on the payroll and larger bonuses being paid. In the light of these matters I find that certainly by the time she was suspended (on 27 March 2007) both Mr McAlindon and Mr Dyson believed that Ms Birdi was guilty of gross misconduct and was likely to be on the way out.

145. On 26 March 2007 Mr McAlindon attended the store with 2 other Loss Prevention employees, Mr Barnes and Mr Samuel. It was Ms Birdi's day off but Mr McAlindon spoke to her on the phone and told her that the investigation had been extended to cover her involvement and that the areas being covered included payroll and invoicing. She told them where to find documentation which they took away with them. The next morning she arrived at the store; Mr McAlindon and Mr Barnes were already outside. Ms Birdi's and Mr McAlindon's accounts of the day differ in the

details but it is not necessary to go into the differences: what is common ground is that Ms Birdi had a meeting with Mr McAlindon and Mr Barnes in the office, that she was told that Mr Patel had accused her of financial irregularities, that she complained of having felt intimidated and threatened in the phone call of a month before, and that in the light of this she said she wanted to have a companion with her. (Interestingly, Mrs Lorraine Frondigoun, an employee who was at work that day, volunteered that Mr McAlindon was *"quite intimidating"* and *"a bit scary"* and that Ms Birdi was frightened). It was agreed that she would be invited for interview with a companion at a later date. Mr McAlindon also asked her about the blue expenses book which Mr Patel had said had records of equalisation payments; she said she did not have it on her but had it at home.

146. Mr McAlindon then handed her a letter of suspension. Since there was some argument as to its effect, I should refer to its terms. It was headed "Dartford Visionplus Limited" and having referred to the ongoing investigation into financial irregularities at the Dartford store continued:

> "This letter confirms that you are formally suspended with immediate effect and until further notice under section 12.2 of your service contract.
>
> During your suspension you are not to attend for work nor visit the Specsavers premises at [the address of the Dartford store].
>
> In addition for the time being you are **not to contact any member of staff who normally works at the store** (this restriction may be lifted once the investigation is concluded). You will continue to receive full pay during the period of your suspension."

It also required her to attend an interview with Loss Prevention and said she could be accompanied. It was signed by Ms Alison Anderson as authorised signatory of SOG in its capacity as company secretary of Visionplus.

147. It will be recalled that when Mr Patel was suspended, he was asked (and agreed) to sign a written resolution of the board of Visionplus resolving that he be suspended from employment and authorising SOG to carry out the disciplinary procedures. In the case of Ms Birdi's suspension this was not done. Mr Dyson was cross-examined extensively about this as a result of which it became clear that he had made the decision to authorise Loss Prevention to investigate Ms Birdi and to suspend her himself, acting on behalf of SOG. He had not discussed it with Dame Mary Perkins, the other director of Visionplus, nor asked Ms Birdi, who was of course herself a director, to agree. When it was put to him that the correct procedure had not been followed, he agreed; and when he was asked why Mr Patel got an opportunity to agree or disagree to a resolution suspending him but Ms Birdi did not, he said he could not answer the question why that didn't happen and agreed that it should have happened.

148. Having given her the letter of suspension, Mr McAlindon escorted Ms Birdi from the store. She went home in a distressed state. The next day her brother, a cardio-thoracic surgeon, came down from Nottingham to be with her. Mr McAlindon rang several times to ask for the expenses book. Ms Birdi had not found it. Her brother spoke to Mr McAlindon and told him that she had been very unwell with chest pains and that he had advised her not to enter into any discussions or positions that were

going to lead to more stress. On 29 March Ms Anderson sent a letter to Ms Birdi asking her to let them know when she would be well enough to attend for interview and again demanding that the expenses book be handed over to Loss Prevention.

149. This was the start of a protracted process in which Specsavers tried to arrange for her to attend for interview, which in the end did not take place until 28 June and 6 July 2007. The reasons for the delay can be traced in the correspondence. On 30 March 2007 Ms Birdi's GP signed a sick note stating that she should refrain from work for 2 weeks for stress reaction. She sent this to Ms Anderson, as she did successive further notes, each for 2 weeks and each referring to work related stress, dated 13 April, 27 April and 11 May 2007. On 12 April 2007 she wrote to Ms Anderson saying that she would update her as to when her GP anticipated that she would be available for interview; that she would be more than willing to attend an interview, but was extremely anxious not to have any further dealings with Mr McAlindon whom she found to be aggressive and intimidating; and that she did not have the expenses book and had not had it since December 2006. On 20 April Ms Anderson wrote to her saying that they had questioned Mr McAlindon and Mr Barnes and were satisfied that they had not behaved inappropriately; they would wait to hear when she would be available for interview. On 1 May Ms Anderson wrote noting that she had been off for nearly 7 weeks and asked her to sign a form consenting to Specsavers approaching her GP. On 3 May Ms Birdi reiterated her complaint against Mr McAlindon (and saying that she had again looked for, but could not find, the expenses book) and on 15 May signed the consent form. On 21 May 2007 Ms Anderson wrote to the effect that although they did not agree with her comments concerning Mr McAlindon's conduct they had arranged for Mr Neil Hamilton to continue the investigation and carry out any interviews, and invited her to interview on 5 June. On 30 May Ms Birdi replied saying that her GP had signed her off sick until 5 June, and requesting that a close personal friend accompany her to interview. On 30 May Ms Birdi's GP faxed Ms Anderson confirming that Ms Birdi had been extremely unwell due to stress and anxiety. On 1 June Ms Anderson wrote telling Ms Birdi that her interview had been rescheduled for 12 June, and asking for her friend's occupation; when Ms Birdi replied on 4 June that she was a personal injury solicitor, Ms Anderson's response on 7 June was that she was not permitted to attend. On 6 June Ms Birdi was signed off sick until 11 June, and on 11 June for a further 2 weeks, so she did not attend for interview on 12 June, although her husband did attend and was interviewed by Mr Hamilton. On 14 June Ms Anderson told her that the interview had been rescheduled for 28 June. Although Ms Birdi was signed off sick for a further 2 weeks on 22 June, she agreed to attend on 28 June and duly did so with a companion, Mrs Deepa Gill. The interview did not finish that day and was adjourned to 6 July.

150. While Specsavers was waiting to interview Ms Birdi, the investigation was progressed, initially by Mr McAlindon and after 21 May by Mr Hamilton. On 12 April Mr McAlindon sent a report to the Board of SOG asking how they would like to proceed. He summarised the history, said that the missing records were in Ms Birdi's possession but she would not produce them (this was before her letter of 12 April was received), and set out 3 possible options. The first was to do nothing, or take some form of disciplinary action falling short of termination. Mr McAlindon however said that Mr Patel had threatened that if she were not dealt with equally to him and remained in the business, he would make a report to the tax authorities accusing her of tax evasion and Specsavers of having done nothing about it, a course of action that

could leave SOG exposed. The second was to carry on the investigation with a view to a disciplinary case, Mr McAlindon saying that on the evidence currently available it appeared highly likely that there was a case of gross misconduct to answer to. He commented that Ms Birdi had shown that she was not prepared to hand over documents (meaning the expenses book) and that it appeared likely that this would be a long and protracted course. The third option was to put together a case to present to the police, again commenting that she was deliberately withholding documents and adding that if she failed to co-operate this might gain her attention and also expedite matters. The memo fairly clearly indicates how Mr McAlindon viewed Ms Birdi, namely as someone who was very likely to have committed gross misconduct and whom it would be undesirable to leave in the business.

151. Mr Dyson told Mr McAlindon to carry on with the investigation. In the meantime Mr McAlindon had arranged for a temporary manager to go into the store. This was Mrs Slark, who started on 29 March 2007. Mrs Slark had worked within Specsavers for 21 years and become a JVP in a store company in Shirley. But she was selling her shares there and looking for temporary work before taking up shares in another store company. On 28 April 2007 she e-mailed Mr McAlindon to the effect that she had been speaking with one of the members of staff at the store (Mrs Frondigoun) who she thought would be happy to give him information against Ms Birdi. The e-mail is very informal, being headed "You'll like this" and starting "Good morning, fine sir!" and in it she said:

> "I genuinely believe that if you investigate/interview her [Mrs Frondigoun] you may get what you need.
>
> Lorraine seems very happy to help as she is cross they have not had pay rises in years and the husband was on the payroll, that is taking the mickey."

It is clear from this e-mail that Mrs Slark enjoyed a good relationship with Mr McAlindon, and was aware that he was looking for evidence to build a case against Ms Birdi.

152. Mr McAlindon did come to the store and interviewed Mrs Frondigoun and another member of staff Ms Patrice O'Brien (now Mrs Dando). A considerable time was taken up in evidence (with both employees and with Mr McAlindon) with the way these interviews were conducted and recorded. In each case there is a typed record of the interview signed by the employee dated 1 May 2007. Mrs Frondigoun's recollection was that her interview lasted a long time, about 4 hours, starting at about 12.15 but not finishing until about 4; that Mr McAlindon recorded it on a machine which she described as an oldy-fashionedy kind of thing which he kept turning on and off; and that he produced the typed up record for her to sign some time later (about 2 days later she thought). Mrs Dando's recollection was that her interview took about an hour and a quarter; that Mr McAlindon was just taking notes, and didn't have either a tape recorder or a computer with him; and that she was given the typed up record to sign a few hours, or possibly a day or two, later. On the strength of these recollections, and the fact that the metadata for each document showed that they were created on 2 May, it was suggested to Mr McAlindon that he had interviewed the employees on 1 May, and then created the typed records the next day. But this seems to me highly improbable. The metadata for Mrs Frondigoun's interview show that it was created at 12.14, last modified at 14.36 and printed at 14.36 (all on 2 May), which

corresponds strikingly with the times shown on the record of the interview itself, namely that it started at 12.15 and finished at 14.34; the metadata for Ms O'Brien's interview show that it was last modified at 15.59 which again accords with the time of 15.58 recorded in the document itself as the time the interview terminated. I find, in accordance with Mr McAlindon's evidence, that he typed up the interviews on a laptop as they happened just as he did with Mr Patel, that he misdated the interviews to 1 May when they in fact took place on 2 May (Mr McAlindon was certainly at the store on 2 May as Mrs Slark sent him an e-mail that evening saying "Nice to finally meet you today"), and that he printed out the interviews and gave them to the employees to sign, Mrs Frondigoun signing hers at 14.54 (as someone, probably her, has recorded in manuscript), and Ms O'Brien signing hers the same day. This means that Mrs Frondigoun and Mrs Dando have each misremembered the details of how the interviews were recorded (although Mrs Frondigoun's description of Mr McAlindon turning the machine on and off might well reflect the intermittent nature of the interview where Mr McAlindon asked her a question, waited for the answer and then typed it out). I do not find this surprising given the length of time since the interviews, and I am sure they were both trying to assist the Court to the best of their ability, but it does mean one should be cautious about the extent of their recollection.

153. I accept therefore that the records of interview were made contemporaneously. There is no reason to doubt that they accurately record the answers given by the employees: Mrs Frondigoun accepted in terms that she said (and believed) what was attributed to her; and Mrs Dando signed the record of her interview making a few manuscript corrections which indicates she was otherwise happy with it. Each said that Mr Rehman did not work in the store, that they did not regard him as an employee, that he had done some interviews but they did not know what else he might have done out of hours or at home to justify a salary or bonuses.

154. Mrs Frondigoun however gave evidence that Mr McAlindon was continually pushing her to say things; he asked her to tell him anything she could think of; he wound her up and made her cross, suggesting that Mr Rehman had been doing her NHS work, and she got very worked up and angry at the idea that he had been claiming to have been paid for doing her job. She said that Mr McAlindon had said "She's a real bitch" and "That Nim seemed like quite a nice guy to me". Mr McAlindon denied this, saying that he was always careful with what he said in interview as it was not unknown for interviewees to record what he said secretly. I am not prepared to find, solely on the basis of Mrs Frondigoun's recollection over 7 years later, that he used those particular words about Ms Birdi, and she was wrong about the length of time the interview took; but I do accept that there must have been something in Mr McAlindon's style of interviewing which left such a strong impression on her. I have already said that Mr McAlindon by this stage considered that there was very probably a good case against Ms Birdi and I consider it probable that he did give Mrs Frondigoun the impression that Mr Rehman was claiming to have been paid for a lot of work which he did not actually do, and was looking for this to be confirmed by the employees. Mrs Dando did not think that Mr McAlindon was leading with his questions but she did accept that Mr McAlindon had given her the impression that Mr Rehman was claiming that his salary was for doing 'MARS' work (this was a system for ensuring that the stock was correctly displayed and necessarily had to be done in the store).

155. An entry in Mr McAlindon's log for 8 May 2007 refers to a further visit to the store when among other things he asked the employees if everyone was OK. One of the employees, a trainee dispensing optician, was concerned that there was a witch hunt against Ms Birdi, and that a judgment had already been made on her. Mr McAlindon reassured her that the investigation was fair and had not been pre-judged; but she must have got this view from somewhere and the obvious inference is that this was the impression left on the employees who had been interviewed.

156. As already indicated on 21 May Specsavers agreed that Mr Hamilton should continue the investigation in place of Mr McAlindon. Mr McAlindon e-mailed him the investigation log and the records of interview with Mr Patel and the employees on 24 May; and on 4 June e-mailed him copies of the cheque and bank statement he had obtained from Mr Patel along with an undated list of investigation matters written by Mr Patel and an (also undated) letter from his wife complaining of how Ms Birdi had treated him. In his covering e-mail he said:

> "there is a lot in the files that actually you could do with seeing because many of the documents demonstrate many possible explanations she could give would be untrue, and therefore you would need knowledge of them in detail to ensure that explanations that are clearly untrue can be challenged in the light of the evidence in the files."

Mr McAlindon accepted in evidence that at this stage his view of the evidence was that it would be difficult to explain how they could legitimately do what was being suggested and he did have a view that there was a probability that malpractice had taken place. On 6 June he followed the e-mail up with a meeting with Mr Hamilton that according to his invoicing control file was "to explain Dartford files" and lasted 6 hours. It is I think a fair inference that he used the meeting to point out the evidence in the files to Mr Hamilton and give him the benefit of his own views of the strength of the case against Ms Birdi.

157. Mr Hamilton interviewed Mr Rehman on 12 June. In effect he said that the directors decided to put him on the books because he was helping them, that he was assistant to Ms Birdi, that he had no fixed hours but worked ad hoc hours doing whatever was needed, and that the significant bonus he was paid was for some IT work that he had done on an online appointments system (which he had completed in 2004 but for which he had not then been paid).

158. Mr Hamilton was a Retail Development Consultant and worked for Mr Raines who was Director of Retail Development. On the next day he sent an e-mail to Mr Raines' PA, Ms Linda Weaver, with a list of the costs to be charged to Dartford (flights, room hire, food and drink and a daily charge) as she was responsible for keeping a spreadsheet of the costs. He added:

> "Also if you need the cost of my room/food and airport parking they were £77.70 and £41.50 respectively. Then there's the car hire.
>
> I'd screw 'em for everything."

Ms Weaver's reply was:

"i agree ha ha"

159. Both Mr Dyson and Mr Raines sought to distance themselves from these comments, but they are an illuminating insight: they suggest that Mr Hamilton was of the same view of the strength of the case against Ms Birdi as Mr McAlindon, and that both he and Ms Weaver thought it was acceptable for Specsavers in such a case to try and load costs onto the store (and hence on her).

160. On 22 June 2007 Mrs Slark sent an e-mail to Mr McAlindon telling him that she would have to stop work at Dartford on 13 July, and thanking him for the opportunities, saying she had thoroughly enjoyed the experience. Mr McAlindon forwarded it to Mr Dyson, saying:

> "Thought you might be interested in this e-mail. Carol Groves very happy. Not bad for me either as she has seen the other side now and now appreciates the work we do in dealing with bad eggs (she was very surprised at how badly the store has been managed)."

Mr McAlindon was asked about the "bad egg" comment. He denied that it simply referred to Ms Birdi, and said that he was referring to all the other cases where there had been difficult situations, not just her. He plainly however did think of Ms Birdi as a bad egg, and that is how Mr Dyson understood him.

161. Ms Birdi was interviewed by Mr Hamilton on 28 June and again on 6 July 2007. She said that Mr Rehman was being paid £275 a month to assist her with her administration, that it was largely done at home in the evenings and weekends, but he did come into the store to do MARS and inventory; and that the bonuses paid to him were for developing the online booking system for which she and Mr Patel agreed to pay him £15,000. She dealt with Mr Hamilton's other questions including as to the work to the kitchen, but her answers evidently did not satisfy him as on 27 July 2007 an investigation summary was prepared which recommended that there was a disciplinary case for her to answer. It does not have the name of an author but both Mr McAlindon and Mr Raines thought it had been prepared by Mr Hamilton. Mr Stuart however submitted that although Mr McAlindon was ostensibly removed from dealing with the investigation, in practice he was still involved in the background and that the report was actually produced by Loss Prevention. I do not accept this: I accept that Mr McAlindon was anxious to give, and did give, Mr Hamilton the benefit of his (strong) views on the case when he handed it over; but I see no reason to doubt that Mr Hamilton was the author of the report – indeed Mr Stuart's submissions include a statement that the metadata identify him as the author – although Mr Raines thought Mr Hamilton had sent it to the Legal department, and it may very well be that the final summary had some input from the Legal department. The outcome of the investigation – that is that there should be a disciplinary hearing – does not seem to have come as a surprise: even before the second interview Ms del Grazia was referring in an e-mail dated 3 July to "the disciplinary process that is going to follow the investigation".

162. Ms Anderson sent Ms Birdi a formal letter on 30 July 2007 requiring her to attend a disciplinary hearing on 9 August to be conducted by Mr Raines. It summarised the charges against her and enclosed a package of material. On 31 July her GP signed her off sick for 4 weeks, and on 6 August solicitors then acting for her (Crust Lane Davis

LLP) asked for the hearing to be postponed. It was re-fixed for 20 September 2007. It was heard by Mr Raines and he gave his decision in writing on 3 October 2007. He found that the employment of Mr Rehman (and Ms Birdi's father and Mr Patel's wife) was unsatisfactory in a number of respects; that they were treated differently from other employees and that the size and frequency of payments to them had not been satisfactorily explained; that she had arranged for works to be carried out using non-approved contractors in contravention of Specsavers policy; and that communication with her had been difficult and protracted. He did not however find proved the allegation that the payments to the family members had been a mechanism for extracting money out of the business and/or equalising payments between the A directors, thereby bypassing the legitimate financial approval systems: on this he said he was not entirely convinced about her motivation and was prepared to give her the benefit of the doubt. He concluded that while the matters referred to could collectively amount to gross misconduct, he took into account the fact she had 14 years' service with Specsavers and the fact he had not found the allegation of extraction proved and gave her a final written warning which would remain on the file for 12 months.

163. On 9 October Ms Birdi attended a return to work meeting with Mr Dominic Savill, a Retail Development Consultant, with a view to returning to the store on 10 October. After the meeting he went to the store and told the staff that Ms Birdi would be returning to work. His comment was that all of the staff were a little surprised to learn that she was coming back. On 12 October her solicitors appealed the outcome of the disciplinary process. The appeal was heard by Mr John Perkins on 21 November. He produced his written decision on 12 December. He dismissed the appeal, expressing in his final paragraph the hope that Ms Birdi was now prepared to accept the decision and in doing so draw a line under this matter, and move forward within the Group.

164. On these facts Mr Stuart argued a number of disparate points in his closing submissions. The first is that the entire investigation was unauthorised, and all costs flowing from it therefore improperly charged. That is a point I will come back to.

165. The second is that the investigation into Ms Birdi and her suspension were motivated by SOG's desire to force her out of the business such that SOG was not acting bona fide in what it believed to be in the interests of Dartford. The decisions to investigate her and to suspend her pending the investigation were in each case made by Mr Dyson, but he in turn relied on the views of Mr McAlindon. I have accepted above a number of the criticisms levelled against Mr McAlindon on behalf of Ms Birdi: I have found that he was aggressive and intimidating in the telephone call of 27 February, ordering Ms Birdi about when he had no business doing so; that, contrary to his evidence, he had reached the view at least by 27 March that Ms Birdi was guilty of gross misconduct; that he conducted the interviews with the employees on 2 May in such a way as to give an impression that there was a witch hunt and that he was looking for evidence to support a case against her; and that he regarded her as a "bad egg" who needed dealing with. None of this however begins to persuade me that he was anything other than genuine in his view that the allegations made by Mr Patel were serious and merited investigation. Indeed he remained unrepentant in his views even after Mr Raines had given Ms Birdi the benefit of the doubt on the most serious allegation (that of using the payments to her husband as a means of extracting money

from the business): in a note that he prepared in May 2008, when a complaint by Ms Birdi against him was being investigated, he said:

> "Whether I agree or disagree with how the allegations of criminal financial misconduct … were dealt with, although I have very strong views about this…"

and in oral evidence confirmed that the very strong views he had were that he disagreed with the decision to give her the benefit of the doubt. I find that he genuinely considered that Mr Patel's allegations had substance, and as the investigation continued these views were strengthened not dispelled.

166. Since Mr Dyson relied on Mr McAlindon's assessment in deciding to authorise the investigation, I find that he too genuinely thought that there was a case that merited investigation. So far as his decision to suspend her is concerned, he explained in evidence that:

> *"it's standard practice when we have got serious allegations like this. To avoid any tampering with any evidence and to avoid any distress with staff in the store, we take the partner out of the business, out of that environment while we complete the investigation."*

I accept this evidence. I see no reason to doubt that Specsavers' standard practice when it was thought that a JVP might have been acting with serious impropriety was to suspend them pending an investigation, and I find that Mr Dyson authorised the suspension because he honestly thought that was the best way to handle the situation. In accordance with the principles I have summarised above, the question for the Court in deciding whether a director is in breach of the duty to act bona fide in the interest of his company is not whether this was the best decision or even a reasonable one, but whether it was bona fide believed by him to be in the interests of the company. I find that it was.

167. So far as the alleged motive of getting Ms Birdi out of the business is concerned, there is undoubtedly ample material indicating that Specsavers expected that the investigation might very well lead to her leaving. I have already referred to Ms Meagher's e-mail of 8 March 2007 indicating that Mr Dyson was expecting that there might well soon be a double vacancy at Dartford; and to Mr McAlindon's memo of 12 April 2007 which clearly indicated his view that it would be undesirable to leave her in the business. He thought there was a strong case against her, and passed that view on to Mr Hamilton; and before Mr Hamilton's investigation was complete, Ms del Grazia's e-mail of 3 July assumed that there would be a disciplinary process following the investigation.

168. Other relevant material is as follows:

(1) On 18 April Mr Singh e-mailed Ms Del Grazia asking if his proposal to buy the shares had been considered. She passed the query on to Mr Ryan who replied on 18 April that there were still some unresolved issues at Dartford which precluded any transfer of shares at that time and suggested that he re-present his proposal when the issues had been resolved "when it will be considered along with the other options we may have at the time." Mr Singh

replied asking (not unreasonably) to be informed when the issues at Dartford had been resolved. Mr Ryan sent this on to Ms del Grazia and Mr Dyson with the comment:

> "Subtle doesn't always work !"

It seems from this that Mr Ryan was trying in his earlier e-mail to put Mr Singh off (although it was indeed a rather subtle way of doing so). Specsavers evidently wished at this stage to keep its options open, and I infer that one reason for this was the real possibility that it might have not only Mr Patel's shares to dispose of but Ms Birdi's as well.

(2) On 22 May 2007, Mr Neil Lunn e-mailed Mr Ryan. Mr Lunn was in charge of the Shared Venture department. He said that the latest rumour was that the Gravesend partners had been seen in the Dartford store because they were buying it, and said that he would be keen to discuss it due to the proximity to Bexleyheath. Bexleyheath was a store about 15 minutes' drive away which was a shared venture store, and it appears that Mr Lunn thought Dartford would be a possible candidate for a shared venture store. Mr Ryan's answer was:

> "We are not at the moment seeking buyers for any shares in Dartford.
>
> The Gravesend partners had asked to be considered if/when shares are for sale.
>
> This is in Mel's realm at the moment."

It seems likely from this that the Gravesend partners (a Mr Blair Hunter and a Mr Dominic Candon) were an example of what Mr Dyson had asked for in March, that is partners who might want to work together in Dartford – indeed after Ms Birdi's suspension was lifted, Mr Dyson wrote to them on 8 October 2007 thanking them for their interest and this letter shows that they had made a formal application – and this is therefore another illustration of the fact that one of the reasons why Specsavers was not at that stage looking to dispose of the shares it had acquired from Mr Patel was that there was a real possibility of all the A shares being available at the end of the investigation into Ms Birdi. The store was "in Mel's realm" as it was under investigation, and, as Mr Raines explained, nobody knew what was going to happen in terms of the outcome and Specsavers' policy would be not to make any appointments while everything was up in the air.

(3) On or about 31 August 2007 a form called a Shared Venture Assessment was completed. The author was not identified, but Mr Dyson said that it would have been drawn up by the Shared Venture department under the control of Mr Lunn. The form gave a score for various features which made the Dartford store suitable to be a shared venture store. Whoever drew it up referred to the fact that due to an ongoing Loss Prevention investigation there was no current promise regarding the future structure of the store, and included the following, among other, comments:

> "100% of shares should be available once the Loss Prevention situation has been concluded. This should give SOS sufficient scope to attract a buyer.
>
> A focused OO Director will greatly benefit this business.
>
> If Dartford joined the SV portfolio it would give a small run of stores in the area with Bromley, Bexleyheath and Erith.
>
> (As a contingency I know that both the Gravesend store Partners and the Bexleyheath store Partner are interested in buying into the store, with Gravesend being the preferred option from these two.)"

The author plainly expected that the outcome of the investigation and disciplinary process for Ms Birdi (the existing ophthalmic optician) would be that she would be leaving the store and that Specsavers would acquire her shares. In the light of his e-mail to Mr McAlindon of 31 August (below) the author may well have been Mr Lunn himself.

169. Mr Lunn sent an e-mail on 31 August to Mr McAlindon. This is the start of a short run of e-mails which are relevant to the question whether the charges levied by Mr McAlindon on the Dartford store were excessive (and I will have to return to them in that context) but also illustrate again the expectation that Ms Birdi would be leaving. They are as follows:

(1) Mr Lunn's e-mail of 31 August to Mr McAlindon:

> "I have caught up with Derek regarding Dartford, and Sean McLaughlin taking the reins wef 10/9/07.
>
> As the store is currently (technically) a Shared Venture, and likely to become a Group Venture until we find a prospective Partner I would like to discuss the Loss Prevention charges being applied to the store, as they will effectively be reducing SOG income as we are the shareholder.
>
> Can we please agree that Sean McLaughlin charges the store directly for his days, and the store accounts are therefore a true reflection of the business performance.
>
> I haven't discussed the topic of charges with DD but Dartford is currently running at a £16k loss for the year."

Since a Group Venture store is one where Specsavers owns all the shares, this confirms that Mr Lunn was expecting Ms Birdi's shares to be acquired.

(2) Mr McAlindon forwarded this to Mr Dyson (copying in Mr Lunn) by e-mail on 1 September. He said:

> "Derek
>
> I am currently charging Dartford the equivalent of £440 a day for

> management fees. As you are aware, two reasons. First, an income stream for the dept. Second, and more important, because of the share value – the more the store is charged, the lower the value. Do you want me to continue charging until a compromise agreement has been agreed, disciplinary process completed and/or all shares are bought, or stop charging to improve store performance ?"

This suggests that Mr McAlindon too was expecting that the likely outcome would either be a compromise agreement (that is a deal of the sort used to exit Mr Patel), or that the disciplinary process would run its course at the end of which Ms Birdi's shares would be acquired.

(3) Mr Lunn then e-mailed Mr McAlindon on 4 September saying:

> "I understand from Derek that at the point where sog own 100% of the shares that the loss prevention involvement will cease and my involvement will commence, therefore leaving the charging arrangements with me."

My Dyson said he had had no recollection of any conversation with Mr Lunn, but this would appear to indicate that Mr Dyson also then expected that Ms Birdi would be leaving and that SOG would soon own 100% of the shares.

170. On the basis of this material, I find that it was widely believed in Specsavers that Ms Birdi had been caught out and widely expected that she would in due course be found guilty and either exited as Mr Patel had been, with an agreement that she resign and sell her shares, or dismissed. But it is one thing to conclude that the various Specsavers personnel expected this as a likely, or even the likely, outcome; it is quite another to conclude that SOG (that is Mr Dyson) authorised the investigation and disciplinary process in order to acquire her shares, and was not acting bona fide in what it believed to be in the interests of Dartford. If that had been the plan, no-one seems to have told Mr Raines who made the decision not to dismiss her. It was suggested that the plan had been thwarted by Ms Birdi's solicitors' requests for information, but this does not add up: Mr Raines was unaware of their requests, and in any event if he had been party to any plan to get rid of her, he could still have done so. His oral evidence was to the effect that he certainly thought that the most serious allegation (that of using the family members to extract money) was one where there was certainly something going on and which he could have called both ways; and in any event even though he decided to give her the benefit of the doubt on that allegation, he did find a case of gross misconduct, which no doubt could have been used as a basis for dismissal. His evidence was that he did not do so because he was really impressed with Mrs Gill, who made a really good plea for Ms Birdi along the lines that she had not been in trouble before, that he did not want to lose another partner in the business, and that it is better to do a remedial solution than a dismissal.

171. I accept this evidence, and I find that there was no plan or plot or conspiracy to get rid of Ms Birdi, however much there was a belief that she had acted improperly and an expectation that she would be found guilty and would be leaving. Indeed even Mr McAlindon, who undoubtedly thought there was a strong case against her and that she ought to go, recognised that it was not a foregone conclusion: when at the end of June Mrs Slark, who was leaving, e-mailed Mr McAlindon saying that the staff were

worried that she might return and were asking if she was coming back, his reply was that it was not possible to give any indication as to the outcome of the process; and again when he installed covert cameras in September, he e-mailed Mr Dyson saying that he would do a full audit to ensure a clean bill of health "for the suspended partner or the new partner if she leaves". If there had really been a conspiracy he might have been circumspect with Mrs Slark, but he had no reason to be with Mr Dyson.

172. I can now return to the allegation that the suspension, investigation and disciplinary process were not duly authorised. As a matter of fact this is so. Ms Birdi's contract of service was with Visionplus and it was a matter for Visionplus whether she should be suspended as an employee or disciplined; any investigation preparatory to such acts were themselves matters for Visionplus (or Dartford). None of these matters were matters of day to day management, nor were they delegated to SOG under the Shareholders' Agreement. By clause 3.1 of that agreement they were therefore matters that fell to be decided at a duly convened meeting of the Board of directors (or general meeting) of Visionplus (or Dartford). But as I have already referred to Mr Dyson made the decisions to authorise an investigation and to suspend Ms Birdi on behalf of SOG without any attempt to hold a Board meeting, obtain a written resolution of all directors, or even discuss these matters with SOG's fellow-directors; and in his evidence accepted that the correct process had not been followed.

173. Mr Stuart submitted that this meant that the investigation was unauthorised and unlawful and that all the costs which flowed from it were therefore improperly charged to Dartford and should be returned. He accepted (see paragraph 56 above) that where a Board meeting should have been held but if it had been, the same decision would have been made, the failure to hold a Board meeting did not constitute unfairly prejudicial conduct; but he submitted that it could not be said that a Board meeting to decide on Ms Birdi's investigation and suspension, and subsequently her disciplinary process, would have reached the same decision. One of the directors was Dame Mary Perkins and, he suggested, had there been a Board meeting, she would have listened to Ms Birdi's explanations and it cannot be assumed that she would have voted to investigate, suspend and discipline her.

174. I approach this question on the basis that I accept that Mr McAlindon and Mr Dyson genuinely thought that there was substance in the allegations against Ms Birdi. I am not surprised that they took that view. If one looks at matters at the date of her suspension (27 March 2007), it is probable that by that stage not only had Mr Patel made his initial allegations but this had been followed up by his written "List of Investigation Matters", and copies of his wife's bank statement and cheque dated 2 December 2006 confirming payment to Ms Birdi of £536.41. Mr McAlindon had also no doubt confirmed from the payroll records that (i) Dr Karina Patel had indeed been paid £275 per month from April 2000 (with Mr Patel accepting that she had not done work justifying anything like that level of payment); (ii) Ms Birdi's father had also been paid £275 per month from April 2000 to June 2006; and (iii) Mr Rehman was paid £275 per month from June 2006. Mr Patel had alleged that Ms Birdi's father never worked in practice for the company at any time, and that significant amounts had been paid to Mr Rehman for work he had not done. On the face of it these matters gave rise to a reasonable suspicion that Ms Birdi had been using the payroll (i) to pay family members when they had not done work to justify such payment and (ii) to extract money from the business for the kitchen refit without authorisation from

SOG's Financial Planning department. Mr Dyson's decision that they warranted further investigation seems to me to have been a justified one.

175. In these circumstances I consider it virtually inevitable that if there had been a formal Board meeting on 27 March 2007 to decide whether to suspend Ms Birdi pending investigation, a decision would have been made to do so. Following Mr Patel's resignation from the Boards of Dartford and Visionplus, there were 3 directors of each company, namely Ms Birdi, SOG and Dame Mary Perkins. SOG would no doubt have been represented by Mr Dyson, or someone briefed by him; and if one envisages a Board meeting at which Mr Dyson (or someone on his behalf) advised that investigation and suspension was warranted, and Ms Birdi argued against it, it seems unrealistic to think that she would at that stage have had all her explanations accepted. The fact that Mr Raines ultimately gave her the benefit of the doubt on the extraction of money allegation does not to my mind begin to suggest that the likelihood is that Dame Mary Perkins would, against Mr Dyson's advice, have put an end to the investigation there and then. I find it overwhelmingly probable that she would have voted for the investigation to continue. Given the seriousness of the allegations, and SOG's standard practice in such situations, I find that she would also have voted for Ms Birdi to be suspended pending the investigation.

176. So much for the decision to suspend her on 27 March. In fact of course Mr McAlindon had begun investigating Mr Patel's allegations even before then, but I do not think this raises any separate issues. In strict theory no doubt it might be said that a Board meeting should have been held to decide on the initial investigation; but in practice it made good sense to see if there appeared to be anything in the allegations made by Mr Patel before taking any formal steps to suspend Ms Birdi, and I have little doubt that if there had been a Board meeting to decide on the suspension, it would also have ratified Mr McAlindon's initial investigations. And similarly if a Board meeting had been called to consider what to do in the light of Mr McAlindon's memo of 12 April, it would no doubt have authorised the continuation of the investigation.

177. Equally, if a Board meeting had been held after Mr Hamilton's investigation report, I think it inevitable that the Board would have decided to hold a disciplinary hearing. Mr Hamilton's report concluded there was a disciplinary case for Ms Birdi to answer. Again I am not surprised at that conclusion. By that stage Mr Hamilton had had the benefit of Ms Birdi's explanations, but nevertheless thought that the similarity of the payments to Dr Karina Patel, Mr Birdi and Mr Rehman (and their connection to Mr Patel's and Ms Birdi's households) "raised serious doubts"; and that even if one accepted Ms Birdi's explanation that further payments to Mr Rehman were in respect of IT work previously carried out, "the wisdom of ordering this work and the mechanism of payment is extremely irregular". Mr Stuart in his submissions characterised this report as a deeply unsatisfactory and myopic report produced by Loss Prevention: I have already rejected the suggestion that it was really produced by Loss Prevention and I do not see that there was anything flawed about its conclusion that there was a disciplinary case to answer. This was a view which could be, and in my view was, genuinely and justifiably held. In these circumstances even if a Board meeting had been held, the overwhelming probability is again that the Board would have voted to hold a disciplinary hearing into Ms Birdi.

178. I find therefore that although the investigation, suspension and disciplinary processes applied to Ms Birdi were not duly authorised, they would have been had formal Board

meetings been held and in those circumstances the failure to hold them in breach of the Shareholders' Agreement does not constitute unfairly prejudicial conduct.

179. The next allegation is that excessive fees were charged. This affected Ms Birdi as the fees charged reduced Dartford's distributable profits and hence (as to 50%) reduced the dividends payable to Ms Birdi on her A shares. Indeed in his written submissions Mr Stuart went further and submitted that it was at least arguable that in circumstances where Ms Birdi was the only A Director/A shareholder (until Mr Singh acquired the shares in July 2008), she should have been entitled to 100% of distributable profits not just 50%. I do not think this latter point can be right. Under clause 4.1 of the Shareholders' Agreement, the distributable profits (after provision for reserves) were to be applied in the payment of cash dividends to "the holders of the A shares" (paragraph 34(9) above). Between SOG's purchase of the A shares from Mr Patel and its sale of them to Mr Singh, SOG was one of the holders of the A shares (or at least beneficially entitled to them). I do not understand in these circumstances how Ms Birdi could assert a claim to 100% of the distributable profits in that period: insofar as any profit fell to be distributed the mechanism for doing so was to declare a dividend on the A shares and I am not aware of any principle whereby a company can declare a dividend in favour of the holder of only half of one class of shares to the exclusion of the holder of the other half. Mr Stuart I think accepted this in his oral closing submissions.

180. Mr Stuart also submitted that SOG should have been providing all requisite services and support in consideration of their 6.5% fee. Again I do not think this can be right. Clause 5.1 of the Shareholders' Agreement provided that Dartford should pay the Management Fee "in return for the services and support supplied by [SOG]" (paragraph 34(10) above). That does not in terms impose any obligation on SOG to provide any particular level of support and services, and does not I think mean that SOG was obliged to supply, in return for the fee, unlimited support and services. What it means is that the fee covered the normal level of support and services. It does not in my judgment prevent SOG agreeing with Dartford (or Visionplus) to provide additional services at a cost.

181. As however that demonstrates, the reality is that these arrangements took effect as an agreement between SOG (or its wholly-owned subsidiary SOS) and Dartford (or Visionplus) and there was inevitably an inherent conflict of interest in the arrangements. It was in SOG's interest to charge more for the services that it or SOS provided; it was in Dartford's and Visionplus' interest to be charged less. The conflict is obvious although it seems to have received scant recognition from Mr Dyson. I was not in fact addressed on the directors' duties in relation to such a conflict, but on the agreed basis that they are the same as those applicable under the Act from 1 October 2007, it seems to me that the position is as follows:

(1) Under s. 175(1) of the Act a director is under a duty to avoid a situation in which he has a direct or indirect interest that conflicts with the interests of the company; under s. 175(3) however this duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company so there is in this case no breach of the s. 175(1) duty (or its equivalent).

(2) In the case of a proposed transaction with the company, s. 177(1) requires a director who is in any way, directly or indirectly, interested in a proposed

transaction or arrangement with the company to declare the nature and extent of that interest to the other directors; and s. 177(4) requires the declaration to be made before the company enters into the transaction. SOG was clearly interested in the arrangements.

(3) But s. 177(6)(b) provides that a director need not declare an interest if, or to the extent that, the other directors are already aware of it or ought reasonably to have been aware of it.

(4) If the company's articles contain provisions for dealing with conflicts of interest, s. 180(4)(b) provides that the general duties (which by s. 170(1) refers to the duties specified in ss. 171 to 177) are not infringed by anything done by the directors in accordance with those provisions. Here the Articles of Dartford and Visionplus each contain a provision relaxing the strict rules of equity (under which a director, being a fiduciary, cannot profit at the expense of the company) in art 18, which provides that a director may vote on any resolution notwithstanding that it in any way concerns or relates to a matter in which he has, directly or indirectly, any kind of interest whatsoever provided always that such interest is first disclosed to the directors, and that such vote shall be counted.

(5) Two other provisions of s. 180 can be noted. First, by s. 180(1)(b) if the s. 177 duty is complied with it is not necessary to obtain the consent of the members of the company unless the company's constitution so requires (and here the Articles of both companies do not); and second by s. 180(3) compliance with the general duties does not remove the need for approval under Chapter 4 (of Part 10 of the Act). Under Chapter 4 the approval of the members is required for certain specific types of transaction but none of these provisions is applicable here.

182. The upshot of these provisions taken together therefore is that there would be no breach of the s. 177 duty if either SOG's interest in the proposed transaction had been disclosed beforehand to the directors in accordance with the Articles; or (by s. 177(6)(b)) the other directors ought reasonably to have been aware of the nature and extent of their interest.

183. On the facts SOG did not actually disclose the nature and extent of its interest in the arrangements to Ms Birdi. So the question is whether she should reasonably have been aware of the nature and extent of its interest. I do not think she should. She no doubt knew, or might reasonably have been aware, in general terms that SOG would seek to charge Dartford the costs of investigation and the costs of management while she was suspended; but I do not see that anything was done to make her aware of the scale of charges or the extent of costs before they were incurred. I find therefore that SOG acted in breach of s. 177 (or to be more precise the equivalent common law or equitable duty) in entering into transactions with Dartford and Visionplus which it was interested in without having disclosed the nature and extent of the arrangements to Ms Birdi.

184. But as with the breach of the Shareholders' Agreement, this would no doubt not constitute unfairly prejudicial conduct if the failure to comply with the s. 177 duty made no practical difference, that is if the same decisions would have been made by

the Board had matters been properly disclosed. I find that had matters been put before the Board, they would indeed have been approved. But the fact that the relevant decisions were unilaterally made by SOG rather than as they should have been by the Board acting collectively after full disclosure, makes it all the more important to scrutinise with care the suggestion that in doing so SOG was bona fide acting in the best interests of Dartford and Visionplus.

185. Mr Stuart took a number of points on the charges. Most concern the charges for management. The facts are as follows:

(1) The first manager was Mrs Slark. She was not an employee of SOS but a JVP in a store in Shirley, and she invoiced Mr McAlindon (through her company Laurel Design Innovations Ltd) for the days that she worked, charging him £400 per day. Her first day was 29 March 2007, and her last was 21 July. She charged Mr McAlindon for a total of 59 days (2 in March, 17 in April, 14 in May, 19 in June and 7 in July); over a period of some 16 weeks, this is on average between 3 and 4 days a week. She also charged him expenses, largely for rail tickets, amounting to about another £2,000.

(2) Mr McAlindon charged Dartford £440 per day, based on 5 days a week. His evidence was that one of his team filled in on the days that Mrs Slark was unable to attend the store and that it was covered from Monday to Friday. He was unable, 7 years later, to provide records of who worked when, and no documentary confirmation was produced.

(3) Mrs Slark was replaced by Ms Imogen Collar who started on 23 July and stayed until early September. She was an employee of Loss Prevention who had given in her notice, and Mr McAlindon got her to work her notice in Dartford. No evidence was adduced as to what she cost SOS to employ, but it is perhaps unlikely that it was as much as Mrs Slark charged (£400 per day is the equivalent of £2,000 per week for a 5-day week or over £100,000 per year). Mr McAlindon continued to charge Dartford £440 per day.

(4) Ms Collar was replaced by Mr Sean McLaughlin, who was provided by Mr Howarth. His first day was 7 September. Ms Birdi returned to work on or about 10 October, but Mr McLaughlin continued to attend the store up to 21 December, usually for 5 days a week. He invoiced for the days he worked, charging £200 per day; up until 26 October 2007 he sent his invoices to Mr McAlindon. Mr McAlindon continued to charge Dartford £440 per day. As appears from the e-mails set out above (paragraph 169), Mr Lunn had on 31 August queried whether he should continue to do so, but Mr Dyson decided on or about 4 September that he should. From 29 October he invoiced the store directly.

186. On these facts the first point taken by Mr Stuart was that there was no justification for charging Dartford after Ms Birdi returned to the business. Mr Stuart pointed to a later e-mail (dated 29 July 2009) in which Mr Lunn told Mr Raines as follows:

> "You may recall that during the period that SOG held shares in Dartford, that Swarandeep refused to acknowledge our existence and we then placed Sean McLaughlin into the store to give us some confidence that the store was

> being managed accordingly.
>
> For the vast majority of the time that SV & Sean operated the store, Swarandeep was absent through sickness, and would refuse to engage with SV as 'to engage with SV would suggest that she has accepted the structure'."

Mr Stuart said that this showed that the reality is that Mr McLaughlin was kept on because Specsavers wanted to keep an eye on what was going on. This is I think a fair inference, but it does not follow that it was inappropriate for SOG to have Mr McLaughlin in the store. SOG owned half the A shares and as such it had an interest in profits. That is why it was regarded as a shared venture store. SOG was I think entitled to take the view that it was not only in its own interest but in that of Dartford to have Mr McLaughlin keep an eye on how the store was run.

187. Mr Stuart's next point was that the extent of the replacement cover was unjustifiable. He said that if Ms Birdi had not been suspended she would have been at the store for only 136 days, and some of the time she would have been testing, so that the need for management cover was, if needed at all, no more than 2 days per week, whereas the actual number of days charged was 188 days (in fact I think 186½ as Mr McLaughlin's initial invoice for 5 days in the week beginning 10 December was later amended, after Ms Birdi had challenged it, to 3½ days).

188. This submission rather overlooks the fact that the purpose of the emergency management cover was to run the store in the absence of either JVP. In the normal course of events, one or other if not both JVPs would be on site every day. SOG was I think entitled to take the view that it was in the interest of Dartford, where there was neither JVP available, that there should be a substitute manager in the store for up to 5 days a week.

189. The next question is as to the quantum of the charges, in particular the £440 per day charged by Mr McAlindon. Here I think one has to look at the question separately in relation to (i) Mrs Slark; (ii) Ms Collar and other employees of Loss Prevention; and (iii) Mr McLaughlin. So far as Mrs Slark is concerned, Mr McAlindon in effect passed on the charges she made to SOS. Once expenses are taken into account SOS does not appear to have made any, or any significant, profit on the arrangements. They could only I think be criticised if the daily fee agreed with Mrs Slark was too high and not in Dartford's interests. There was undoubtedly a risk of this: the figure of £400 was agreed with Mrs Slark by Mr McAlindon, apparently by himself, and since he was going to be passing the cost on he had no reason to try and negotiate a low figure. Mr McLaughlin later agreed to do a similar job for £200 per day. But although the long-term effect of paying her £400 per day turned out to be very expensive for Dartford (and hence for Ms Birdi), I accept Mr McAlindon's evidence that he did not then have anyone available, that it is not easy to find someone with the requisite skills who is available at short notice, and that when he placed her in the store he did not envisage that she would need to remain there for so long. So although there is significant room for doubt, in the end I do not have any real material on which to conclude that agreeing to pay her £400 a day was unjustifiable.

190. So far as Ms Collar (and the other members of Mr McAlindon's team) are concerned, there are two points. First, there are no records to confirm Mr McAlindon's statement

that members of his team filled in for Mrs Slark when she was not there. It seems to me prima facie unfair for SOS to charge Dartford (and hence Ms Birdi) for emergency management cover when she was suspended and not be able to produce records confirming who worked when so as to justify those charges. Had the matter been dealt with properly this would no doubt not have been the case. As it is the state of the evidence leaves it unclear whether Mr McAlindon's charges were all justified or not.

191. The second point is that it is also impossible to identify how the £440 was arrived at. Mr McAlindon's evidence was that he charged this because he had agreed with Mr Dyson, some years before, that Loss Prevention should make a charge for provision of its personnel which took into account all the costs of providing them which would be a uniform rate, which Mr McAlindon referred to as a 'blended rate'. He said he provided all the evidence to the SOG Board which decided on the figure of £55 per hour or £440 for an 8-hour day. Mr Stuart challenged this account, suggesting to him that he had made up the figure for the purpose of charging Dartford, but there is in evidence a spreadsheet of invoices charged to various stores other than Dartford (identified only by number) in April and May 2007, which show that a charge of £440 was applied to other stores for a "Loss Prevention Audit" (which Mr McAlindon said took a full day), and various other stores were charged multiples of £440, including at least one store that was charged £8,800 for management costs for each of April and May (which would equate to 20 days at £440 per day). In the light of this I accept that the £440 figure was the usual daily charge levied by Loss Prevention.

192. What however the evidence left unclear was the basis for the £440 figure. Both Mr Dyson and Mr McAlindon referred to it as not only covering the salaries of Loss Prevention employees but also expenses (travel, accommodation and meals). But Mr McAlindon accepted in evidence that Ms Collar's annual salary might be about £30,000, and even making a generous allowance for expenses, it is not obvious that this would justify a charge of £440 per day. The suspicion is that the blended rate of £440 per day was intended to provide a profit for Loss Prevention over and above its direct costs. In his e-mail of 1 September to Mr Dyson (paragraph 169(2) above), Mr McAlindon gave as his first reason for charging £440 to provide "an income stream" for his department, and in oral evidence confirmed that he had an income budget for his department which was intended to enable it to break even (although he did not in fact achieve this as some work could not be charged to stores). I think it probable that the £440 figure was indeed intended to provide an income for the department over its direct costs of employment of the managers and provide a contribution to its general costs. There is nothing to suggest that in fixing it Mr Dyson had in mind the duties SOG owed to the store companies. The circumstances seem to me to give rise to a real risk that the store companies might be being overcharged. It is not possible on the state of the evidence to be any more precise; but this illustrates the problems caused by SOG's conflict of interest, its failure to comply with its duty to make full disclosure of the nature and extent of its interest in the arrangements at a board meeting, and its failure to be careful to distinguish between its own interests and those of store companies such as Dartford.

193. When it comes to the charge for Mr McLaughlin's services, that conflict comes into sharp focus and it is possible to be more precise. Mr McLaughlin was not an employee of Loss Prevention and it is easy to identify the exact cost to SOS of his

services as he charged SOS £200 per day and made no separate charge for expenses (apart from one invoice of £371.40 later charged direct to Dartford in connection with a Christmas party). As the exchange of e-mails show (paragraph 169 above), Mr Lunn, who had an interest in his role as head of Shared Venture in improving the profitability of the store, suggested that Mr McLaughlin charge Dartford direct; Mr McLaughlin referred this to Mr Dyson; and Mr Dyson decided that Loss Prevention should continue to charge. Mr Dyson said he had no recollection of speaking to Mr Lunn, but there is no reason to doubt what Mr Lunn says and I find that Mr Dyson did indeed make this decision. It is impossible to see how he could have regarded this as being in the interests of Dartford. It may well have been in the interests of Dartford for Mr McLaughlin to attend the store; but his role in the store did not in any sense depend on Loss Prevention's involvement (he was not there to further the investigation but to manage the store), and it was plainly not in the interests of Dartford that he invoice Loss Prevention with Loss Prevention then invoicing the store at £440 per day rather than, as Mr Lunn suggested, charging the store direct at £200 per day. In the light of the e-mails it is clear that this was not a mere unthinking continuation of the previous charges but a conscious decision by Mr Dyson.

194. Since Mr Dyson had no recollection of it, he did not provide any explanation of why he took this view. In the absence of any other explanation, the obvious inference is that he agreed with Mr McAlindon who had suggested two reasons for continuing to charge, the second and "more important" one being because of the effect it would have on the share value: the more the store was charged the lower the share value. Mr McAlindon attempted to explain this in evidence as referring to the fact that if he was carrying costs in his department and the shares were sold without those costs being charged, the purchaser might not be aware of a pending charge and so might overpay. But this explanation does not seem to me in point. I can well understand that if the question is when Loss Prevention is to invoice a store for charges which it has incurred, it may be important that they do so before rather than after a sale. But the question here was not when Loss Prevention was going to charge but whether it was going to charge at all. I reject Mr McAlindon's explanation as a rather far-fetched attempt to explain away the obvious meaning of his e-mail, which is that if extra charges were made to Dartford, this would depress the profitability of the store and hence, if the outcome of the disciplinary process were that SOG acquired Ms Birdi's shares (as I have already found he expected to happen), lower the price SOG would have to pay, the share price as already explained being routinely calculated by reference to weighted average profits. In practice therefore for every extra £1,000 charged by SOS, not only would SOS benefit to the tune of £1,000, but the profits for the year would be reduced by £1,000, the weighted average profit (which attributes half the weight to the last year's profits) by £500, the valuation (calculated at a multiple of 2 to 3 times the profit) by £1,000 to £1,500, and the price payable by SOG for half the A shares by between £500 to £750. I have no real doubt that this is what Mr McAlindon was referring to, and no reason to doubt that this is why Mr Dyson took the decision to continue charging. It seems to me plainly a decision that was taken in the interests of SOG and not in the interests of Dartford, and indeed one that not only shows a failure by Mr Dyson to appreciate the position of conflict that he was in, but a deliberate and cynical sacrificing of Dartford's (and hence Ms Birdi's interests) to SOG's own. I find that it was in breach of SOG's duties and unfairly prejudicial to Ms Birdi. Between 7 September and 26 October Mr McLaughlin charged for 35 days, so the practical effect is that SOS charged £240 a day more than

it should for 35 days, a total of £8,400.

195. Mr Stuart's next point is in relation to the RCS invoices. The facts are as follows:

(1) The RCS invoices give an address for RCS in Hesketh Bank, Lancashire. Ms Birdi and her solicitors appear to have uncovered the fact that this is Mr Barnes' address, and Specsavers have said that RCS is a partnership of which Mr Barnes is one of the partners.

(2) Mr McAlindon was asked in evidence about how he received the invoices. He said (on day 9) that they came through the post to his home and he then scanned them as a PDF and e-mailed them to group accounts.

(3) However there is an e-mail in evidence from Mr McAlindon dated 27 February 2007 to a Ms Kelly Turian in the accounts department forwarding two RCS invoices (those for the purchase of the hard discs). These attachments are not in PDF form but have an '.xls' suffix (that is Excel spreadsheets). Mr McAlindon was asked (on day 10) about this discrepancy with his evidence the previous day, and said that he had no idea how they were created, as it was too long ago. In fact the metadata show that the spreadsheets were created by Mr Les Gutteridge (a Loss Prevention employee) and last modified by Mr McAlindon.

(4) Taylor Wessing disclosed the metadata, following a request by Akin Palmer, after Mr McAlindon had given evidence. They gave an explanation in the accompanying letter which was to the effect that although Mr Barnes' standard practice was to send hard copy invoices, if he had formatting problems he would very occasionally ask Mr Gutteridge for assistance and Mr Gutteridge would then give the file back to Mr Barnes on a USB stick or dongle; and that Mr McAlindon could not recall amending or modifying the spreadsheets, but it was possible that Mr Barnes (who worked closely with him) used his laptop to finalise the invoices. None of this explanation was the subject of evidence before me or tested in cross-examination.

196. In these circumstances Mr Stuart invited me to find that the RCS invoices were not legitimate but were concocted in Loss Prevention, and said that Ms Birdi feared that the RCS invoices were just a mechanism for Loss Prevention employees to extract personal profit from Loss Prevention investigations.

197. I accept that the state of the evidence on this is rather unsatisfactory but I do not think I can find on this evidence that the RCS invoices were concocted or the partnership a sham. Nor can I form any view as to whether they were excessive as I have no material on which to judge this. I do however accept that there was an obvious conflict of interest: it was in the interest of the store companies such as Dartford that RCS only be employed where necessary, and their costs limited to reasonable charges, but in circumstances where Mr McAlindon was passing the full costs on to the store companies he had no incentive to keep costs down, and every reason to allow his friend and colleague Mr Barnes to charge what he could get away with. There is nothing to suggest that Mr Dyson, who should on behalf of SOG have been acting in the interests of the store companies, exerted any control over these costs either. In these circumstances there is again an inevitable risk of the store companies having to

pay more than they should.

198. Taking Issue 2 as a whole therefore, I find (i) that the investigation, suspension and disciplinary action in relation to Ms Birdi were not motivated by malice or a desire to acquire Ms Birdi's shares; (ii) that they were not properly authorised but would have been had the matters been considered at a Board meeting as they should have been; (iii) that SOG acted in breach of its duties in relation to conflicts of interest; (iv) that this led to an identifiable overcharge to Dartford in the case of Mr McLaughlin in the sum of £8,400; and (v) that although I cannot find any identifiable overcharge in relation to the costs of Ms Collar and other Loss Prevention employees, and the RCS invoices, there is a real risk that there might have been.

Issue 3

199. Issue 3 concerns increases to staff salaries, and changes to the staff bonus structure, which were implemented during Ms Birdi's suspension.

200. The facts are as follows. In Mrs Slark's "You'll like this" e-mail of 28 April to Mr McAlindon (paragraph 151 above) in which she suggested that if he interviewed Mrs Frondigoun he might get what he needed, she added that the staff had not had pay rises in years.

201. This was followed by another e-mail on 2 May to Mr McAlindon as follows:

> "I have put together a proposal of salaries to be altered in a review. As we discussed the dedicated staff at the Dartford store have not received a salary review over the last 3 years and having spoken to Susannah Hart, Operations manager, and using the salary scales on Eye Q, it was proved that the staff are underpaid. I also made a phone call to Lucy, manager of the Gravesend store, again to compare salaries."

She then referred to a proposal (attached) for 5% increases, with certain larger increases for particular staff, and continued:

> "I will have to cost these against the Accounts to see how realistic they are, taking into account that the husbands and wifes are removed from payroll and see what this puts the salary costs at.
>
> I also propose a new bonus … clear and concise. Again taken from a model used in the Reading and Oxford stores.
>
> Sales + 10% = £10
>
> Sales + 20% = £20
>
> Sales + 30% = £30 and so on
>
> This will be done on a daily calculation, so they may not get 10% up on the week but they may on the day and therefore to keep motivation and daily interest they will be able to calculate their own bonuses.
>
> The attachment is for you at the moment, let me look at working against

accounts to see if you can then take it to the Board for approval.

I have been very generous here!"

202. There was an existing bonus scheme. I received a detailed explanation of it from Ms Birdi by reference to an example from February 2005. It was calculated each month and there were two parts to it. One was a bonus for coatings and tints: each time a hardcoat or tint or the like was sold, a contribution was made to the bonus pool (eg £1.50 per hardcoat). In the month in question this added £556 to the tints and coats bonus pool. This was then divided up among the staff according to the number of days worked: there were 20 working days in the month in question, and the staff worked a total of 167 days so a member of staff received a tints and coats bonus of 1/167 of £556 (£3.33) for each day worked. The other part of the bonus was the practice bonus which was related to turnover. If the turnover of the store in a week exceeded a pre-set level (in this case £18,500), the amount of the excess (in this case £3,345) less the cost of remakes due to errors (£1,202) formed the basis of the practice bonus calculation (£2,143). An employee who worked all 20 days received 1% of this figure (£21.43) and those who worked less received a proportionate amount. The total practice bonus for February 2005 was £178.94 and the total bonus therefore £734.94.

203. Mrs Slark kept a log of her actions as manager. One of the early entries is:

> "Pay is not clear; bonus paid but staff unaware of how it is calculated…Bonus paid for April with 10% extra paid on bonus as authorised by Mel. Revisiting bonus structure for May's payroll."

I am not surprised that the staff found it difficult to understand how the existing bonus was calculated. Although quite possible to follow if taken through it line by line, it was undoubtedly opaque. The payment of a 10% extra for April is confirmed by the payroll figures which show that the bonuses given in April 2007 to the staff were taken from the figures for March 2007 and simply increased by 10% – Mrs Slark noting "all bonuses + 10% as agreed with Mel".

204. On 16 May 2007 she e-mailed Mr McAlindon with a proposal for salary reviews and a calculation of the proposed staff costs as percentage of turnover, and said:

> "Please could you look at this suggestion going to board level and please also bear in mind that I have changed the bonus structure and they will receive bonus on top of this however if they get bonus it will be because they have reached the 10% growth minimum that I am after. The bonus will pay for itself so does not need to be costed in."

Mr McAlindon sent this on to Mr Dyson the next day (17 May) saying:

> "Following our interviews, salaries were identified as being an issue, which I asked Carol to review. Her proposals seem appropriate and reasonable and I feel should be approved. Could you authorise this, should I pass the proposal to someone else to review or should we leave it on hold ?"

Mr Dyson replied the same day:

> "I agree with the sentiments but we need to discuss the proposals with Legal (CDG) – so no action yet.
>
> We may need Directors approval for this sort of action (day to day business)."

205. In a memo (dated only May 2007) from Mrs Slark to all staff she announced the introduction of the new bonus scheme and asked them to agree to the change and sign a written acknowledgment (which it appears they all did). The memo refers to Mrs Slark producing a clear, concise and motivational bonus for the staff as none of them understood how the previous bonus was calculated, to be based on a minimum growth of 10% like for like sales over last year's figures, with a 10% increase giving a bonus of £10, and so on up to a maximum of £50 for a 50% increase, the bonus only being paid to the staff who worked that day. It included this explanation:

> "Every week a Sales Target report will be printed off by Jo and then the sales target will be entered into the excel spreadsheet on the computer which will calculate an avg based on 6 working days."

Mrs Slark's log refers to it as follows:

> "Have changed the staff bonus by programming 10% sales growth into the Sales Targets on Socrates. There is also a document labelled Bonus targets May 2007 and it works out 10%, 20%, & 30% growth but dividing it down into exactly 6 days. If staff reach 10%=£10 20%=£20 and 30%=£30 and so on. With a ceiling set at 50%=£50. No more than £50 can be earnt in any one day."

206. This explanation enables one to see how it worked. If the weekly sales figure the previous year was for example £18,500, then 10% sales growth would mean weekly sales of £20,350, and 20% £22,200. Dividing these figures down into exactly 6 days would give a daily average for the previous year of £3,083, and daily targets of £3,391 (10%) and £3,700 (20%). The 50% target would be reached with sales of £4,625. The drawback with this method however is that the pattern of sales was not spread evenly over the week. Ms Birdi's evidence was that Saturday was noticeably better than the other days, which is what one would expect. She said the store would typically take £4,000 to £5,000 on Saturday, perhaps £3,500 on Wednesdays and less on the other days. One can now see that the effect of taking an average over 6 days means that the scheme could, and in the normal run of events would, throw up significant bonuses without any increase in weekly turnover at all. If the turnover in any particular week was £5,000 on Saturday, £3,500 on Wednesday and £2,500 on each of the other 4 days, the total turnover would still be £18,500, but the bonus scheme would register a 50% increase on Saturday and a 10% increase on Wednesday without any sales growth at all. Indeed sales could go down in the week overall and bonuses still be payable; and the likely effect would be that bonuses of £40 or £50 would be payable every Saturday to each of the staff working that day. It can be seen that Mrs Slark's description of it as one that would "pay for itself" was very far from accurate.

207. It is not entirely clear when or by whom the bonus scheme was authorised. There are no documents evidencing its authorisation; and Mrs Slark's e-mail of 16 May (saying

"I have changed the bonus structure") might be read as suggesting she had done it herself. Mr Dyson made no mention of it in his witness statement. But in oral evidence he said that he had approved the bonus scheme, at around the same time that he was considering the changes in salaries. This has its own difficulties: the bonus scheme was announced in May and implemented in June, whereas it is doubtful that Mr Dyson considered the salaries until rather later, if indeed he did at all (see below). The true position remains obscure, and I did not hear from Mrs Slark, but I accept that she was unlikely to have put the new bonus structure in place without authorisation, which could only really have come from Mr McAlindon or Mr Dyson and Mr McAlindon plainly regarded it as a matter for Mr Dyson. So I accept that it is likely to have been authorised by him as he said. If so however, it seems clear that he did not understand how it worked. He said he thought it involved comparing each day's turnover with that for the same day the year before, and like Mrs Slark described it erroneously as *"self-financing"*. He said he did not have the memo which Mrs Slark sent to the staff, and could not now remember what documents he did have.

208. The new bonus structure was first implemented in the June payroll. Its overall effect was to increase the bonuses received by members of staff, so that 5 received £250 or more (whereas in March, the last month for which Ms Birdi was responsible, none had received more than £198.47), and in some cases individuals received considerably higher bonuses (Ms O'Brien, who had received £66.59 in March, received £270 in June). Rival calculations were put before me as to how much the new bonus scheme cost compared to the old bonus scheme (see below), but on any footing it was noticeably more expensive.

209. So far as salaries are concerned, again the documentary evidence leaves the details of what was authorised when, and by whom, unclear. Mrs Slark had made her proposals in April. Mr Dyson's response was that he needed to discuss the proposals with Legal. In his witness statement he said that after discussion with SOG's legal advisers, he authorised increases in respect of 5 out of the 19 employees mentioned by Ms Slark. There is no written record of such authorisation, or indeed any further communication on the subject from Mr Dyson at all.

210. In fact I am doubtful that Mr Dyson did authorise any of Mrs Slark's proposals as he said he did. In August 2007 Ms Collar, who was by then managing the store, made her own proposals for a salary review, and the figures she gives in that document for the current salaries of the staff are in almost all cases, including in the case of the 5 individuals mentioned by Mr Dyson, the same as they were in Mrs Slark's April proposals. This would seem to indicate that Mr Dyson had never approved Mrs Slark's proposals, and that they were never in fact actioned.

211. Nor is there anything to suggest that Ms Collar's proposals went to Mr Dyson. She initially raised the question of a salary review in an e-mail of 28 August 2007 to Ms Hart, saying that the issue had come to a head the previous week when a member of staff (Ms Fendick) qualified as a dispensing optician and when offered a salary did not feel it was adequate; and that the salary was not in line with Specsavers recommendations. She added:

> "With the current Tesco threat I feel it is necessary to conduct a pay review for the Dartford team, without which the store would not be operational."

Ms Hart replied that she agreed that it needed to be actioned and asked her to put her suggestions together and discuss them with Robin Vernieux, a Retail Performance Consultant for the region, before communicating to staff. Ms Collar then sent through her proposals to Ms Hart and Mr Vernieux, saying she would contact the latter. Ms Hart replied that the proposals looked rational. There is nothing else in the record save a note on the September payroll that 6 members of staff had been given a pay rise effective 6 September (being 4 of the 5 referred to by Mr Dyson and 2 others that he also mentions). In the light of the e-mail exchange between Ms Collar and Ms Hart, one would expect the increases to have been signed off by Mr Vernieux rather than by Mr Dyson, and although Mr Dyson says he authorised the increases, he does not refer to any document in support. I think he is likely to be mistaken about this, and the approval probably came from Mr Vernieux.

212. On these facts Mr Stuart made a number of submissions. He first submitted that the awarding of bonuses and the adjustment of salaries was a matter of day to day management, and as such was delegated to Ms Birdi as the only A Director, SOG never being appointed as an A Director. Mr Potts did not dispute that these matters were day to day matters, but submitted both that SOG was an A Director and that the effect of Ms Birdi's suspension was to suspend her powers of day to day management.

213. On the first point SOG was already a director of the companies (as a B Director) before it acquired Mr Patel's shares and I agree that there is no question of it being appointed again. I accept therefore that there was nothing in the way of an appointment of SOG to the Board as an A Director as such. But Mr Potts relied on the definition of A Directors in the Shareholders' Agreement which was "All the registered holders of the A Shares", and said that SOG was the registered holder of half the A shares and hence squarely within the definition of A Director. There is no doubt that this is the literal meaning of the words; but it is a commonplace that contracts are not to be construed solely by reference to their literal meaning but also by what makes sense in context.

214. This is not an entirely straightforward point. The Shareholders' Agreement is drafted for the usual case where the A shares are held by 2 JVPs who are then appointed to the Board (as A Directors), and the B shares are held by SOG which is entitled to appoint any persons nominated by it, such that there would always be an equal number of A and B Directors. In such a case its provisions work without difficulty: the JVPs are the holders of the A shares, appointed to the Board as directors, and undertake the day to day management as A Directors, while SOG is the holder of the B shares and nominates the B Directors onto the Board. But the Agreement does not specifically cater for the case where half the A shares are held by SOG itself, and its provisions are not easily adaptable to such a case; as Mr Stuart submitted, it was no doubt not envisaged that SOG would become the holder of A shares. His submission was that one did not become an A Director just by holding shares; one had to be appointed to the Board as A Director, and it was never envisaged under this form of agreement that SOG would be appointed to the Board as A Director; nor was it in fact ever appointed to the Board as A Director.

215. On this point however I prefer Mr Potts' submission. The term "A Directors" is used as a reference to certain persons, those persons being identified as the holders of A shares. It is not in my judgment a prerequisite of being an A Director as defined that the shareholder has already been appointed as a director: see for example clause 2.1 which provides that on or before signing the agreement the Shareholders (which itself

is a reference to the A Directors and SOG) should cause certain steps to be taken including by clause 2.1.1:

> "the appointment of the A Directors and the B Directors as the directors of the Company and any Subsidiary."

This is therefore an example of a reference to the A Directors as "A Directors" before they have been appointed to the Board. They are called A Directors because it is agreed that they will be appointed to the Board, not because they already have been. In any event SOG had already been appointed to the Board of Dartford, so if it were necessary for it to be a director before it could be an A Director, it was. And so far as corporate governance is concerned, there is nothing in the Articles providing for two classes of directors on the Board: there are two classes of shareholders, but on the Board each director is just a director, and the Articles draw no distinction between types of director. In other words "A Director" is not a description of a particular type of director with a particular status. Moreover this construction seems to me to make perfectly good commercial sense; the evident purpose of delegating day to day management to the JVPs is that they take the profits of the business and so should take the decisions as to how it is run (as indeed Mr Stuart in another context submitted: what the A shareholders get is a right to 50% of the profits each and with that goes the right of day to day management). But to hold that SOG did not become an A Director when it acquired the A shares would mean that despite having an equal interest in the profits to Ms Birdi, it would have no say in how the store was run on a day to day basis, and would have to leave that entirely to her. This does not seem to me a very sensible construction of the Agreement. In my judgment when SOG acquired Mr Patel's shares and became the holder of the A shares, it did become an A Director within the meaning of the Agreement. It did not need to be appointed to the Board again as it was already a director, but that did not prevent it being an A Director as defined.

216. That however is not the end of the point. The Shareholders' Agreement refers to the A Directors as the "registered holders" of the A shares, and Mr Stuart took the point that SOG did not become an A Director until it became the registered holder. (Mr Potts accepted, and I agree, that this meant registered in the register of members kept by Dartford, not registered at Companies House). This is itself an intricate question. The evidence is that Mr Patel was sent the Share Sale Agreement and stock transfer form for signature on 20 February 2007. He certainly signed the Share Sale Agreement that day, and although I have not seen a copy of the signed stock transfer form there is no reason to doubt that he signed that as well. On 5 March 2007 the Legal department sent Ms Birdi a draft written resolution of Dartford for her to sign and return; this would have resolved that the transfer be approved, share certificates be issued to SOG and the company secretary instructed to record the changes in the books of the company. Ms Birdi however declined to execute it. On 22 June 2007 SOG as company secretary filed an annual return for Dartford at Companies House which showed SOG as holder of 50 A shares as at 22 June, and Mr Patel as having disposed of his shares on 20 February. Finally, at a Board meeting of Dartford on 25 June 2008 a resolution was passed by a majority (Ms Birdi dissenting) formally ratifying the transfer of 50 A shares from Mr Patel to SOG with effect from 20 February 2007. In these circumstances Mr Stuart submitted that SOG was not shown to be the registered holder at the material times.

217. Mr Potts submitted that on these facts there was persuasive, even if not conclusive, evidence, that SOG had been registered as a shareholder by at the latest 22 June 2007, and even if this administrative act was technically performed too early (something that had not been contended) it had been ratified. Although the evidence is not as clear as it might be (explicable as this was not a point which emerged from the pleadings), I accept these contentions; indeed ratification of the transfer "with effect from" 20 February 2007 had I think the effect that the company agreed to treat SOG as if it was the shareholder, and entitled to be registered, from that date, and I do not think the question of whether SOG acted in an unfairly prejudicial way turns on precisely when its name was entered on the register if it was entitled to be registered.

218. The next point that was argued was that Mr Potts submitted that Ms Birdi's suspension had the effect of suspending her from her powers of day to day management. Again this is not an entirely easy point. Ms Birdi's Service Contract was with Visionplus, and I have set out the relevant provisions above (paragraph 36), namely clause 2.1 under which she agreed to perform such duties and exercise such powers as should be assigned to her by the Board of Visionplus, and clause 12.2 under which Visionplus could suspend her from her duties. Mr Potts' argument was that the duties assigned to her by the Board were those specified in the Shareholders' Agreement, namely the powers of day to day management; during her suspension therefore, while she remained a director, her powers as an executive director, and in particular her powers of day to day management, were suspended.

219. Mr Stuart however said that her status as a director was distinct from her status as an employee and the suspension only affected the latter. He pointed out that she was a director, and had powers of day to day management, of both Dartford and Visionplus whereas her Service Contract was only with Visionplus so her suspension could not affect her rights and duties as a director of Dartford; and he pointed to the difference between the suspension of her *duties* under the Service Contract and her *powers* of management that were delegated to her by the Shareholders' Agreement.

220. It is of course correct that Ms Birdi was a director of Dartford as well as Visionplus. The present issue however is only relevant to the question of salaries and bonuses for the staff, and it is apparent from the accounts of both companies that the employment of staff as well as that of directors was a matter for Visionplus not Dartford. This is what one would expect as the staff were employed in the store and it was Visionplus which operated the store's retail business. That means that I am not directly concerned with the effect of the suspension on Ms Birdi's rights and duties in relation to Dartford.

221. So far as Visionplus is concerned, the Articles provide (by reg 70 of Table A) that the business of the company shall be managed by the directors; and (by reg 72 of Table A) that the directors may delegate their powers to any committee consisting of one or more directors, or to any director holding any executive office such of their powers as they consider desirable, and that such delegation may be made subject to any conditions the directors may impose. Then clause 3.1.1 of the Shareholders' Agreement provides that the Directors delegate their powers of day to day management of Visionplus to the A Directors. This is therefore an exercise of the reg 72 power to delegate (or an agreement to do so once appointed). The Shareholders' Agreement also requires the A Directors (by clause 2.1.5) to enter into Service Contracts, and clause 2 of Ms Birdi's Service Contract provides that she "shall

perform such duties and exercise such powers" as should from time to time be assigned to her by the Board. This must include the powers of day to day management delegated to the A Directors by clause 3.1 of the Shareholders' Agreement. It is to be noted that clause 2 is framed as an obligation ("the Executive shall…"), and this seems to me to accord with the reality of the position: as a matter of corporate governance the Board has delegated powers to the A Directors, but as a matter of employment law, the Board requires them actively to exercise them.

222. Against this background I accept Mr Potts' submission that the provision in clause 12.2 that entitles Visionplus to "suspend the director from his duties" must be read as referring to suspending the director from the duties of day to day management (these being part of her duties under clause 2), and that no sensible distinction can be drawn in this context between her *duties* and her *powers* of management. The whole purpose of the right to suspend is to remove the director temporarily from his or her position, and it makes no sense to suggest that although the director had no obligation to act while suspended, she retained the power to do so. I therefore find that the suspension of Ms Birdi had the effect of suspending her powers of day to day management of Visionplus, and that Mr Potts is right that management during the period of her suspension was technically a matter for SOG as the only A Director.

223. Mr Stuart's next point is that the underlying motivation for the increases was malicious. The pleaded case is that these actions were motivated not by genuine business reasons but by malice towards Ms Birdi and a desire ultimately to remove her from the business; in his closing submissions Mr Stuart expressed it slightly differently as being based on an improper desire by Specsavers or by Mr McAlindon to garner support from the staff so that they might later be counted upon to make life difficult for Ms Birdi or back actions against her.

224. There are certainly some matters that are left unexplained, and one can understand why Ms Birdi is suspicious. In April 2007 Mrs Slark, instead of operating the existing bonus scheme, simply took the bonuses for March 2007 and increased them by 10%, having agreed this with Mr McAlindon. I have not understood why she did not operate the existing bonus scheme: I suspect she may not have understood its complexities, but she did not trouble to ask Ms Birdi to explain it. Nor have I understood what business it was of Mr McAlindon to authorise payment of an extra 10%. It was not his money, but Dartford's (and hence Ms Birdi's and SOG's) and it is not suggested that he had been given any authority to make decisions of this type. But he was not asked any questions about this 10% increase and I do not think I can find that he authorised it maliciously.

225. It appears that the question of salaries was discussed between Mr McAlindon and Mrs Slark on 2 May when he came to the store, as in his e-mail of 17 May to Mr Dyson Mr McAlindon said that they had been identified as an issue and he had asked her to review them. In oral evidence he said that the initiative came from her: she suggested that salaries were an issue and he told her to prepare a document. I accept this evidence which seems inherently likely.

226. The result of that was her e-mail of 16 May with a proposal for 5% increases and a new bonus scheme. As is now apparent, the actual design of the bonus scheme was seriously flawed, as it could, and in all likelihood would, lead to significant bonuses being paid even if turnover was not increased at all. And there is no doubt that it

proved expensive. Ms Birdi and Mr Rehman produced calculations of the average bonus under the old scheme and the new scheme which calculated the average monthly bonus (for all staff) from May 2006 to April 2007 at £979, but from May 2007 to April 2008 at £2,436. Mr Potts challenged the calculations on the basis that they did not include all the sums shown as bonus on the payroll, but Ms Birdi explained that some of the sums shown as bonus on the payroll were not payments under the bonus scheme at all, but for example payments to Mr Rehman for his IT work and payments to others who did not have a basic salary, and without in any way attempting to verify her figures, I accept that they are indicative of a real substantial increase in costs of Mrs Slark's new bonus scheme compared to the old one. When read with Mrs Slark's comment in her e-mail to Mr McAlindon of 2 May that "I have been very generous here", it is understandable that Ms Birdi should suspect that the new bonus scheme had been deliberately designed as an unnecessarily expensive one intended to benefit the staff at her expense.

227. As I have already said I have not had the advantage of hearing from Mrs Slark. But she told Mr McAlindon that the scheme would pay its own way; and in the end I am not persuaded that this was anything other than her genuinely held view. She went to some trouble to model the impact of the proposed salary increases on the percentage of turnover that went on pay, but (as she said) did not factor in the bonus scheme as she thought it would pay for itself. And there are a number of instances in which she appears to have been concerned to keep costs down generally, so it is difficult to conclude that she was indifferent to costs being incurred by the store.

228. Moreover the bonus scheme, as I have accepted, was ultimately not a matter for her decision but for Mr Dyson's. I accept his evidence that he too thought it was self-financing. This no doubt betrays a woefully inadequate understanding of what it was he was approving, and I am quite prepared to find that he was careless with Ms Birdi's money: the bonus scheme was ill thought-through and badly designed and cost Dartford and hence Ms Birdi a significant amount of money. But none of this substantiates the charge of malice, and I find Mr Dyson did not act maliciously but in the misguided belief that this would benefit and motivate the staff but pay for itself. Mr McAlindon, I find, had no input into the design of the bonus scheme at all but simply passed matters to Mr Dyson for approval.

229. That leaves the question of salary reviews. There is little doubt that Mr McAlindon encouraged Mrs Slark to review the salaries, and I think he was quite alive to the fact that increasing salaries might not be a bad thing if it kept the staff on side; he may also have had in mind that the effect would be to reduce the profits of the store and hence the cost of buying Ms Birdi's shares if she were to leave. But this latter allegation was neither pleaded nor put to him, and in any event Mrs Slark's proposals were not adopted. As the facts set out above show, the salary increases were not implemented until September and that was based on Ms Collar's recommendation, and although it is unclear who approved them, I find they were most probably approved by Mr Vernieux. There is nothing to suggest that Ms Collar's proposed increases, or Mr Vernieux's approval of them, were driven by anything other than genuine business considerations.

230. In these circumstances I reject the suggestion that the salary increases and bonus scheme were introduced maliciously, and on Issue 3 I find that no unfair prejudice has been established.

Issue 4

231. Issue 4 concerns the salary paid to Mr Singh which is said to have been excessive and not properly justifiable.

232. The facts are as follows. As set out above (paragraph 97), Mr Singh's sister-in-law Ms Kaur had been interested in buying Mr Patel's shares in November 2006, but her application was rejected by SOG in January 2007, at which point Mr Singh proposed that he himself should buy them. He was however told by Ms Del Grazia in February that there would be some delay, and by Mr Ryan in April that matters were still unresolved. On 25 September 2007 he e-mailed Mr Ryan again asking if things had been resolved at the store; and on 1 October 2007 he e-mailed Ms del Grazia saying he was very keen on the project. The reply from Ms del Grazia was that she was not aware of any firm plans to sell on the shares in Dartford but she had passed on his message.

233. At this stage it seems clear that Specsavers had indeed not decided on the future of the store. As set out above (paragraph 168(3)) Mr Lunn or his Shared Venture department had carried out a shared venture assessment at the end of August 2007, in which the conclusion was that the shared venture assessment was conservatively positive; and on 19 September 2007 Mr Lunn referred in an e-mail to "our new sv store in dartford", and at Ms Birdi's return to work interview on 9 October Mr Dominic Savill explained to her that the store was now a shared venture one. Ms Birdi asked if this was a long term strategy and Mr Savill replied that:

> "we will act in the best interests of the business and if that means staying as SV or returning to JV then so be it, but no time lines were mentioned."

This suggests that an option then being considered was to keep the store as a shared venture store. But it was not the only option. In the first week of October Mr Raines had a conversation with Mr Dyson which he noted in his daybook as "Gravesend – premature" and on 8 October Mr Dyson wrote to the Gravesend partners (paragraph 168(2) above) saying that the partnership structure in Dartford was currently under review and a number of options were available for consideration by the SOG Board. I infer from this that one option that Mr Dyson had in mind was that as Ms Birdi had been given a final written warning, it was possible that both sets of A shares might yet become available at which point SOG might want to offer them to the Gravesend partners together. And when Ms Birdi's then solicitors wrote on 10 October to say that she was surprised to be told by Mr Savill that the basis upon which the business was owned had been changed to one where Specsavers had taken over Mr Patel's shares and asking precisely what arrangements Specsavers was proposing, Ms del Grazia replied on 16 October that given her recent conduct and the outcome of the disciplinary hearing, Specsavers did not deem it appropriate to make any firm plans; her written warning included a monitoring and support period of 6 months and the position would be reviewed at the end of that time.

234. Ms Birdi's position was that it would be better to have another partner in the store, and she wrote to Specsavers to that effect more than once in December 2007. On 2 January 2008 Mr Lunn agreed, saying in an e-mail to Mr John Perkins and others that the turn-around and income opportunity in Dartford was clear but would not be achieved without an instore partner and that Dartford was not strategically vital to the

shared venture portfolio; he said the pragmatic, uncomplicated and commonsense route was to restructure the business to a joint venture. The Board of SOG must have agreed as on 25 January Ms del Grazia replied to Ms Birdi's letters saying that they were actively seeking a second joint venture partner for the Dartford store. She would be kept informed but the selection of a new partner was a matter for SOG. On 4 March Mr John Perkins e-mailed Mr Ryan to say that the Board had signed off on Mr Singh; Mr Ryan spoke to Mr Singh who confirmed that he was still interested in the shares, and on 5 March told Mr John Perkins that he proposed selling the shares to him at £60,000 ("3 x p/e based on current performance"), which would cover Business Transfer fees, and asked if he was OK with that sale price: Mr Perkins must have said he was, as on 12 March 2008 Mr Ryan sent Mr Singh a letter offering, subject to contract, to sell the shares to him for £60,000. He disclosed a contingent VAT liability to HMRC estimated at £20,340. In relation to salary he said:

> "As discussed, you will be acting as the DO/Retail Partner in Dartford, and will therefore be paid in the region of £32,500 per annum as salary."

On 20 April 2008 Mr Singh changed this in manuscript to read

> "£42,000 (+ any P11D/car payment that Swarandeep is taking"

signed it, and sent it back to Mr Ryan. Mr Singh's evidence was that he had discussions with Mr Ryan about his proposed salary, that he made it clear that £42,000 was the salary that he wanted and that he wasn't prepared to go into the business at the lower rate, and that Mr Ryan (who was, he thought, the only person at Specsavers he was talking to about this) agreed it, which would have been before he amended the letter and sent it back. On 24 April Mr Ryan wrote to Ms Birdi telling her that Specsavers had concluded negotiations with Mr Singh to buy the A shares formerly held by Mr Patel, and on 29 April someone in his department drew up a "BTS Memo" recording the terms including the salary at £42,000.

235. The formal steps for the transfer of the shares to Mr Singh took place at a Board meeting of Dartford held at a hotel in Gatwick on 25 June 2008. The meeting was attended by Mr Dyson (representing SOG) and Ms Birdi in person and by Dame Mary Perkins on the telephone. The directors (by a majority of 2 to 1, Ms Birdi voting against) formally ratified the transfer of the 50 A shares from Mr Patel to SOG with effect from 20 February 2007, and, by the same majority, approved the transfer of the shares from SOG to Mr Singh. The meeting also (unanimously) resolved to convene an EGM of the members to be held on 17 July in Guernsey to approve the appointment of Mr Singh as a director, and (by a majority of 2 to 1, Ms Birdi voting against) resolved that Mr Ryan (in respect of 199 shares) and Mrs Jill Clark (in respect of the 1 jointly held share) be authorised to represent Dartford at any general meeting of Visionplus until further notice; the same individuals, meeting as the Board of Visionplus, then passed a resolution convening an EGM of Visionplus also for 17 July. The minutes of the Board meeting of Dartford record, under "Any other business", Ms Birdi as asking what Mr Singh's salary would be, to which Mr Dyson replied that:

> "SOG can address that. SOG is very clear about appropriate levels of salary and the Secretary will provide you with details at the same time as the notice of EGM."

Ms Birdi says that this is not an accurate reflection of what happened which is that she was told that Mr Singh's salary would be "the next step" and she was deliberately not told what it would be.

236. On 26 June 2008 Ms del Grazia sent to Ms Birdi formal notice of the EGMs and a copy of Mr Singh's service contract with Visionplus. This revealed to her for the first time that he was to be employed at a salary of £42,000. On 8 July she wrote to Ms del Grazia complaining about not having been consulted, and saying that Mr Patel's salary had only been £30,000 and Mr Singh would appear to be vastly overpaid for his role. On 10 July Ms del Grazia replied to the effect that the figure agreed on for his salary was part of the overall negotiations involved in Mr Singh purchasing the shares; that although his salary was higher than that paid to Mr Patel, the Dartford business was in an unusual position and one in which finding a partner had been of the utmost priority; that the commercial reality was that it was necessary to ensure that the desired candidate's salary expectations (provided they were not unreasonable) were met; and that Mr Singh commanded an identical salary at Grays and it would not be realistic to expect him to move for any less than his current basic wage. She also said that SOG was not required to consult an existing JVP about negotiations relating to the placing of a new JVP.

237. The EGMs took place at SOG's offices in Guernsey on 17 July 2008. I have not I think been provided with the minutes of the EGM of Visionplus, but the minutes of the EGM of Dartford, which took place at 10.30, record that at the EGM of Visionplus held earlier that day (the notice of the EGM said it would take place at 9 am) Mr Singh had been elected as a director of Visionplus and the terms of his Service Contract had also been approved. The EGM of Dartford (attended by Mr Singh, and by Mr Lunn on behalf of SOG) resolved that Mr Singh be appointed director of Dartford; Ms Birdi did not attend but appointed Mr Lunn as her proxy and by him voted against the motion but it was carried by a majority of 2 to 1.

238. On these facts Ms Birdi's pleaded case is that the salary paid to Mr Singh was in excess of what the new post reasonably demanded and that payment of this level of salary was not justified on any genuine business ground but was motivated by malice, or by Specsavers' desire to remove her from the business by making the working conditions with Mr Singh increasingly difficult.

239. In closing submissions, Mr Stuart submitted that the increase was not justified by the job, stating that it is standard practice throughout the Specsavers stores that the Optician partner is paid more than the Retail partner and that by paying Mr Singh so much more than Mr Patel, Specsavers was more or less disregarding the market.

240. There is certainly some evidence of ophthalmic optician JVPs normally being paid more than dispensing optician or retail JVPs. Ms Birdi's evidence was that as the ophthalmic optician was responsible for clinical testing and prescribing he or she normally receives a higher salary than a dispensing optician, this being the norm throughout the industry; and Ms Birdi herself was paid £42,500 when Mr Patel was paid £30,000, and continued to be paid £42,500 when Mr Singh was recruited at £42,000. The question however is not so much of the normal differentials but of whether £42,000 was excessive for Mr Singh, and on that I have almost no evidence of market rates of pay. It was put to Mr Dyson that the £32,500 initially offered by Specsavers to Mr Singh was the going rate for a dispensing optician retail director at

the time, but Mr Dyson's evidence was that the going rate might be anything from that level up to £45,000-ish, depending on experience. There is before me no substantial evidence to counter that, and indeed there is some evidence supporting it, in that it is admitted that a Mr Parham, who was the retail director of a Specsavers store at Uckfield, was paid £42,000 in April 2008. Mr Stuart made the point that Mr Parham and his wife were the 2 JVPs so it was a matter of indifference to them whether they took money as salary or as profits, but the evidence I heard was to the effect that Specsavers itself took an interest in what salaries were paid even though it did not affect them directly.

241. Mr Dyson's evidence was that Mr Ryan had asked him about Mr Singh's proposed salary of £42,000, and that once Mr Ryan had explained that it was similar to the salary he was receiving at the Grays store (where he was then retail director), Mr Dyson was happy with that. It was suggested both to him and to Mr Singh that there was no evidence that Mr Singh had a salary of £42,000 at the Grays store. It was initially £32,500 (as specified in Mr Singh's service contract dated 27 October 2003) and by 2006 had increased to £34,125 (as specified in a second service contract dated 17 February 2006), but no further contracts were issued to him. Mr Singh however said that he and his wife (the other JVP at Grays) had requested, and been granted, pay increases – the standard procedure was to submit a request to Specsavers' Financial Planning department – and although he could not remember the details, he knew he had done so as by the time he left Grays his salary was just under £42,000.

242. It was suggested to him that it might have been increased a few days before he left in an artificial attempt to justify the salary of £42,000 at Dartford, but I am satisfied that the evidence establishes that this was not so. It is apparent from Mr Singh's final payslip from Grays, and his P45, that by the time he left his basic pay there was £3,432.75 per month (equivalent to £41,193 per annum), which together with a car allowance of £1,500 per month made total monthly pay of £4,932.75; and that it had been the same at least throughout the tax year from April 2008 as his "pay to date" was £24,663.75 which is exactly 5 payments of £4,932.75. It seems to me too far-fetched to suppose that Specsavers increased Mr Singh's salary at Grays to £41,193 in April 2008 in order to justify a salary of £42,000 at Dartford, and I accept therefore that his basic salary at Grays at £41,193 is evidence of a reasonable rate of pay for the job. Taken together with the admitted salary of Mr Parham at Uckfield (who according to Mr Singh had less years' experience than he did), it seems to me to make it impossible to conclude that £42,000 was an excessive salary for the post.

243. Mr Stuart also submitted there was no genuine commercial need to pay Mr Singh £42,000 in order to attract him. He had shown himself keen to become a JVP at Dartford. His sister-in-law Ms Kaur had been willing to offer £170,000 for the shares in November 2006; Mr Singh said that he didn't agree with that price but accepted that when he proposed acquiring them himself in January 2007, he probably would have paid up to £120,000, which compares well with Mr Glass's valuation in February 2007 of between about £80,000 to £125,000. In his witness statement he said that when he pursued the question in September 2007, he was persistent because he didn't want to miss what he considered to be such a good opportunity. When he was finally offered the shares in March 2008, he did not need to negotiate the price, being offered them by Mr Ryan at £60,000 which he was happy to accept.

244. In cross-examination Mr Stuart took him through a hypothetical calculation to

demonstrate that with an anticipated turnover of about £1m pa, and an expected profit level of 10% to 15%, he could expect dividends of £50,000 to £75,000 pa. It was therefore suggested to him (and to Mr Dyson) that he was being offered the shares at an absolute bargain, and there was no need to pay him a large salary to attract him. Mr Singh was only prepared to accept that he thought the price a *"fair"* one, given that the business was then overdrawn, but I suspect that he did think the price quite attractive, and that if he could make it work he had indeed got a bargain.

245. It was suggested to Mr Dyson that Specsavers' motivation for letting Mr Singh have the shares at a low price was as an incentive to him to do what Specsavers wanted him to do. I am not directly concerned with the price at which Specsavers sold him the shares – the shares were its property to do what it liked with, and the action of a shareholder in selling shares is not part of the conduct of the affairs of the company – but only with whether this casts light on Specsavers' motivation in agreeing Mr Singh's salary at £42,000. The price was suggested by Mr Ryan and agreed by Mr John Perkins, neither of whom gave evidence, so it is a matter of inference why they were willing to let Mr Singh have the shares at what seems in hindsight to have been an attractive price: Mr Ryan referred to the price as being "3x p/e based on current performance", which is no doubt a reference to his standard calculation based on weighted average profit. This would have given most weight to the immediately previous year where the profits were badly affected by the extra costs charged by Loss Prevention – indeed the consolidated accounts for the year ended 30 September 2007 showed an operating loss of nearly £60,000 – and the valuation therefore appears to have taken no account of the fact that these costs were extraordinary items that should not in the normal course of events recur. The inference I draw from this is that once the Board of SOG had decided that the store should not be retained as a shared venture store and that the shares should be offered to Mr Singh, there was no desire to risk the transaction by holding out for a high price. The business was after all, whatever its potential, one that had recently made a substantial loss and was heavily overdrawn, and the important thing was to get Mr Singh in there as soon as possible. I do not regard the sale price of £60,000 therefore as constituting an incentive to Mr Singh to do Specsavers' bidding, but more as an indication of a desire to see the business put on a joint venture basis as quickly and easily as possible: Mr Lunn's recommendation on 2 January 2008 had been that the business would not be turned around without this.

246. Similarly when it came to salary. The evidence does not establish that Mr Singh would in fact have been willing to take a cut in his basic pay in order to move; nor, more pertinently, does it establish that Specsavers deliberately paid Mr Singh more than they knew they needed to for devious purposes of their own. The most useful contemporary evidence of Specsavers' motivation is that contained in Ms del Grazia's letter to Ms Birdi of 10 July in which she said that as a matter of commercial reality it was necessary to ensure that the desired candidate's salary expectations, unless unreasonable, were met. I have already rejected the submission that the salary was so out of line with what other retail managers could earn as to be unreasonably excessive, and I see no reason to doubt that what happened was that Specsavers decided that it did not want to retain the store as a shared venture store, decided that Mr Singh was the appropriate candidate and offered him the shares, and were then met with a request for a salary in line with what he was then earning at Grays. Mr Ryan took that request to Mr Dyson who agreed it because he thought it was not

unreasonable and that it was in the interests of the Dartford store to have Mr Singh there, and (as Ms del Grazia's letter suggests), thought it was necessary to give him the salary he wanted. He may have been wrong, and if Specsavers had stuck to their initial proposal of £32,500, Mr Singh might have come anyway; but it is impossible to be confident of that, and in any event the question is not whether he would in fact have come at a lower salary, but whether Specsavers agreed to the higher salary for improper motives. I am unable on the evidence to conclude that Mr Dyson was acting out of malice or other improper motive. He no doubt did want Mr Singh in the Dartford store; he was no doubt conscious of the fact that the cost of paying his salary would not fall on Specsavers but would come out of the profits of the store (and hence half out of Ms Birdi's share); and he no doubt thought that keeping Mr Singh happy would be in Specsavers' interests. But I accept that he was acting in what he perceived to be the interests of the store companies as well, as he perceived it to be in their interests for Mr Singh to come in, and whether he was right or wrong in his assessment that Mr Singh needed to be paid the salary he asked, that was a matter for his commercial judgment, which the Court will not second-guess. I therefore reject the case that paying Mr Singh a salary of £42,000 was a decision taken for improper motives or unfairly prejudicial conduct.

247. There is also a pleaded case that by setting Mr Singh's remuneration as it did without proper consultation with Ms Birdi, SOG was in breach of clause 3.3 of the Shareholders' Agreement. This does not seem to me to be right. It is true that the employment of Mr Singh fell within clause 3.3 as not being a matter of day to day management: by clause 3.2.8 it was in fact expressly agreed that the employment of officers at a salary exceeding £10,000 per annum was not a day to day matter. And it is noticeable that the question of Mr Singh's salary was not brought, as one might have expected it to have been, before the Board of Visionplus where Ms Birdi would have been able to voice her objections to the proposed salary. But on examination there does not seem to me to be any breach of the Shareholders' Agreement. Clause 3.3 provides that matters not expressly delegated should be determined:

> "at a duly convened meeting of the board of Directors *or general meeting* of the Company or relevant Subsidiary in accordance with the Articles of Association of that company" (emphasis added).

The relevant subsidiary was Visionplus, whose Articles incorporate Table A. Reg 82 of Table A provides that:

> "The directors shall be entitled to such remuneration as the company may by ordinary resolution determine …"

I see no reason to doubt the statement in the Minutes of the EGM of Dartford that the EGM of Visionplus on 17 July 2008 did approve the terms of Mr Singh's Service Contract. Ms Birdi was not present at that meeting, but that is because she was not a member of Visionplus, whose only shareholders were Dartford (as to 199 shares) and Dartford and SOG jointly (as to 1 share), and there is no reason to doubt that they were duly represented by those authorised to represent them, namely Mr Ryan and Mrs Clark. In these circumstances clause 3.3 appears to me to have been complied with. And although Ms Birdi was not able to raise objections at a Board meeting, she did have the opportunity, which she took, to raise objections in correspondence. And even if the matter had been discussed at a Board meeting, it is highly unlikely that she

would have persuaded the other directors to make any different decision.

Issue 5

248. Issue 5 concerns the costs of investigation and suspension of Ms Birdi and of the disciplinary proceedings into her. These costs arose directly from a resolution passed at a Board meeting of Dartford held on 23 February 2010 authorising SOG to carry out disciplinary procedures in relation to Ms Birdi's "refusal to follow a board instruction". This is a reference to the Testing Resolution, which had been passed at a Board meeting in August 2009, and which itself referred back to what had been agreed in September 2008. It is therefore necessary to examine the background to the February 2010 resolution. But it is not necessary to detail, let alone resolve, all the factual issues ventilated at trial. The essential question on this aspect of the case is whether, as Mr Stuart put it, "the entire chain of events was brought about because of the malicious motivation on the part of Specsavers and Mr Singh."

249. When it was decided to offer the shares in Dartford to Mr Singh, Mr Ryan asked Mr Michael McGonagle, a Retail Development Consultant in the Shared Venture department, to facilitate an initial meeting between him and Ms Birdi, and generally manage his introduction to the store. The initial meeting took place on 18 March 2008. By then Mr Singh had the 'Bottom Line' accounts for Dartford for January 2008 (which gave the figures for the 4 months from October 2007 to January 2008); and he followed up the meeting with an e-mail to Ms Birdi on 20 March setting out in some detail the areas he thought they should concentrate on. He identified a number of items from the Bottom Line that were out of line with group averages such as low conversion rates (the number of eye tests which led to sales), and high costs, including ophthalmic optician costs at 21.64% of total sales. This was the only factor which he could see could be changed from day one, and he proposed that the set up should be changed to shorter appointments and fewer clinics with Ms Birdi testing 5 full days a week which would mean employing only 2 locums a week at a cost of £500 rather than the current set up under which 8 locums were employed each week at a cost of £2,000. He said that she had mentioned not being keen on testing 5 days a week but there was a strong business case to do so. Ms Birdi replied on 27 March but did not directly address Mr Singh's proposals; rather she said she was fully aware of what was required to turn the business around, that there were a number of matters she still had to resolve with SOG and that she did not feel it would be fair to him or her or any other potential director to get involved until they had been.

250. On 16 April 2008 Mr McGonagle visited the store to discuss the structure and roles and responsibilities if Mr Singh joined the team. His agenda for the meeting recorded that progress had been made with Ms Birdi back in the store, but showed OO costs as still high compared to the group as a whole, and referred to agreeing a plan to reduce them. He reported on the meeting to Mr Ryan, who e-mailed Mr Clark and Mr Dyson on 17 April to the effect that Ms Birdi was still sticking to her guns about only testing 4 days a week, that Mr Singh was going to try to persuade her to test 5 days per week for 6 months, and adding:

> "I am becoming more persuaded that the big win in all this is to sell Kam the shares, and accept that she will test 4 days, and work on the shop-floor for the other day, perhaps, as Michael suggests, with Kam doing a day's testing to cover the 5th day."

He asked Mr McGonagle for a written report which Mr McGonagle provided on 18 April. In this he recorded Ms Birdi as being happy "to work 5 days, 4 of them testing": she wanted to have a day on the shop floor so as to be more aware of the retail side of the business. Mr Singh was of the view she should test 5 days to reduce costs, but did initially agree that 4 days would be acceptable. Mr McGonagle concluded his memo:

> "the biggest issue at present would appear to be the ulterior motives of the two individuals:
>
> - SB does not want to be managed and appears to be putting KS off, in the belief that she will either be offered the shares or introduce someone to the business that she is comfortable with.
> - KS acknowledges the business potential and ultimately wants to introduce a member of his own extended family, and will manage and communicate with Swarandeep accordingly.
>
> Ultimately it would appear that the main issue in Dartford is Swarandeep Birdi's attitude to change, which is apparent in her communication with SOG, her outstanding grievance and her attitude towards KS."

251. Mr Singh started in the store on 23 July 2008. Almost immediately the relationship between him and Ms Birdi ran into problems. One issue was the completion of a 'roles and responsibilities' document setting out their respective responsibilities; a meeting to discuss this on 31 July ended abruptly after Mr Singh told Ms Birdi that he had been told that she would test 4 days a week and would make sure it was enforced, Ms Birdi regarding him as being high-handed and acting as if he had a right to manage her. Mr Singh sought the advice of Mr McGonagle and Mr Lunn, telling Mr Lunn on 8 August that the main issue was the number of days testing she did at the store, that she currently did less than 3.5 days and that the 4 days testing which had been agreed through negotiations with Mr McGonagle and Mr Ryan was a sticking point. Ms Birdi had her own complaints about Mr Singh, including the fact that her credit card which she used to pay for car expenses was withdrawn, that Mr Singh cancelled locums booked for Saturday without her agreement, and that he refused to do any testing himself.

252. By 14 August Mr Lunn was referring in an e-mail to Mr McGonagle to "their persistent squabbling", and sought to set up a meeting for Mr McGonagle to visit them to discuss, among other things, partner roles and responsibilities, what had gone well and what could be improved upon. This was to be in preparation for the handing over of the store from the responsibility of the Shared Venture team (Mr Lunn and Mr McGonagle) to Mr Michael Rowe, a Retail Development Consultant with the Retail Support Team. On 19 August Mr Raines e-mailed Mr Savill, another Retail Development Consultant, (thinking wrongly that Dartford was in his area rather than Mr Rowe's), as follows:

> "Hi kam is now in the store – can you pl arrange to visit the store 3 times (as part of new partner support). There is a concern that kam may go "native" once in the store – I am sure he wont but we need to guard against it.

> Kams objective is to drive the business forward and not let swarandeep impact on that objective – kam may need your support."

After Mr Savill pointed out that Dartford was in Mr Rowe's area not his, Mr Raines forwarded it to Mr Rowe, who replied:

> "I discussed this with neil lunn last week and the store will now be handed back to the meridian rst [retail support team]. There is a final meeting planned for the 10th sept I will the put the psp [partner support process] process in place.
>
> I had to tell neil it was now time to hand it over.
>
> All in all will keep you updated"

Mr Raines replied:

> "Great I hope you can read between the lines in terms of my comments"

to which Mr Rowe said:

> "Yes I get the situation and how closely it needs to be managed."

253. Ms Birdi placed great reliance on this e-mail chain as showing the real motivation behind Specsavers' actions. In cross-examination it was suggested to Mr Raines that he believed that Specsavers and Mr Singh had an understanding between them; and in his closing submissions Mr Stuart invited me to find that Mr Raines believed that Mr Singh had been placed into the business by Specsavers to act against Ms Birdi, and that Mr Raines did not want him to change sides. Mr Raines denied that there was any such understanding between them. His explanation of what he meant by the e-mail was as follows. When he had conducted her disciplinary hearing in 2007, he had found Ms Birdi challenging and evasive; he was aware she had objected to Mr Singh's appointment; to his mind she appeared to be really obsessed with the issues dating back to 2007. His understanding of the phrase "go native" was that it was when somebody adapts to the environment; so if the environment was one where Ms Birdi was continually talking about issues relating to 2007, that would become a distraction for Mr Singh. What Mr Raines wanted was for him to concentrate on the store, on driving the business forward, rather than be caught up in issues that related to previous history. And by his "reading between the lines" comment he meant that Mr Rowe should watch the store really closely. Mr Rowe was also asked about the e-mail but could not recollect how he understood the "go native" comment; what he understood overall was that it could be a difficult partnership to manage given the history.

254. On this I accept Mr Raines' evidence. I accept that his concern was that Mr Singh should focus on improvements to the store, both in terms of financial performance and service levels – that is what he meant by 'driving the business forward'; he thought Ms Birdi was difficult and obsessed with issues arising out of 2007 and he did not want Mr Singh to start getting sidetracked into those issues. This all seems to me both consistent with the ordinary meaning of the language used, and inherently credible. Specsavers' interest was that Dartford, which was regarded as a store that

had the potential to do well, should be a successful business. That required the partners to focus on the business. Mr Raines went on to say that he wanted the partnership to work and nothing would have made him happier than for it to have done so; Mr Rowe also said that he understood the need to support Mr Singh, but it was not to support him against Ms Birdi: his intention, right throughout the process, was if possible to make the relationship work and make Dartford as successful as possible. I do not read the e-mail chain as reason to reject this evidence and I accept it.

255. Mr Rowe's first meeting with the partners was on 12 September. Mr Lunn had originally sought to fix up a meeting for Ms Birdi and Mr Singh with Mr McGonagle, but Ms Birdi was resistant to this as Dartford was a joint venture store not a shared venture store; Mr Lunn, although explaining that it was standard practice where a store was being moved from one team to another (here shared venture to joint venture) to have a meeting with the outgoing team, acceded to her request and re-arranged the meeting with Mr Rowe and Mr Alan Moylan, a Retail Performance Consultant. On 16 September Mr Rowe wrote a letter recording what had taken place at the meeting. He asked for 2 copies to be sent, one to each of Ms Birdi and Mr Singh; Ms Birdi could not recall whether she saw it at the time but included in her disclosure were pages 1 and 3 of the letter (this version being signed on behalf of Mr Rowe and not the (unsigned) copy which she later requested and was sent), and it seems probable to me that she did.

256. Among other things, Mr Rowe's letter records a discussion about the need to complete the roles and responsibilities document, and an agreement that they would do so by 1 October. It also records that Mr Singh raised the issue of the clinic structures and the number of days Ms Birdi tested, and that:

> "After a detailed discussion Swarandeep confirmed that she would move from three and a half days testing to a full four days testing. Swarandeep did confirm that she wished to have one full day out of the test room to keep up to date with all her other roles and responsibilities. This was agreed by all parties."

Under the summary of actions at the end of the letter were included:

> "Roles and responsibilities completed by 1st Oct
>
> - Copy of R&R's to be sent to Mike Rowe
>
> Swarandeep to move to 4-day testing by 1st October."

The letter ended by thanking them for a positive approach to the meeting, and an e-mail sent by Mr Rowe to Mr Raines the same day said that the meeting went well, however there was tension between the partners under the surface.

257. Mr Rowe's evidence was that Mr Singh wanted Ms Birdi to test 5 days a week (all the time she was contracted to work in the store), and was very keen that they maximised the potential of her testing ability. Mr Rowe said that he did have a lot of partners who tested 5 days a week, but that Ms Birdi was resistant to this as she had other duties to fulfil as a director. Mr Rowe thought this was reasonable and therefore

proposed that she test 4 full days a week as a compromise, which he said demonstrated that he was acting *"kind of on both parties' sides"*. His position was that she made a very specific agreement, and the purpose of his letter was to be specific about the agreed actions.

258. Ms Birdi's evidence was that she would not have agreed to an unqualified obligation to test 4 full days a week. She said that she had agreed to it as a temporary measure while the store was in 'TAPS' (this acronym stands for turn around practice store, and refers to a list of stores that were regarded by Specsavers as needing close monitoring because of their poor financial performance); she also said that her agreement to it was qualified as it would depend on her directorial duties:

> *"Also, as you can appreciate when you are in a business, when you say four full days, if something came up within the business as a director, I would have to deal with it. So again it would depend on my directorial duties….*
>
> *I will do what I feel is in the best interests of the business. If I test 0 days or 5 days, it will depend on the needs of the business and my directorial duties."*

259. On this I prefer Mr Rowe's evidence. I find that Ms Birdi's agreement to 4-day testing was not expressly qualified either by being a temporary measure while the store was in TAPS, or by being subject to the needs of the business and her directorial duties. Not only is there no hint of this in his letter, the very purpose of which was to record in specific terms what had been agreed; but I consider it inherently unlikely that these points were raised at the meeting, as if they had been, it is I think unlikely that agreement would have been reached at all. Mr Rowe was trying to get the partners to reach agreement on this issue and evidently thought he had done. But if Ms Birdi had said in terms that this was a purely temporary measure while the store was in TAPS, I have little doubt that it would have been unacceptable to Mr Singh and no progress would have been made. Mr Rowe, while accepting that nothing was expressly said about it being permanent, and that circumstances can always change, made the point that if the partners were agreed that 4 day testing was in the best interests of the business and the way to develop its profitability while it was in TAPS, why would you in the future have gone back to 3½ days, revert to an old way of working, that would incur more costs ? Once the partners had agreed on 4 day testing, they had agreed on what was right for the business. There is no reason to think he would not have made similar points if it had been suggested that Ms Birdi's agreement was only to a temporary arrangement. Mr Rowe's letter had referred to Dartford being a TAPS store but said that with real determination and application they could recover the position quickly, so he was aware that the store being in TAPS might be only a short-term matter (in the event Dartford came out of what was called 'full TAPS' by 1 October, and moved off TAPS entirely by January 2009). I do not think he would have regarded the agreement on 4 day testing as a significant step forward, or expressed himself as he did in the letter, had he thought that what was being agreed was a short-term measure. Similarly if Ms Birdi had reserved the right not to test 4 days if she considered the needs of the business required it, I have little doubt that Mr Singh would have vigorously dissented (as he did later – see below) and it is likely that no agreement would have been reached; even if it had been, Mr Rowe would have seen this as storing up trouble for the future. The whole point of this part of the meeting was to see if an agreement could be reached which settled this issue (which

as set out above had been a contentious issue between the partners since before Mr Singh even started), but an agreement to test subject to such a reservation would have left it open to Ms Birdi to assert that business needs entitled her not to test, which would not resolve the issue at all.

260. One of Mr Rowe's recommendations had been for regular meetings between Mr Singh and Ms Birdi. The first took place on 18 September; Mr Singh's notes of the meeting referred to the roles and responsibilities document being completed at the next meeting on 23 September, and to Ms Birdi going to 4 full days' testing from 5 October. Ms Birdi e-mailed Mr Singh afterwards saying that she got the distinct impression towards the end of the meeting that he was not intending any flexibility to the clinics should she need to adjust her testing to fulfil her Director's responsibilities. She said that if she needed to perform other duties she would adjust her testing and rebook a locum if necessary as the business and her directorial duties dictated "without further discussion". The next meeting in fact took place on 25 September and was largely taken up with a discussion of this issue. Ms Birdi reiterated that as the ophthalmic optician, she regarded it as her role to book locums as required; Mr Singh was adamant that he wanted to have input into the matter, and that there was no way he would give her sole decision on booking locums. They agreed that they could not agree on this.

261. There were other matters that caused disagreement between them. It is not necessary to detail them all, but among other things Mr Singh took a new clocking in machine on trial and asked the staff to give fingerprints; this upset one of the staff, the lab manager, who felt she was given no option and was signed off sick for 2 weeks with work related stress; she later gave in her notice in January 2009 saying she had been very unhappy. Another member of staff, a lab technician assistant, complained to Ms Birdi that he had been intimidated by Mr Singh. For his part Mr Singh remained unhappy about Ms Birdi booking locums without consulting him. Ms Clare Morse, a Regional Development Manager who visited the store on 19 November to assist with training the staff, told Mr Rowe afterwards in an e-mail that the staff seemed demotivated, and that on numerous occasions Mr Singh and Ms Birdi began arguing: neither would accept the other's opinion or were willing to compromise. When later in November the lab technician took out a grievance against Mr Singh (a grievance in the event dismissed by Mr Vernieux), he complained to Ms Birdi that she had not mentioned this to him despite being in contact with him throughout the day and managing to raise it with Mr Rowe, and said he got the impression she was withholding information from him and felt that she had been working against him in resolving the issues in the lab; he accused her of not complying with NHS procedures, of shouting at him in front of the staff and said that they were still having issues with her commitment to 4 days testing which had been agreed in the presence of Mr Rowe and Mr Moylan.

262. In December 2008 Mr Rowe had a second meeting with Mr Singh and Ms Birdi, at which their relationship issues were discussed. There is reference in his follow-up letter to one of the issues being the completion of the roles and responsibilities document, but the evidence does not suggest that it was ever completed.

263. In February 2009 Ms Birdi raised with Mr Rowe the question of directors working at other stores. Mr Rowe's reaction was to e-mail Ms Hart saying:

> "I assume Kam has been playing silly buggers and been working in his wifes store. So what is the party line on this ? it is strictly forbidden in the JVA."

Ms Birdi was asked to be more specific and responded with detailed allegations that Mr Singh had indeed been working at the Grays store.

264. Each of the parties complained that the other was failing to approve their expenses to equalise their benefits. In June Mr Singh sent an e-mail with numerous complaints against Ms Birdi including the statement that since the meeting at which she had agreed to test 4 days a week:

> "there has not been a single week in which you tested 4 days a week."

Then, in July, Mr Singh issued a memo to the staff telling them they were under no circumstances to do repairs or adjustments on non-Specsavers frames, getting them to sign it; a few days later Ms Birdi issued a memo to the staff saying that Mr Singh's memo had not been discussed and instructing them to disregard that memo and return to the previous policy; she too got them to sign her memo.

265. Mr Rowe had meetings with them separately, on 2 June with Ms Birdi; and on 14 July with Mr Singh. In her witness statement Ms Birdi commented on Mr Rowe's proposal to have a meeting with Mr Singh alone (as a pre-meeting to a meeting with both of them) as an example of Specsavers having private meetings and discussions with Mr Singh as a tactic to advance the plot between them: this is an example (of which there are many) of Ms Birdi seeing sinister motives in everything Specsavers did, and in this case it is demonstrably unjustified: not only had Mr Rowe in fact already had a "one-to-one" meeting with Ms Birdi, but at that meeting he had told her (according to his note of the meeting which there is no reason to doubt) that he would have a one-to-one meeting with Mr Singh and then a joint partner meeting to resolve the issue of conflicts of interest.

266. At the meeting with Mr Singh, he told Mr Rowe that he was working in his wife's store at Grays, but this was mainly on Sundays (which was his day off) and he was adamant he was doing his full 5 days a week at Dartford. He again complained to Mr Rowe that Ms Birdi was not delivering on her commitment to test 4 days a week – he said she was only testing 3 days a week and this was causing issues with locum costs. It was agreed these issues would be addressed at the next partner meeting, but Mr Singh said he was doubtful it would make a difference and asked what the next more formal process would be. Mr Rowe described the process of taking matters to a BRM (business review meeting) or Board meeting, and Mr Singh then asked about the grievance process. On 23 July he lodged a formal grievance against Ms Birdi. This raised a number of issues: equalisation of benefits, directors' pensions, her failure to test 4 days a week, an overclaim which he alleged she made on an NHS repair voucher (suggesting it might have been fraudulent), and a failure to supervise a student optometrist who carried out a contact lens clinic. As appears from an e-mail of 29 July sent by Mr Raines to Mr Lunn, it had by then been decided that given the previous history of partner issues the most appropriate course of action was to go straight to a Board meeting.

267. A Board meeting was called for 20 August 2009. Notice of the Board meeting arrived at Ms Birdi's house on 13 August, although she may not have seen it until 14 August.

The agenda covered the matters raised by Mr Singh's grievance: equalisation of benefits, confirmation of the roles and responsibilities of the directors and the need for an NHS audit. On 13 August she also raised a formal grievance against Mr Singh: this covered his working in the Grays store, and his relationship with her. On 17 August she wrote asking for the Board meeting to be rearranged due to the short notice, but the reply from Mr Andrew Kidd of the Legal department was that the Board meeting would go ahead as planned, which it did. Mr Raines attended the meeting on behalf of SOG and chaired the meeting; Mr Savill attended as an alternate for Dame Mary Perkins. Mr Singh attended but Ms Birdi did not. In her absence all resolutions were carried 3-0. There was a resolution that all distributions to the A directors be equalised, and then a discussion of the directors' roles and responsibilities including testing. Mr Singh confirmed that the roles and responsibilities document remained outstanding, the main thing, he said, being Ms Birdi's commitment to 4 day testing which she committed to but had never been followed up. After discussion, what has been referred to as the Testing Resolution was passed in these terms:

> "a) The A Directors comply with their respective roles and responsibilities as set out in the document provided on the 31st Jan 2009 and their respective service contracts; and
>
> b) without prejudice to resolution a) above, SB has agreed as at 12th Sept 2008 BRM, to commit to 4 full days ophthalmic testing per week at the Dartford store."

The "document provided on 31st Jan 2009" has not been identified. After discussion about the NHS audit, under 'any other business' Mr Raines said he would like to acknowledge that Ms Birdi had raised a grievance against Mr Singh and that there were still outstanding areas of Mr Singh's grievance against Ms Birdi, and proposed a resolution that authority to carry out an investigation into these grievances, hold a disciplinary hearing and effect any disciplinary action (short of dismissal) be delegated to SOG. Mr Goddon, a Retail Development Consultant, was appointed to carry out the investigation.

268. On 8 October 2009 Mr Raines wrote to Ms Birdi referring to the Board meeting and in particular the Testing Resolution, which he described as the resolution that:

> "you are required to spend 4 full days ophthalmic testing per week at the Dartford store."

He said that he understood she might not be acting in compliance with this instruction, and as chairman of the Board meeting he was therefore writing to formally instruct her that as a director of Dartford and employee of Visionplus she was required to comply with the resolution, and should she fail to do so further action might be taken against her including potentially disciplinary action.

269. Ms Birdi's response on 16 November was to the effect that the idea of her testing 4 days a week came from Mr Singh and she had written after the Board meeting with her objections to it; she would continue to perform her duties at the store to the best of her ability but would not be bullied into testing 4 days a week just because Mr Singh demanded it.

270. On 17 November Mr Goddon sent his report on the grievances. On Mr Singh's grievance, Mr Singh said that of the 5 issues raised in his grievance, 3 had been resolved at the Board meeting and the other 2 resolved to his satisfaction subsequently so there were no complaints which he wished to be determined. On Ms Birdi's grievances there were a large number of complaints raised under 4 heads: Mr Singh's conflict of interest in relation to the Grays store; his not acting in the best interests of the business; his failure to authorise Ms Birdi's expenses; and unfair treatment at work. Save in certain minor respects he did not uphold the complaints, but he made a number of recommendations.

271. Mr Raines e-mailed Mr Goddon referring to his work as a comprehensive investigation and report, to which Mr Goddon replied (on 18 November):

> "I believe we have flushed out most of her complaints and do not uphold the majority of them. I do not believe this will be the last of Dartford and am sure we will hear from her shortly with regards to the stage 2 appeal."

This was an accurate prediction as on 27 November Ms Birdi appealed against Mr Goddon's decisions. The appeal was conducted by Mr Frewin, a Retail Development Consultant. He sought to set up a meeting with Ms Birdi but she told him she thought it was unnecessary to attend a further review as all the evidence had already been provided. He therefore considered the appeal on the basis of the notes that had been made available to him, and on 2 February 2010 dismissed the appeal.

272. Meanwhile on 4 December 2009 Mr Raines had written to Ms Birdi saying that he understood that she was still not acting in compliance with the Testing Resolution, and that if she failed to start doing so by 14 December and continuing thereafter she would be called to a disciplinary hearing. On 4 January 2010 he followed this up with a letter saying that the issue would be discussed at a further Board meeting.

273. The Board meeting took place on 23 February 2010. Mr Raines attended representing SOG as chairman; Mr James Butcher, a Retail Performance Consultant, attended representing SOG as alternate director for Dame Mary Perkins; Mr Singh and Ms Birdi were both there. It was a long meeting which discussed a number of issues, among which (according to Mr Raines' notes of the meeting) were the following:

    (1) Under agenda item 6 (to note the outcome of the grievance process) Mr Raines said that both Ms Birdi and Mr Singh needed to let go of all historical gripes/complaints, and secured a commitment from each of them to work together for the benefit of the business (in Ms Birdi's case she had reservations about how it would work as she believed she was harassed and bullied at work); and a motion was passed unanimously ratifying SOG's actions to date in respect of the grievances as being in the best interests of the business and in compliance with internal procedures.

    (2) Under agenda item 8 (to further consider equalisation and what distributions should be paid), Mr Raines referred to the fact that neither Ms Birdi nor Mr Singh had been able to take distributions of profit (the business now being profitable and having substantial cash reserves), and one of the causes of the 'log jam' being Ms Birdi's belief she was still owed money. A letter from the Distribution and Investment team in January had shown that according to their

records Ms Birdi was owed £7,595; a motion that she be paid that was carried unanimously.

(3) A second motion however that the directors each be paid £25,000 was opposed by Ms Birdi as she said she was still owed a further £8,705.61. This was a historic claim which dated back to 2006, which she had referred to on a number of occasions. The motion was however carried by 3-1; Mr Raines said that they would each receive £25,000 immediately and that if any additional amount was owed to Ms Birdi it would be paid once the issue had been investigated. He would personally re-investigate it and if Ms Birdi had any further information as to why she felt she was owed it she should share that with him.

(4) Under Agenda Item 9 (to consider the refusal of Ms Birdi to comply with the Testing Resolution), Mr Raines asked Ms Birdi why she had not complied with the resolution. She confirmed that she would not test 4 days a week. She would not take instructions from the Board; rather she would decide for herself when she wanted to test and that might be anywhere between 0 and 5 days. There was a long discussion. Ms Birdi's position was that she should 'lead from the front' (be on the shop floor) on Tuesdays when Mr Singh was not in, that Mr Singh was often not on the shop floor, that she had only agreed to 4 day testing because the store was in TAPS and that she was not going to move on her stance; Mr Singh's position was that there had been a trial in April which showed that the store's performance did not improve when Ms Birdi was on the shop floor (Ms Birdi disagreed there had been a trial), that the business needed an Optom Director and a Retail Director, not two Retail Directors, that everything he did was questioned by Ms Birdi and that the poor relationship with her was now affecting the morale of the staff. Mr Raines, having expressed the view that 4 day testing had been agreed by Ms Birdi, had been the subject of an instruction from the Board, benefited the business financially and was in the spirit of the partnership and supported the director business model for Specsavers stores, adjourned the meeting to give Mr Singh and Ms Birdi an opportunity to discuss the question and try to find a solution.

(5) They were however unable to agree as Mr Singh believed Ms Birdi should test for 4 days but she did not. On their return she confirmed to Mr Raines that she would not test 4 days a week. Mr Raines expressed his disappointment and proposed a motion that SOG be authorised on behalf of Dartford to initiate its disciplinary procedure, carry out any suspension or investigation as necessary, hold a disciplinary hearing and effect any disciplinary action (save for dismissal) in respect of Ms Bird's refusal to follow a Board instruction. Ms Birdi voted against the resolution but it was carried 3-1.

274. Despite the terms of the last motion, disciplinary proceedings were not commenced straight away. On 19 March Mrs Alison Girollet (as Ms Anderson had become) wrote to Mr Singh and Ms Birdi on behalf of SOG as company secretary of Dartford asking, among other things, if Ms Birdi had reconsidered her position and had now commenced full 4 day testing. Mr Singh's reply on 5 April was that Ms Birdi had made it clear to him that she had no intention of committing to this agreed strategy; Ms Birdi's own reply on 10 April referred to SOG trying to force 4 days testing on her (which she said was unfair and inconsistent) and said that she had made her position

very clear on the issue. She also complained about the outcome of the grievance process, which she described as unsatisfactory and the result of a whitewash.

275. Specsavers then decided to try mediation, a suggestion made by Ms Pauline Best (the HR Director) and agreed to by Mr Raines. A further Board meeting to discuss this was called for 13 May 2010, and Mr Raines wrote to Ms Birdi on 28 April saying that although they were now in a position where the disciplinary procedure could be initiated, in "one final effort to avoid initiating the disciplinary procedure against you" he proposed that she and Mr Singh participate in an external mediation process in a final attempt to resolve her apparent refusal to comply with the Board's instructions and resolutions re testing 4 days per week and resolve the ongoing working relationship difficulties. He added that in the event that she was unwilling to participate fully in the process or if it did not result in the resolution of the above matters to their satisfaction, they would have no choice but to initiate the disciplinary procedure. He also said that she and Mr Singh had to move on from all historical issues and accept that the outcome of the grievance and appeal process was final.

276. Ms Birdi's response on 5 May was that it was obvious from Mr Raines' language that there was only one outcome which would satisfy the Board which is that she gave in to their demands; and that she would participate in the mediation if he confirmed that the Board was prepared to accept an outcome to it which did not involve her testing 4 days a week, "otherwise the exercise will be a waste of time."

277. The meeting in the event took place on 17 May. Mr Raines again attended on behalf of SOG as chairman, Ms Weaver as representing SOG as alternate director to Dame Mary Perkins; Mr Singh and Ms Birdi both attended. On the issue of mediation, Mr Singh said he was happy to participate in the mediation on the 4 days testing issue and go into it with an open mind. Ms Birdi asked if SOG agreed to be party to the mediation to allow all issues to be resolved since 2007. Mr Raines said that SOG would be party to the mediation, but that he could not give a definite answer about issues relating back to 2007, as it would be for the mediator to decide whether to go into the issues to remove the deadlock. SOG was not putting conditions on the mediation. Mr Singh said he was not happy to go into mediation to cover Ms Birdi's issues with SOG over the last 4 years; Mr Raines said to Ms Birdi that she had an issue with SOG and an issue with Mr Singh and the relationship and that it was the latter that they were most interested in as customer service was being compromised. The motion referred to mediation by Ms Birdi, Mr Singh and SOG (on behalf of the B Directors) on the issues of Ms Birdi's compliance with the 4 day testing resolutions and the ongoing working relationship difficulties between Ms Birdi and Mr Singh. Ms Birdi voted against the motion on the grounds that although mediation was a good way forward it needed to look at all 3 parties; Mr Singh and Ms Weaver voted in favour. Mr Raines then said that he would have been prepared to vote in favour but success depended on all parties participating in it and since Ms Birdi was not willing to do so, he saw little merit in SOG continuing with the motion or going ahead with mediation. He therefore withdrew it, and said that the company now had no choice but to proceed with the disciplinary procedure against Ms Birdi.

278. In the meantime a complaint had been made by a member of staff, Ms Jas Khunkhuna, against Mr Singh. On 29 April she asked for a meeting with Ms Birdi which she came to accompanied by a colleague, Ms Fatima Gulamali. She accused Mr Singh of inappropriate behaviour and of being very touchy feely with her in a way that he had

never displayed with any other staff member. Ms Birdi typed up the notes of the meeting, which Ms Khunkhuna signed, and sent them to Mr Raines. At the Board meeting Mr Raines acknowledged that this had been received but said that Ms Khunkhuna had not then decided if she wished to make a formal complaint. Ms Birdi said that Ms Gulamali had told her that she was also very upset, that Mr Singh had become very cold and negative to her, and had on 15 May extended her probationary period (which was due to end that day) by a further 3 months. On 21 May Mrs Girollet e-mailed Mr Singh to tell him that Ms Khunkuna wished her grievance to be taken forward formally, and that Ms Gulamali also now wished to make a formal complaint. On 23 May he wrote to her saying that the two members of staff and Ms Birdi had become very close over the previous week, talking to each other in secret meetings and distancing themselves from the other staff, and accused Ms Birdi of orchestrating Ms Khunkhuna's allegations in an attempt to tarnish his reputation. On 27 May Ms Gulamali gave notice of resignation with effect from 2 June. On 2 June Ms Birdi rang Mrs Girollet to say that a replacement position offered to her was not yet available and she wanted her to continue working. Mrs Girollet e-mailed Mr Singh to suggest this. Mr Singh e-mailed her back early on 3 June saying that he was shocked that Ms Birdi wished to re-employ Ms Gulamali; that he did not believe it was in the best interests of the store; that "my team" had openly discussed their relief that she had resigned; and that when told that Ms Birdi wished to re-employ her, 5 out of 8 of them had told him that they would themselves resign should they be forced to work with her again. Mrs Girollet then wrote saying that in the absence of agreement between them, SOG considered that it would be inappropriate for an offer to re-employ her to be made.

279. On 3 June Mr Raines made an entry in his daybook about Dartford as follows:

> "Dartford – agreed
>
> – DC to suspend next week
>
> – DC to investigate relationship breakdown
>
> – One of Pauline's team to carry out Disp Hearing which is the relationship breakdown plus the not testing 4 days
>
> – Off the record with Kam re suspension."

Underneath, Mr Singh's mobile number is given with "Action" next to it. "DC" refers to Mr Clark. On 8 June letters were sent to Mr Singh and Ms Birdi (by Mr Stephen Moore, a Senior Employment Counsel in the Legal department, on behalf of SOG) informing them that SOG as chairman of the Board and B Director of Visionplus had decided that an investigation was needed, which would be carried out by Mr Clark, into the actions of the A Directors towards each other and the business, the state of their working relationship and whether either or both of them had failed to act in the best interests of the business and/or failed to comply with instructions or board resolutions, and formally suspending each of them. The letter to Ms Birdi also said that the investigation was without prejudice to, and did not supersede, the Testing Resolution so that the disciplinary procedure in relation to that might still be instigated against her.

280. Mr Raines was asked about the entry in his daybook. It is evident that there had been a meeting to agree the way forward, which he said was with Ms Pauline Best and with the Legal department. It seems likely that it was in response to Mr Singh's e-mail of that morning. Mr Raines was asked about the off the record conversation with Mr Singh. He said he could not recall whether he had the conversation or not, or what it was to be about. It was suggested to him that he was going to tell Mr Singh not to worry about the suspension as it would only be temporary and the real purpose was to get rid of Ms Birdi, that he would be fine and was not going to be exited from the business and Ms Birdi was. He denied that, although he did accept that it would be inappropriate to have off the record conversations with directors about their suspension.

281. I think it probable that Mr Raines did call Mr Singh. The phone number has "Action" written next to it, which was a reminder by Mr Raines to himself to do it. I think it much more doubtful however whether an inference can safely be drawn as to what was said. The position was that at the Board meeting of 23 February 2010 the Board had resolved that SOG should investigate Ms Birdi's failure to comply with the Testing Resolution, and at the Board meeting of 17 May 2010 at which mediation had been proposed and rejected, Mr Raines had said that it was that disciplinary process that would be continued against Ms Birdi. There had therefore up to then been no suggestion that the investigation would widen to include the relationship breakdown and both partners. I find that this was triggered by Mr Singh's e-mail which demonstrated that the difficulties between the partners were leading to real problems with the staff, with the suggestion that the staff were taking sides. In those circumstances, I think it likely that it was agreed that Mr Raines should contact Mr Singh to give him advance notice that he was about to be suspended and explain why, rather than just send him a formal letter out of the blue. Whether or not it was inappropriate for him to speak to Mr Singh off the record in this way (and despite Mr Raines' acceptance of this in cross-examination, I am not at all sure that it was), I am not persuaded that I should infer that the purpose of the call was not only to warn him what was coming, but to reassure him that he need not worry as there was a predetermined plan to use the process to exit Ms Birdi and he would be fine. Mr Stuart pointed to the fact that Mr Raines' daybook referred to "Disp hearing" in the singular, and since it combined the relationship breakdown and the not testing 4 days, this must have been already decided to be a hearing against Ms Birdi alone. I think this is reading too much into this informal note. Mr Raines was very familiar with the 4 day testing issue, and I suspect that he (and the others who made this decision) fully expected that there would have to be a disciplinary hearing into it as it was regarded as a straightforward failure by Ms Birdi to follow a Board instruction and all other attempts to resolve the issue had failed. But it does not follow from this that it had already been decided that Mr Singh would be exonerated from any responsibility for the relationship breakdown and exempt from any disciplinary action, let alone that he would be assured before the investigation started that he had nothing to worry about.

282. Mr Clark duly started his investigation with meetings with Mr Singh on 16 June, and with Ms Birdi on 22 June. Also on 16 June, a letter was written by some of the staff and given to Mr Daniel Laing who was acting as temporary manager in the absence of the suspended directors. He told Mr Clark of it and sent him a copy the next day. It is addressed "To whom it may concern", and had the names of 6 members of staff on it, of whom 4 had at that stage signed it – the other 2 later signed as well. The letter was

written so as to be supportive of Mr Singh and critical of Ms Birdi: it said that they had been affected by Mr Singh not being in the store as they found him very helpful; that they felt ostracised by Ms Birdi since Ms Khunkhuna and Ms Gulamali started working with them and felt that she had given them preferential treatment, and taken a big part in their grievances being brought to head office's attention; that she had approached other members of the team asking if they had any issues with Mr Singh, something which she had instigated, not the staff. They said that in the past many of them had had issues with Ms Birdi but had been scared of repercussions had they made a complaint; she could make you feel very intimidated and pressured.

283. I heard a considerable amount of evidence about the genesis of this letter, including evidence from 3 of the signatories. Unsurprisingly their recollections over 4 years later were not quite the same. Mrs Tidmass said they had discussed it in the pub where the staff often went after work, she thought perhaps about a week before the letter was written, that Mr Singh was there, that they asked him if they could put in a grievance and that he said that they could but that he had to have nothing to do with it; they had to go through head office. Mr Hummell agreed that there was a discussion about it in the pub perhaps a week before, but could not remember Mr Singh being there. Mrs Hornby, who was the one who actually typed out the letter on the morning of 16 October, was less sure about it: she remembered them having a discussion when they weren't in work and said they would often sit and chat in the pub, but could not remember a discussion with Mr Singh.

284. On the basis of this and of photographs showing Mr Singh's car being in the centre of Dartford on 9 June, it was suggested to him that he had met the staff in the pub that day (when he was suspended and ought not to have been having any contact with them). He said his car was in a car park as he was going to the gym and that he did not meet the staff or have any contact with them during his suspension. He said that he did have a meeting in the pub at which they discussed it but said it was in February not June. This is supported by a letter from him to Mr Raines dated 5 April 2010 in which he refers to:

> "…a private meeting I had with 6 long standing members of the team a few months ago. They collectively approached me to discuss issues they had with Ms Birdi. In general, they felt that Ms Birdi, is very rude and made them feel insignificant. I advised them, that there is a formal process that is required for them to proceed with their grievances."

I accept on the basis of this that Mr Singh had already advised the staff well before April that if they wanted to bring a grievance there was a formal process to do so. I accept that the members of staff did discuss writing the letter in the pub after work one day shortly before it was written; but I find that Mrs Tidmass is misremembering in thinking this was the occasion when Mr Singh joined them and told them how to make a formal grievance. The evidence was that the staff members went to the pub frequently after work and it is entirely understandable how she might have conflated the two occasions. I find it telling that Mrs Hornby who drafted the letter had no recollection of talking to Mr Singh about it just beforehand; her evidence rather was that she spoke to Mr Laing that morning and said that they wanted to construct a letter and asked him if that was allowed as she didn't understand the procedure; he told her she was freely able to do that, and if she did write it she could give it to him, which she did. On the evidence as a whole I am not prepared to find, as I was asked to, that

Mr Singh broke the terms of his suspension and met the staff on 9 June.

285. On 17 June Mr Moore sent to Mr Singh the decisions of Mr Riyaz Rajan, a Retail Performance Consultant, on the complaints against him by Ms Khunkhuna and Ms Gulamali. He decided not to uphold either complaint although in each case he made recommendations on improvements to procedures.

286. On 1 July Mr Clark telephoned Mr Singh and told him that his suspension would be lifted; Mr Moore wrote to Mr Singh confirming this the next day. Mr Clark explained in evidence that he had by that stage largely completed his investigation as far as Mr Singh was concerned, and had found no reason to continue his suspension. The purpose of suspending a partner is so that they cannot influence the investigation and he had by then carried out the majority of interviews with the staff.

287. Mr Clark however wanted to interview Ms Birdi again to discuss the staff's 16 June letter and comments made by a number of staff in their interviews, and on 7 July she was invited to attend a second interview on 13 July. Ms Birdi however declined to attend, sending a letter on 12 July which said that the staff letter appeared to be a grievance against her and should be dealt with separately; and giving various answers to the allegations in the letter. This was passed to Mr Clark as part of his investigation.

288. On 21 July Mr Raines also wrote to Mr Clark giving his view on the relationship between the partners at Dartford and SOG. He said that he had chaired a number of Board meetings and that no significant issues arose re the state of the working relationship between Mr Singh and SOG. However his view was that the relationship between Ms Birdi and SOG had severely broken down. He thought that many of her comments in Board meetings or her numerous letters seemed aimed more at blaming her fellow directors (SOG and Mr Singh) or trying to re-open past/closed issues, rather than moving the Dartford business forward. She appeared unwilling to accept that just because SOG did not agree with her point of view on an issue (or for example a grievance by her was not upheld) that did not mean SOG was biased against her or that there was some kind of conspiracy against her – rather, it simply reflected a genuine difference of opinion. It was suggested to him in cross-examination that he was *"very anti her"* to which he said that he had never had a personal view on her, all he wanted was for that business, that partnership to work. He did however find her very difficult, very challenging and very difficult to move forward. And the meetings would frustrate him as he couldn't understand why she wouldn't leave stuff behind and in the interests of the business just move forward. So by this stage he did feel that she was responsible for the breakdown of the relationship.

289. On 22 July 2010 Mr Clark signed off on a 15-page report. He had interviewed 11 of the 13 staff (as well as Mr Singh and Ms Birdi). His recommendations were that Ms Birdi be called to a hearing to consider whether dismissal for 'some other substantial reason' was warranted (that is whether there had been a complete breakdown in the working relationship between her and her fellow directors); that a disciplinary case also existed against her in relation to alleged gross misconduct; and that no disciplinary case existed against Mr Singh.

290. A Board meeting was called for 9 August to consider appropriate actions in light of the

report. Mr Rowe attended for SOG in its role as chairman, Ms Weaver again representing SOG as alternate director for Dame Mary Perkins. Mr Singh attended but Ms Birdi sent apologies, although she asked for it to be recorded that she voted against any action or hearing to consider her dismissal for some other substantial reason. At the meeting those present voted in favour of a motion to ratify Mr Clark's investigation, accept his recommendations, continue Ms Birdi's suspension and delegate to SOG authority to conduct procedures, hold hearings and impose any sanction short of dismissal; Ms Birdi's wishes were recorded but since she had neither attended nor appointed an alternate, they were unable to be formally included and the motion was therefore passed 3-0.

291. Ms Birdi was invited to a hearing on 1 September 2010 to consider whether disciplinary action should be taken or dismissal for some other substantial reason was warranted. The meeting was rescheduled several times, largely due to a disagreement over whether Ms Birdi could be accompanied by her husband, but finally took place on 20 October. It was held by Mrs Dawn McIntyre, a Director of HR. It lasted 5 hours but did not conclude matters, and a further lengthy hearing was held on 29 October, supplemented by a letter from Ms Birdi on 15 November containing written examples of Mr Singh's and her behaviour.

292. Mrs McIntyre completed her investigation and signed a 28-page report on 14 December 2010. On the allegation of failing to comply with the Testing Resolution, she found that Ms Birdi had consistently refused to follow the Board instruction given and resolution passed at the Board meeting of 20 August 2009 that she complete 4 full days testing, and disagreed with Ms Birdi's assertion that she had reasonable justification for failing to comply with the instruction. On the allegations arising out of Mr Clark's investigation, she found most of the allegations proven (but not all of them – two allegations relating to Mr Singh's pension and PCT funding she found not proven), including in particular that as a consequence of her actions and behaviours her working relationships with Mr Singh and SOG had completely broken down. She concluded that Ms Birdi was guilty of gross misconduct which would warrant her summary dismissal and that dismissal was also warranted for some other substantial reason, namely the complete breakdown of the working relationship. Despite her conclusion on gross misconduct she was prepared to recommend to the Board that she should be dismissed for some other substantial reason in which case 10 weeks' pay in lieu of notice would be payable to her.

293. In dealing with the Testing Resolution she set out its text as follows:

> "a) That the 'A' Directors comply with their respective roles and responsibilities as set out in the document provided on the 31 Jan 2009 and their respective service contracts; and
>
> b) Without prejudice to resolution a) above, Swarandeep Birdi (as agreed as at 12 Sept 2008 BRM), to commit to 4 full days ophthalmic testing a week per week at the Dartford store."

A comparison with the text of the resolution as recorded in the minutes of the meeting shows some variations: the addition of a "That" in paragraph (a), and in paragraph (b) the spelling out of her name in full, the change of "has agreed" to "(as agreed ….)", and the addition of "a week". Mr Stuart cross-examined her at length about the third

of these changes suggesting that it was a significant change which altered the resolution from a mere record (which he said was inaccurate) of what had been agreed into an instruction, and that she must have done it deliberately to support the finding of gross misconduct.

294. I am quite unpersuaded that she deliberately changed the text in this way or for this purpose. I do not accept that the difference in the text had the significance that Mr Stuart sought to ascribe to it. As passed, paragraph (a) of the resolution requires the directors to comply with their roles and responsibilities, and paragraph (b) records that without prejudice to that Ms Birdi had agreed at the meeting of 12 September 2008 to test 4 full days a week. It seems to me that the intention behind that was to make it clear that it had been agreed that this was one of her roles and responsibilities, in other words to be specific about one of the matters that she was required to comply with. As such it was intended to be an instruction. This was certainly how Mr Raines understood it at the time as his letters of 8 October and 4 December 2009, and the long discussion at the Board meeting of 23 February 2010 make clear. Ms Birdi's position then was not that she did not understand it to be an instruction but that she would not take instructions from the Board. Mrs McIntyre said she felt in the meeting that this was a very clear instruction, and I consider it was entirely understandable that she should have read it that way: indeed she said that she understood Ms Birdi's interpretation to be the same (and as Mr Potts pointed out in his closing submissions Ms Birdi in her Petition referred to the resolution as requiring her to spend 4 full days of testing at the Dartford Store each week). In those circumstances the change ceases to be a significant one at all; and I see no reason to think that it was deliberate rather than an innocent mis-transcribing of the resolution.

295. A Board meeting of Visionplus was called for 21 December 2010 to consider Mrs McIntyre's recommendation of dismissal. Ms Birdi did not attend, but asked the chairman to act as her proxy to vote against the motion. It was attended by Mr Giles Edmonds, the chairman of the UK Operations Board, who acted as the representative of SOG both as chairman and as alternate director for Dame Mary Perkins, and in accordance with her letter as alternate director for Ms Birdi, and by Mr Singh. A motion to accept Mrs McIntyre's findings and recommendations, and in accordance with them that Ms Birdi be dismissed with effect from that day for some other substantial reason and be paid 10 weeks' pay in lieu of notice, was passed by 3 to 1, Mr Edmonds voting in favour of the resolution on behalf of SOG and Dame Mary Perkins and against it on behalf of Ms Birdi.

296. Ms Birdi appealed against her dismissal. She was invited to an appeal hearing but declined to attend on the basis that she had said all she needed to say in her appeal letter. The appeal was dismissed by Mr Dyson by letter dated 17 March 2011.

297. On these facts the pleaded case is that the following decisions were motivated by malice and/or by SOG's and Mr Singh's improper and unlawful desire to remove Ms Birdi from the business, namely (i) the Board resolution of 23 February 2010 to authorise disciplinary proceedings against Ms Birdi in respect of her refusal to comply with the Testing Resolution; (ii) the decision on 8 June 2010 to carry out an investigation into the state of the working relationship between Mr Singh and Ms Birdi; (iii) the decision on or about 20 August 2010 to institute disciplinary proceedings against Ms Birdi; and (iv) the decision on 21 December 2010 to terminate her employment.

298. There is a secondary case that these decisions were taken in breach of clauses 3.1 and 3.3 of the Shareholders' Agreement in that they all ultimately derive from a difference of opinion on the number of days testing Ms Birdi should have carried out and this was a day to day management issue.

299. I will deal with this latter point first. I agree that such matters as the roles and responsibilities of the directors and the amount of testing that they would do were matters of day to day management that Specsavers would normally expect the A Directors to sort out between themselves: this was Mr Raines' own evidence. But it is apparent that the question of the amount of testing that Ms Birdi would do was a contentious issue right from the start. At the meeting of 12 September 2008 Mr Rowe sought to broker a compromise between Mr Singh's desire that Ms Birdi test for 5 days and her desire not to. That was not taking the decision away from the A Directors, or imposing 4 day testing on Ms Birdi, but assisting them to come to an agreed decision on a matter of day to day management. What then happened as the record clearly shows is that Ms Birdi did not in fact test for 4 days, and Mr Singh complained of this first to her, then to Mr Rowe, and then in a formal grievance, while Ms Birdi insisted on her right to decide the amount of testing that was compatible with her other duties.

300. It seems to me quite unrealistic in those circumstances to interpret the Shareholders' Agreement as precluding the Board from getting involved. If it is apparent that the A Directors cannot agree on a matter of day to day management, I do not see that the Board is prevented from taking steps to resolve the impasse. As Mr Raines said, the key to him was that they could not agree on the issue, and he viewed SOG's role as to try and move it forward, to remove the blockage:

> *"What I was trying to do … was trying to unblock a point – a major point of disagreement between the two partners that had been present in the business for nine months that was starting to impact on the way that that business was performing."*

But quite apart from that, the position here was not so much that the A Directors could not reach agreement, but that on the material before the Board it appeared (and as I have found was in fact the case) that the A Directors had already reached an agreement but it was not being implemented. That went beyond a mere difference of opinion on a matter of day to day management, but went to the heart of the relationship between the partners, and in circumstances where the relationship was very poor, I see nothing at all wrong in the Board as a Board seeking to ensure that an agreement that had been made be adhered to. I reject this complaint.

301. That leaves the more serious allegation that the decisions were motivated by malice. This case was elaborated in great detail in Ms Birdi's witness statements and oral evidence, but in essence it comes down to a single question: were SOG's decisions taken in what they considered to be the best interests of the business, or was the dominant motive to use Mr Singh to get rid of Ms Birdi ? I will say at once that I do not find this case has been established.

302. It is not I think necessary to go through every point that was put to Specsavers' witnesses in cross-examination or advanced in closing submissions. It is sufficient to refer to some of the main points:

(1) First, I accept that the decision was made in March 2008 to recruit Mr Singh not in order to make life difficult for Ms Birdi, but because Specsavers had decided in January 2008 that it was better to return the store to a joint venture store rather than hold it as a shared venture store, as this was the only way to realise its potential (paragraph 234 above).

(2) Much was made by Mr Stuart of Mr McGonagle's comment in his memo of 18 April 2008 as to Mr Singh's ulterior motives, namely that he acknowledged the business potential and ultimately wanted to introduce a member of his own extended family and "will manage and communicate with Swarandeep accordingly" (paragraph 250 above). Mr Singh denied saying this to him, but Mr McGonagle must have got it from somewhere, and I find that Mr Singh did say something along these lines. But there is not a hint in all the voluminous documents, including internal e-mails which are often quite candid, that SOG encouraged him to think that sooner or later he would be able to introduce a member of his family, or were trying to assist him to engineer this outcome. On the contrary, I accept that Mr Raines and Mr Rowe (the two most relevant individuals for this purpose) genuinely wanted the partnership to be a success, and repeatedly urged the partners to try and work together for the good of the business.

(3) I have already said that I do not regard Mr Raines' "go native" e-mail of 19 August 2008 (paragraph 242 above) as supporting the case that SOG had a secret agenda to use Mr Singh to get rid of Ms Birdi. On the contrary I have accepted Mr Raines' evidence that he wanted the partnership to work and nothing would have made him happier than for it to have done so, and Mr Rowe's evidence that his intention was to make the relationship work and Dartford as successful as possible.

(4) Ms Birdi complained of the Testing Resolution being dealt with at the Board meeting of 20 August 2009 (paragraph 267 above) rather than as part of the usual grievance procedure. Mr Raines' evidence was that SOG's position was that Ms Birdi had agreed to test 4 days and that the partners should just sort it out – that SOG should not have to get involved in these issues and if they were not sorted they were going to damage the partnership moving forward. I have already said that I see nothing wrong in SOG dealing with this at a Board meeting and seeking to ensure that an agreement that had been made was adhered to.

(5) The next relevant step was the decision at the Board meeting of 23 February 2010 (paragraph 273 above) to authorise disciplinary procedures over Ms Birdi's failure to adhere to the Testing Resolution. I reject the suggestion that this was motivated by malice and by a desire to engineer her removal from the business. It is apparent from the notes of the meeting that there was a long discussion in which Mr Raines explored the whole question with Mr Singh and Ms Birdi in some depth. Mr Raines' evidence was that he found Ms Birdi's attitude that she could test anywhere between 0 and 5 days alarming, and the suggestion that she needed to spend time filling in NHS forms surprising; but he suggested that they try and sort it out between themselves in the hope that they would be able to come to some sort of compromise. When they came back and announced that they had been unable to compromise, he

was disappointed. I accept this evidence which is quite inconsistent with his real motive being malicious and designed to harass her out of the business. Had this been his intention, it is unlikely that he would have tried to encourage them to reach a compromise at all, but would have moved straight to disciplinary action. I accept that his motivation was to try and encourage the partners to resolve the issue between themselves as this would be in the interests of the business.

(6) Nor does his conduct after the Board meeting suggest a desire to use the Testing Resolution to get her out of the business. Despite having a resolution authorising disciplinary procedures, no immediate steps were taken to implement this: instead she was given another opportunity (by Mrs Girollet's letter of 19 March (paragraph 274 above)) to see if she would reconsider; and when this did not work, Mr Raines held another Board meeting to consider mediation (paragraph 277 above). It seems impossible to reconcile this decision with Specsavers having a motivation to use the Testing Resolution against her: it is only explicable on the basis that, as Mr Raines said, it was a final effort to avoid initiating the disciplinary procedure.

(7) As to the decision to investigate the working relationship between the partners and suspend them both (paragraph 279 above), I accept Mr Potts' submission that this was a legitimate business decision. It was quite apparent not only that the relationship between the partners had entirely broken down but that it was seriously affecting the staff and the relations between them. It is not necessary to consider whether what the 6 members of staff wrote in their letter of 16 June (paragraph 282 above) was justified or not; the fact that they wrote it at all showed that the poor relationship between the partners was having a damaging effect.

(8) As to the decision to institute disciplinary proceedings against Ms Birdi in August 2010 (paragraph 290 above), this was based on Mr Clark's report. Ms Birdi described this as a sham, and Mr Stuart in his closing submissions described it as containing failures that exhibited an underlying bias against Ms Birdi, and a whitewash explicable by the fact that the result was predetermined, as revealed by the entries in Mr Raines' daybook for 3 June 2010. I have already said that I do not regard these entries as evidence of a predetermined outcome (paragraph 281 above). Mr Stuart made criticisms of Mr Clark's investigation processes: for example he suggested that putting one individual's evidence to another is inappropriate, unfair and improper as it suggests what the inquirer wants to hear. I do not accept this criticism: as the evidence of the various members of staff before me amply demonstrated, they had their own quite strong views and were more than capable of making it clear if they disagreed with what was put to them; I did not get the impression that any of them would simply have told Mr Clark what they thought he wanted to hear. But quite apart from this, I remind myself that the question is not whether I agree that Mr Clark's investigation was in all respects conducted flawlessly, but whether it contains material from which I can draw the inference that the investigation was carried out with a malicious or improper motive rather than being a genuine attempt to identify where the responsibility lay for the breakdown in relations. Having reached the conclusion that no

such inference can be drawn, it is not I think necessary to go through his conclusions and the evidence for them one by one: Mr Stuart accepted that it is not the function of these proceedings to determine if there were failings in the report (such that its conclusions were not in fact justified). In the light of his report, it seems to me that the resolution to institute disciplinary proceedings against Ms Birdi was a reasonable one and there is no basis for regarding that decision as motivated by malice or improper motive.

(9) That leaves the decision to dismiss Ms Birdi on 21 December 2010 which in turn relies on the report of Mrs McIntyre. I have already rejected the suggestion that Mrs McIntyre deliberately altered the Testing Resolution to change its meaning (paragraph 294 above). Mr Stuart also criticised her for not conducting any independent investigation save for the interviews with Ms Birdi, essentially relying on Mr Clark's investigation. Again I remind myself that the question for me is not whether criticisms of the procedures she adopted are justified but whether there is material from which I can infer that she did not make a genuine attempt to consider the questions honestly, but was implementing some predetermined plan. I saw nothing in her report, nor in the evidence she gave (or the way she gave it) to persuade me that she was doing anything other than investigating the issues in a genuine way. In these circumstances it seems to me that there is also nothing to suggest that the decision of the Board to accept her recommendations was anything other than a decision taken in the best interests of the business.

303. I therefore find that Ms Birdi's allegations under this issue are not made out.

Issue 6

304. This issue raises a number of discrete points about dividend payments.

305. The first concerns Ms Birdi's claim that she is owed a sum of £8,705.61 dating back to 2006. The facts are as follows. On 1 November 2006 Ms Birdi and Mr Patel (the then A Directors) signed a form requesting the Financial Planning department to approve a distribution request in the sum of £6,177.03 which was said to be an equalisation bonus to Ms Birdi in regards to corporate credit card expenses. This was approved by SOG on 6 November 2006 (being signed by 2 authorised signatories) and paid to her. It appears that the form this took was a declaration of a dividend of £123.54 per A share (making £6,177 for Ms Birdi's 50 shares), Mr Patel having signed a Deed of Waiver of Dividends (which was faxed to him by Financial Planning on 3 November 2006 and signed and returned by him the same day).

306. On 21 December 2006 a further similar request for payment of an equalisation bonus, this time in the sum of £8,705.61, was signed by Ms Birdi and Mr Patel and faxed to Financial Planning. It was acknowledged by Ms Kristina Smith who sent an e-mail on 27 December saying:

> "Once I have run the figures and had this distribution signed by my manager I will contact you either by e-mail or telephone to confirm it has been approved."

There is no documentary evidence before me of any such approval being given, either

shortly thereafter or at all. In cross-examination (although not in her witness statements) Ms Birdi said that Ms Smith phoned them back to say that it would be paid in the New Year as there wasn't enough cash for a distribution.

307. The next reference in the documentary record to this sum is in Mr Patel's handwritten "List of Investigation Matters" (undated but probably shortly after 20 February 2007 – see paragraph 137 above). Here he says that Ms Birdi:

> "made me sign a dividend request for her to take 8,705.61 and waiver my right for a dividend. Again this was for so called overtime that she had done. This request is with Financial Planning at the moment, I'm not sure if it has been paid or not."

Ms Birdi was not however asked about this allegation of Mr Patel's that the dividend request was not actually for equalisation at all but as a disguised method of paying her overtime.

308. On 12 April 2007 Ms Birdi referred to the £8,705.61 in a letter to Ms Anderson when she explained that she did not have the blue account book in her possession, and was very keen for it to be located as it would demonstrate that she was owed £8,705.61 which was still outstanding. Since the book has never been found, there is no evidence before me explaining the calculation of the figure. Mr Stuart referred in closing submissions to some P11D figures, but it is not obvious how these figures support the figure of £8,705.61 and no attempt was made to reconstruct how it was calculated.

309. Ms Birdi raised the question of the £8,705.61 at her disciplinary hearing with Mr Raines on 20 September 2007 (paragraph 162 above), where she said that nobody at SOG wanted to acknowledge it and asked why not; and again at her return to work interview with Mr Savill on 9 October 2007 (paragraph 163 above) where she said that she was owed monies from the business, namely an equalisation bonus for Mr Patel's credit card use, an equalisation bonus for Mr Patel being given his car when he left, and money outstanding in the form of a loan. Mr Savill said that it was unlikely that the business would be able to pay her this money if indeed she were actually owed it.

310. On 19 September 2007 Ms Birdi's then solicitors, Crust Lane Davis LLP, had asked Ms Anderson for various information including:

> "SOG records relating to the conversation between SOG and NP in December 2006, acknowledging receipt of dividend request for SB for £8705.61 and confirmation of when it will be paid."

Ms del Grazia replied on 16 October 2007 that Ms Birdi could request such historical information from the Corporate Tax Planning team in SOG in the usual way. On 15 December Ms Birdi wrote to her saying that she had been told that the first £20,000 of profit would be paid to her as equalisation for the gift of his company car to Mr Patel when he left, and said she was owed a dividend/bonus of £8,705 and a loanback of about £7,500. Ms del Grazia replied on 25 January 2008 confirming that SOG Financial Planning department had a record of the requirement to 'equalize' the distributions which would mean that the next available distribution profits matching

the value of the car given to Mr Patel would be paid to her before the profits split returned to normal, and suggested she contact Financial/Corporate Tax for an update on the business' ability and timing of the next distribution. She did not say anything about the £8,705 or loanback.

311. On 31 March 2008 Crust Lane Davis again raised the question of the £8,705.61 with Ms del Grazia. In her reply of 4 April she said that if Ms Birdi had any queries she was free to contact Financial Planning in the usual manner.

312. The share sale agreement under which SOG sold its A shares to Mr Singh, dated 25 June 2008, contained a provision under which Mr Singh warranted that he was aware that:

> "the first £14,942.96 of any distribution is to be paid to Swarandeep Birdi, after which profits will be distributed according to the respective 'A' shareholdings"

This sum of £14,942.96 represented an equalisation bonus for the written down value of the car given to Mr Patel. Nothing was said about the £8,705 claim.

313. On 1 August 2008 Ms Birdi e-mailed Mr Jonathon Le Maitre, a Corporate Tax Planning Administrator, asking him to confirm the monies outstanding owed to her amounting to £3,675 (loan back), £14,942 (gifting of car to Mr Patel) and £8,705.61 (equalisation bonus). His reply was limited to the £14,942; and when she asked again about the £8,705.61 he suggested she contact Mr Ryan. There is no record of her having done so.

314. When Mr Goddon investigated Ms Birdi's grievance against Mr Singh in November 2009, she raised the issue as part of her complaint that Mr Singh would not authorise expenses due to her. Mr Singh said that he had authorised the £15,000 which he was told at the time of his purchase was due to her (that is the £14,942 for the car), but said that he had spoken to Financial Planning who had told him there was no outstanding money owed. Mr Goddon in his report (paragraph 270 above) recommended that Ms Birdi and Mr Singh together investigate the issue with Financial Planning and Business Transfer. On 25 November 2009 Ms Birdi wrote to Mr Moore saying that she was owed 2 loanbacks (of £3,675 and £3,920) and the equalisation bonus of £8,705.61. Mr Moore replied that they should take the matter up with Financial Planning as recommended by Mr Goddon.

315. Ms Birdi did take the matter up again with Mr Le Maitre. He spoke to Mr Ryan, and on 7 December 2009 e-mailed Mr Ryan to confirm the conversation, in which Mr Ryan had said to him that the money owed to her was £14,942 and "any other money owed to her from the company was lost due to it going insolvent". He asked if Mr Ryan would have any paperwork from her confirming her agreement to this, to which Mr Ryan replied:

> "No we don't.
>
> She did not have to agree to anything she had to apply to FP for a distribution, and there was no money for a distribution."

316. Mr Le Maitre obtained copies of the credit card statements for 2006 and up to March 2007. He left a voicemail for Ms Birdi to the effect that he was sending the statements and it was for her and her partner to work out between them. If they had any further queries it would have to go to the Legal department.

317. On 29 December Mr Singh e-mailed Mr Ryan saying that he needed his help as Ms Birdi believed she was owed money from the business, talking about an equalisation of credit cards between her and Mr Patel dating back to 2006. He had spoken to Financial Planning and they had not confirmed it, but she insisted, which was preventing him from taking any money from the business. As far as he was concerned the only monies owed to her were for equalisation of the car (and if there had been anything else, it would surely have been in the share sale agreement) and asking Mr Ryan to confirm the position in writing as he wanted to put an end to it. He followed this up with a letter to Specsavers of 7 January 2010 which contained a number of complaints against Ms Birdi including the fact that she believed she was owed equalisation monies dating back several years; they were not part of the share sale agreement that he signed and he did not believe she was owed any money. He said he had contacted Financial Planning and spoken with Mr Ryan (and a Ms Meryl Englefield) and been informed that there was no evidence of monies owed.

318. On 12 January 2010 Mr Moore wrote to both Ms Birdi and Mr Singh to set out the amounts owed by Dartford to Ms Birdi. Having spoken to Mr James Bourgaize, Distribution and Investments Manager, he said that Ms Birdi had been owed £14,942, equivalent to the P11D value of Mr Patel's car, which she had been paid (as is not disputed); and 2 loanbacks of £3,675 and £3,920 (totalling £7,595) which they could jointly request to be paid by completing the normal loan repayment request form. If they could not agree on the repayment of monies owed SOG might add it to the agenda for the Board meeting that it intended to call shortly. He said nothing about the £8,705 claim, but it is implicit that he did not regard it as monies owed to Ms Birdi.

319. No agreement was reached between Ms Birdi and Mr Singh, and the question of the directors' entitlement to equal distributions and benefits and what distributions should be paid was added to the agenda for the Board meeting called for 23 February 2010. At that meeting (paragraph 273 above) a motion proposed by Mr Raines that £7,595 for the loan backs should be paid to Ms Birdi immediately was passed unanimously. However when Mr Raines next proposed a motion that £50,000 be distributed equally to the A Directors, Ms Birdi voted against it (it was still passed 3-1). She said she would have been happy to pass it if the money owed to her by the business since February 2007 had been paid, and when Mr Raines said that the only amount was the £7,595 referred to in Mr Moore's letter she disagreed, saying that she was owed the £8,705.61. Mr Raines said that as she had raised the point he would re-investigate and if there was an amount outstanding to her it would be paid. If she had any further information as to why she felt she was owed this sum she should share it with him so he could take it into account when re-investigating.

320. On 19 March 2010 Mrs Girollet wrote to Ms Birdi and Mr Singh with minutes of the Board meeting and at Mr Raines' request to report on what had been done on various action points. The question of the £8,705.61 had been reinvestigated with Mr Bourgaize, and the Distribution and Investments team (formerly Financial Planning) had re-confirmed that they could not find evidence of any other sums owed to Ms

Birdi. They suggested that there might have been confusion with the sum of £6,177 net paid on 2 November 2006 which with 30% Corporation Tax would have been around £8,700. They were unable to consider it further without any further information from her.

321. On 10 April 2010 Ms Birdi replied to Mrs Girollet to the effect that she believed the evidence she had provided was sufficient to prove the money was outstanding. The evidence she referred to was the signed request for a distribution, Ms Smith's e-mail of 27 December 2006, and the fact that the credit card details for herself and Mr Patel had been viewed and discussed with Financial Planning. Mr Raines replied on 28 April 2010, referring back to her letter of 12 April 2007 in which she had referred to the accounts book which she felt would demonstrate that the sum was owed to her through the equalisation process, which book had never been produced. He also said, as confirmed in the letter of 19 March 2010, that Financial Planning had advised that the sum had been paid on 2 November 2007. He therefore considered the matter closed.

322. Ms Birdi tried again on 5 May 2010 saying that the accounts book had disappeared but the figures it contained could be found in the credit card statements and other documents held by SOG; and that the £6,177 and £8,705 were two separate sums. She enclosed her amended version of the minutes of the Board meeting of 23 February 2010 in which she had added that the £8,705.61:

> "could not be paid at the time but FP spoke to Mr Patel and confirmed it would pay when there was enough cash flow in the business."

323. On these facts the pleaded case is one of failure to pay the equalisation dividend in the sum of £8,705.61 "which had been agreed by [SOG]". It seems clear from the evidence that the only possible basis on which it could be suggested that SOG had actually agreed the dividend is the phone call that Ms Birdi says that Ms Smith made shortly after her e-mail of 27 December 2006, when she phoned them back to say it would be paid in the New Year because there wasn't enough cash for a distribution (paragraph 306 above). Mr Potts submitted that the first time she had suggested this was on 5 May 2010 when she amended the minutes to refer to Financial Planning speaking to Mr Patel (paragraph 322 above); but I do not think this is right as Crust Lane Davis's letter of 19 September 2007 had also referred to what is evidently the same conversation (paragraph 310 above). Both references incidentally refer to the conversation as having been with Mr Patel, and although in her evidence Ms Birdi referred variously to Ms Smith as having "phoned us", "spoke to Mr Patel" and "phoned me back", the evidence overall suggests that what she meant was that Ms Smith had telephoned Mr Patel.

324. In fact the Bottom Line report for December 2006 showed the cash available for distribution at the end of that month as £3,701. Ms Birdi accepted that she understood that no dividend could be paid unless there were cash available (after making allowance for reserves). It is not unlikely therefore that Ms Smith telephoned Mr Patel at the end of December to explain that there was not enough cash to pay the request; nor is it unlikely that she said something along the lines of that it would have to wait until the New Year, or (in one of the formulations Ms Birdi adopted in evidence "there is not enough cashflow present but we should distribute it in the New Year"). It does however seem to me inherently unlikely that Ms Smith would say that

it had been approved or that it would be paid in the New Year, as it would only be paid if there were enough cash, something that could not be predicted. And I have already said that the evidence suggests that Ms Smith spoke to Mr Patel not to Ms Birdi direct, so her account of what was said must be based on what Mr Patel told her. I find that Ms Smith telephoned Mr Patel to explain that the dividend could not be paid as there was not enough cash, and said something to the effect that it would have to wait until the New Year. But I find that nothing was said which amounted to an indication that SOG had already approved payment or a promise that it would do so.

325. Mr Stuart's closing submissions advanced the case that Ms Birdi and Mr Patel had agreed what was due to her by way of equalisation; that the fact that Dartford did not have the cash to pay at the time did not affect the underlying liability; and that the equalisation would still be owed as soon as Dartford had available assets for distribution. There is no dispute that Specsavers had a practice of making equalisation payments where one JVP had received a benefit out of the business: this is not only shown by the examples of the £6,177 paid to Ms Birdi in November 2006, and the £14,592 paid to her in respect of the written-down value of Mr Patel's car, but is clear, for example, from the minutes of the Board meeting of 20 August 2009 where Mr Singh was complaining that he was not getting benefits equal to Ms Birdi's, and Mr Raines said that his understanding was that she was getting a pension and a company car and he was entitled to equal benefits to her, and proposed a resolution, which was passed and then implemented, that all distributions to the A shareholders be equalised. And in his witness statement, Mr Raines explained the practice as follows:

> "an equalisation dividend is made in circumstances where one JVP has derived benefits from the business which the other has not. For instance, a Store Company may have provided one JVP with a company car but the other JVP of that Store Company may not require one. As both JVPs are entitled to share in the profits of the Store Company in proportion to their "A" shareholdings (usually 50/50), the Store Company will in such circumstances declare that an equalisation dividend is due for the benefit of the JVP who had missed out on the benefit."

326. But the precise way in which this worked is not as clear as it might be. There does not appear to be any reference to the practice in the Shareholders' Agreement. Ms Birdi's pleaded case refers to clause 4.1 (paragraph 34(9) above) which provides that if Dartford has profits available for distribution the Shareholders shall procure that all such profits shall be applied in the payment of the maximum cash dividends to the A shareholders (subject to normal requirements for reserves) but this says nothing about making a payment to one A shareholder to equalise benefits paid to the other – it is simply an obligation to procure the distribution of profits to the A shareholders together.

327. From what little material is available, however, it seems that the mechanism by which an equalisation was paid was (i) for the 2 JVPs jointly to make a request; (ii) for SOG to approve it (subject to there being enough cash available); (iii) for the A shareholder who had already received a benefit to waive his right to a dividend on his shares; (iv) for the dividend to then be formally declared, with payment only made to the non-waiving partner. At any rate this was how the equalisation payment of Ms Birdi of £6,177 in November 2006 was done. In the case of the £8,705.61 matters never got

beyond the first stage; but the absence of any clear contractual obligation leaves it obscure whether what was expected if a request was not approved (because there was insufficient cash available) was that a fresh request would have to be put in (once there was sufficient cash), or whether the old one would normally be processed; let alone what the effect was of a partner who had made a request leaving before the request had been authorised. It seems clear that Mr Patel never agreed to waive a dividend as matters never got to that stage.

328. I think it is therefore an oversimplification to say that there was an underlying debt owed to Ms Birdi; she no doubt had an expectation that Mr Patel would agree to her receiving a dividend by way of equalisation – and, it seems to be accepted, although it is not quite clear where this is to be found, a contractual right to require him to do so – and he did agree (although as set out above he later said he had been wrongly made to do so); but that was not authorised before he sold his shares, so it never became translated into a debt owed by Dartford. That no doubt explains why Financial Planning had no record of monies being owed, as I assume (although the evidence did not really deal with this) that their records identified sums which had been authorised and were therefore due to the partners from the company.

329. So I do not consider there was an "underlying debt" owed by Dartford to Ms Birdi in the sense that she had a claim for the money against the company. What her complaint really amounts to is that SOG should have authorised the payment because Mr Patel had in fact received a benefit which had not been equalised. I agree that SOG should have taken steps to see if there had in fact been benefits that had not been equalised. In fact Specsavers consistently dealt with Ms Birdi's repeated requests by referring her to Financial Planning: this is what Mr Goddon did, and Mr Moore, and Mr Raines. Financial Planning had no record of the £8,705.61 being due and for reasons given above I think this is understandable as it had never been authorised. That is why Mr Moore and Mr Raines said that it had been investigated and nothing more was due. It seems to me that Ms Birdi is entitled to say that this was an inadequate response; and that SOG should have checked whether Mr Patel had had benefits which had not been equalised. As explained above, no attempt has been made before me to justify the figure of £8,705.61, beyond the fact that Mr Patel agreed it (the credit card statements not being sufficient to explain it); and there are two problems with this, namely that Mr Patel later said it was not justified, and the accounts book which would have explained it has disappeared. So I do not think I can positively find that Mr Patel had received unequal benefits to the sum of £8,705,61; but I can and do find that SOG should have done more to identify what if anything had been paid to Mr Patel rather than simply assume that because Financial Planning had no record of anything due, that there was nothing in Ms Birdi's repeated complaints. I find that if Mr Patel had indeed received benefits that had not been equalised, SOG should have authorised an equalisation payment to Ms Birdi and failed to do so.

330. But I do not find that SOG deliberately ignored her request or refused to pay her what was due. Mr Raines at the Board meeting of 23 February 2010 said that he would reinvestigate the matter and he did so. The answer he got from Mr Bourgaize's team was that nothing was due. That was why on 28 April 2010 he wrote to say that he considered the matter closed. I find that it was Mr Raines' genuinely held view that nothing was due, that he was not setting out to deprive Ms Birdi of money that was

due to her – indeed his intention was the very opposite, namely to clear up for once and all what was due to her and see it paid so that the business could move on.

331. Mr Potts submitted that if I found that more should have been done but there was no evidence of malice, that would not constitute unfairly prejudicial conduct. But a finding of improper motive is not, as I understand the law, the only way in which unfair prejudice can be established: a breach of the terms on which it was agreed that the affairs of the company would be conducted is capable of constituting the relevant unfairness. The terms on which it was agreed that Dartford would be conducted included, as is apparent from Mr Raines' explanation of the practice, an understanding that where one JVP had received a benefit from the business by way of distribution but the other had not, an equalisation payment would be made to the other; and that SOG had to authorise any such dividend. Normally no doubt SOG would leave it to the JVPs to agree what was due, and only concern itself with whether there was sufficient cash available to make a distribution; but in circumstances where it was apparent that the JVPs were unable to agree, I consider that SOG should have investigated the matter properly itself, and its failure to do so was both prejudicial to Ms Birdi and unfair.

332. The next question under this head concerns the failure of Dartford to declare dividends following Ms Birdi's dismissal. The facts are as follows. Ms Birdi was dismissed in December 2010. No dividends were declared in 2011: at a Board meeting of Visionplus on 14 December 2011 Mr Clark, representing SOG, said that it was not proposed to make any distribution of profit to the A shareholders in light of anticipated legal costs which the Company would incur in ongoing litigation – this being a reference to the Employment Tribunal proceedings which Ms Birdi had brought.

333. Dividends were next considered at a Board meeting of Visionplus on 28 August 2012. The maximum sum available for distribution was then calculated at £91,000 but after allowing for a reserve of £30,000 to cover legal fees in the defence of the employment claim (Ms Birdi's claim had been struck out but there was an appeal pending to the Employment Appeal Tribunal), and £6,000 for the deposit on a car for Mr Singh, Mr Rowe (who was representing SOG) recommended that £55,000 be distributed by dividend (£27,500 to each A shareholder), which was duly agreed to.

334. Mr Stuart referred to the fact that on that very day Akin Palmer had written to Taylor Wessing asking for various information including the distributable profits which had arisen since the last dividend paid to Ms Birdi, and suggested that this letter had had a seemingly miraculous effect; but it does seem that the timing was a coincidence as the minutes of the Board meeting indicate that the motion was passed shortly after 10.35, while Akin Palmer's letter was not faxed until 17.43 and there is no reason to doubt these timings.

335. Since that date a number of other dividends have been declared by written resolution of the directors of Dartford, in each case recognising that half the amount would be payable to Ms Birdi, as follows:

March 2013	£45,000
July 2013	£80,000

October 2013	£75,000
January 2014	£16,819

336. Mr Stuart invites me to find that the only reason that these dividends were paid was because of these proceedings and the correspondence, a finding which he suggested might have costs consequences. I find that the resolution on 28 August 2012 was not prompted by the correspondence, but I suspect that it might have been prompted in part by the allegation in the Petition (which was issued on 20 December 2011) that no dividend payments had been made since Ms Birdi's employment was terminated. But that does not mean that I find that SOG acted in breach of duty in not declaring any dividends before August 2012, or that its failure to do so justified the bringing of the Petition: it was undoubtedly open in principle to the directors in December 2011 to take the view that it was prudent to make a reserve for the anticipated costs of the Employment Tribunal proceedings, and no argument was really addressed to me that the amount reserved for this purpose was unreasonably high. In any event clause 4.2 of the Shareholders' Agreement (paragraph 34(9) above) provided that any dispute as to the amount of profits available for distribution or the maximum level of cash dividend should be referred to an independent expert, and this was not done.

337. The next question under this head concerns salary increases and bonuses paid to Mr Singh from 2011 onwards. The facts are as follows. On 25 February 2011 Mr Singh e-mailed Mrs Girollet that he was still waiting for certain equalisation monies. Mrs Girollet replied the same day that whereas distributions could be equalised up to Ms Birdi leaving on 21 December 2010:

> "Any further "distributions of profit" which effect the period post 21 Dec 2010 are likely to be a problem for a while as this is post SB's exit date but also in that she still retains shares in Dartford in present."

338. On 4 August 2011 Mr Singh wrote to SOG as director of Visionplus asking for a substantial increase in his salary (which was still at £42,000), pointing out that he had been running the Dartford business on his own since June 2010 when Ms Birdi was suspended, adding:

> "As Miss Birdi is still a shareholder, I am advised that it may be difficult for there to be a distribution of profits from the business. However, I understand, it is possible for the directors of the business to agree to an increase in my remuneration."

He then sought an increase to £84,500 (that is the combination of his £42,000 and the salary of £42,500 which had been paid to Ms Birdi). In cross-examination, Mr Singh explained that when he referred to having been "advised" he meant that he had discussed it with his wife and his sister-in-law; he also had some difficulty explaining why the fact that Ms Birdi was still a shareholder made it difficult for there to be a distribution. It seems to me fairly plain that what he meant was that the problem with distributing profits was that he would have to share them with her, whereas money paid by way of remuneration could be paid to him alone.

339. Mr Singh's request for a salary of £84,500 was not accepted. But by 28 September 2011 his salary had been increased as from July 2010 by 5% to £44,100, and as from

July 2011 by 8% to £47,628. With effect from August 2012 it was further increased by 5% to £50,000.

340. In October 2011 he was awarded by written resolution of the directors of Visionplus the first of what became a series of discretionary employment bonuses, in the sum of £7,500. The next bonus was £2,500 awarded in January 2012. Mr Singh asked for it to be increased to £6,000 or for another £4,000 bonus, but this was not done: instead bonuses were awarded regularly at the rate of £2,500 per quarter in April and July 2012, increased by 5% to £2,625 per quarter in October 2012, March, April, July and October 2013 and January 2014. When Mrs Girollet arranged for these to be paid she made a point of emphasising that they were to be paid as employment bonuses: in January 2012 she e-mailed Ms Sadie Jones (Stores Payroll Manager) that the resolution authorised "a **discretionary employment bonus** to Kam Singh" (and Ms Jones forwarded this to a Ms Gillian Le Tocq saying that the bonus "mustn't go through as a directors bonus"); in October 2012, when Mrs Girollet e-mailed Ms Le Tocq direct, she referred to Mr Singh's "quarterly **employment bonus**"; in March 2013 to "an EMPLOYMENT bonus (ie just like any other employment bonus / i.e. not distribution of profit)"; and in April 2013 to "an **employment** bonus for Kam".

341. On these facts the pleaded case is that Ms Birdi had been concerned for some time that Mr Singh had been receiving increased salary and bonus payments in place of former dividend payments; and that if so this would suggest the utilisation of a mechanism by SOG and Mr Singh to prevent the Petitioner receiving any income from the Company. This is slightly hesitant language but in closing Mr Stuart characterised them as "disguised distributions".

342. I find that SOG appreciated that the effect of paying extra money to Mr Singh as increases in salary and employment bonuses, rather than as distributions of profit, was to preclude Ms Birdi from claiming that she was entitled to an equal distribution. Certainly the Legal department appreciated that, as is shown by Mrs Girollet's e-mails, and Mr Rowe's evidence was that throughout the whole process, any of the salary questions or bonus questions were directed through Mrs Girollet and dealt with that way. What I understand that to mean is that the strategy of paying salary increases and bonuses to Mr Singh was devised and overseen by the Legal department, with the directors who actually signed the regular written resolutions (Dame Mary Perkins and various others), or, in Mr Rowe's case, chaired a Board meeting of Visionplus on 28 August 2012, did so with the benefit of a steer from the Legal department: Mr Rowe explained that he received a Chairman's briefing pack which contained guidance from the Legal department. Mr Singh, as I have found, also appreciated that if he was to have extra money it was in his interests to have it structured this way.

343. But that does not it seems to me by itself mean that the decisions to award salary increases and bonuses were flawed. The question is whether it has been shown that the directors were acting otherwise than in what they thought was the best interests of the company. The justification given by Mr Dyson and Mr Rowe, both of whom were asked about this, for paying salary increases and bonuses to Mr Singh was that he was running the store single-handed and this was a fair reward for his hard work, and a way of keeping him motivated. It was suggested to Mr Rowe that there was no reason to think that Mr Singh needed to be motivated, but he said that Mr Singh had, not "wobbles", but he would maybe be questioning that he was doing all the work and not

getting any of the rewards. Mr Rowe said that £50,000 (Mr Singh's salary from August 2012) was at the top end of Specsavers' salary band but there were plenty of examples of partners who do have that salary and also take a company car (which Mr Singh had asked for and been given in August 2012).

344. I accept Mr Rowe's evidence and find that the dominant motive behind the decisions to increase Mr Singh's salary and pay him bonuses was to remunerate him at what was perceived to be a fair rate given the fact that he was running the store single-handedly. It is noticeable that Mr Singh's more extreme demands (for a salary of £84,500 and for an extra £6,000 bonus) were not acceded to. Paying a director such as Mr Singh a fair rate for his work seems to me plainly in the interests of a company (even without any specific suggestion that he needs to be motivated); and it is a matter for the judgment of the directors what is a fair rate. I do not think I have the material on which to find that the salaries and bonuses paid to Mr Singh were not actually thought by SOG to be a fair rate for his work; and in those circumstances the fact that both SOG and Mr Singh appreciated that such payments would enable his income to go up without a corresponding benefit to Ms Birdi does not it seems to me mean that they were acting in breach of duty.

345. In his closing submissions Mr Stuart took one other point which is that no attempt was made to equalise Ms Birdi for the value of the company car Mr Singh was given in August 2012, despite the fact that Mr Singh was given equalisation payments when Ms Birdi had a company car and he did not. Mr Stuart pointed to the fact that Mr Raines in his witness statement had in fact used the very example of one JVP having a company car and the other not as a case where an equalisation dividend should be paid.

346. This point is not pleaded, and I have not been referred to any part of the cross-examination where it was raised. It does seem to me arguable, given Mr Raines' evidence, that Ms Birdi had a claim to an equalisation dividend in respect of the value to Mr Singh of his car, but in the light of the fact that this point is not pleaded, that the oral evidence did not I think specifically address it, and that although the principle of equalisation was accepted on both sides, the precise way in which it worked was left somewhat obscure, I do not propose to decide this point.

347. My conclusion therefore is that Ms Birdi has established unfair prejudice in relation to the failure by SOG properly to investigate whether she should be entitled to an equalisation dividend in respect of the £8,705.61, but not otherwise under Issue 6.

348. That makes it strictly unnecessary to decide another unpleaded point, this time raised by Mr Potts. In his written closing submissions, he took the point, for the first time, that Ms Birdi was in any event not entitled to any dividends after she became contractually obliged to sell her shares on the basis that a contract to sell shares in a private company is specifically enforceable; the effect of a specifically enforceable contract for the sale of shares is to transfer the beneficial ownership of the shares to the purchaser; and unless the contract provides otherwise the purchaser becomes entitled to dividends declared after the date of the contract even if the dividend is referable to an earlier period.

349. In his written closing Mr Potts said that the beneficial entitlement passed on 14 March 2012 when SOG exercised its contractual option to purchase her shares by serving a

Purchase Notice, and that she held any dividends received since then on trust for SOG. In oral submissions, while not resiling from SOG's position that the Purchase Notice was valid, he was happy to proceed on the basis that beneficial entitlement had passed at the latest by 30 July 2012 when Deputy Registrar Briggs made the order for the trial of issues in agreed terms; and he also made it clear that he was not advancing a claim for repayment of dividends that had already been paid.

350. Mr Stuart made a number of submissions in answer to this point by written submissions filed after the hearing. He said that SOG had proceeded since July 2012 on the basis that Ms Birdi was entitled to the dividends which had been declared, and the new argument was inconsistent with the correspondence from its solicitors, and with its pleading, both of which proceeded on the basis that Ms Birdi was so entitled; and that it had not been raised in the witness statements or opening submissions or put to Ms Birdi. I agree that it is plain that it is a point which had only occurred to SOG's legal team when preparing closing submissions. But the fact that SOG, as well as Ms Birdi, had previously proceeded on the basis that she was entitled to the dividends which had been declared does not seem to me by itself to preclude them from taking the point now (although it might well preclude them from claiming back dividends which had been paid, something which as I have explained, Mr Potts confirmed he was not seeking to do).

351. Mr Stuart also said that it was unclear what agreement was now being relied on; the parties were proceeding on the basis that there will be a sale of the shares pursuant to the order of Deputy Registrar Briggs, but there was no agreement, and had been no determination, of what the basis of that sale was, and it should not be determined now. I agree that this question remains open and that it is not one that I should determine – neither party wished me to decide whether SOG's Purchase Notice was valid or when an agreement was reached for the sale. But as I have said earlier, it does not seem to me to be in dispute that the parties are agreed that there will be a sale. Mr Potts seems to me to be right in saying that that agreement had been reached by 30 July at the latest if not before, and I do not think it is necessary, in order to deal with this point, to determine whether Ms Birdi became obliged to sell her shares at some earlier date. By 30 July she had so agreed.

352. Mr Stuart said that the agreement was too vague to be specifically enforceable, not least because the date of valuation had not been agreed. Again I accept that there is a dispute about the date at which the shares are to be valued, and although I heard some submissions on the point, I made it clear that I did not regard it as something that fell within the scope of this judgment and did not intend to decide it now, although it is something that may have to be decided at some stage if the parties are unable to agree. But I do not think this means the contract is too vague to be enforceable. It means that the Court may have to determine what the effect of the agreement is, which, since there is no relevant express term, will doubtless have to be by reference to what term should be implied.

353. Mr Stuart said that the price had not yet been determined, and that until it had been the contract could not be enforced, citing the decision of HHJ Thomas sitting as a High Court judge in *Taylor Barnard Ltd v Tozer* [1984] 1 EGLR 21. In that case a tenant sought specific performance of an option contained in a lease to purchase the reversion, the price payable under the option to be determined by arbitration if not agreed. The tenant had served a notice exercising the option but the price had not

been determined, and HHJ Thomas held that the claim for specific performance was premature.

354. I agree, as is obvious, that the contract could not be completed until the price had been determined. I am not sure that it follows that no decree of specific performance could be made before then, as the Court does I think have power to decree specific performance even before the date for completion: if, for example, the defendant makes it clear that he is not going to complete a contract when the time comes, my understanding is that the Court can, and will, make a decree of specific performance even before the date for completion.

355. But even if this is wrong, it does not follow that the beneficial ownership in the shares has not yet passed and remains with Ms Birdi. In the case of a contract for the sale of land, the vendor, as I understand it, becomes a constructive trustee (although it is a qualified trusteeship) of the land from the date of the contract, not from the later date fixed for completion. I see no reason to think that the position might be any different in the case of a sale of shares.

356. For these reasons at the moment I see considerable merit in Mr Potts' argument. But I am persuaded that it would not be fair to Ms Birdi to determine the question in these proceedings. It does not clearly emerge from the order of Deputy Registrar Briggs, and not having been pleaded, she had no proper opportunity to deal with it. And I can see that the question might arguably be affected by the question, which I have already said I am not deciding yet, of what the valuation date is. If the shares are to be valued in March or July 2012 when the agreement that they be sold was reached (however that came about), it does not seem very surprising if they should be valued on the basis of the then retained profits in the company, and that when those profits were thereafter distributed they should belong to the purchaser who would on this view have paid a price which reflected them. But if the shares are not to be valued until some later date, then a conclusion that the beneficial ownership had passed in 2012 might throw up anomalies, as it might mean that SOG could benefit both by taking the retained profits out of the company by way of dividend first and then have the shares valued when no profits were retained. I will therefore not decide the point.

Summary on Issues 1 to 6

357. It may be helpful if I summarise my conclusions on Issues 1 to 6:

(1) On Issue 1 I find that SOG was in certain respects in breach of its duties, but that no loss was caused to Dartford as a result, or prejudice to Ms Birdi.

(2) On Issue 2 I find that SOG acted in breach of its duties in relation to conflicts of interest that led to an identifiable overcharge of £8,400 in relation to Mr McLaughlin and a real risk of further unidentifiable overcharges.

(3) On Issue 6 I find that SOG was in breach of its duties in failing properly to investigate whether Ms Birdi was entitled to be equalised in respect of the £8,705.61.

(4) I find none of Ms Birdi's other allegations established.

358. I left open above (paragraph 66) the question whether the term pleaded by Mr Stuart should be implied into the Shareholders' Agreement. I do not see, in the light of my conclusions on the facts, that this is of any practical significance. Where I have accepted that SOG acted in breach of its duties, it adds nothing. Where I have not, I do not see that the conduct could constitute breach of the implied term. In those circumstances I do not think it is necessary to resolve what is a hypothetical point.

359. As appears from the summary of the position at paragraph 48(6) above, it is agreed by counsel that before granting any relief to Ms Birdi in respect of the two matters which I have found established under Issues 2 and 6, I need also to be satisfied that in each case they (i) constituted conduct of the affairs of Dartford; (ii) that that conduct was prejudicial to the interests of the members generally or at least to some part of the members including Ms Birdi; (iii) that the conduct or act was unfair; and (iv) that the Court should in all the circumstances exercise its discretion to order an adjustment to the price. The first three of these do not cause any difficulties, and I find that the two relevant matters do indeed constitute unfairly prejudicial conduct of the affairs of Dartford by SOG.

360. I have addressed these issues by reference to the allegations against SOG. The pleaded case refers to conduct of the affairs of Dartford by SOG and Mr Singh, but I do not think that in these two respects Mr Singh bore any responsibility. I do not see that this has any practical consequences in any event as the only relief sought is an adjustment to the price payable by SOG to Ms Birdi for her shares, a matter which as far as I can see has no consequences for Mr Singh one way or the other.

Adjustment to the price

361. That leaves the question whether these two matters do warrant an adjustment to the price. As referred to above (paragraph 50) there is a significant difference between the parties on this.

362. Mr Stuart's fully developed case was as follows. The Court has a discretion. In respect of some matters, where expenses had been improperly charged to the company, then the adjustment was likely to have two elements. To take the example of the excessive £8,400 charged for Mr McLaughlin, the effect of this would be to reduce the profits of Dartford by £8,400. Since Ms Birdi was entitled to 50% of the profits by way of dividend, that will have reduced the dividends payable to her by £4,200. The first element of compensatory adjustment which she seeks is a sum to reflect that loss of dividend – this sum of £4,200 can simply be added to the price payable as a specific adjustment. But over and above this, the £8,400 wrongly charged would have a direct impact on the profit and loss account so that if it had not been charged the profits for the year would have been £8,400 higher (or the loss £8,400 less). That may be relevant to the valuation of the shares, depending on the approach to valuation that the valuer takes. The Court should therefore direct the valuer to value the shares taking account of these breaches, which might increase the valuation. So much for breaches consisting of expenses wrongfully charged. Where however the breach consisted of not paying a dividend which should have been paid, the appropriate adjustment would be the addition of the relevant discrete sums.

363. Mr Potts however said that I should not be ordering any specific adjustments to the price in this way. He said that I should simply decide whether the matters should be

taken into account in fixing the price, and then leave it to the valuer, no doubt an accountant, to decide quite how it should be taken into account. He cautioned me against trying to form any view myself, without any expert evidence, of what would be an appropriate adjustment; he said it was not as simple as saying that if there were more profits Ms Birdi would have received 50% of them as dividend, as there were actually a number of requirements before a dividend would have been payable; and he expressed a particular concern that Mr Stuart's suggested way of ordering adjustments might involve an element of double counting in providing both for a dividend and for the continuing effect on value. He supported these submissions, although accepting that this was not determinative, with the fact that the order of Deputy Registrar Briggs (set out at paragraph 47 above) only required the Court to determine *whether* the matters referred to constituted breaches such as to warrant an adjustment (inviting a Yes/No answer), not *what* the adjustment should be.

364. On this I prefer the submissions of Mr Potts. I accept that where the value is to be determined by a valuer and the Court has had no expert evidence, the Court is unlikely to be in a good position to determine what adjustment should be made to the price. It seems to me that just as it is for the valuer to say what the value of the shares is, so it is for the valuer to say what adjustment should be made to that figure to arrive at a price for the shares which takes account of the matters that the Court has directed should be taken account of. And I also accept that although the question is not in the end one that turns on a textual analysis of Deputy Registrar Briggs' order, this does explain why he directed that the Court should determine whether the matters constituted breaches of duty such as to warrant an adjustment to the price.

365. On the other hand I should make it clear that I accept Mr Stuart's submission (which I do not think was really dissented from by Mr Potts) that the question of what adjustment should be made is not just a question of looking at whether the particular matters concerned had a continuing effect on the value of the shares as at the date of valuation. It is common ground that relief under s. 994 is discretionary and flexible, and it seems to me wide enough to include a direction that the price payable for a petitioner's shareholding should include a sum to make good the prejudice which has been unfairly suffered by the petitioner. To take a specific example, a failure by SOG to investigate, and if well founded, pay an equalisation dividend to Ms Birdi would not so far as I can see be likely to have any effect on the value of her shares at the valuation date as these are to be taken as a rateable proportion of the total value of all shares, and non-payment of an equalisation dividend to her is unlikely to depress the value of the company as a whole. But it nevertheless seems to me to be something that can and should be taken into account in fixing the price payable for her shares. On this therefore I accept, as Mr Stuart submitted, that there is a difference between the *value* of the shares, and the *price* payable for them.

366. I consider that the matters which I have found to constitute unfair prejudice under Issues 2 and 6 do warrant an adjustment to the price. It will be a matter for the valuer what adjustment is required, my intention being that such adjustment should be of such an amount as in the opinion of the valuer fairly makes good the prejudice which Ms Birdi has suffered as a result. I do not think I need say more than that. I will make a declaration accordingly and hear counsel on what other consequential orders should be made.