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Case No: CR-2015-009042

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF EDWARDIAN GROUP LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/07/2018

Before:

THE HONOURABLE MR JUSTICE FANCOURT

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Between:

(1) ESTERA TRUST (JERSEY) LIMITED (formerly known as APPLEBY TRUST (JERSEY) LIMITED) (a company incorporated under the Laws of Jersey)	**First Petitioner**
(2) Herinder Singh	
- and -	
(1) JASMINDER SINGH	**First Respondent**
(2) VERITE TRUST COMPANY LIMITED (a company incorporated under the Laws of Jersey)	**Second Respondent**
(3) JEMMA TRUST COMPANY LIMITED (a company incorporated under the Laws of Jersey)	**Third Respondent**
(4) EDWARDIAN GROUP LIMITED	**Fourth Respondent**
(5) JASMINDER SINGH AND HERINDER SINGH (as trustees of the English Trusts)	**Fifth Respondent**

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Mr Justin Fenwick QC, Mr Alex Barden & Mr Anthony Jones (instructed by **Arnold & Porter Kaye Scholer LLP**) for the **Petitioners**
Mr Ian Croxford QC, Mr Daniel Lightman QC and Ms Emma Hargreaves (instructed by **Orrick, Herrington & Sutcliffe LLP**) for the **First Respondent**
Mr Anthony de Garr Robinson QC and Mr Sam O'Leary (instructed by **Herbert Smith Freehills LLP**) for the **Second and Third Respondents**

The Fourth and Fifth Respondents were not represented

Hearing dates: 23-27, 31 January, 1-2, 5-9, 12-16, 19-23, 26-28 February, 1-2, 9, 12-14 March 2018

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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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THE HONOURABLE MR. JUSTICE FANCOURT

Mr Justice Fancourt:

This judgment has the following Parts, which I explain in more detail in Part I below:

Part I. Introduction

A. Introduction to the issues

1. The Petitioners claim relief under sections 994-996 of the Companies Act 2006 on the ground that the affairs of Edwardian Group Limited ("the Company") have been and are being conducted in a manner unfairly prejudicial to their interests as members of the Company. The relief principally claimed is an order that the First Respondent, Jasminder Singh ("JS"), or the Second and Third Respondents ("Verite" and "Jemma" respectively), or the Company, or all of them, buy out the Petitioners' shares at a fair price.

2. The Company runs a very successful business owning, developing and running hotels, principally in London. It was incorporated in 1977, originally for the purpose of acquiring and running a holiday let property in Kensington. It then switched its business to hotels in 1979. JS, who is a certified accountant, has been a shareholder and director of the Company since it was first acquired on behalf of the Singh family and is now and has for many years been its Chief Executive. The Second Petitioner is his younger brother, Herinder ("HS"). HS is 16 years younger than JS. He too has been a shareholder of the Company since 1977, and he was appointed a director in 1986 at the age of 19. He became employed by the Company in 1992, immediately after obtaining his chartered accountancy qualifications.

3. Despite successful growth of the business between 1979 and 1990, the Company very nearly foundered during the economic recession of the early 1990s. This coincided with the insolvency of a significant lender, BCCI, whose liquidator made an untimely demand for repayment of a loan of about £28m. The Company was eventually rescued with the support of other banks in 1993. As part of the rescue package, options to buy the banks' convertible preference shares were granted by them to Jersey discretionary trusts that had been created to hold those options. For tax reasons, the settlors who established the Jersey trusts were JS's and HS's parents, BM Singh and Satwant Kaur ("Mrs Kaur"). As will be described in detail later, it was JS who, with the benefit of professional advice, instigated the creation of the Jersey trusts.

4. The Company recovered and prospered. Between 1997 and 1999, those options were exercised by Verite – the original trustee of all the Jersey trusts – and further shares in the Company belonging to the banks were later bought back and settled on the same trusts.

5. The First Petitioner ("Estera"), Verite and Jemma are the current trustees of the Jersey trusts. The twelve trusts originally created were 'divided' in 1999 between trusts that the settlors wished to be regarded as principally for the benefit of JS's immediate family ("the Jasminder trusts") and those that they wished to be regarded as principally for the benefit of HS's immediate family ("the Herinder trusts"). In 2005, by which time the relationship of JS and HS was very strained, BM Singh and Mrs Kaur appointed Estera as co-trustee of the Herinder trusts and Jemma as co-trustee of the Jasminder trusts. Verite resigned as trustee of the Herinder trusts in May 2008, leaving Estera as the sole trustee of those trusts. Verite and Jemma remain the joint trustees of the Jasminder trusts.

6. The ordinary shares in the Company at that time (and at all times since) have been held in the following approximate proportions:

Jasminder	5.28%
Verite and Jemma	69.25%
Herinder	0.36%
Estera	19.53%

There are other small shareholders.

7. The Fifth Respondents are the trustees of a relatively small number of shares in the Company that were settled by BM Singh and Mrs Kaur on ten trusts in 1989 ("the English trusts"). Most of these trusts are for the benefit of HS's family. Others are for the issue of JS and HS.

8. Verite and Jemma therefore have a large majority of the shares and have control of the Company in general meeting.

9. The matters about which the Petitioners principally complain, as the basis of the relief that they seek, are (in outline) the following:

    i) The removal of HS as a director of the Company in 2009 and as an employee in 2010.

    ii) Breaches of fiduciary duty by JS in relation to 'corporate opportunities' to invest in companies called Winchfern and Expotel. These matters occurred as far back as 1983 and 1991-4 respectively, but they have continued to affect the conduct of the Company's affairs.

    iii) Non-disclosure by JS of his interests in Winchfern and Expotel, such that he remained (until 2005 and 2008 respectively) as a director in a position of conflict of interest and duty.

    iv) The unfair way in which an investigation into Winchfern and Expotel was carried out and approved by the Company, resulting in a misleading report and recommendation to the shareholders in 2012.

    v) Improper distribution of Company profits to JS through extraordinary and unreasonably high remuneration (in the years 2011, 2012 and 2014), in the absence of a proper policy to pay appropriate dividends to shareholders.

10. The Petitioners allege that although the articles of association of the Company permit the owner of at least 50% of the ordinary shares to appoint or dismiss a director with immediate effect by written notice to the Company, the shareholders (or at least the Singh family shareholders and Estera, Verite and Jemma) were bound by a fundamental understanding that JS, HS and BM Singh were each entitled to remain a director and participate in the management of the Company equally. In other words, the Company was – to that extent – a type of company loosely described as a "quasi-partnership", where those shareholders (or all the shareholders) were bound by and had the benefit of an understanding between themselves that entitled each of them to be involved in running the Company's business in a way similar to the partners of a partnership. Where such an understanding is proved to exist, it gives rise to mutual equitable rights and obligations preventing the exercise of majority voting control in a way inconsistent with it.

11. On that basis – but only if such equitable rights can be established – the Petitioners complain that the exclusion of HS in 2009 and 2010 was unfair and prejudicial to their interests as members, both because HS was personally deprived of his right to participate and because the Herinder trusts lost their representation on the board of the

Company. The impact of such prejudice is compounded to the extent that the Petitioners can establish that the Company is unfairly paying out profits of the Company by way of remuneration of directors and employees rather than as dividends for the benefit of all shareholders equally.

12. The history of the Company and its development over the years is important in establishing whether or not, at the relevant times, it was a "quasi-partnership", such as to give rise to equitable rights and obligations between the Singh family shareholders (that is to say, the three adult male members of the family and the Jersey trusts) or between all the shareholders. In that regard, the Petitioners' case is that the Company from its inception, alternatively by no later than 1993, had that quasi-partnership character. Their alternative case is that by 2009, when HS was removed by Verite and Jemma, all the shareholders, without exception, had become bound by such equitable rights and obligations.

13. It is necessary to say something about recent litigation in this Court involving JS and HS.

B. The BM Singh Claim

14. The history of the Singh family and the Company has already been considered by the High Court in great detail. Findings of fact were made by Sir William Blackburne, sitting as a deputy judge of the Chancery Division, in previous proceedings started by BM Singh and Mrs Kaur against JS and HS in 2010 ("the BM Singh Claim"). Judgment was given in that claim on 8 April 2014. In it, Sir William describes the litigation as being "of a most unusual nature".

15. The Singh parents claimed that, at all times since 1977, the Company had been operated by agreement of BM Singh, JS and HS in accordance with the principles of joint family property enshrined in the Hindu code of Mitakshara, under which all male members of a defined family unit are coparceners of the family property, regardless of the identity of any particular member of the family in whom given property is vested. It was claimed in the BM Singh Claim that effect could be given to that understanding in English law under the principles of constructive trust. It was accepted in the BM Singh Claim that the shares of the Company vested in the Jersey trustees could not be said to be held as joint family property and the Claim excluded those shares. It therefore related principally to the shareholdings individually owned by JS (and HS) and the valuable family home, whose title was vested in JS.

16. The principal defendant to those proceedings was JS. HS was the second defendant but played a limited part: he pleaded that he substantially accepted the basis of the claim advanced by his parents but did not appear at the trial other than as a witness called by his parents under a witness summons. In his evidence, he explained that although he was only a child at the time that the Company was formed, he supported his parents' case because he trusted them to tell the truth about what was agreed or understood long ago. Sir William observed (without having to decide) that there appeared to be some tension between his support for his parents' claim – on the basis that property owned by him or his brother was to be treated as joint family property – and his threat (as it was at the time) himself to present an unfair prejudice petition under section 994 of the Companies Act, in which (as now brought) he complains that

his own interests as a minority shareholder have been unfairly prejudiced by the way in which JS, Verite and Jemma have conducted the affairs of the Company.

17. It is important, however, to recognise that although the factual background and some of the factual questions were the same in the BM Singh Claim as in this claim, the legal basis of the BM Singh Claim was quite different from the current proceedings. So far as the facts found by Sir William are concerned, all parties in these proceedings accept them for the purposes of this claim, whether or not they are technically bound to do so by issue estoppel or the principles of abuse of process.

18. The main issue that Sir William had to decide was whether there was at any relevant time a common understanding of the parents, JS and HS that any property acquired by any of them was held subject to the concept of joint Hindu property (as pleaded). He held that there was no evidence to support the claim: no agreement to that effect and nothing to support an alleged understanding between those members of the family. Sir William observed that there was not a single document that supported the parents' claim and that a very substantial list of transactions and arrangements that they did make were flatly inconsistent with any such understanding being in place. In dealing with costs, he observed that the claim was no more than a construct, and awarded JS his costs against his parents on an indemnity basis.

C. These proceedings

19. This litigation has been conducted by all three sides on a grand scale, with few points left untaken, no detail overlooked and seemingly no expense spared. I received 430 pages of skeleton arguments. The witness statements (without exhibits) filled two lever arch files. There were originally 16 lever arch files containing 153 authorities referred to in the skeletons. By the time closing submissions extending to 1,160 pages had been prepared, another 5 files containing 66 new authorities were produced. A number of schedules were agreed between the parties and produced to guide me through the complexities of the case, which have been very helpful. The submissions, both written and oral, have been of the highest quality on all sides.

20. I have reminded myself that I do not need to decide all the disputed matters that have arisen during the course of the hearing; only those that will enable me to reach reasoned conclusions on the issues in the case. I have nevertheless had to make detailed factual findings on issues that, on my conclusions, do not strictly arise, in case any of those conclusions are reversed on appeal. In order to do so, it has been necessary to address certain parts of the factual narrative in detail: the factual issues in this case span a period of more than 30 years of family and corporate life, with innumerable sub-issues along the way. In order to guide the reader, I have divided the judgment into 7 main parts and for each part that follows I have provided a list of its detailed contents.

21. The quasi-partnership issue is of fundamental importance for the assessment not only of whether there has been unfairly prejudicial conduct by JS and the Jasminder trustees but also – if such conduct is proved – what remedy is appropriate. I therefore deal with it first in Part II of this judgment. In Part III I address the allegations of breach of fiduciary duty by JS in relation to the acquisition by him of interests in Winchfern and Expotel. In Part IV, I deal with the circumstances in which HS was removed as a director and then as an employee of the Company, and in Part V with

the Company's investigation into JS's dealings with Winchfern and Expotel and subsequent report to shareholders. Part VI addresses the distinct issue of the remuneration of JS in 2011, 2012 and 2014. Part VII concerns the questions of whether the Petitioners culpably delayed until November 2015 in issuing the petition and, if so, what impact such delay has on the appropriate remedy for any unfairly prejudicial conduct. Part VIII deals with remedy.

Part II: Quasi-partnership

This part of the judgment contains the following sections:

A. The undisputed facts (paras 22-88)

B. Overview of the witnesses of fact (paras 89-114)

C. The pleaded case of the Petitioners (paras 115-122)

D. What as a matter of law is a quasi-partnership? (paras 123-134)

E. Conclusions on primary quasi-partnership case (paras 140-159)

F. The alternative case on quasi-partnership (paras 160-168)

G. Factual conclusions on alternative quasi-partnership case (paras 169-214).

H. Legal conclusions on alternative quasi-partnership case (paras 215-223)

I. The position of Estera (paras 224-231)

J. Termination of any equitable obligations (paras 232-243)

K. HS's conduct (paras 244-248)

A. The undisputed facts

22. The issues that arise under this part of the petition depend substantially (in each of the alternatives on which the Petitioners rely) on the history of the Singh family, the Company and Edwardian Hotels Limited (a subsidiary company in the Edwardian group). It is convenient to set out first the facts that are undisputed. Many of these are the facts found by Sir William Blackburne in the BM Singh Claim, but as this claim developed it became clear that a number of other background facts were undisputed. It is necessary to consider at this stage events up to the time that HS was removed as a director of the Company in July 2009, so that conclusions can be reached about whether or not HS had (or still had) the entitlement of a quasi-partner at the time that he was removed and if so who was bound by such equitable considerations. Since it was only Verite/Jemma, as joint trustees of the Jasminder trusts, who had the voting power to remove HS as a director, the crucial question will be whether, if equitable considerations of the type claimed existed at all, Verite and Jemma were bound by

them or have otherwise acted so as to merit relief being granted against them for having removed HS as director.

23. The family story starts, for the purposes of this claim, in Kenya in the 1960s. BM Singh, Mrs Kaur and their children had moved there from Tanganyika. HS was born there in 1967. The parents ran various entertainment establishments in Kisume. Mrs Kaur's brothers, the Vohras, were in the hotel business. In 1968, aged 17, JS was sent by his parents to the UK to continue his education. Mrs Kaur's youngest Vohra brother, Satinder, lived in London at 25 Princes Avenue, Finchley, a house owned by the Vohras. JS eventually moved there too and at about the same time met and got to know Shashi Shah, who was training to be an accountant. JS took up accountancy studies in London. In 1972, BM Singh bought 25 Princes Avenue from the Vohras. In 1974, JS qualified as a certified accountant and the Singh family decided to move to London. They all lived initially in Princes Avenue.

24. Later that year, BM Singh bought a post office with flat above in Stamford Hill. It was financed by a loan from a bank. The family moved there and rented out the house in Princes Avenue. The post office was run by the parents with help from others, including their daughter Seema, who was only 3 years younger than JS. JS did not work at the post office or share in the business: he worked for Hacker Young, a firm of accountants.

25. The Vohras also ran hotels in London. In late 1975, they were planning to buy The Edwardian Hotel in Kensington using a corporate vehicle that they owned. It was re-named Edwardian Hotels Limited ("EHL") at that time. Satinder Vohra and three of his brothers were the existing shareholders. Satinder invited JS to join them in the new venture. JS agreed. He gave up his job with Hacker Young. New shares at £1 in EHL were issued in January 1976, and 333 shares were allotted to JS. JS paid for the shareholding himself. The Vohras held 334 shares. JS was appointed a director of EHL.

26. The Edwardian Hotel was purchased by EHL on 21 January 1976 at a total cost of about £335,500. This was funded partly by a loan from BCCI and partly by unsecured loans from other Vohra companies, a £43,000 loan from Arrow Trading & Investment Establishment ("Arrow"), controlled by a Mr Gulhati (who was also an hotelier), a £30,000 loan (to EHL) by BM Singh, and further by means of director's loan accounts and a bank overdraft. BM Singh's loan was exactly that: not a donation to JS or a stake in the equity of the business of EHL. The loan was later repaid.

27. The remaining 333 shares in EHL were then allotted to Mr Gulhati, who also became a director, along with 4 others, including two of the Vohras. Shortly after this, in February 1977, BM Singh sold 25 Princes Avenue for £18,000. At about the same time, the original 1,000 shares in EHL were converted into management shares, with the exclusive right to manage the company, and 9,000 new ordinary shares in EHL were issued: 3,000 to JS, 3,000 to Arrow (for Mr Gulhati), and 3,000 to Vohra corporate entities. It is interesting to note, therefore, that EHL was originally a company set up with three equal co-venture parties (treating the Vohras for this purpose as one), who agreed that each of them, as holders of the management shares, would have the right to manage its business. But only JS of the Singh family had an interest in EHL.

28. In May 1977, BM Singh sold the Stamford Hill property and business. A new residence was bought in JS's name in Spencer Road, Wembley. The purchase price was funded by a building society loan and £9,000 from BM Singh, which was apparently a loan. Shortly afterwards, a new company called Patentgrade Limited was incorporated (it later changed its name to Edwardian Group Limited – the Company). JS took the subscriber shares and new ordinary shares were allotted so that JS, BM Singh and Satwant Kaur each had 30 shares and HS (although then only 10 years old) held 10 shares. The Company was incorporated in order to buy 6 Collingham Road, South Kensington, a run-down holiday let property. The Singh parents, JS and Seema were appointed directors. It was, therefore, a family company.

29. The total expenditure on purchasing Collingham Road and renovating it was about £126,000. This was partly funded by loans from BCCI, but £89,000 of the cost was loans from BM Singh, Mrs Kaur and JS. The loans from BM Singh included the £30,000 previously loaned to EHL, which he withdrew from his loan account with EHL, and £10,000 that JS repaid him. The end of year accounts for the Company as at 31 December 1978 show BM Singh and Mrs Kaur as loan creditors in the sum of £75,212 and JS as loan creditor in the sum of £9,013. (The 1984 accounts showed that the parents had by then been almost entirely repaid.)

30. Later in 1977, the Edwardian Hotel was sold by EHL. JS was unaware of this until the Vohras announced the terms agreed. The sale completed on 31 October 1977. JS had been living and working in that hotel, but then went to live with his family in Spencer Road. At that time, therefore, the family business was the holiday lets owned by the Company, which was still a family company.

31. In May 1978, EHL purchased the Vanderbilt Hotel in South Kensington. At about the same time, Mr Gulhati disposed of his and Arrow's interest in EHL to the Vohras, with the result that EHL became owned as to two-thirds by the Vohras and as to one-third by JS. JS threw himself into the operation of the new hotel; his parents ran the holiday lets business at Collingham Road.

32. A significant change took place in 1979. The Company sold the Collingham Road property in February with a view to buying another hotel, the Savoy Court Hotel near Oxford Street. The opportunity to do so was identified by JS. He stood as guarantor for the Company's rental and other obligations under the lease of the hotel. The purchase price was partly funded by the sale proceeds of Collingham Road and otherwise by a mixture of loans (from BCCI and from Vinod and Shashi Shah) and new share capital. 1,200 new shares in the Company were allotted to JS; 2660 to Arrow, and 1440 to Shashi Shah. These £1 shares were issued at a premium of £7 above par. JS, Mr Gulhati and Shashi Shah each guaranteed the Company's bank borrowings and Mr Gulhati and Mr Shah were appointed directors of the Company. At this stage, JS held just over 26% of the shares in the Company, Arrow (for Mr Gulhati) just under 26%, BM Singh and Mrs Kaur just over 14.5% each, Shashi Shah just under 14% and HS just under 5%. As a result, the Company was no longer only a family company and its business was not only a family business. Turnover and profits were rapidly increasing.

33. The articles of association of the Company at this time were based on the Companies Acts 1948 to 1976 and corresponding version of Table A. Of significance is the restriction on members' disposal of shares. Save where the disposal was to another

member or a relative of the member or a subsidiary of a corporate member, a member wishing to dispose of his shares had to give notice to the directors, who would then offer the shares to the other members in proportion to their existing shareholdings. The offerees would have 3 months in which to take up all or any of the shares offered to them, in consideration of a fair price to be fixed by the Company's auditor, if not agreed. If not fully taken up, the selling member would be entitled to sell to any buyer but the Company would retain the power to refuse to register a transfer of which they disapproved. There was therefore a significant fetter on a member's ability to sell his shares outside the Company.

34. Another change took place in 1980. The Vohras sold their two-thirds shareholding in EHL to the Company for £258,000. That made EHL a subsidiary of the Company. JS retained his one-third personal shareholding. In place of the Vohra directors, Mr Gulhati and Shashi Shah were appointed as directors of EHL.

35. In 1983, the Company and Veladail Limited (another company controlled by Mr Gulhati) incorporated Cleftfield Limited in order to acquire the Kenilworth Hotel, which it did. The shares in Cleftfield were shared 50/50 between the two incorporating companies.

36. By the end of 1986, the Company had acquired further hotels and the group had become increasingly successful. The audited accounts for the year ended 31 December 1986 showed consolidated net profits of £3.1m, turnover of £18.1m and net assets of £59.4m. On any view, the group was a substantial commercial undertaking.

37. Further changes took place in relation to the Company and its subsidiaries that year. JS sold his one-third share in EHL to the Company, in consideration of the issue to him of 266,350 new shares in the Company, and Veladail sold its half share in Cleftfield Limited to the Company in consideration of the issue to Veladail of new shares in the Company. As a result of these two transactions, JS then held 45.8% of the issued share capital of the Company, Arrow 16.6% and others (including the previous shareholders but now including Veladail) having lesser holdings. 32.13% of the shareholding of the Company was external to the Singh family at that time.

38. HS joined the board of the Company in April 1986, at the age of 19. He and David Batts were appointed at the same time, when other directors were abroad negotiating a possible sale of the group, but whereas Mr Batts was soon removed from the board HS remained a director, though he had no involvement in the Company's affairs until 1992.

39. In January 1989, BM Singh and Mrs Kaur settled the majority of their holding in the Company (amounting to about 15% of the ordinary share capital) on trusts for the benefit of HS and his family as to the larger part, their grandchildren for most of the remaining part, and themselves as to the residual part. JS, HS and Shashi Shah were appointed trustees. These are referred to as the "English trusts", to distinguish them from the Jersey trusts that BM Singh and Mrs Kaur later settled. As a result, BM Singh and Mrs Kaur were personally left with only about 2% each of the ordinary shares in the Company.

40. In September 1989, JS purchased Tetworth Hall in Ascot, a substantial residential property, for £2.8m. That year, the Company declared a dividend of £1.5m. Part of

the price for Tetworth Hall was funded by a loan of £197,000 from HS's accumulated funds paid as dividends on his shareholding in the Company. It is common ground between JS & that JS borrowed those funds from HS's account without asking him for a loan. Tetworth Hall was then refurbished for the Singh family's better accommodation, with funds derived from a bonus of £750,000 voted to JS for that year.

41. On 13 March 1990, Amrit Singh (JS's wife) resigned as a director of EHL and was shortly afterwards appointed a director of the Company.

42. By the end of 1990, the Company's turnover was over £44,500,000 and it had net assets of over £175m. It had continued to expand its operations, including the purchase of the Marlborough Hotel and the re-opening of the refurbished Skyway Hotel at Heathrow, re-named the Edwardian International Hotel. However, the recession of the early 1990s and its high interest rates were affecting the Company's profitability: interest payable on its debts significantly increased during 1990 so that an annual loss of over £4.25m was made that year. Although trading continued to improve, similar losses were made during each of the next 3 years, for the same reason, and the value of the net assets was significantly reduced in 1991 upon a revaluation of the Company's subsidiaries' properties.

43. On 3 June 1991, an agreement in writing between all the shareholders of the Company was made ("the 1991 Shareholder Agreement"). This is of some importance to the issue of whether there existed after June 1991 any agreement or understanding between some of the shareholders as to their rights to participate in the management of the business. The background to this Agreement was that there had been dissatisfaction on the part of Mr Gulhati about the way in which the Company's affairs were being managed, or about prejudice that was allegedly being caused to his interest (and Veladail's interest) as a shareholder, or both.

44. The 1991 Shareholder Agreement confers on Mr Gulhati and his company and on JS mutual rights, in varying terms, to sell or acquire the minority shareholding of Mr Gulhati and Veladail, on a non-discounted basis, in certain defined circumstances, within a period of time beginning 5 years and ending 8 years after the date of the Agreement. These rights therefore apparently address concerns voiced by Mr Gulhati about his being locked into the Company, as a result of restrictions in the articles of association on sale of shares to outsiders. Unless various specified matters occurred that would have the effect of liberating Mr Gulhati's interests, the Agreement would not terminate without the written consent of all the shareholders.

45. The 1991 Shareholder Agreement also made important provision for the way in which the Company's affairs were thenceforth to be managed. By clause 6.2, the day-to-day management of the Company was the responsibility of JS, and subject to that its business would be carried on by the board. By clause 5, all the shareholders agreed to be bound by the terms of schedule 3 in their future conduct of the management of the Company. Schedule 3 precluded all the shareholders from acting as a director or a shareholder to vary the Company's share capital or voting rights, amend the memorandum or articles, remove Mr Gulhati as a director or do any act unfairly prejudicial to some of the shareholders. Significantly, clause 15.2 of the Agreement provided that it (and any other agreements made contemporaneously with it) took effect in substitution for all previous agreements and arrangements, written oral or

implied, between the parties or any of them in relation to the Company or the matters referred to in the Agreement, and that all such agreements and arrangements are deemed to have been cancelled. Clause 15.7 is an entire agreement clause. All the shareholders signed the Agreement.

46. The very same month that the 1991 Shareholders Agreement was made, BCCI demanded repayment of its loans to the Company, and on 5 July 1991 it went into liquidation. For reasons that will be developed later in this judgment, that left both the Company and JS personally with real financial difficulties. It also presented financial difficulties for one of the Company's more important trading partners, Keith Prowse Holdings Limited ("KP"). A proposal by a third party to buy KP with continued financial assistance from JS led JS to disclose to the board of the Company an existing personal exposure to BCCI on account of KP, amounting to £1.5m. The rescue of KP was seen as providing a valuable benefit to the Company. In the event, that potential purchase did not proceed, but in early September 1991 Maurice and Jonathan Segal, who had hotel and other businesses based in Jersey, agreed to buy KP (or its holding company, Expotel) by means of a corporate vehicle in which JS would be interested. Whether or not that agreement and JS's interest was disclosed by JS to the board of the Company is of considerable importance to the question of whether JS breached his fiduciary duties to the Company by acquiring an interest in Expotel, to which I will return in a later part of this judgment. For present purposes, what matters is that Mr Gulhati – who was far from satisfied about what was going on – was eventually persuaded to join the rest of the board of the Company in agreeing that it was in the interests of the Company for KP/Expotel to be kept afloat, and that JS's personal liabilities in that regard should be underwritten by the Company. Provision was eventually made in the Company's year end 31 December 1991 accounts to that effect.

47. The 1991 accounts were not approved until 3 March 1993. The reason for that was that until continuing support from the Company's other bankers was assured, the Company could not be signed off on a going concern basis. From August 1991 until June 1993, when a new master agreement was signed with the banks, JS was engaged in seeking to persuade them to support the Company, to allow it the chance to trade out of its financial difficulties. It is common ground that JS himself conducted these difficult negotiations, with some backroom support from the Company's financial department and managers, and that neither BM Singh nor HS was involved at all in the negotiations.

48. HS had by this time joined the Company as an employee in the finance department. The exact circumstances in which he joined are in dispute, but join he did, as a relatively junior assistant in that department. He assisted as required, under the supervision of more senior members of that department, in connection with the work that was going on to enable JS to put forward credible proposals and projections to the banks.

49. In autumn 1992, the banks (led by Barclays) required Coopers & Lybrand ("C&L") to report on the Company and on JS's personal finances. C&L reported on 3 November 1992, both on the Company and on JS's financial position. Their report on the Company was to the effect that JS's personal involvement was critical to the rescue of the Company's business. It was quite lukewarm about the importance of any other

director or employee. It stated, as regards HS, that C&L were unsure whether there was a need to allocate his responsibilities to a separate role.

50. The C&L reports led to heads of agreement being drafted in December 1992. The banks agreed to forgo enforcing their rights under existing loans and subscribe instead for £4.5m in convertible preference shares, carrying a dividend of 8-9%. The convertible shares were to be subject to call options in favour of trusts established for the management. It was a condition of the terms agreed that JS remained as chairman of the Company. It was also necessary that Mr Gulhati be brought on board: as a result of the 1991 Shareholder Agreement the Company's share capital and articles could not be varied without his and all other shareholder agreement. Mr Robert Morley – at that time acting on behalf of HSBC – sought to persuade him to support the proposals, and Mr Gulhati exploited his strong position to extract the grant of share options in his favour too.

51. At this time, JS sought advice from his (and the Company's) accountants, Shah Dodhia and from a connected firm of specialist tax advisers, Chamberlain & Co, as to how the rights that he was to be offered by the banks could most advantageously be structured. As a result, 12 Jersey trusts were created, using BM Singh and Mrs Kaur as settlors for tax reasons – initially only a small amount of money was settled in trust, and then a single share in the Company was settled in each of the 12 trusts in October 1993. The trusts were established so that four of them would benefit principally HS and his family, four for JS and his family and another four for JS, his parents and possibly other employees or directors of the Company. What exactly was known at the time by the various members of the family about these trusts is important but, at this length of time, unclear.

52. Final agreement was reached with the Company's banks in a master facilities agreement signed on 7 June 1993. Pursuant to that agreement, the Company was to issue to the banks 9m cumulative preference shares of 50p nominal value, and each existing £1 ordinary share was to be converted into one ordinary share of 50p nominal value and one deferred share of 50p nominal value. As a result, the banks would hold 90.7% of the Company's issued shares (other than the deferred shares). At an EGM held on 6 October 1993, the Company resolved to create the convertible preference shares and authorise the directors to allot them as they thought fit, to convert the existing share capital and to amend the memorandum and articles of association of the Company. The Company resolved to proceed with the restructuring.

53. The new articles of association relaxed the restrictions on transfer of shares. There was no restriction on transfer to family members or family trusts. A member wishing to sell to someone else had to give notice to the Company of the price at which he proposed to sell. Existing members had the right to buy all or any of the shares at that price. If only part of the holding was taken up, the selling member had the right to withdraw from sale. Any shares not taken up could be sold outside the Company at the price specified in the notice. There was no longer an express reservation of the right for the Company to decline to register a transferee of shares.

54. At some stage in 1993, the banks were allotted their convertible preference shares.

55. On 31 December 1993, a shareholder deed was made between the following parties: the banks, the Company, the trustee of each of the 12 Jersey trusts, all individual

members of the Singh family other than Seema, Mr Gulhati, his two corporate vehicles, Mr Shashi Shah, Mr Shah's settlement trustees (of the Sarean trust), and JS and HS as trustees of the English trusts ("the 1993 Deed"). Under the 1993 Deed, the banks granted call options to each of the Jersey trusts, the Sarean trust and Arrow, and those grantees in return granted the banks put options, all relating to 87.5% in aggregate of the convertible preference shares (75% of which were granted for the Jersey trusts, 10% for Arrow and 2.5% for the Sarean trust). 12.5% of the banks' shares were not subject to options. In the case of the Jersey trusts' shares, the price payable was the par value of the shares plus the accrued but unpaid dividends on the shares.

56. Each of the Jersey trusts warranted that it was a trust whose beneficiaries were JS, the broader Singh family and directors or employees of the Company, and that the classes of beneficiary under those trusts would not be varied without the consent of Barclays, acting as agent for the banks. Clause 25 of the 1993 Deed states that in the event of conflict between its provisions and those of any other agreement between the shareholders of the Company, its provisions should prevail. Accordingly, in so far as it was inconsistent with the 1993 Deed, the 1991 Shareholder Agreement was superseded.

57. In 1994, HS married Alka, who moved into Tetworth Hall to live with the Singh family. The board of the Company had previously been told by JS that the Company would be participating in HS's wedding celebrations. Singh family weddings were an occasion for entertaining the Company's business contacts. On 27 April 1994, BM Singh and Mrs Kaur executed memoranda of wishes for each of the twelve Jersey trusts. Four of the trusts were identified as being intended to benefit HS and his family and parents, but all the memoranda stated that JS (not HS or the parents) should be consulted from time to time on the management, administration and investment policy for the trusts.

58. On 1 June 1994, the board resolved that Mr Wason, Shashi Shah and HS should be asked to take over the responsibility for technology throughout the Company. On 8 March 1995, HS became a director of marketing, working under Nick Smart and David Batts.

59. By 1997, the Company had recovered from its financial difficulties. It made pre-tax profits of £10m that year. JS wished to exercise the options to acquire the banks' preference shares and take back control of the Company. It was proposed that the Jersey trusts would borrow the money needed to exercise the options, whereupon the shares would be converted to ordinary shares and the Company would immediately declare substantial dividends enabling the trusts to repay the loans. There was a potential problem with Mr Gulhati, whose options could only be exercised at a higher price. This was eventually compromised and on 30 December 1997 the banks and the shareholders of the Company entered into a deed regulating the exercise of the options. On 31 December 1997, Verite exercised most of the options.

60. At about this time – which otherwise must have been uplifting and optimistic for the Company and the Singh family – HS was becoming concerned about his financial security. He had become aware that although four trusts were earmarked in principle for him and his family, this was subject to the expression of JS's wishes to Verite. His parents became involved in seeking to ensure that he had further financial

security. An important sequence of events then took place, on which the Petitioners ultimately placed considerable reliance in arguing that there was an understanding among the Company's shareholders (or some of them) that HS was entitled to be a director and involved in the management of the Company at a senior level.

61. On 3 December 1998, JS executed a memorandum of wishes in relation to the shares in the Company held by the Jersey trusts and the English trusts. This expressed the desire that the trustees would see fit to keep the holdings of shares in the Company together as a single block, to avoid problems caused by dissident shareholders; and that after JS's death (a) consideration could be given to disposal of the shares but only if all beneficiaries aged over 21 agreed and (b) professional reviews of the Company's business should be obtained and if it were worth more than £100m (at 1998 values) one of the CEO and Finance Director should be independent of the Singh family.

62. On 1 February 1999, Mr Machan of Verite travelled to London to attend a meeting of the members of the Singh family with their accountants, Shah Dodhia, and tax advisers, Chamberlains. A re-designation of the four trusts ear-marked for HS ("the Herinder trusts") was agreed and JS executed a memorandum of wishes in relation to those trusts. This was to the effect that HS should be consulted in relation to any distributions; that distributions should be made at his request, and that the trustees should follow his wishes in relation to the trust capital. Mr Machan of Verite later wrote to confirm that all present at the meeting had confirmed that they were content with these arrangements.

63. On 25 May 1999, Verite as trustee executed revocable declarations, one for each of the twelve trusts, to narrow the classes of beneficiaries under the Herinder trusts and the remaining eight Jasminder trusts. All children and remoter issue of the settlors other than HS, his children and remoter issue were excluded from the class of discretionary beneficiaries under the Herinder trusts and all children and remoter issue of the settlors other than JS, his children and remoter issue were excluded from the class of discretionary beneficiaries under the Jasminder trusts. The Herinder trusts comprised 22% of the Jersey trusts' shares in the Company (so 22% of 79.26% of the Company's shares that Verite by then held).

64. Following that, on 13 June 1999, HS wrote to Shah Dodhia (copied to JS), as he had been invited to do, recording that all his concerns over the Jersey trusts and the Company shares had been satisfactorily resolved and thanking JS unreservedly. HS confirmed in his oral evidence that that letter reflected his view at the time. HS, BM Singh and Mrs Kaur all later confirmed at a meeting with Shah Dodhia and Chamberlains on 23 June 1999 that they were happy with the resolution of the Jersey trust issues. HS is recorded, in a short note of the meeting prepared by Shah Dodhia, as saying that he was initially happy with the 6% of the total equity in the Company that he was seeking and that he was very grateful to JS for being generous. The note records that HS confirmed that he was never seeking 50% and that JS was just paranoid in thinking that.

65. In the autumn of 1999, HS attended a management training course at Harvard University. Although there was no agreement on whose initiative this was, it seemed to be agreed that the purpose of his attending the course was for him to develop his management skills. JS himself signed off the proposal form for HS to attend. It stated that the principal objective in nominating HS for the course was to prepare him

for the role of CEO. However, his leadership skills and human relations were assessed as being only "average", with various weaknesses identified.

66. Shortly after his return from Harvard, HS's role in marketing was terminated and he was instead given responsibility for non-core investments. It was common ground that HS had at the time a particular enthusiasm for technology and IT and a desire to seek to develop business in those areas that could benefit the Company. On 14 March 2000, the board voted him a budget of £3.5m. A proposal for a first investment was placed before the board by HS in September the same year. It came to nothing.

67. On 10 November 2000 a memorandum of wishes regarding the Jersey trusts' shareholding in the Company was executed by JS and HS. This repeated much of the content of the December 1998 memorandum, including the wish to keep the holdings of the different Jersey and English trusts together and not to pass them on to beneficiaries or others. It stated that the 1999 memoranda of wishes were subject to the 2000 memorandum. It included two new wishes. First, that after JS's death, his parents should continue to be employed by the Company, at the same rate at least as they were to be paid for the year ending 5 April 2001. This was stated to be in view of their immense experience "due to their long term involvement in the Group". Second, that after JS's death there should be no long term policy for payment of dividends while there were other minority shareholders of the Company, but that nevertheless the trustees should use their influence to ensure that the Company declare a dividend of at least £1m per annum. This was stated to be so that the Jasminder trusts had sufficient funds to make distributions to the beneficiaries of those trusts.

68. On 11 April 2001, BM Singh and Mrs Kaur made a declaration in relation to the Herinder trusts, stating that, having established JS securely, they wished to do the same for HS by allocating the 22% held within the Herinder trusts to HS alone. (Both parents had contingent interests under the Jersey trusts.)

69. In October 2001, HS was given responsibility by the board for the operation of Project Optimum – an initiative led by external consultants from India to reduce the costs and increase the efficiency of the Company's operations.

70. In August 2002, Mr Gulhati was removed as a director of the Company by Verite, exercising its right under the articles to do so by delivering an instrument to the secretary of the Company. This provoked litigation. Mr Gulhati's companies, Arrow and Veladail, issued a petition under section 459 of the Companies Act 1985, claiming relief against unfairly prejudicial conduct of the majority directors. Relief was also claimed against the Company itself and Verite. JS and HS were legally represented by Baker & McKenzie, who instructed leading and junior counsel to advise. Mr Hart and Mr Morley sought separate legal advice on behalf of the Company. This caused the Company to be represented and take a positive stance in opposition to the petition, but it was eventually restrained from doing so. HS and JS attended meetings with solicitors and counsel to prepare their defence to the petition.

71. The Arrow/Veladail petition did not allege that the Company was a quasi-partnership company, but did claim that their shares should be bought out at a proportionate share of the Company's net asset value. In their defence, JS and HS pleaded that since the Company was not a quasi-partnership the appropriate valuation was the open market

value of the minority shareholding of Arrow/Veladail. The statement of truth was signed by a solicitor at Baker & McKenzie on behalf of all the respondents. In their Reply, Arrow/Veladail admitted that the Company was not a quasi-partnership. During the course of the litigation – which was eventually settled in August 2004 – HS raised questions about cases relating to quasi-partnerships and was provided by Baker & McKenzie with copies of some relevant authorities.

72. In February 2003, an incident took place in the Company's offices in which HS criticised Vijay Wason for what he regarded as improper conduct relating to trial balances maintained by the Company's accounts department. The following day, the dispute recurred and JS became involved. He asked HS to leave the offices. Precisely who said what and who lost his temper is a matter of dispute. But a few days later JS sent HS a conciliatory email, recording HS's valuable contribution to Project Optimum; complimenting HS on his positive attributes, but encouraging HS to resolve his personal, behavioural issues in order to become a better leader. The letter states that JS's key goal is for them to work together as equals, and that as long as HS is committed and passionate JS will offer his full support.

73. During 2004, HS moved out of Tetworth Hall with his family and bought a house in Putney. Although JS made a contribution toward the purchase price (and repaid, without interest, the 'loan' from HS that had been outstanding since the purchase of Tetworth Hall in 1989), it is clear that relations between the two brothers were not good by this time. HS had had no clear role in the Company since the end of Project Optimum, though nominally he remained the director for non-core opportunities (none of which had been taken up by the Company). Mr Hart met HS on 3 February 2005 to discuss his role and future in the Company. Mr Hart reported afterwards that, apart from the possibility of starting up his own hotel company, HS did seem very committed to the ongoing success of the Company's business. HS expressed "no great enthusiasm" for realising capital from his shareholding.

74. The fact that Mr Hart raised this possibility indicates that HS's future in the Company was under review by this time. At about the same time (May 2005), JS took steps to cause the protectors of the Carriere trust (which by then indirectly held a very valuable shareholding in Expotel) first to appoint his son Inderneel as a beneficiary and then to exclude HS and his family from the class of beneficiaries. Verite declined to exclude HS and his family and was then persuaded by Ramesh Shah to resign as protector and nominate Ramesh Shah as his successor. Mr Shah then promptly excluded HS and his family from the beneficiaries of the Carriere trust.

75. On 23 August 2005, JS wrote to HS following a meeting with Shah Dodhia. It is evident that HS had been presented with the choice of going his own way, in an earlier without prejudice letter dated 22 July of that year, but had chosen to stay in the Company. While expressing his preference for that decision, JS alludes to problems in HS's relations with the senior management team. He expresses the view that HS is capable of moving to a much-enhanced role through future proper progression. He calls on HS to make a firm decision to commit to the 'family option' (i.e. staying in the Company) and confirms that no better terms will be offered for a separation than those in the 22 July letter.

76. On 6 September 2005, HS's salary was substantially increased to £200,000 p.a. plus benefits. On the following day, Chandrika Shah of Shah Dodhia noted a call from Mr

Machan of Verite, who had spoken to JS about the planned succession at the Company should anything happen to him. JS had stated that HS was not yet capable of running the Company; that he wanted the majority beneficiaries of the trusts (i.e. JS's family) to be able to express their wishes about such matters, and that he had started to groom Inderneel into the business, who should be in a position to take over "in seven years or so".

77. A further incident took place on 10 November 2005, when HS secretly recorded a family settlement meeting at which JS, Seema and their parents were all present. HS had used Company employees to procure and set up a recording machine. JS was displeased and caused the Company's HR director, Beverley Stewart, to write to HS reprimanding him for this conduct. That in turn led to a letter of protest from HS to JS dated 6 December 2005, complaining at the use of Company personnel to rebuke him over a private matter and accusing JS of not running the Company in accordance with his parents' wishes, namely for the benefit of the family as a whole. The letter shows that relations between JS and HS were at a very low ebb. JS replied the same day, expressing sadness at what HS had said about JS deliberately undermining him, stating that he respected and valued HS's contribution and inviting HS to draw a line under the matter.

78. Shortly after these matters, BM Singh and Mrs Kaur, as settlors of the Jersey trusts, appointed Estera to be a joint trustee of the Herinder trusts and Jemma to be a co-trustee of the Jasminder trusts. This step was taken - without any prior knowledge of Verite - at the instigation of HS and his lawyers, in order to displace Verite as common trustee and to provide a means of discussion between the respective trustees to assist in resolving the disputes between JS and HS. At this time, HS had begun (as he accepted in evidence) to try to obtain Company information, and indeed information about JS's wife's investments, that would be likely to assist him in any proceedings that he brought against JS. At about the same time, Mr Hart emailed HS seeking to persuade him to take up a new business opportunity with a Mr Syed, and pointing out that he (Mr Hart) did not agree the large pay increase that HS had received and that HS would not be sorely missed if he left the Company.

79. Without any further incident in the meantime, HS then replied on 17 January 2006 to JS's letter of 6 December 2005. The long letter recounts HS's unhappiness with the way that JS had run the Company and treated him since his return from Harvard, when he felt marginalised by being taken out of the Company's core business. The trial balances dispute of 2003 is relied on as showing that JS was willing to humiliate his brother and fellow director in front of Company employees. There is reference to another operations board meeting at which JS is alleged to have slighted HS in front of the managers. A recurrent theme of HS's complaints is that JS has failed to honour his parents' wishes that JS and HS should both be involved in running the Company together for family benefit:

> "Your selfishness and your behaviour towards me in the end has led me and the rest of the family to conclude that you have not honoured your responsibility and duty to the family to run the business as a 'father figure' as entrusted to you by Dad, and you clearly have no intention of doing so. It is because of this that Dad feels that, if the business is going to be run as yours, against the whole basis on which you got to hold family shares

> in your name in the first place (which were of course to be held by you only on the basis that you would use them for the benefit of the rest of the family too), then at least I should have the opportunity to make my own way in life outside the company. Dad's feeling is that, since you treat the company as yours, then the rest of the family's interests, and particularly mine, will have to be looked after outside the company."

80. The letter concludes:

> "This is clearly the end of the road for the two of us ever being able to work together to fulfil Dad's wishes and his life work to have a family business with us both fully involved together at the centre of its management. I am going to remain on for the moment as a director (not least because my family and I are beneficially interested in some of the family's shares in the company) but now I am under no illusion that I have no long term future of the sort that was always intended. I know that, so far as you are concerned, my role is simply to help out at your bidding and fit into a role you will control. It is now very clear to all the employees that, to you, I am just another employee. There is now no point in our trying to agree a role for me within the company. Things have gone too far. We clearly have such different ideas about what that role should be; and anyway I am sorry to have to say that I just would not trust you in the future to respect any role that I was given and stop undermining me at every turn….
>
> We need to go our separate ways. I speak for me alone on that, as I know that Dad is thinking about where that leaves him. He has got his own lawyers and that is all I will say on that subject for the moment."

81. It is common ground that, when this letter was written, HS had retained Mr Mervis, then of SJ Berwin, who remains his solicitor today as a partner of a different law firm. The letter does not allege any agreement or understanding reached between JS and HS (or between the family members generally) that HS should have a right to manage the business and be a director of the Company, or argue that the Company is a quasi-partnership and that therefore HS has a right to manage the business jointly with JS. Instead it alleges a failure by JS as 'father figure' to run the Company for the family benefit, rather than for his own benefit, and otherwise in accordance with the wishes of BM Singh that JS and HS should be able to run the family business together.

82. Receipt of that letter caused JS to prepare a number of retrospective file notes relating to some of the incidents referred to by HS, including a file note for the events of February 2003. HS meanwhile continued to make demands to be provided with substantial numbers of Company documents, including its dealings with BCCI before

its liquidation. That led Mr Hart on behalf of the Company to seek Counsel's advice on the disclosure of documents to a director in circumstances such as these. Counsel advised (on 27 February 2006) among other things that the position was different between a 'normal' company and a 'quasi-partnership' company. Receipt of that advice led JS to observe at a board meeting on 28 February 2006 that he did not consider the Company to be a quasi-partnership and HS at the following board meeting on 14 March 2006 to state that he believed that it was. It appears that, following the Gulhati petition and their defence of it, each of them had some awareness of the meaning of quasi-partnership in this context.

83. On 13 February 2006, JS replied to HS's letter of complaint. He stated that he had not intended to sideline HS and had tried to find the best role for HS that suited his talents, but that HS was not experienced or skilled enough to have a position of overall responsibility. He expressed hope that they could work together and willingness to help HS to find a role consistent with his ambitions. HS responded on 28 February 2006 pointing out that JS had not addressed his concerns or his explanation of why he had been driven to conclude that it was impossible for them to continue to work together. The response notably states that the share options were put into trust on behalf of all the family on the basis that the shares in the Company were always intended to be for the family as a whole. It ends by saying regretfully that HS does not believe that JS is sincere in saying that he genuinely wishes to work with HS and find him a suitable role. JS replied on 6 March 2006, stating that he had every intention of working with HS and offered again to sit down with HS and work out a way forward.

84. Thereafter the focus of the dispute moved to Jersey, where Verite resisted HS's suggestion that it should resign from the Herinder trusts on the basis of a conflict of duties as between the Herinder trusts and the Jasminder trusts. SJ Berwin's letter of 24 March 2006 stated openly for the first time that the dispute might involve proceedings under s.459 of the Companies Act 1985. Eventually in October 2006 Verite made a representation to the Royal Court for directions as to what it should do. On 22 February 2008, in his second affidavit in the Jersey proceedings, HS stated that he had a settled intention to issue a minority shareholder's petition in London, which was being held up only by settlement discussions and a desire to have the Herinder trustees join with him as co-petitioners.

85. On 13 May 2008, Verite resigned as trustee of the Herinder trusts. During the course of the Jersey proceedings, without prejudice negotiations continued between JS and HS and their teams (with Mr Hart and Mr Morley involved on behalf of JS), but ultimately they came to nothing. HS remained a director and played an active role at board meetings but had no specific role in the day-to-day business of the Company.

86. In June 2008, the Company came within a few days of default on its banking covenants owing to the late approval of the 2007 accounts. At a board meeting on 23 June 2008, HS and BM Singh abstained from approving the annual accounts for various reasons, one of which related to a memorandum of disclosure relating to Winchfern and Expotel that JS presented to the meeting. I shall deal with the exact circumstances in Part III of the judgment below, but for present purposes it is sufficient to state that HS was warned that one possible outcome of refusal to approve might be his removal as a director by the majority shareholder. Within a few days, HS

and BM Singh agreed to approve the accounts. No objection was made by HS or SJ Berwin at that time to the suggestion that he could be removed as a director.

87. On 26 September 2008, SJ Berwin wrote to JS's solicitors, noting that the without prejudice discussions had ended without success and stating that HS had no possible exit from the Company or means of obtaining relief other than by issuing a section 994 petition, and that a letter before action was being finalised by leading and junior counsel at that time. At the same time, SJ Berwin were pursuing JS's solicitors for detailed information relating to the Winchfern and Expotel transactions, to which those solicitors declined to respond further in February 2009.

88. Little then happened until shortly before the June 2009 board meeting, called to approve the 2008 accounts, following which HS was removed as a director of the Company.

B. Overview of the witnesses of fact

89. Before turning to consider the disputed facts relevant to the basis on which this part of the petition is advanced, it is convenient to say something about the witnesses of fact who gave evidence at the trial. I will come at a later stage (in Part VI) to the two expert witnesses who gave opinion evidence about the reasonableness of the amount of JS's remuneration as chief executive of the Company.

90. The witness statements prepared for the main witnesses (HS, JS, Mr Machan and Mr Christensen) were very long. They traversed and commented upon a range of events – in the case of HS and JS, their family lives from an early stage and the history of the Company from 1977. It is clear to me that they are the products of careful reconstruction of events and states of mind, based on a meticulous examination of all the documents in the case by the large teams of lawyers involved. The true voices of the witnesses, and the extent of their real recollection, which became apparent when they were cross-examined over a number of days each, are notably lacking from the witness statements. As was demonstrated repeatedly in cross-examination, the statements mostly present considered argument and assertion in the guise of factual evidence and often with a slant that favours the case of the witness. In many instances, it emerged that this was without any real recollection on the part of the witness of the events or circumstances being described, but with a belief that the witness "would have" done or said something for superficially plausible reasons that are now advanced with the benefit of hindsight.

91. That is not to be taken as suggesting that, as part of this process, the witnesses have been deliberately dishonest about parts of their evidence. Rather, it seems to me that the process of creating the written statements has infected or distorted the true evidence that the witness was capable of giving. The written statement then, in turn, affects the witness's memory of events when he or she comes to court to give oral evidence, having studied carefully his or her written statement in the days before doing so. It took skilful and painstaking work by counsel to remove the varnish that had been applied and identify what the witness could fairly recall and that of which he or she had no real memory at all.

92. The result is that, in my judgment, these principal witness statements are not of much greater value as evidence of the matters in dispute than detailed statements of case

(largely duplicating the already lengthy and detailed statements of case that were previously prepared). In other words, an inordinate amount of time and costs have been expended in preparing statements that are of limited value in resolving the factual disputes in this case. While I take account of the contents of all the statements, and draw on particular passages where material, I am cautious about relying on factual assertions in the statements where these are not either supported by contemporaneous documents, or confirmed by the account that the witness gave of the matter when cross-examined or by the credible evidence of other witnesses.

93. HS seemed to me to be a generally candid witness, though there are certain parts of his account that I consider to be unreliable and parts of his evidence that I do not accept. I heard his evidence over the course of 4 days. Inevitably, he became tired and somewhat emotional towards the later stages of his cross-examination. He had a tendency to want to tell his story and explain why he was advancing the case that he was, rather than answer the question that was put to him, and some of his answers were very long and rather unfocused. Subject to that, he was intelligent and articulate. In some respects, he readily accepted or even volunteered matters that were not on the face of it helpful to his case, and it was clear to me that, despite the considerable differences between them in this litigation, he remains in respectful awe of his older brother and cannot help but admire what JS has achieved in business.

94. HS was well aware of what his case was and what in certain respects he needed to emphasise in his evidence. As a result, he sometimes gave answers that put a particular spin on the true facts, or answered questions put to him in a way that was favourable to his case, or tried to avoid answering awkward questions. Over the years, he has developed a particular focus and interpretation of events, which he genuinely believes to be a correct interpretation, but which sits uncomfortably with the objective facts of the case. His memory of events was good, though of course coloured by the process of reconstructing and rationalising over many years what had happened to him and why this was unfair or legally wrong.

95. HS's and JS's sister, Seema Abbhi, was called to give evidence by the Petitioners. She is 3 years younger than JS and 13 years older than HS. She had been called as a witness by BM Singh to support his claim and gave evidence in support of that claim. I did not find her evidence to be helpful for a number of reasons. First, it was clear that she had formed her own strong view of the fairness of what had happened within the family and the Company and that injustice to her parents and HS had resulted. Her central thesis was that it was inconceivable that BM Singh would have given JS money in 1977, leaving himself with nothing, and that whatever the Company's accounts may show he did not give him a loan at that time, but that the £30,000 advanced to JS then was "family money", to which (and to the proceeds of which) the family remained entitled, and that it was not JS's money that was invested in establishing the Company's hotel business. She took the opportunity to advance that thesis, rather than simply answer to the best of her recollection questions that she was asked.

96. Second, Seema left the family and moved to the United States in 1979, when she married Deepak Abbhi, so she had only an occasional view or second-hand accounts of what was happening thereafter. Third, on her own evidence to Sir William Blackburne, she had nothing to do with the business of the family before she married. She simply signed documents when she was asked to, without understanding what it

was that she was signing or why. Fourth, I formed the view that what she said was greatly influenced by what her parents had said to her in their last years, and naturally what they told her reflected the views that they themselves had advanced in the BM Singh proceedings, which were comprehensively rejected by Sir William Blackburne in his judgment.

97. The Petitioners' third witness was Mr Prosser, a trust officer and company director of Estera. He first became involved in the Herinder trusts in March 2009, though then only to a limited extent. Prior to and for a substantial period of time after then, a Mr Graham Boxall and a Ms Naomi Rive of Estera looked after the Herinder trusts. Mr Boxall had been involved from the start, in 2005, and remained involved until 2010 or even later; Ms Rive was already involved by 2009 and remained involved until 2013. Both of them are alive and well in Jersey but neither of them was called to give evidence. Mr Prosser was very little involved in the key events after March 2009, namely the events leading to HS's removal from the board in July 2009, HS's redundancy in 2010 and the funding and insurance arrangements leading to the bringing of this claim. To the extent that he was shown by the documents to have been involved, he repeatedly claimed to have no recollection of what had happened. I formed the view that Mr Prosser's failure of memory might not be as complete as he professed it to be, and that he sometimes used it as a way of avoiding being drawn into answering difficult questions that were put to him. It was convenient for him that Mr Boxall and then Ms Rive were principally involved in dealing with the Herinder trusts between 2009 and 2013 (although he was a co-director of Estera with them during that period), but on the other hand they were not called to give their evidence. Accordingly, the evidence contained in the carefully prepared witness statement of Mr Prosser is not evidence on which I feel that I can place reliance, save where there is some other independent support for what is there asserted. In any event, a substantial part of Mr Prosser's statement is no more than assertion and argument about matters of which he had no personal knowledge.

98. Jasminder Singh was a very careful witness. His demeanour and way of giving his answers gave me an insight into his character and the way in which he would have conducted the affairs of the Company as its CEO. From the outset he tried to use his strength of personality and considerable intellect to impose his will on Mr Fenwick QC, Counsel for HS and Estera, in the exchanges between them, an endeavour in which he did not succeed. He also sought on occasions to control what other people in the courtroom were doing while he gave his evidence, when things occurred in court which he did not like: he complained about his brother pulling faces and passing notes to his own solicitor, Mr Mervis, during his evidence. It was very clear to me that, consistently with the evidence given by several witnesses and with JS's own admission of the "rod of iron" with which he ran the Company, he is a very dominant and quite intimidating person, who does not readily tolerate anyone doing things of which he does not approve.

99. His ability to recall events of up to 40 years ago was generally very good. He was, of course, centrally involved in them, but was extremely well prepared to be examined on his written evidence. I consider that he was, to a substantial extent, a truthful witness. However, it was clear that to a significant degree he too has over the years reconstructed in his mind the events that occurred in a way that favours his case. That is not to say that he has consciously distorted the facts about which he gave evidence:

all witnesses over time reconstruct in their minds the events that they have gone over and over in preparing for court proceedings, so that they are often unaware of (and strongly deny) any difference between what actually happened and what they remember. Mr Singh, being a highly intelligent man, was fully aware of the detail of the case that his lawyers advanced in defending the petition. As a result, in my judgment, the accuracy of his recollection has been subconsciously affected by his knowledge of those facts that support his case and those facts that do not do so.

100. It was convenient to his case that Mr Hart and Mr Morley should now be seen to be acting 'independently' as directors in taking certain actions, or in making recommendations to the board or to the shareholders. I am satisfied for reasons that will become clear that, however much JS welcomed the input of Messrs Robson, Morley and Hart as 'external' directors and their ability to give him a perspective that was not bound up with Singh family considerations, nothing happened in the Company without JS both knowing about it and sanctioning it. If something that JS didn't like happened (of which Mr Hart gave two examples), it was because he reluctantly acquiesced in it, perhaps for internal political reasons, not because there were independent forces at play that took important decisions out of his hands, or that took them regardless of his views.

101. As a separate matter, on a number of occasions I found JS's claimed total inability to recall certain matters surprising, given the clarity of his recollection of historic events generally. I consider that he too knew more about certain matters than he was prepared to say, and on occasions (which I will identify) he did not give the whole, unvarnished truth about what happened and why it happened.

102. Mr Hart was an unimpressive witness. He took every opportunity to quibble with questions put to him and to try to find a way of avoiding answering the substance of the questions. He was the opposite of forthcoming and open. He was very defensive from the moment that he went into the witness box. I formed the clear view that he knew that he was vulnerable to serious challenge on his evidence of what had happened at the Company and in particular the 'independent' investigation that he and Mr Morley carried out, and that he was going to do his best to avoid disclosing anything that would be unhelpful to JS's case. On occasions, this took the form of untruths (e.g. on whether or not he was acting with the support and to the knowledge of JS, or independently); on other occasions, convenient amnesia. He ducked and dived in order to avoid making admissions contrary to JS's case (e.g. on whether or not JS had a financial interest in the shares of Expotel that should have been disclosed to the board of the Company). He adopted a pious and purist approach on certain matters (e.g. whether the Company could tolerate an overpayment (as he saw it) of £30,000 p.a. by way of salary to the mother of the chief executive at a time when its accumulated profits were in excess of £45m and its net assets in excess of £250m); but on the other hand was quite willing to overlook implementation of appropriate reforms on matters such as the payment of benefits in kind and on recording compensation agreements when the chief executive did not wish it to happen. I approach his evidence with considerable caution, as it seems to me that at all times he has been far from independent from the interests of the majority shareholders in the Company – both during the time of the events with which these proceedings are concerned and in giving evidence in the proceedings.

103. There was another issue on which Mr Hart was most unsatisfactory. Despite being a solicitor and a former partner of a City law firm, Baker & McKenzie, for 20 years, and despite knowing that litigation was threatened between JS and HS and that his independence was challenged by HS, Mr Hart deliberately destroyed the drafts and many of the working papers associated with his 'independent' inquiry into the Winchfern and Expotel matters. This he admitted and explained as being in accordance with his commercial practice over many years. I find that very surprising and Mr Hart had no convincing reason for it. It was clearly a conscious decision so far as the investigation was concerned, as a draft of his report contained, at annexe 1, a list of documents that had been seen, but this annexe was removed from the last version of the report.

104. Mr Morley gave his evidence with considerable vigour at all times, and generally with apparently good recollection of much of the detail of events, which in his case went back as far as the restructuring of the Company in 1993. At that time, he was acting for one of the Company's lenders, HSBC plc. He demonstrated a sharp intellect in his exchanges with Mr Fenwick QC, which at times resulted in his evidence being very argumentative and combative. I found him nonetheless to be generally reliable as a witness: when pressed hard he made some sensible concessions. But he was well aware of the weak points of the account that he was giving, particularly with regard to the inadequacy of his and Mr Hart's investigation into HS's complaints about Winchfern and Expotel. I was not impressed with his attempt to explain how and why that investigation only had a limited remit, such that questions of non-disclosure by JS to the Company's board and to its auditors were subsidiary and unimportant matters. I formed the impression that he well knew that he and Mr Hart had done a poor job of investigating and reporting thoroughly and fairly on those matters.

105. Mr Vijay Wason, the company secretary of the Company, was very nervous and somewhat diffident in giving his evidence, but I found him to be straightforward and honest throughout. In particular, his evidence of what was happening in the Company between HS and other senior management employees and himself – which was given in the presence of HS – had a ring of truth to it. Although he expressed strong loyalty to JS and had every reason to support his CEO, I find that his evidence was not tainted in that regard but fair and honest.

106. Mr David Batts ceased to be employed as a senior manager by the Company (or its subsidiary) in 2000 and then worked for the Marylebone Cricket Club until his retirement. He was manifestly an honest witness and I accept his evidence.

107. Mr George Machan was a very careful witness throughout his evidence: careful to understand and answer precisely the question that was asked; careful to review documents to which he was taken in cross-examination; careful and thoughtful in the answers that he gave, and cautious about volunteering anything more than he had to. His recollection was not very detailed, but overall it was reasonably good and he was in my judgment honest in stating when he had no recollection of particular matters. There were some inconsistencies between his answers and his witness statement or contemporaneous documents – e.g. as to whether he recalled the detail of the Carriere trust (having ceased to be its protector in 2005) when considering the issues relating to Expotel raised by HS and his solicitors in 2009; to what extent his refusal until May 2008 to resign as trustee of the Herinder trusts was driven by the wishes of JS, and how he so quickly was persuaded in July 2009 to favour the removal of HS as a

director of the Company. I also consider that he was not fully candid about the extent to which he wished to oblige JS in acting as a trustee of the Jasminder trusts. Apart from these matters, which I shall consider in more detail later in this judgment, I found him to be reasonably reliable as a witness.

108. Mr Christensen was a straightforward witness who seemed to me to be doing his best to provide truthful answers, though with a tendency to answer a slightly different question from the one asked. His recollection was not consistently good. On certain matters, I consider that his recollection has been adversely affected by the process of reconstruction and analysis that took place before he gave his evidence, in particular on the question of what was discussed between JS and him at lunch on 3 July 2009. But, with those qualifications, I find that I can and should accept his evidence, save where it is demonstrated to be in error by some contemporaneous document.

109. Mr Iype Abraham was an eloquent and clear witness, who answered well the questions that were put to him. He fully accepted his loyalty to JS and the Company, but also accepted that for many years he was a friend and confidant of HS. I found him to be truthful and reliable notwithstanding his evident interest in serving JS and the Company.

110. Mr Paul Mansi was a mostly impressive witness. He had a good and clear recollection of matters with which he was involved over many years of working for the Company. He had worked quite closely with HS in the years leading up to HS's redundancy in 2010 and had observed HS's behaviour over many years. I did form the view that Mr Mansi even now had animus against HS amounting to personal dislike of him, and which HS seemed to me substantially to reciprocate. It was evident that they had had disagreements on numerous occasions prior to 2010, and Mr Mansi was openly critical of HS. In my judgment, that did give rise to some exaggeration by Mr Mansi, when describing HS and his qualities and skills (or lack of them). Subject to allowance for a degree of overstatement in certain respects, I accept that Mr Mansi's evidence was truthful.

111. Mr Ramesh Shah is a qualified chartered accountant and a tax adviser, practising from the firm Chamberlain & Co, which is associated with Shah Dodhia, the firm of accountants used by JS and the Company and joint auditors of the Company. Despite the very close involvement of Mr Shah in the financial affairs of JS and the Company over the whole period with which I am concerned, Mr Ramesh Shah was not called as a witness. I would have expected him to be called by JS, on whose behalf others who had worked in or for the Company were called to give evidence. Mr Ramesh Shah declined to answer questions from Mr Hart and Mr Morley in 2010 during their investigation into the possible breaches by JS of his fiduciary duties as director of the Company.

112. It is obvious that Ramesh Shah would have had material evidence to give about the Jersey trusts, Winchfern, Expotel and the Carriere trust. It was on Mr Shah's advice to JS that the Jersey trusts were set up in 1993. Mr Shah had good contacts with Mr Machan of Verite and acted throughout as intermediary between Verite and JS. Mr Machan described him as retaining a very close relationship with his clients, ensuring their loyalty to him and so retaining his client base. Mr Machan also thought that Ramesh Shah would have drafted the letters of wishes relating to the Jersey trusts.

113. Chandrika Shah was the principal accountant in charge of the Company's and JS's financial records. She told Mr Morley, in the course of his and Mr Hart's investigation into Winchfern and Expotel, that she did not know that JS had an interest in shares in Expotel. She was not called to explain what JS had disclosed to Shah Dodhia about those matters or about the Carriere trust.

114. Mr Boxall and Ms Rive were, as I have already noted, the partners of Estera principally concerned with the Herinder trusts from 2005. Either or both of them would have been better placed than Mr Prosser to give evidence about Estera's approach to its shareholding, the dispute between JS and HS and the steps that were taken with a view to bringing these proceedings, but neither of them were called by the Petitioners.

C. The pleaded case of the Petitioners

115. The Petitioners' pleaded case on the quasi-partnership issue is that the Company is a vehicle for a family business, and that there was a fundamental understanding and common intention from the start, or alternatively which developed over time and by the time that HS started to work for the Company, and at the latest 1993, that the Company's business was to be run by and for the benefit of the family, and/or that all of the male members of the family who were old enough would be directors and would be entitled to be involved in the business, managing or working in it (Amended Petition, para 27). On that account, there was a relationship of quasi-partnership between the members of the immediate family, or at least the male members, and the exercise of members' and directors' powers under the Company's constitution and the Companies Act were subject to equitable considerations (para 28). Consistently with that, it is pleaded that it was "intended, understood and assumed" by the Singh family that HS would be entitled to play a full role in the management of the Company's business and be a director of it (para 30(4)).

116. These pleas were elaborated in Further Particulars. In response to a question whether any of Mr Gulhati, Arrow, Veladail, Mr Shashi Shah, Verite, the Sarean trustees and Estera had had the fundamental understanding explained to them or had agreed it, the Petitioners pleaded that it was not part of their primary case that any such party shared the understanding or intention; however that by 2009 at the latest all shareholders in the Company were aware that it was run for the benefit of the Singh family, and that they acquiesced in this. There is therefore a secondary case pleaded, namely that by 2009 all shareholders had become party to, or acquiesced in, a relationship of quasi-partnership.

117. In response to a request to specify the nature of the equitable considerations and how the consciences of various parties to them were affected, the Petitioners pleaded that, as a result of the family relationships, the quasi-partners were required to act fairly and in good faith between one another, given the relationship of mutual trust and confidence between them and given HS's training for and joining the Company. It is pleaded that the relevant legal test is fairness, not whether conscience is affected, but if necessary that the consciences of the Singh family members were affected. It is also pleaded that the trustees were bound as from the inception of their shareholding; that on the Petitioners' primary case Mr Gulhati and others were not initially bound

but that, on their secondary case, all (then remaining) shareholders were bound by 2009.

118. In response to a request to state what was meant by "a full role in the management of the Company's business", the Petitioners plead that this includes a role as an executive director with participation in the day-to-day and strategic management of the Company and full-time employment in that capacity.

119. Four things are notable from this pleaded case. First, that there is no allegation of any express agreement between anyone that the Company would be run in the manner alleged or that male members of the family and HS in particular would be entitled to participate in the management of the Company and be a director of it. Second, that the primary case that is pleaded itself contains a number of alternative formulations of the "fundamental understanding and common intention": that it existed from the very start (1977) or alternatively arose by 1993 at the latest; that the Company's business was to be run for the benefit of the family and/or that the male members of the family would be entitled to manage it, and that the quasi-partnership encompassed all members of the family, alternatively the male members of it only. Third, that two distinctly different cases are being advanced by the Petitioners: first, that the quasi-partnership did not extend beyond the Singh family members, and second that it extended by 2009 to all shareholders. Fourth, that there is no clarity about how and when exactly the Jersey trustees became subject to (or entitled to the benefit of) the equitable considerations alleged, or how the non-Singh shareholders became subject to them by 2009 when they were not previously subject to them. All that is pleaded is that by 2009 the Jasminder trustees were aware of the fundamental understanding and that they "accepted and became party to that understanding" (response to request 3 of Verite and Jemma's Request for Further Information) or "acquiesced in it" (para 8(e) of the Reply). How they accepted it or acquiesced in it is not stated.

120. Given that it was Verite and Jemma who in 2009 used their rights as majority shareholders in the Company to remove HS as a director, the question of how exactly those trust companies became bound by any fundamental understanding of the Singh family is of some materiality. In opening the claim, the Petitioners relied on the family and cultural background of the Singhs, and stressed that, as a matter of law, the fact that shareholders such as Mr Gulhati and (between 1993 and 1998) the banks did not have any rights or obligations as quasi-partners does not preclude such considerations arising as between other members of the Company. They accept that the Jersey trustees do not themselves, as shareholders, have any expectation that they would be involved in management (indeed, the trust deeds indicate that they should not), but nevertheless it is argued that they are directly subject to equitable considerations in favour of others (viz. the alleged entitlement of HS and other Singh males to manage and be directors of the Company) having received their share options gratuitously, as trustees, and in the context of the evident relationship of trust and confidence between the members of the Singh family (Petitioners' written opening, para 103).

121. In any event, it is suggested that relief can be granted against Verite and Jemma on the basis of the "business realities of the situation" because the main beneficiary of the Jasminder trusts (JS himself) is the primary mover behind the unfairly prejudicial conduct. I was not wholly clear, as the Petitioners' case developed and was refined during the trial, whether this amounted to an allegation that Verite/Jemma were in

some way a party to unfairly prejudicial conduct of JS, so that their own conduct in removing HS was unfairly prejudicial conduct, or whether it was only an argument that it was appropriate in the circumstances to grant relief against the Jasminder trustees as well as against JS on account of JS's unfairly prejudicial conduct of the Company's affairs. Of course, if Verite/Jemma were themselves bound in 2009 to respect a right for HS to be a director then their removal of him was (unless deserved) unfairly prejudicial conduct. But if they were not bound by any such equitable considerations, it is difficult to see how their own conduct in removing HS could be an unfairly prejudicial act. If Verite/Jemma could be proved to have acted in bad faith in the light of proven unfairly prejudicial conduct by JS then it may be arguable that relief for JS's unfairly prejudicial conduct should also be granted against them. That is, however, a different point.

122. It seemed to me, as the trial progressed, that what was on the face of it the Petitioners' primary case against Verite/Jemma, namely that the consciences of the trustees were affected or that they were otherwise bound in equity by HS's equitable rights as a quasi-partner, became secondary to an argument that in all the circumstances it was appropriate to grant relief against the Jasminder trustees too because they and JS were complicit in the unfair treatment of HS by JS, including his removal from the Company. I shall address later, in Part III of the judgment, the allegations of JS's breaches of fiduciary duty, but in this Part I am concerned with whether or not there was a quasi-partnership, at least as regards the Singh family members, that conferred on HS the right to remain a director, and that the exclusion of HS was therefore an act or conduct of the Company's affairs that was unfairly prejudicial in that regard.

D. What as a matter of law is a quasi-partnership?

123. The origin of the use of the expression "quasi-partnership" in relation to a particular type of limited company is Ebrahimi v Westbourne Galleries Ltd [1973] A.C. 360. The only shareholders of the company in that case were two former partners of a business and the son of one of them. After a disagreement, one partner was removed as a director, using the majority voting rights of the other two shareholders in accordance with the articles of association. The profits of the company had only ever been distributed by way of directors' remuneration. The Judge held that the respondents had done the appellant a wrong in equity, notwithstanding the rights conferred by the articles. It was a breach of good faith to exclude the appellant from participation in a business upon which they had embarked on the basis that all should participate in its management. The Court of Appeal allowed an appeal, holding that it had not been shown that the shareholders' voting rights had been exercised in bad faith.

124. Lord Wilberforce, giving the leading speech in the House of Lords, held that the statutory jurisdiction to wind up a company where it was just and equitable to do so acknowledged that there was room in company law for recognition of the fact that behind the corporate status and personality of the company there were individuals with rights, obligations and expectations among themselves, not necessarily submerged in the corporate structure. While in most cases the corporate constitution adequately defined the rights of the members, the just and equitable criterion allowed courts to subject the exercise of legal rights to considerations of a personal character, arising between one individual and another, which may make it unjust or inequitable to insist on legal rights or to exercise them in a particular way.

125. His Lordship then identified the extra considerations, above purely commercial ones, that could indicate that equitable rights or considerations could be superimposed:

> "… typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.
>
> It is these, and analogous, factors which may bring into play the just and equitable clause …."

126. Lord Wilberforce then observed that in very many cases exercise of statutory rights or rights conferred by a company's articles would be unexceptionable and part of the risk that a director of a company accepts, and continued:

> "The just and equitable provision nevertheless comes to his assistance if he can point to, and prove, *some special underlying obligation of his fellow member(s) in good faith, or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that, if broken, the conclusion must be that the association must be dissolved.*" (emphasis added)

127. The application of that principle to the winding up of such companies has readily transferred to the principle enshrined in what is now s.994 of the Companies Act 2006, namely that a member of a company may seek relief if the company has done some act, or its affairs have been conducted in a way, that is unfairly prejudicial to the members or a part of them. Where equitable considerations of the kind identified by Lord Wilberforce apply, a court is likely to find that, although the conduct of the company was lawful according to its constitution, nevertheless the contravention of the special underlying obligation was a wrong done to some or all of the members that justifies the grant of relief. Nevertheless, it is salutary to remind oneself that the initial question on such a petition must be whether the conduct of which complaint is made was in accordance with the articles of association. If it was, then the allegation of some inconsistent obligation or right needs to be carefully scrutinised: In re Saul D Harrison & Sons plc [1995] 1 BCLC 14 at 17-18, per Hoffmann LJ. It is also pertinent to add that there must be something in the nature of the 'special underlying obligation' or the circumstances in which it arises that makes it enforceable in equity at the suit of the petitioner. An unenforceable agreement or understanding will not suffice: there must be something that makes it unconscionable for those controlling the company to disregard the agreement or understanding, and that will generally be found where there is mutuality between the shareholders as to the benefit and burden

of the obligation, or some detrimental reliance or change of position that makes it inequitable to deny the obligation.

128. This is well illustrated by the facts of O'Neill v Phillips [1999] 1 WLR 1092. The majority shareholder, Mr Phillips, appointed Mr O'Neill a director and expressed the hope that he would take over the running of the company, whereupon he would be given 50% of the profits. Mr O'Neill did so. Mr Phillips then negotiated with Mr O'Neill to increase his shareholding to 50%, but the following year became concerned about the management, took back control and declined to pay Mr O'Neill 50% of the profits or give him any more shares. The Court of Appeal reversed the trial judge's decision that Mr O'Neill had no entitlement to 50% of the profits or further shares, holding that he had a legitimate expectation that he would receive more shares and 50% of the profits and so was prejudiced as a shareholder by Mr Phillips' change of mind.

129. On appeal, the decision of the trial judge was restored. Mr Phillips had made no binding promise. A legitimate expectation was not enough; there had to be some equitable restraint on the conduct of the majority or a correlative right on the part of the minority. The question was whether Mr O'Neill had a right in equity to the shares and profits. Lord Hoffmann, giving the only speech, pointed out that the jurisdiction to grant relief under what is now section 994 of the Act of 2006 is a principled one, not based solely on an indefinite notion of fairness, and agreed with Jonathan Parker J's dictum in In re Astec (B.S.R.) plc [1998] 2 BCLC 556 at 588:

> "in order to give rise to an equitable constraint based on 'legitimate expectation' what is required is a personal relationship or personal dealings of some kind between the party seeking to exercise the legal right and the party seeking to restrain such exercise, such as will affect the conscience of the former."

His Lordship suggested that a useful cross-check in the type of case under consideration is to ask whether the exercise of the power in question would be contrary to what the parties, by words or conduct, have actually agreed – would it appear to conflict with the promises that they appear to have exchanged? While emphasising that it was not necessary to prove that any such promises were contractually enforceable, Lord Hoffmann said that it would suffice if it was binding as a matter of justice and equity.

130. None of these important authorities addresses an issue that the Petitioners' primary case acutely raises. This is whether a quasi-partnership can exist (and give rise to equitable constraints of the type identified in the authorities) where some only of the shareholders are said to be within the scope of the agreement or understanding about participation in management. This is a different point from that adverted to in Lord Wilberforce's reference to sleeping partners, which indicates only that some of those within the scope of the understanding and relationship of mutual trust and confidence may be agreed or understood not to be going to be personally involved in managing the business. The Petitioners' primary case seems to me to involve something different from that, namely a relationship of trust and confidence and an understanding about management participation that exists only between some, not all, of the shareholders. Of course, if the understanding exists only as between a minority

of the shareholders it is unlikely to be of real practical importance, since ex hypothesi the majority is not bound by it. But it is easy to envisage a case where one or more minority shareholders stand outside a relationship and understanding shared by all the other shareholders, perhaps because of a transmission of the shares of an original member.

131. The Petitioners' case on this issue is as follows. It is possible for some shareholders only to make a shareholders' agreement as regards the way in which they will exercise their voting rights. Such agreement will bind those who are party to it. What can be done by express agreement can be done informally, in equity. In neither case can such an agreement or understanding override the duties that the shareholders may have as directors of the Company, in particular relating to the interests of the minority shareholders who are not 'within the ring' of the understanding and equitable rights. But, subject to that, the agreement or understanding should be enforceable between those who are party to it. It would be bizarre if a small shareholding, say by a pension trust or an employee, prevented equitable considerations being enforced as between the large majority of members.

132. The Petitioners rely upon Re Yung Kee Holdings Ltd [2014] 2 HKLRD 313, in which the court in Hong Kong expressed the strictly *obiter* view at para [129] that there was no bar to the operation of equitable considerations under a quasi-partnership merely because there were members who were not party to the mutual understanding relied upon. (The first instance judge had reached the conclusion that there was no impediment.) However the court acknowledged that giving effect to the mutual understanding in such circumstances "can present real and insurmountable difficulties" if it may unfairly prejudice the members who were not party to it.

133. The Petitioners also rely on Fisher v Cadman [2005] EWHC 377 (Ch); [2006] BCLC 499. In that case, equitable considerations deriving from the incorporation of a family building company by a father, mother and two sons were held to apply as between the shareholders. The fact that another family member later inherited shares and a very few shares were transferred to other family members did not, unsurprisingly, lead the deputy judge to conclude that the quasi-partnership character of the family company had changed. Those coming into the company were members of the family. Indeed, the point was not taken that the company had ceased to be a quasi-partnership for that reason.

134. I am very doubtful whether the Petitioners are right in their argument, except perhaps in a case where the shareholders that are not parties to the equitable considerations are either a very small minority or are closely connected to the quasi-partners (as in Fisher v Cadman), such that the established quasi-partnership character of the company does not change. The quasi-partnership status of a company arises not just from an informal understanding arising between some or all shareholders (which would otherwise be unenforceable as a matter of contract) but from the particular character that the company has where there is a mutual relationship of trust and confidence, akin to a partnership, and where the agreement or understanding affects the conscience of the members of the company:

> "Equitable considerations, affecting the manner in which legal rights can be exercised, will arise only in those cases where there exist considerations of a personal character between the

> shareholders which makes it unjust or inequitable to insist on legal rights or to exercise them in a particular way." (per David Richards J in Re Coroin Ltd (No.2) [2012] EWHC 2342 (Ch); [2013] 2 BCLC 583 at para [635])

135. The understanding is enforceable in equity because of its mutuality: the mutual relationship of trust and confidence, of a personal character, affects the conscience of each member equally. Almost by definition, if the majority (by voting rights) of the members are not bound by any such mutual rights or understanding, the company does not have the characteristics of a partnership. One can see that, in an exceptional case, the fact that a small shareholding may have devolved on someone 'outside the ring' ought not to affect the character of the company. In other cases, the shares may only be permitted to be transferred to someone who is a member of the class within the ring, so that the character of the company is unaffected. But these facts are far removed from the instant case.

136. Further, the notion of a quasi-partnership between certain members only of the Company, entitling them to manage the Company's business, will inevitably be likely to create difficulty as regards the minority shareholders. They are entitled to expect the Company to be run in accordance with its constitution, in the best interests of the members of the Company as a whole, not in accordance with rights and obligations to which they are not parties. This was the reason why in Fowler v Gruber [2010] 1 BCLC 563, Lord Menzies held that, on a transmission of a minority of shares to outsiders, a company that was of a quasi-partnership character necessarily ceased to be such, although he nevertheless held that the conduct of the respondent was unfairly prejudicial to the petitioner because the "founders' agreement" – which formed the basis of the original quasi-partnership – had been broken. In Re Ringtower Holdings plc (1989) 5 BCC 82 at 93, Peter Gibson J expressed scepticism at the idea that any quasi-partnership obligations could exist in circumstances that included the parties to the alleged understanding having only 11% of the issued share capital. But the decision in that case did not turn on the point, nor was it considered by the Judge in detail.

137. The Petitioners emphasise that the equitable considerations operate only as between shareholders as shareholders, and therefore do not derogate from their fiduciary duties as directors. That may be so in principle, but the kind of equitable rights alleged go beyond agreement on how voting rights will be exercised and supposedly confer rights to manage and be a director of a company. There is therefore an obvious risk of the rights of minority shareholders being adversely affected by such equitable considerations.

138. On the Petitioners' primary case, none of Mr Gulhati, Arrow, Veladail, Mr Shashi Shah, Verite, the Sarean trustees and Estera were party to the understanding and relationship relied upon. Admittedly, prior to 1993, that meant that, on the basis pleaded, a majority of shares were 'within the ring' but a substantial minority lay outside it. As soon as the banks' convertible preference shares were issued, the original shareholdings were massively diluted, thereby altering the character of the Company. The banks' shares – a substantial majority of the Company's ordinary shares – in due course became vested in Verite.

139. For reasons that will appear from the following sections of this part of the judgment, I do not need to decide whether, as a matter of law, a quasi-partnership, conferring the alleged rights can exist where there are some minority shareholders who are not party to the personal relationships on which the quasi-partnership status depends. That question must be decided in another case, where it is necessary to do so.

E. Conclusions on the primary quasi-partnership case

140. I must now address the evidence on which the Petitioners rely for the contention that there was from the outset, or by 1993 at the latest, a quasi-partnership as between the Singh members of the Company, or at least the male Singh members. The Petitioners rely on the (undisputed) family context in which the Company was created, particularly the cultural, Indian family context in which close relationships exist between all members of the family and the family operates as a single unit, living together and often running the family business together. The Petitioners contend that the Company was from the outset funded and operated by the family and family contacts, and that in return the Company funded their lifestyle.

141. There is no doubt that for a considerable period of time, including well after the restructuring in the 1990s, the Company was regarded by JS and the other members of the family as being run in the interests of the family as a whole, for their joint benefit. JS accepted that the share options were important "*so that the Singh family in particular should take back control of the family business*" and that the shares in the Jersey trusts were under "*family control*" and should be voted, where necessary, as a family holding. There was, no doubt, a relationship of trust and confidence between the Singh family members generally (until it broke down over the period 2000 to 2005), though not obviously so in the way that the Company was being run prior to the restructuring. Although HS became a director in 1986, it is common ground that he did not participate in the management of the Company until 1992 at the earliest, and it is common ground that BM Singh and Mrs Kaur, though directors and good sounding boards at home, did very little in practice in terms of management of the Company, particularly after the restructuring in 1993.

142. As part of the restructuring, the articles of the Company were changed. The new articles permitted a shareholder to sell or transfer his shares without restriction to privileged relations or family trusts, and otherwise to sell at any price that he could obtain, subject to pre-emption rights in favour of the existing shareholders. The express power of the directors to decline to register a transferee was removed. This relaxation indicates a move away from a closely controlled quasi-partnership type company.

143. A considerable part of HS's witness statement is devoted to establishing an unspoken understanding that, from the earliest days of the Company, all male Singhs would have the right to manage the Company's business as directors and all family members would be involved in its business. However, he also says that "*my parents told me later in various conversations over the years that Jasminder was responsible for the incorporation of the Company and they did not know at the time how the shares were split*" (para 23). This is more consistent with the Company's business being run by JS on the basis that the family expected it to be run for their benefit and they trusted JS to

do so. It is notable that, at about the same time, the new family home was purchased in JS's sole name. HS states that "*in keeping with the way that in my experience Indian 'business' families operate, the Company was intended to be a family company in which all members of the family would be involved*" (para 43) and "*it was always understood that I would work in the Company when I was older*" (para 44).

144. In cross-examination, HS said that – before he started to work for the Company in 1992 – although JS was the boss who made the decisions (including who would do what and who would have what) that did not mean that HS wasn't going to be involved in certain decisions, as he became older. HS said he understood that he was going to be involved with JS running the business, taking decisions within the family household.

145. HS asserted that his brother's keenness, manifested in various ways and on various occasions, for him to obtain a good education and the degree of a chartered accountant, were not for the benefit of advancement generally but in order to play a senior and active role in the family business. He understood from his parents and JS that on completing his education he would be joining the Company. He was told by JS, who sometimes drove him to Middlesex University when he was studying, that he needed to develop himself in order to take on responsibility – to be JS's number two, with the likelihood that he would one day take over. JS referred to him in that regard as being in the position of a 'Prince of Wales'. JS denied that he ever used that expression, but it is hardly likely to be something that HS would invent. He said that he had grown up with that assumption, fuelled by the discussions that he had had with his parents and with JS. By obtaining his accountancy qualification, he felt that he had passed the tests that his brother had set for him and was entitled to join the business. He did accept that his right to do so was subject to his demonstrating that he had the skills and ability for high management office and that, if he didn't show that, he would have some lesser role in the Company. But during his upbringing he never understood that he was to have a choice about his career: he was always going to go into the family business.

146. JS said that it was nonsense that the Singh family was a traditional Indian family where everyone works in the family business. All had their own interests and roles and anyone who wanted to participate in the Company on merit could do so. The family and the business were never regarded by him as being one and the same thing. There were no discussions at home about HS and his future role in the Company – it was JS's position, not his parents' position, that all members of the family could work for the Company if they had the right credentials to do so. JS said that there were never family discussions about HS's role in his presence, and that there was never a discussion in his presence at any time when it was suggested that HS might join the Company. Further HS had never discussed with him his possible joining the Company and never mentioned that hope while HS was growing up. JS said that he did not hope that HS would join the Company but if HS had asked he would have made it possible for him to work for the Company.

147. I had the distinct impression that JS was overstating this, when he gave evidence. I find that it was considered likely that HS would work for the Company when qualified, but that there was no obligation on him to do so and no absolute right for him to do so. It would have been the natural thing to happen, given the closeness of the family at the time; however nothing to this effect was expressly agreed.

148. HS accepted that he was only appointed as a director in 1986 so that there was someone trusted who could sign for the Company while the other directors were out of the country. HS said that he took that as a sign that he was going to be given more responsibility within the family after that. But he accepted that he did not attend any board meeting until he started working for the Company in 1992. JS said that, unlike Mr Batts, he decided to leave HS as an appointed director because he wished him to be a director and in case there was any problem with appointing him at a later time.

149. HS said that Mr Gulhati, who (through Veladail) had invested a further £5m in the Company in 1986, would have understood that HS was going to be joining in the business, and that he would have got that understanding "through conduct". I find that it is likely that Mr Gulhati would have expected HS to become involved in the Company at some stage, but that he would not have expected that HS would have an entrenched right to manage the Company's business in a way that he, Mr Gulhati, did not have.

150. A number of documents were put to HS in cross-examination as being inconsistent with his primary pleaded case and the account that he gave in his evidence in chief, namely that it was always understood by the family shareholders that the members of the Singh family – or at least the male members – would be entitled to be directors and involved in the management of the Company. These documents included the 1991 Shareholder Agreement. This is dated 3 June 1991 and is signed by all the then shareholders of the Company. It was made at a time when HS asserts that he had a right to be a director of the Company. It states that it replaces any prior agreement or understanding between shareholders, written or oral, and it contains an entire agreement clause. It expressly provides an entrenched position for Mr Gulhati as a director of the Company, but says nothing about an equivalent position for HS, or indeed anything about HS's claimed rights to be involved in the management and direction of the Company.

151. JS said that although he had charge of settling this document, with the assistance of Baker & McKenzie, he explained its terms to his parents and to HS at the time.

152. HS said that this Agreement was made in order to placate Mr Gulhati over a dispute about expenditure on Tetworth Hall and that it was really an agreement between JS and Gulhati. HS was unable to recall what he thought about it at the time but he believed that he would not have read it, or asked anyone to explain it to him, before signing it. He said that there was no meeting with Baker & McKenzie before it was signed, nor did he receive legal advice. He said that JS advised him to sign it, to calm down Mr Gulhati, as it was a critical time for the Company. JS accepted that the agreement was made as the price of getting Mr Gulhati to stop pursuing issues (including expenditure on Tetworth Hall) that might concern the banks at a time when the Company depended heavily on the banks' continuing support. JS said that there were no agreements or side agreements made at the same time as the 1991 Shareholder Agreement.

153. My conclusion on the alleged quasi-partnership at the time of the 1991 Shareholder Agreement is that there was no such quasi-partnership, and even if there was one it was necessarily ended by the terms of the 1991 Shareholder Agreement itself. Although the Company was undoubtedly a family company when it was incorporated, that in itself does not mean that its shareholders were quasi-partners. At the time of

its incorporation, JS was busy running the Edwardian Hotel for EHL, HS was a boy of 10 and the purpose of the Company was for the Singh parents to acquire and run a boarding house in place of the post office that they had sold shortly beforehand. In my judgment, it is more likely, in view of the non-involvement of JS and HS in day-to-day business of the Collingham Road property, that the business was originally run as a family business by (or principally by) BM Singh and Mrs Kaur, for the benefit of the family generally, but not on the basis that all four of them owed each other duties of trust and confidence as partners in the business. Unlike EHL, the Company did not have management shares conferring a right to manage the business; it only had ordinary share capital.

154. In any event, in 1979 Arrow and Shashi Shah invested at a significant premium in shares in the Company, as did JS, which resulted in Arrow and Mr Shah owning nearly 40% of its share capital. Both were appointed directors of the Company. HS was a 12-year old boy at this time. It is not suggested now by the Petitioners that Messrs Gulhati and Shah invested on the understanding that the Company was a family company in which JS and BM Singh and HS in due course had an entitlement to remain directors regardless of the wishes of the majority of shareholders. It seems to me to be implausible that the Singhs had that clear understanding between themselves but did not tell their investors about it.

155. In 1980, the Company acquired the Vohras' two-thirds share in EHL and Mr Gulhati and Mr Shah were appointed directors of that subsidiary too. Mr Gulhati had by then become a significant investor and shareholder, through his corporate vehicles. By 1986, the Company was already a very substantial undertaking. In that year, it acquired JS's one-third share in EHL and Veladail's one half share in Cleftfield, in consideration of the issue of further shares, as a result of which Arrow, Veladail and Mr Shah were owners of over 32% of the Company's share capital. It is not suggested by the Petitioners that those external investors were apprised of any fundamental understanding between the Singhs. None of these developments sits comfortably with the notion of the Company as a family company, operated by the Singh family for their own benefit, with an entrenched right for the Singhs only to remain directors and managers of the Company regardless of its articles.

156. By 1991, as previously explained, the Company was a very substantial commercial business, with a large, employed professional management team. Such a business is by its nature far from the model for a typical quasi-partnership, where there is personal management of the business by the shareholders based on trust and confidence between them.

157. Even if it were the case that an understanding of an entitlement to manage the business were capable of existing, as between certain shareholders only and not others, and if it did exist prior to 1991, it cannot have survived the 1991 Shareholder Agreement. This was an agreement made between all the shareholders expressly on the basis that all previous agreements and arrangements, written oral or implied, between the parties to the deed or any of them in relation to the Company or the matters referred to in the Agreement were deemed to have been cancelled, and that the Agreement contained the entire agreement between the parties or any of them. A quasi-partnership is also inconsistent with the banks owning 90% of the Company's share capital, by dint of their cumulative preference shares, which they did from 1993 until 1998. It therefore cannot be said that, in 1993, the Company was a quasi-

partnership in that there were equitable rights and obligations as between the Singh shareholders, or the male Singh shareholders, entitling all of them to manage the Company's affairs and be directors of the Company in the future, without limit. Such an understanding would have been nonsensical in 1992/1993, given the financial straits that the Company was in, given the huge majority shareholding of the banks as a result of the restructuring, and given the known fact that the banks had confidence in and support of JS alone at that time.

158. In my judgment, it was only JS's loyalty to, first, his family, and secondly to the other shareholders and the Company's creditors, that kept a role in the Company for the other family members at that time. It was not a matter of entitlement on their part owing to an overriding understanding that they should all be entitled to manage the family business.

159. Accordingly, I reject the Petitioners' primary case on quasi-partnership. The Company was not at any stage prior to 1993 a quasi-partnership and even if it was no equitable considerations of that kind survived the 1991 Shareholder Agreement and the 1993 restructuring.

F. The alternative case on quasi-partnership

160. The effect of the 1991 Shareholder Agreement and the banks' shareholding on the quasi-partnership argument were largely conceded by the Petitioners in their closing oral submissions. They nevertheless submitted that the family background and previous quasi-partnership binding the Singh family members (but not the other shareholders) had significance for later events. They contend that it is right to infer a new understanding between the Singhs, or alternatively between all shareholders, that the Singh adult males should have the right to be a director and senior manager of the Company. This is alleged to arise as a result of the basis on which the banks conferred options on the Jersey Trusts; the exercise of these options, giving back to the Singh family control of the Company in 1998, and the alignment of the Jersey trusts and future management of the Company by agreement between 1999 and 2000.

161. For the reasons given above, I do not agree that any of these subsequent events were coloured by the previous existence of a quasi-partnership because I consider that no such quasi-partnership came into existence. There was, however, admittedly a family context in that the Singhs and the English trusts as shareholders had previously enjoyed majority control of the Company and control of the board, largely through the shareholding and dominant executive position of JS. I accept that it was generally understood and assumed within the Singh family that JS was exercising his control of the Company for the benefit of the family as a whole, in that their livelihoods all depended on the notable success that he was making of running the Company. They, in turn, trusted him to look after the family. That is far from sufficient in itself to create a quasi-partnership as between family members – it is more redolent of the basis of the 'karta' claim advanced by BM Singh. However, the family understanding was honoured by JS during the difficult years of the 1990s and up to the time, towards the end of the decade, when HS began to challenge JS about his right to some of the Jersey trust holdings. I accept that that is capable of adding colour to what happened at that stage.

162. I turn then to the alternative basis on which the Petitioners now seek to advance their case on quasi-partnership. This was not pleaded with any particularity (though the case was pleaded generally so as to encompass the particular case now advanced) but has evolved as the evidence and arguments have developed during the trial. As I understand it, shorn of reliance on any pre-1991 quasi-partnership, it is essentially this.

163. When JS negotiated with the banks for the grant of share options and established the Jersey trusts in 1993, he did so on behalf of the Singh family, not solely for his own benefit. The 12 Jersey trusts were created in terms that catered for the Singh family as a whole to benefit from them. Accordingly, when in 1998 the options were exercised and the shares were converted to ordinary shares, the shares so held by the Jersey trusts were held for the benefit of the family – subject to appointment by the trustees – in approximately the proportions represented by the holdings in the Company prior to their dilution by the shares allotted to the banks. A memorandum of wishes made by JS in 1998, discussed and agreed with the family, showed that the shareholdings of the various trusts were to be kept as a single block for the benefit of the family.

164. Against that background, in 1999 agreement was reached with HS to give him a clearer right to control the shares held by the Herinder trusts. This was in return for his commitment to undergo further education and training with a view to becoming, in due course, JS's equal or successor as CEO of the Company. That agreement was enshrined in the 1999 memoranda of wishes and the 1999 revocable declarations. That amounted to an understanding reached between the Singh family members and Verite, or at least between the Singh family members, that HS had a right to remain a director of the Company and be involved at a senior management level, based on a relationship of trust and confidence and the family character of the Company at that time.

165. Thus, the Petitioners' alternative case appears to be that the equitable rights on which HS (and Estera) rely crystallised in about 1999, when it was agreed that HS would go to Harvard to undergo training for senior management and he did go. At that time, it is alleged that there was an understanding that HS would remain a director with a view to one day becoming CEO, such that JS and Verite could not in conscience have revoked that understanding on HS's return from Harvard at the end of 1999, or indeed at any later time.

166. The Petitioners do not rely on anything that happened subsequently to 2000 as giving rise to a quasi-partnership if one had not already arisen. They did not in terms abandon their alternative pleaded case that by 2009 *all* the shareholders had become aware of and had acquiesced in a quasi-partnership, however the argument that shareholders such as Shashi Shah or the Sarean Trust were aware of the 1999 understanding about HS's rights, or had entered into a similar understanding, is simply unproven. Mr Shah was not called to give evidence, nor were his trustees. Their state of knowledge is unknown. They were not apparently involved in any of the family discussions in 1999. Further, as I will show, the evidence does not establish that Verite, acting by Mr Machan or anyone else, had any knowledge of the 1999 understanding, either at the time or subsequently. There is nothing to which the Petitioners have been able to point, between 2000 and 2009, that would suffice to

create a quasi-partnership, whether binding on all the shareholders or on the Singh family members, if one did not already exist by 2000.

167. The relationship between JS and HS deteriorated in an increasingly public way during those years. Mr Machan witnessed some of the divergence of views at AGMs and heard something about it from Ramesh Shah in 2005. On HS's own case, nothing more was done to prepare him for succession; he says that he was marginalised on his return from Harvard in 2000 and increasingly so up to 2005. In those circumstances, it becomes much harder, indeed impossible, to conclude that as a result of close relationships of trust and confidence between the Singhs, a special obligation had come into existence after 2000 by which all shareholders were bound. There is nothing to which the Petitioners can point, as regards Verite's state of knowledge of such matters, prior to the appointment of Estera and Jemma as new co-trustees in December 2005.

168. In my judgment, the Petitioners were therefore realistic in focussing their argument in closing submissions on what happened between 1998 and 2000. What they say is that at that time HS's rights as a shareholder (and indirectly under the Herinder trusts) became linked to a clear understanding that he would be groomed to be ready to succeed JS as CEO, and therefore had a right to be involved in senior management and remain a director.

G. Factual conclusions on alternative case on quasi-partnership

169. The evidence as to the events of 1992 to 2000 is as follows. It concerns mainly the circumstances in which HS started to work for the Company; the setting up of the Jersey trusts by JS at the time of the restructuring of the Company; HS's developing role at the Company; the exercise of the share options and the memoranda of wishes; HS's concerns about his entitlement under the Jersey trusts and the agreement between JS and HS that was reached in 1999, leading to HS going to Harvard later that year. I review the evidence under paragraphs 170-200 below and then reach my conclusions at paras 201-213.

170. There was a dispute between HS and JS in evidence as to the circumstances in which HS started to work for the Company. HS said that JS positively wanted him to become involved, as it had always been intended that he should be. JS said that HS joined the Company because, in his mind, he had no other options at the time and was about to be made redundant. JS said that he was not pleased by HS's wishing to work for the Company and was put under parental pressure to allow it.

171. This was somewhat inconsistent with JS's own witness statement, at para 68 ("While I hoped that Herinder might one day show an interest in the business of the Company, it was far from a foregone conclusion in my mind that he would work in the business".) JS could not explain the inconsistency except by accepting that there was "a gap".

172. HS said that he was very tired on completing his final audit referral, having worked through holidays for his examinations as well as for the accountancy firm that employed him, and asked JS for a break, but that JS said when approached that HS was needed at the Company the very next day, to help to assist C&L prepare their report for the banks on the Company's affairs. He said that the prior conversations

with JS had been that he would join after having a couple of years' experience working elsewhere, after qualification, but because of the urgency of the situation he was needed immediately at the Company. I consider that HS's account is more likely to be accurate. It was envisaged that HS would in due course work for the Company; HS had in mind a good holiday first, but JS characteristically wished him to start immediately if he was going to do so.

173. According to HS, for the next year and a half JS and HS drove into work and back together, discussing the Company's affairs as they went. HS accepted that when he started working at the Company he did whatever was needed – whatever Mr Shah, Mr O'Connor or Mr Wason (the main managers in the finance department) asked him to do. Mr Iype Abraham, who joined the Company two years before HS, said that HS did odd jobs when he joined; he was part of the finance team but didn't have a specific role within the finance department; when financial reviews were held on a monthly basis, it was Messrs Abraham, Wason and Shah who would be present but not HS. Mr Abraham said that he and HS were friends and used to talk about the Company and work, in the car on the way home and sometimes in late night phone calls, particularly about the things with which HS was unhappy.

174. HS said that he formed the impression that he and JS would be working together as equals – as he developed his skills, not from day one, but that in due course they would become equals in the Company. HS said in cross-examination that in 1992 or 1993, in the midst of the Company's financial troubles and the attempt to restructure, JS had said to him that they were going to be "equal partners going forward". However, he accepted that it was perfectly reasonable for JS alone to be dealing with the banks about the rescue and restructuring of the Company in 1992-93 and reasonable for JS to say that he should be dealing alone with C &L. HS accepted that the banks could not have cared less whether BM Singh, Mrs Kaur or he carried on with roles in the Company as long as JS was in charge.

175. HS said that he did not have any detailed conversation with JS about how the restructuring and in particular the share options were going to work, or about the Jersey trusts. He accepted that the banks left it to JS to decide how he wanted to deal with the share options. He said that he didn't bother to find out about the trusts and did not read the C &L report to the banks. He was unaware that new articles of association for the Company were being put in place at the same time. He said that he signed the 1993 Deed terminating the 1991 Shareholder Agreement without reading it, trusting JS. This behaviour is of course quite inconsistent with the notion that HS was from the outset an equal partner in the business and is much more consistent with a family that trusted JS, as the businessman, to look after them all.

176. At the same time that HS was starting to work for the Company, JS was engaged in negotiating the restructuring, including the share options. JS accepted that the purpose of the share options was so that the Singh family could take back control of the family business. He accepted that this was the opportunity for the shareholders before the restructuring to work together in order to buy back the shares.

177. Mr Morley, who was representing the interests of HSBC in the negotiations, said that he did not negotiate with BM Singh, Mrs Kaur or HS. He said that he had no knowledge of any arrangement under which those shareholders would obtain further rights. Mr Morley and the other banks assumed from what JS told them that he would

"deliver" the agreement of the other members of the Singh family (whose agreement as shareholders was necessary because of the terms of the 1991 Shareholder Agreement). It was important to Mr Morley and the banks that it was JS personally who was motivated by the share options.

178. Mr Morley said in his witness statement (para 35) that it was of fundamental importance to the lenders that the new shareholders' agreement to be made in 1993 had absolute supremacy over any other agreement. He said that the banks had no knowledge of any other inter-family arrangement and desired to exclude any prior agreements. JS had told him that there was no other agreement between the shareholders other than the 1991 Shareholder Agreement.

179. JS said that when the Jersey trusts were being set up, JS discussed with his parents and brother the 4:4:4 split in the twelve trusts. He accepted that there were no detailed conversations to the effect that the trusts being set up principally for HS could be varied by JS in future, to exclude HS's interest if he felt like it. JS said that he told his parents that the Jersey trusts were being set up and that he was aiming for "maximum flexibility". He accepted that he also gave them to understand that HS would be looked after. The letter of wishes for HS's four trusts – unlike the letter for JS's four trusts – did not express irrevocable wishes that they were allocated to him. This was, JS accepted, so that he *could* allocate the benefit elsewhere. JS suggested that he would be surprised if he or Chamberlains or Ramesh Shah had not had conversations with his parents of HS about the trusts, as part of the process or saving the Company. In the absence of any evidence from Chandrika Shah or Ramesh Shah, I cannot accept that there were any such discussions involving Shah Dodhia or Chamberlains. I am satisfied that there were general discussions involving the parents and HS relating to the creation of the trusts, but I reject JS's suggestion that the extent of JS's control over the trusts was discussed with them. I am satisfied that JS did not tell them more than he felt that they needed to know and that JS felt that he was looking after his family as he considered appropriate.

180. Mr Wason said that after meetings with the banks leading up to the re-structuring of the Company, JS would come back to the office and unwind by telling him and others about what was happening. On those occasions, JS told Mr Wason that he was negotiating with the banks to protect the business. What lay behind the business – whether it was the family or something else – was down to JS, as far as Mr Wason was concerned. He did not agree with the suggestion put to him that JS was negotiating on behalf of himself and his family. He recalled JS saying that the banks did not want to pay a lot of salaries and expenses and wanted the family directors to be brought down to a level of pay that the banks would agree. He recalled JS saying that he was going to look after the family and felt from these discussions that JS didn't feel obliged to give HS a role.

181. In 1995, HS was made marketing director, working under Nick Smart, who was the sales and marketing director. Mr Mansi said that HS ran the marketing part of Nick Smart's department and had a small team of about 3 or 4 people under him. HS said that he attended senior management meetings and recalled David Batts and Joseph Adu falling out at one such meeting. Mr Abraham said that immediately after HS was offered the marketing position, HS came into his office, a little agitated, and

expressed the view that he had been offered the role because David Batts and Nick Smart were out to get him, and that this was a trap. Mr Abraham reassured him and encouraged him to take his opportunity.

182. HS said that he was taken aback when he discovered in about 1997 that he was not an equal shareholder in the Company through the Jersey trusts. He said that he was very disturbed by it. The reason given for this in his witness statement is that he "had assumed that Jasminder would keep to his word about being 'equal partners' in the business". This appeared to be a reference back to something said during the financial travails of 1992 and 1993 rather than to any more recent (or renewed) assurance. HS said that JS explained to him that the shareholdings had to be so, to keep the banks happy, and that that did not translate into any sidelining of him in the management of the Company.

183. Although he was only marketing director at the time and JS was CEO, HS said that JS assured him that he was to be groomed into a position of equality in terms of roles in the Company, with an intention to take over from him when needed. HS says in his witness statement that he was reassured by JS that he was to have an equal role in the management of the business: they were to be equal partners in respect of management. He did not say that this was discussed with JS at the time of the separation of his trust shareholding from JS's trusts. But HS had got the impression that he was going to "escalate up the chain", and he inferred that he was carrying on on that basis.

184. I am very doubtful about the accuracy of HS's recollection of these matters. It is inherently unlikely that JS would have spoken to HS in these terms at a time when the Company was starting to find its feet again and to contemplate buying out the banks. HS had only recently been promoted to marketing director, but had had little experience of senior management at that time. I have already found that some reassurance of a similar kind was given to HS at a very early stage in 1992 – to encourage him to take his work at the Company seriously, and by way of expression of brotherly affection and support at a very difficult time for the family. I am not persuaded that reassurances of equal partnership rights were made in the mid-1990s or later. HS's own life had changed, with his marriage in 1994 and then the birth of his first child in 1996. It is understandable in those circumstances that HS and his wife might have been asking themselves about the nature of HS's security as an employee of the Company. It was also the time when the share options were about to be exercised, bringing into focus the nature of the interests held by the Jersey trusts. I find that it is for those reasons that HS started to enquire about his entitlement under the Jersey trusts. Having enquired, HS was eventually provided with the relevant trust documents and did not find in them the comfort that he hoped to find.

185. In 1997, a new shareholders' agreement was made regarding the exercise of the share options. The Jersey trusts' options were exercised between 1997 and 1999. JS then signed memoranda of wishes addressed to Verite as trustee of the Jersey trusts on 3 December 1998. The first of these related to the management of the shares in the Company held within the twelve trusts. It expressed the wish that the holdings of shares held by all the trusts (including the English trusts) should be kept together, and not divided into smaller holdings. There was also a wish that, after JS's death, if the Company's value exceeded £100m the trustees should ensure that either the CEO or the Finance Director was independent of the Singh family. At the same time, JS

signed memoranda of wishes for the management of each of the individual trusts, including the four Herinder trusts, but these were subject to the memorandum of wishes relating to the management of the shares. The memoranda relating to the Herinder trusts expressed the wish that the trustees should consult JS during his lifetime on the management policy of the trusts (and HS after his death) but HS on any distribution of income.

186. JS accepted that the overriding memorandum of wishes regarding the management of the shares in the Company envisaged that all twelve trusts would manage their affairs collectively and for a common goal, namely to increase the value of the Singh shareholdings. The individual shareholdings vested in the English trusts and the Jersey trusts were to be managed together, not disposed of or dealt with separately. He said that was agreed by JS, HS and their parents. Although it was contemplated in the letters of wishes that a Singh family member should be either CFO or CEO after the death of JS, JS did not accept that that would necessarily be HS: it would depend on his ability. HS said, in relation to this provision (which was in the December 1998 and the November 2000 letters of wishes) that he was "always under the assumption that I would have a role within the company at a senior level" and that JS would need someone from the family to perform an active role in the business after he ceased to work.

187. The documents that came into existence in 1998 and 1999 were intended to provide comfort to HS that his four trusts were effectively ring-fenced from being appointed in favour of anyone other than a member of his immediate family. These documents were created by Chamberlains (Ramesh Shah) and were seen and approved by all family members. However, the memorandum of wishes of December 1998 did not indicate that HS might be in a position to give directions or to express wishes to the trustees, whereas there was such a provision for BM Singh and Mrs Kaur to do so. It was suggested to HS that if his account of expecting to be an equal partner in the Company's business with JS was correct, he would have objected to the terms of that memorandum when he saw it. His answer was that he was only focused on the effective ring-fencing of his shareholding, not on questions of who should in future be able to give advice to the trustees, and that at the time family relations were still good and they were all living and working together for the good of all. He considered that he was not mentioned in the 1998 memorandum because that was not the purpose of the discussions at that time; nevertheless, the understanding that HS was going to play a prominent role in the Company's affairs was still there. He felt that the fact that JS agreed to send him to Harvard Business School for a 9-week course in management development in autumn 1999 supported that understanding. HS regarded himself as being groomed to be in an equal position with JS, with the intention of taking over from him if and when necessary.

188. HS accepted that no issue relating to senior management of the Company was raised by him at that time with his solicitors, Mundays, who were advising him in connection with the trusts arrangements that were then being put in place.

189. At a meeting with George Machan of Verite on 1 February 1999, all members of the family were present. This was the first time that HS had met Mr Machan. Mr Machan reassured himself that all were consenting on an informed basis to the new trusts arrangements, including the 1 February 1999 memorandum of wishes for the Herinder trusts. HS said that he did not raise there the question of his management

expectations "because it was inferred I would have a role in the business going forward": it was not at that time a concern for him.

190. HS accepted that nothing was said by him or anyone to Mr Machan during the meeting about any promise or understanding of HS's role. HS accepted that there was no way in which Mr Machan would have understood that there was any agreement, issue or problem in that regard.

191. After this process of separating out the Jersey trusts was completed, Chandrika Shah of Shah Dodhia wrote to HS on 11 June 1999, no doubt on JS's instructions, to obtain confirmation that he was satisfied with everything that had been done. The letter said:

> "As you are aware, we have had very lengthy discussions in relation to the Letters of Wishes sent by Jasminder to the trustees in respect of all the trusts, including in respect of EGL shares, the Revocable Deeds which have now been executed, and the draft Letter of Wishes (not yet signed) relating to conditional distribution to you of monies for purchase of a principal residence.
>
> Jasminder has asked me that you confirm to me in writing that you are now satisfied with all the documentation that has been put in place and that all of the matters relating to the trusts have been resolved to your satisfaction, and that there are no unresolved issues, except appointment of additional or new trustees in due course."

192. HS's reply was in the following terms:

> "I am more than happy with your succinct summary of the current status of the Trusts, and I am pleased that all my concerns over the Jersey Settlements, and the EGL shares they hold, have now (or at least will shortly, by the signature of the last documents) been satisfactorily resolved.
>
> Through the respect they have shown for my wishes, Jasminder and my family has helped to make this process simple and painless. You and your firm have contributed to that. I thank all of you, and in particular Jasminder, unreservedly."

193. HS confirmed in evidence that that represented his view at the time, though he said that it was written in a spirit of mending fences. Satisfaction was also confirmed by Mundays, on behalf of HS, who stated that the arrangements dealt satisfactorily with all matters that HS had raised with Mundays. Although the family relationships were still on a sound footing, there had been some disagreements and tension as a result of his pursuit of ring-fencing of his share of the Jersey trusts. A meeting with Shah

Dodhia relating to the Jersey trusts then took place on 23 June 1999. A formal note of that meeting kept by Shah Dodhia records HS as saying that:

> "…he had only wanted to clarify his position when the whole trust issue started and he was initially happy with the 6% of total equity he was seeking and he was very grateful that JS had been generous and allocated certain trusts to him irrevocably. He said he was never seeking 50% as JS thought and asked his dad to confirm this. Mr BM Singh said he had never asked Herinder and was not aware ever that Herinder was seeking 50% and JS was just paranoid in his thinking."

194. This note, if accurate, does not sit easily with HS's case that he always understood that he was to have an equal share of the Company with JS. It is evident from the contemporaneous documents that HS emerged from the negotiations with substantially more than he believed he was entitled to, and that JS's generosity was recognised. That could not be so if HS believed himself to be a 50-50 partner with an entitlement to manage at a high level and eventually to succeed JS as CEO of the Company. When pressed, HS said that he thought Chandrika Shah's note was wrong in suggesting that he was initially happy with 6%. However, Mr Abraham said that from his memory of conversations with HS at the time, HS was very happy and recognised that JS had been very fair and generous to him.

195. HS then went off to Harvard. The Company had prepared a sponsoring statement for HS. It described the various roles that HS had had and that it was envisaged that at some future date he would take on the role of CEO of the group. JS described that as an "aspirational goal" subject to HS proving that he was capable of taking such responsibility but accepted that he approved the statement before it was sent to Harvard. He accepted that the content of the statement was made known to HS, to encourage him. The content of the statement was derived from comments garnered from the senior management team by JS's secretary.

196. JS accepted that sending HS to Harvard was part of a process of helping him to develop and possibly in due course to be ready for the CEO role, and that that aspiration was shared with HS at the time. JS accepted that he must have discussed the objective with HS himself, from 1998 onwards but not before then. He felt that they were tied up with the issue of ringfencing the Herinder trusts. Going to Harvard to prepare himself for a long-term position as a senior executive of the Company was part of the future for HS that was envisaged in 1998 and 1999, and JS and HS both operated at that time on that basis.

197. When he came back from Harvard, JS noted that HS appeared to have learned well from his experience. At that stage, he said that it was a given that HS would be a long-term director and executive of the Company, but not a given that he would become CEO. However, HS discovered – for the first time (he says) by an email from JS to the senior management team in April 2000 – that he was no longer to be marketing director but was to be put in charge of exploring non-core opportunities. JS said that he thought that HS primarily wanted to focus on non-core work in IT and internet developments, but also to have some very low key involvement in the core business. He denied that there was no consultation with HS, though it seemed to me

that this referred only to listening to HS's wish to do non-core work rather than consulting him on taking away the marketing director role.

198. Although HS says in his witness statement that he remonstrated with JS about it, in the witness box he said that they only had a passing conversation about it and that he (HS) simply got on with his new job. Importantly, HS didn't then raise with JS the issue of equal roles. In his witness statement, HS says (para 145) that he saw the new role as a relegation, but in cross-examination he said something different, namely that his concern was that he wasn't going to be involved in the core activities at all. HS said that by 2000 he was concerned that JS was not honouring the agreement and understanding about his equal role, whereas in 1999 he was not so concerned.

199. Despite his professed unhappiness about his status, HS countersigned a revised memorandum of wishes by JS in November 2000 so as to subject the Herinder trusts to the relevant wishes. The 2000 memorandum contains an express wish that after JS's death BM Singh and Mrs Kaur should remain directors and employees of the Company. It says nothing about HS's position. It was put to HS that the wish was pointless, as regards BM Singh at least, if - as a male family member - it was clearly understood that he had the right to be a senior manager and director of the Company. HS thought that the premise for the revised letter of wishes was his parents' feelings of vulnerability, but he did not otherwise explain how the memorandum accorded with his case about his own entitlement. HS did not raise at the time the question of any entrenchment of his position as director, or as successor to JS, when he countersigned the memorandum.

200. My findings about the alleged understanding between JS, HS and their parents (and possibly Verite) that HS should be entitled to be a director and senior manager of the Company are these.

201. First, I do not accept that there was such an understanding before or from the outset of HS's employment by the Company in summer 1992. Although there may well have been an assumption or expectation on the part of the Singh parents and HS himself that HS would eventually work for the Company, there was no agreement between JS and HS and their parents to that effect. JS would not have stopped HS from working for the Company, and it was up to HS to decide whether he did so, though JS would have preferred for HS to go elsewhere first to gain experience. When HS asked to join, with support from his parents, but hoping to take a long break first after completion of his accountant's training, JS required him to start work straight away without a holiday.

202. Second, during the restructuring of the Company, HS played no substantial part. He worked as directed by others in the accounts department, helping to produce figures that would then be used by JS in his negotiations. HS and the Singh parents did not know the detail of the negotiations; they were content to leave it to JS, though they provided moral and family support throughout the arduous process. During the difficult months of the restructuring negotiations, JS probably did say to HS words to the effect that they would go forward as equals, and that HS would be "his Prince of Wales". I accept HS's evidence that this expression was used by JS on occasions. Both expressions were probably used in the spirit of expressing solidarity between the brothers during the difficult times, and to encourage HS in return for his support of JS. There was, however, no specific agreement made that the shareholding in the

Company or the management of its affairs would be shared equally between them, and I do not find that HS thereafter had a belief that he was entitled to an equal shareholding or an equal management role.

203. Third, JS negotiated in good faith with the banks to secure the share options for the benefit of the Singh family as a whole. He set up the trusts with the benefit of tax advice from Ramesh Shah at Chamberlains, who was the only person other than JS who knew the detail of the trusts and the negotiations. HS and his parents knew nothing about the terms of the trusts at the time nor about any allocation of the share options, other than there would be discretionary trusts used for tax reasons to benefit them all. They were content to leave it to JS to sort it out and they relied on him.

204. Fourth, the trusts were drafted with a view to giving JS maximum flexibility about how the beneficial interests under them could be appointed in future. JS did not seek to replicate the previous proportionate shareholdings in the Company (prior to the issue of the banks' preference shares), but he did have in mind that "once the monkey is off our backs", as he put it, there were other family members who had a right to shares in the Company. He did not give any assurance or promise to any other family member about how benefits under the trusts would be allocated and had no intention of doing so. He wished to have such matters in his control, though at that time he had no intention of excluding members of his family.

205. Fifth, although the options and the shares derived from them were intended by JS to be held in a broad sense for the benefit of the Singh family, this was only to be achieved under the mechanism of the discretionary trusts, not on some other basis. There was no pre-existing agreement or understanding about this. Accordingly, Mr Machan of Verite was not told by JS or by anyone else of such an agreement or understanding prior to, at or for years after the 1 February 1999 meeting at Heathrow.

206. Sixth, so far as JS was concerned, once a family member had joined the Company he was entitled to remain in his position provided that he did not misbehave or misconduct himself, just as with any other employee. He could not be dismissed on a whim, and as an employee was entitled to participate in the business. But this was not expressly discussed and there was no agreement between JS and HS that he was unremovable as a director. Progress within the Company was on merit only.

207. Seventh, once HS had joined the Company, JS took particular care to advance him within the Company and give him a range of experience. This was in the hope that HS might progress to the top. JS probably shared his aspirations in this regard with HS, but would have done so on the basis that HS had much to achieve if he was to fulfil that hope and that his progress was subject to his capability to perform any given role.

208. Eighth, in 1998 and 1999 HS would have been seen by JS as the likely successor to him. HS was 16 years younger than JS and at that time the only other adult male of working age in the family. In the 1990s, JS was conscious that if anything happened to him, HS would be the only person within the family able to take over the Company. His own son, Inderneel, was only a boy. That viewpoint is reflected in the terms of the nomination form for HS to attend Harvard Business School, which JS signed and which spoke of it being envisaged that at some time HS would take on the role of CEO. However, the very reason why JS wanted him to attend the course there was

that, as yet, HS was not yet qualified for such a role. JS accepted that he would have shared this aspiration with him at that stage.

209. Ninth, the ring-fencing of the Herinder trusts effected by the 1998 memorandum and the 1999 revocable declaration – which had the effect of giving HS 22% of the Jersey trusts' holding – was probably discussed and agreed between JS and HS at the same time as discussion about HS's future and JS's wish that HS go to Harvard, to prepare for a senior, long-term position in the Company. HS's acceptance of JS's wishes in that regard would have been at about the same time as the final deal on the ring-fencing of the Herinder trusts. JS's instinct and Chamberlains' advice was not to create the potential for a separate minority shareholding, but JS was willing to give HS the security that he sought provided that HS was serious about preparing himself for a senior management role in the Company.

210. Tenth, at that time, that is what JS genuinely envisaged and wanted to happen, but it was subject to HS proving that he was suitably qualified and able to handle a senior management role. In my judgment, JS shared his hopes and wishes with HS and between them there was something that could fairly be described as an understanding that, subject to proving himself by performance, HS would have a long-term role as a director and senior manager of the Company, though not any particular role and certainly not necessarily as CEO. Whether or not he proved suitable for that role remained to be seen, and in view of some of the comments on HS's Harvard application there were clearly real doubts in JS's mind. However much at that time JS wanted HS to prove himself up to it, the understanding with HS was qualified in the way that I have described, not a ticket for life on the board of the Company.

211. Eleventh, although BM Singh and Mrs Kaur would have known (and did approve) of the proposal to send HS to Harvard for further training, there was no specific discussion with them about what JS had in mind for HS in future, much less any agreement or understanding with them that HS would have the right to be a director and to become a senior manager. There is no persuasive evidence that this was discussed with them. If it had been, there would have been no obvious reason for the Singh parents to make their further declaration letter dated 11 April 2001 in favour of HS. By this time, JS was no longer in the habit of discussing everything with his parents: he was running a business with a substantial professional management staff and independent directors, with a turnover of about £80m and making an annual profit before tax of £15m. JS was very much in control of the operation of the Company and BM Singh and Mrs Kaur had no substantial part to play by this time.

212. Twelfth, the understanding reached between JS and HS about advancement of HS in the Company and his long-term position in it was not a matter that was discussed at all with Verite, or of which Verite was made aware at the meeting of 1 February 1999 or subsequently.

213. Accordingly, in my judgment, there was no agreement or understanding prior to about 1999 on which the Petitioners can rely. An understanding was reached between JS and HS in 1999, pursuant to which HS would have the chance to prove himself capable of growing into one of the top management roles in the Company, and possibly one day become CEO. It was implicit in that, though not expressly discussed or agreed, that HS would remain a director of the Company for so long as he was still being considered for such a role. That no doubt gave rise to a moral obligation of JS

to honour his agreement to give HS the opportunity, assuming that HS went to Harvard and applied himself appropriately on his return. But there was no mutuality about this, such as to create equitable considerations between JS and HS (much less any others) as shareholders. The Company did not become a quasi-partnership company as a result of JS's and HS's understanding. It was by that time a very successful, very large business with a substantial cadre of professionals (unrelated to the Singhs) managing the business. In this context, I find it impossible to conclude that an understanding reached between two directors and minority shareholders, of which the majority shareholders were unaware, created any kind of quasi-partnership relationship. Indeed, for reasons I have previously given, it makes little sense to talk of a quasi-partnership of any kind in that context. What there was an agreement reached between two family members, binding in honour only.

H. Legal conclusions on alternative quasi-partnership case

214. Even if there were enforceable equitable considerations affecting JS and HS as shareholders, the understanding that they reached is not of itself sufficient for the Petitioners' purposes, for two main reasons. First, it is an understanding that is qualified, in the way that I have described it above: there was no absolute right for HS to remain a senior manager and director. Second, it was not an understanding to which Verite was a party or of which it was even aware. It was Verite and Jemma who, in July 2009, used their rights as majority shareholder (as joint trustees of the Jasminder trusts) to remove HS as director of the Company. Jemma was appointed co-trustee on 13 December 2005 and for these purposes the position of both co-trustees can be equated with that of Verite, which had been trustee from 1993 to 2005. Verite had an interest as trustee in the options and the shares derived from the options well before the understanding reached between JS and HS. Verite as trustee owed duties to its beneficiaries, who were a wide class of potential beneficiaries (in existence and unborn or unidentified) under discretionary trusts. Verite was not merely a nominee for JS, however much regard it chose to pay to the wishes of JS.

215. Verite was not itself bound by any understanding reached between JS and HS, of which it was unaware. Even if (contrary to the conclusion that I have reached) JS was subject to equitable constraints on his rights arising from that understanding, JS did not have power to remove HS as director of the Company; only Verite and Jemma did. Importantly, there has been no allegation that JS and Verite/Jemma conspired by lawful means to cause HS harm. So the Petitioners cannot implicate Verite/Jemma by that means.

216. To try to get round that difficulty, the Petitioners have advanced two alternative arguments. First, that the Jasminder trustees are subject to equitable considerations, by reason of having received their share options gratuitously as trustees in the context of the evident relationship of trust and confidence between the members of the Singh family.

217. There seem to me to be many difficulties, legal and factual, with this argument. It is sufficient to note that the share options were granted to Verite by the banks over their convertible preference shares in 1993 and then exercised by Verite for valuable consideration in 1997 and 1998. The convertible preference shares in the hands of the banks were not subject to any equitable constraint, and even if they were Verite is a bona fide purchaser of the shares for value without notice of any such rights.

Moreover, on the findings that I have made, no equitable rights capable of binding JS or anyone else could have come into existence before 1999, by which time Verite was already the owner of the shares. When the 1999 understanding was reached, Verite had no notice of it.

218. In any event, for a shareholder's rights to be affected by considerations of the kind alleged, there must be a direct personal relationship or arrangement between the shareholders, so that the conscience of each shareholder is affected by the rights that appertain to it: see Re Coroin Ltd (No.2) [2013] 2 BCLC 583 at 738g-h and 748a. That is the nature of the equity that arises in Ebrahimi type cases, where there is between the shareholders in question a mutual trust and confidence and an agreement or understanding of a right to manage and direct the affairs of the company. It is not a question of someone acquiring property subject to existing equitable rights over it, much less – as the Petitioners seem to suggest in their written closing submissions – someone who already owns the shares subsequently obtaining enough knowledge (or having sufficient opportunity to acquire that knowledge) about equitable considerations that affect others. Moreover, there is no mutuality as between Verite and HS such as to support such equitable rights: Verite is specifically absolved from any requirement to participate in the management of the Company by the terms of the trust deed and no one suggests that it has a right to do so.

219. The second argument is that relief should be granted against the trustees as well as against JS, given that they were complicit in JS's unconscionable desire to remove HS. This is a broad argument going to the relief that should ultimately be granted for any unfairly prejudicial conduct established. I shall have to return to it in connection with the allegations of breach of fiduciary duty and the investigation of the Winchfern and Expotel matters. What I say here is limited to the question of relief if it is assumed, contrary to my conclusion, that HS had equitable rights as against JS that entitle him to remain a director of the Company.

220. In my judgment, the argument that in such circumstances relief can be granted against Verite/Jemma for unfairly prejudicial conduct cannot succeed. Verite/Jemma are not merely the nominees of JS, acting on his behalf. The argument that relief can be granted against the trustees in these circumstances involves accepting that two parties, neither of whom can be individually liable for unfairly removing HS, become liable because each agrees or works with the other to do the act in question. In the absence of any plea of conspiracy, that cannot be sustained. JS cannot be liable for the removal of HS (except as an accessory) because JS was in no position to remove HS: only Verite and Jemma could do that by virtue of their majority shareholding. Verite and Jemma cannot be liable for the removal of HS because their rights under the Company's constitution to remove HS as a director were unfettered by any equitable constraint. JS therefore cannot be liable as an accessory to a removal by Verite/Jemma. It matters not that, as the Petitioners contend, JS and the Jasminder trustees have taken a common line in furtherance of their common interests.

221. The Petitioners seek to rely on F&C Alternative Investments (Holdings) Ltd v Barthelemy (No.2) [2011] EWHC 1731 (Ch); [2012] 3 WLR 10 as establishing a principle that one may look at the business realities in deciding whether relief should be granted against a person for unfairly prejudicial conduct. They say that the reality is that Verite/Jemma were doing JS's bidding. In my judgment, that case is addressing a different question, namely whether a person may be held liable for the

unfairly prejudicial act or omission of another, absent a relationship of agency. The answer is that the facts of a particular case may warrant relief being granted additionally against a person who was sufficiently implicated in (or who benefited from) what was unfairly done. In that case, Sales J held that Holdings was liable, as being the corporate member of the LLP responsible for the acts held to be unfairly prejudicial to the interests of the petitioners. The question then was whether F&C should also have been held responsible for the unfairly prejudicial conduct of Holdings that had already been proved to exist.

222. There is no doubt that a person who was not the direct instrument by which the unfairly prejudicial act was committed may properly be joined as a respondent to a petition and may be held liable to remedy the consequences of the act. One should not be over-analytical in looking at where responsibility lies for an unfairly prejudicial act: see also Scottish Co-operative Wholesale Society v Meyer [1959] A.C. 324; Apex Global Management Ltd v Fi-Call Ltd [2013] EWHC 1652 (Ch); [2014] BCC 286 and Re: Tobian Properties Ltd [2012] EWCA Civ 998; [2013] Bus LR 753. But here the Petitioners are seeking to use matters affecting JS to change the character of what was legitimately done by Verite/Jemma. As I have said, I shall have to return later in this judgment to the question of whether any relief should be granted against Verite/Jemma in respect of unfairly prejudicial conduct proved against others.

I. The position of Estera

223. A further difficulty for the Petitioners is whether Estera can complain that its interests as shareholder were unfairly prejudiced by the removal of HS. Given that Verite was not involved in the 1999 discussions between JS and HS that give rise to an understanding between them about HS's rights, it is difficult to see how Estera can contend that it has a right for HS to remain a director and senior manager of the Company. Recognising that difficulty, the Petitioners do not seek to put their case in that specific way. They contend, more broadly, that it is sufficient if the removal of HS is conduct that is unfairly prejudicial to Estera's interests as shareholder.

224. There appear to be two arguments here. First, the Petitioners contend that it was sufficient on the basis that Estera's interests were best served by having a representative, HS, on the board. Secondly, they contend that the interests of Estera include the interests of its so-called principal beneficiary, HS. As a matter of authority, the interests prejudiced may include the interests of a person for whom the shareholder holds as nominee: Atlasview Ltd v Brightview [2004] BCC 542 at [37], [38]. That is readily understandable. The real shareholder interest is that of the true owner. However, the Jersey trusts are discretionary trusts and are not nominees. On orthodox principles, it seems very difficult to equate the interests of one only out of a broad class of discretionary objects with the trustee's interests. HS had not been appointed to any interest under the Herinder trusts.

225. On the first argument, the question is whether Estera's interests as shareholder have been unfairly prejudiced by the removal of HS. Assuming that it was unfairly prejudicial to HS himself – because Verite/Jemma was in some way bound by HS's right or are otherwise to be held responsible for the wrong of HS's removal, or both – it does not follow (unless one entirely disregards the legal personality and effect of the trusts) that the removal of HS as a director was contrary to Estera's rights or otherwise unfair to it. Estera was not a party to any understanding between JS and

HS. Estera had no legal or equitable right, as shareholder, to have an appointee on the board. The removal of HS therefore did not unfairly prejudice its interests as shareholder because it had no such right.

226. On the second argument, it is not obvious why it suffices that the removal of HS was unfairly prejudicial to one of the discretionary beneficiaries of the Herinder trusts, even a beneficiary to whose wishes the trustees are requested to have regard.

227. The Petitioners rely on a decision of Robert Walker J in R&H Electrical Ltd v Haden Bill Electrical Ltd [1995] BCC 958. In that case, a minority shareholder with a right to be involved in the management of the company was removed as a director. The shareholder had arranged for another company in which he was interested to provide the company's working capital by way of loan. A substantial part (but not all) of the prejudice suffered by the shareholder was in relation to the non-repayment of the loans. The Judge held that, on the facts, the procurement of the loan capital was part and parcel of the shareholder's arrangements to have shares in the company and so the prejudice in that regard could be taken into account, both in establishing liability and formulating the necessary relief. He held that, as a matter of principle, the court should take a broad view of what could properly be characterised as the interests of the petitioner as member of the company. The Judge's approach was approved by Lord Scott of Foscote, delivering the opinion of the Privy Council in Gamlestaden Fastigheter AB v Baltic Partners Ltd [2007] UKPC 26 [2007] 4 All ER 164 at [30], [31], where the point was noted (by way of contrast with the case under appeal) that in R&H Electrical the shareholder suffered some loss as member of the company and some loss as a member of the loan creditor.

228. That principle does not really address the difficulty that the Petitioners face here. This is not a case where Estera has suffered prejudice to its interests as a member of the Company and other prejudice to other interests, which was the position in R&H Electrical. It is a case where Estera may have suffered some prejudice to its interests as a member of the Company, through having lost a friendly representative on the board, but not unfairly so. HS was not removed in breach of any rights that Estera had, but was removed pursuant to the exercise of Verite/Jemma's rights under the Company's articles. Estera therefore did not suffer prejudice unfairly, since as a minority shareholder it had no right to have a friendly representative on the board of the Company.

229. It is only if it can properly be said that in some way Estera suffered the unfair prejudice suffered by HS that Estera can legitimately complain under section 994 that the Company's affairs have been conducted unfairly prejudicially to *its* interests as member. There is no authority drawn to my attention for the proposition that a trustee shareholder may rely in that regard on prejudice unfairly caused to someone who is a member of a class of discretionary beneficiaries under the trust. Such a conclusion seems to me to be contrary to principle and quite different from the case considered in R&H Electrical.

230. Accordingly, were it necessary for my decision, I would have held in any event that Estera could not itself rely on the removal of HS as director as unfairly prejudicial conduct.

J. Termination of any equitable obligations

231. The next question, which again does not strictly arise on my conclusions, is whether any quasi-partnership relationship was terminated by HS's letter to JS dated 17 January 2006. I assume for the purposes of addressing this question that I had concluded that the understanding reached between JS and HS gave rise to equitable considerations under which JS and Verite were bound, subject to proper performance by HS, to allow HS to continue in senior management and be a director of the Company. Unless that quasi-partnership relationship was terminated before July 2009 (or HS's removal can be said to have been deserved and so not unfair to him), Verite/Jemma's act of removing HS on 22 July 2009 would then have been unfairly prejudicial to HS.

232. For these purposes, I remind myself that the essence of a quasi-partnership, as explained in the Ebrahimi case in particular, is that the company in question has not just corporate personality and a constitution but also scope for personal obligations and rights binding the shareholders in equity, which are based on a relationship of mutual trust and confidence and an agreement or understanding that each (or some) shall have the right to participate in the management of the company's business. Accordingly, if the personal obligations and rights, or their substratum of mutual trust and confidence and equal participation, are deliberately and permanently renounced by a member, he cannot thereafter expect that equity will allow him to hold the other members to their equitable obligations.

233. Moreover, the understanding reached between JS and HS was not open-ended. HS was not entitled to be a director and senior manager of the Company come what may. He was entitled to the opportunity to prove himself to be a capable senior manager (and possibly CEO at an unspecified time in the future), but this, and the right to remain a director, was subject to proper performance of his functions. Accordingly, the letter of 17 January 2006 has to be considered in its factual context, and the relevant question is whether it and any further communications or conduct associated with it amounts to a deliberate and permanent renunciation by HS of the equitable rights and obligations arising from the 1999 understanding reached with JS.

234. The context in which the letter was written was one of increasing discord between the brothers and open discussion about HS leaving the Company. It was not at that time a relationship that one would characterise as being one of mutual trust and confidence at all. In July 2005 JS had made HS an offer to be bought out of the Company. Its terms are unknown because the letter was written without prejudice – in itself an indication of the state of the relationship. In August 2005, JS had suggested that if HS was to stay with the Company he had to be truly committed to it and improve his conduct. On 10 November, there had been the incident with the tape recording of the private family meeting and angry correspondence ensued. (Oddly, in September, HS's salary had been significantly increased, though this was really overdue from an independent report on directors' salaries prepared in 2004.) In December, Mr Hart had sought to encourage HS to leave and made disparaging comments about his value to the Company.

235. The 17 January 2006 letter continued the sequence of letters about the tape recording and HS's reprimand by the director of HR, Beverley Stewart. It was written, against the background rehearsed above, in a carefully considered style, with the benefit of

legal advice. It is not the product of uncooled anger or uncontrolled emotion. It is clear that careful thought had been given to the letter by HS over the Christmas break, as it says.

236. In my judgment, the letter purports finally to bring to an end friendly and co-operative relations between HS and JS at the Company. It accuses JS of failing to give effect to an understanding about HS's right to equal participation in management (though one allegedly based on BM Singh's wishes rather than the understanding reached between HS and JS in 1999) and of treating HS as just another employee. It states that HS has no long-term future at the Company on the basis envisaged, and that he should have the opportunity to make his own way in life outside the Company. It states that he has reached the end of the road for their working together but that he will go on "for the moment" as a director; and that there is no point in seeking to agree a role for him in the Company because he would not trust JS to honour it in the future. It ends by stating that JS's conduct has driven the family to realise that they are going to have to rely on what rights they have. It holds out no olive branch.

237. This letter is in my view an indication to JS that although HS will temporarily remain a director (i.e. he is not to be taken as resigning), he had no intention of continuing to work with JS on the basis previously envisaged because he could not trust JS to honour any role that was given to him. There was therefore to be no further proper performance of HS's duties as a senior manager of the Company.

238. Following the letter, HS sought to inspect documents held by the Company, with a view to collecting evidence for his legal claim. JS's reply, when it finally came, was conciliatory and did hold out an olive branch, but HS's response was implacable, accusing JS of being insincere in suggesting that he wished to help HS. Despite a further olive branch held out by JS, it seems clear that HS did not resile from his statements in the 17 January 2006 letter. He did continue to attend board meetings, which was consistent with what he said in the letter, and he was active in the protection of his own interests in those meetings. The communications between JS and HS thereafter took place between the Jersey lawyers for each side and in without prejudice negotiations for a separation of their interests.

239. A repudiation of an agreement or understanding made in haste, repented over at leisure and in due course withdrawn is not fairly to be characterised as a renunciation of equitable rights and obligations arising from the agreement or understanding. Had HS accepted one of JS's olive branches and sought to restore the relationship, in particular to perform his management duties, it would have been wrong to conclude that the understanding made in 1999 had been brought to an end, or that HS could no longer hold JS to the agreement. However, in my judgment HS's letter of 17 January 2006 was and was intended to be final as a renunciation of any relationship of trust and confidence. The assertion that he would stay on for the time being as a director is not a reservation of all his rights but an indication that he was not (yet) resigning as a director.

240. There is no evidence of any attempt by HS to withdraw subsequently from his statement that the end of the road had been reached and that he could not work further with JS (although in fact HS did not give up on working at the Company thereafter). On the contrary, the parties thereafter were on a litigation footing, primarily in Jersey in relation to the non-resignation of Verite from the Herinder trusts, but also in

relation to the threatened section 459 petition. The continuing without prejudice negotiations were intended to effect a consensual separation of HS from the Company. In the end (in November 2008 or thereabouts) the negotiations came to nothing, though it is apparent that on various occasions agreement was nearly reached. An agreement in principle for a de-merger caused HS to wish to scrutinise carefully the values attributed to particular hotels in the 2007 accounts, which caused friction in the June 2008 board meeting. At no time after 17 January 2006 did HS seek to assert an entitlement to a position in senior management. He attended board meetings because he remained a director, until July 2009, and wished to protect his indirect interests under the Herinder trusts.

241. As will be seen in Part III of this judgment, in June 2008, when HS declined to approve the Company's accounts, Mr Morley wrote to him explaining how serious a default on the banking covenants would be and that the shareholders might have to consider removing HS as a director. At the time, HS did not respond by asserting that he had a right to remain a director. When asked in cross-examination how he felt about Mr Morley's threat, HS did not say that he was shocked because he had a right to be a director: he said that legally the Jasminder trustees had the right to remove him, but that he never thought it would happen. When in July 2009 HS was summarily removed as a director by Verite and Jemma, HS did not protest that they had no right to do any such thing. It took 2½ months for HS's solicitors, after a consultation with Counsel, to write alleging that the removal was unfairly prejudicial conduct.

242. Accordingly, had I reached the conclusion that JS and Verite/Jemma were bound in equity by the 1999 understanding reached with JS, I would have held that by July 2009 any equitable rights arising from that understanding no longer bound JS or Verite/Jemma by reason of HS's termination of the relationship that supported them.

L. HS's conduct

243. The next question, which again does not arise on my prior conclusions and which I do not strictly need to decide, is whether – assuming that equitable obligations still bound JS and the trustees in July 2009 – HS's conduct justified his removal by Verite/Jemma, so that it cannot be said in the circumstances to be *unfairly* prejudicial to his interests. When he was removed, the removal was not accompanied by an offer to buy HS's shares in the Company at a fair price, or at any price.

244. As a matter of authority, it is clear that mere misconduct, incompetence or problems in a relationship with fellow shareholders and directors within a quasi-partnership company does not justify the majority in removing a minority shareholder without making a fair offer for his shareholding: see, for example, Re BC&G Care Homes Ltd [2015] EWHC 1518; [2016] BCC 615. In the context of a quasi-partnership, a fair offer invariably means an offer to buy at a proportion of the net asset value of the company, not at the market value of the minority holding: see per Lord Hoffmann in Phillips v O'Neill at pp.1106-7. The kind of conduct that is required, to justify removal without a fair offer, is serious misconduct of the affairs of the company, such as to take away the basis for the equitable considerations that previously bound the parties.

245. In this case, the conduct issue is inextricably bound up with HS's initial refusals to sign the 2007 and 2008 accounts because of JS's inadequate disclosure of his interests in Winchfern and Expotel. I deal with those matters in Part IV of this judgment. The Respondents contend that HS had behaved disgracefully, and wrongly as a director of the Company, by refusing to sign the accounts, without any forewarning to the other directors, in circumstances in which he had made no disclosure of any concern about the accounts to the auditors of the Company, and in furtherance of his dispute with JS rather than in the best interests of the Company as a whole.

246. There were other matters of misbehaviour relied upon by the Respondents. These were the trial balances incident with Mr Wason, the secret tape recording of the family meeting, an occasion when HS lost his temper as a result of someone having interfered with his desk and chair, and various emotional or angry outbursts at operations board meetings (particularly on 13 February 2009) and in emails. There is persuasive evidence that the emotional or angry outbursts at colleagues were rather more frequent than would be acceptable from any employee, even a senior manager of a company. HS's personal relationships with other managers and board members had deteriorated over a period of six years prior to his removal. Some of the behaviour was unpleasant and could have been the subject of disciplinary action, but there was no such disciplinary action, apart from the warning contained in Beverley Stewart's letter about the secret recording of the meeting in November 2005, which was only in small part a matter that related to the Company's affairs.

247. Nevertheless these behavioural problems would not, in my judgment, on their own justify the shareholders in removing HS as a director without making a fair offer to buy his shares. I will consider in Part IV of the judgment in connection with the events surrounding and the reasons for HS's removal in July 2009 and whether the non-signing of the Company's accounts either alone together with the older incidents of misbehaviour summarised above or justified the removal of HS without a fair offer to buy his shares.

Part III Breaches of fiduciary duty

This part of the judgment is divided into the following sections:

A. Introduction to Winchfern and Expotel issues (paras 248-251)

B. Winchfern: the facts (paras 252-259)

C. Winchfern: breach of duty? (paras 260-268)

D. Was there a continuing obligation to disclose JS's interest in Winchfern? (paras 269)

E. Expotel: the facts (paras 270-301)

F. Expotel: breach of duty? (paras 302-314)

G. Was there a continuing obligation to disclose JS's interest in Expotel? (315-27)

H. Was the disclosure made in 2008 accurate? (338-337)

I. What prejudice was caused by the breaches of fiduciary duty? (338-345)

A. Introduction to Winchfern and Expotel issues

248. The Petitioners contend that JS's dealings with the owners of companies that may for convenience be called Winchfern and Expotel amount to unfairly prejudicial conduct of the Company's affairs. In short, they contend that in course of the Company's business JS came across an opportunity to invest in each of these businesses, which was properly an opportunity for the Company to consider, but which without reference to the board or shareholders of the Company JS took for himself, and thereafter covered his tracks and failed to disclose either relationship to the board or to the Company's auditors until 2008. Instead, JS (either himself, or through his wife or a Jersey trust called the Carriere trust) kept a substantial investment in each company and sold them in 2005 (Winchfern) and 2008 (Expotel) for a large profit. When eventually, under pressure from HS, JS did make disclosure to the board on 23 June 2008, the disclosure was materially inaccurate and misleading.

249. The Petitioners contend that JS was in breach of his fiduciary duty to the Company by allowing himself to be in a position where his duty and his interest conflicted; by not disclosing the matter to the board of the Company; by acquiring the investments without the Company's approval, and by failing on a continuing basis to disclose his interest to the board and to the auditors of the Company.

250. JS's case is that neither of the investments was a corporate opportunity and that there was nothing that he should have disclosed to the board of the Company or to its auditors. He also says that he had no personal interest in Expotel. If that is wrong, he says that in any event the Company would have taken up neither opportunity, so that no loss was caused to the shareholders, and as far as disclosure is concerned he acted in accordance with advice, believed that there was nothing for him to disclose, and acted in the best interests of the Company.

251. The factual background to both matters, especially Expotel, is quite complex, and at this length of time (1983 in the case of Winchfern and 1991 in the case of Expotel) it is unsurprising that there remain factual matters that are opaque. It is unrealistic, on the basis of incomplete evidence at this length of time, to expect to be able to reach clear factual conclusions on all issues, in particular collateral issues such as whether JS lied to Mr Gulhati in 1991 about whether the Company had ever lent money to the Keith Prowse group of companies. Other matters, such as whether JS told his parents and HS informally at the time about the interest that he was taking in each company, are difficult to resolve because, understandably, no one claims to have a current recollection of what was said so long ago. What can be done is to seek to reach conclusions on the main factual questions and determine the legal consequences on the basis of those findings and appropriate inferences from them.

B. Winchfern: the facts

252. So far as Winchfern is concerned, the relevant primary facts lie within a fairly narrow compass. Most are undisputed now.

253. In the 1980s, JS was effectively in charge of running the Company's business. A substantial part of its business depended on relationships with hotel booking agencies

and agents for corporate customers, to which the Company paid commission on bookings. JS established strong relationships with a number of such agencies, in particular Hotel Bookings International ("HBI") and Expotel. The man behind HBI was Maurice Segal. JS met him in 1977. He became both a good friend of JS and an important and supportive business partner. Deals followed. In one, the Company made a financial contribution to the cost of HBI's acquisition of another agency, Room Centre, in return for support for the Company's business and a right of first refusal should the Segals sell Room Centre.

254. Through his dealings with HBI, JS met Hasmukh Kanani, who was working for HBI at the time. After he left HBI, Mr Kanani worked for the Company. JS and Mr Kanani became friendly. Mr Kanani sought JS's advice on setting up on his own account in the hotel business. JS had also become friendly with a Mr John Lucas, whose father was the landlord of one of the Company's hotels, The Vanderbilt. At the time when Mr Kanani was establishing a business to run hotels (which became Winchfern Limited), Mr Lucas told JS that an hotel called The Posa, near Notting Hill Gate, was on the market. No explanation was offered by JS as to why Mr Lucas thought that this might be of interest to JS, but Mr Lucas knew JS as the director of the Company that was the tenant and operator of his father's hotel. JS had no interest in hotels at that time other than as director of the Company. It is a strong inference (though it is attempted to be resisted in JS's closing submissions) that JS became aware of this opportunity in his capacity as chief executive and director of the Company, not in his personal capacity.

255. JS described The Posa as a dilapidated bed and breakfast operation and not in the Central London market, so that it did not fit the Company's acquisitions policy at the time. However, about a year later JS was interviewed and profiled in Catering Times. He described the Company's policy as taking over run-down properties and upgrading them to the highest standard possible, and as targeting the business market. JS asserted that he did not consider it suitable for the Company but thought that it was a good starter hotel for Mr Kanani. In view of the size and location of The Posa, that may well have been right.

256. JS then referred the opportunity to invest in the The Posa to Mr Kanani. He gave him some general advice and put him in touch with Bryan Robson at Barclays Bank. Winchfern Limited was incorporated to take the lease of The Posa. JS says that Mr Kanani offered JS a 30% shareholding in Winchfern, as a gift. These shares were held by Mrs Kanani as nominee for JS. In fact, JS personally guaranteed Winchfern's obligations as lessee. JS says that he had forgotten that until it was unearthed by Mr Hart in the course of the investigation that was conducted in 2011. JS had no actual recollection, unsurprisingly, but believed that he would have mentioned his helping Mr Kanani to his parents at home. He also thinks that he would have told Shah Dodhia (his accountants) at the time about his interest in Winchfern. In 1990, he assigned his beneficial interest in the shares to his wife, Amrit. Shah Dodhia prepared the deed of assignment, and the executed deed was witnessed by Mrs Kaur.

257. Further, in 1987 The Posa was sold by Winchfern, which then invested in the Cheshire Hotel, in the same street in Bloomsbury as the Company's Kenilworth Hotel. The Company later acquired the Marlborough Hotel in the same street. JS therefore now had an interest in a potential competitor hotel of the Company's hotels. (JS tried to argue that the Cheshire was not in the same class but ultimately accepted

that it was in the same market and would have used the same agents.) But JS made no disclosure of his interest to the board of the Company until 2008, 3 years after the interest was sold. That remained so even when, to his knowledge, staff employed by Winchfern started to make use of the staff facilities (including a canteen) that were available at the Kenilworth Hotel.

258. The shareholding in Winchfern was realised in 2005. Amrit received proceeds of £1,109,914. Prior to that, dividends totalling £267,000 had been paid to JS or Amrit.

259. JS concedes that at no time prior to June 2008 did he disclose at a board meeting of the Company his or his wife's interest in Winchfern.

C. Winchfern: breach of duty?

260. In my judgment, the opportunity to invest in The Posa was what may be called for convenience a 'corporate opportunity'. I use that term (which is not a term of art) to signify an opportunity that should have been disclosed by JS to the Company since the Company had a legitimate interest in knowing about it. Whether or not it was likely that the Company would have taken up the opportunity, this was clearly not a personal matter for JS. It was referred to him in the course of his acting as chief executive of the Company, not for personal interest. The fact that JS might have had friendly feelings towards Mr Lucas, or vice-versa, is beside the point. I accept JS's evidence that at that time he would have voted against the Posa's lease being acquired by the Company, on the grounds of its small size and location; but other directors (in particular Mr Gulhati) might have had different views. It is likely, but not certain, that the board would have decided not to buy the lease. But it was still a matter that it was relevant for the Company to know about, so that it could decide whether or not to take it. If it did not wish to take it then, with the approval or later ratification of the shareholders, JS was free to do so. But JS himself could not decide on behalf of the Company whether or not it wished to take up the opportunity and then proceed to take it himself. JS had an obvious conflict of interest and duty in making any such decision. See, in this regard, O'Donnell v Shanahan [2009] EWCA Civ 751; [2009] BCC 822 at [70], per Rimer LJ:

> "The statements of principle in the authorities about directors' fiduciary duties make it clear that any inquiry as to whether the company could, would or might have taken up the opportunity for itself is irrelevant; so also, therefore, must be a 'scope of business' inquiry. The point is that the existence of the opportunity is one that it is relevant for the company to know and of which the director has a duty to inform it. It is not for the director to make his own decision that the company will not be interested and to proceed, without more, to appropriate the opportunity for himself. His duty is one of undivided loyalty and this is one manifestation of how that duty is required to be discharged."

261. Moreover, the character of the transaction changed at the time that JS offered to guarantee Winchfern's liabilities under the lease and in return Mr Kanani offered JS a

30% shareholding. The guarantee and the shareholding were clearly connected. I reject the notion that the 30% shareholding was 'gifted' solely on account of JS's giving Mr Kanani the opportunity and some general advice. Without the guarantee the landlord would doubtless not have consented to the lease being assigned to Winchfern and the transaction would not have taken place. At that stage, therefore, having declined the opportunity to take the lease, JS was faced instead with an opportunity to invest in Winchfern. That was a different opportunity that should have been referred to the board of the Company, to see whether it was willing to underwrite the guarantee in return for a 30% shareholding instead of JS making that investment himself. Whether it would have declined to do so and the Company would have authorised JS to make the investment himself is a question that it is difficult to answer with confidence at this length of time, on a hypothetical basis. It probably would have done so. But the point is that the Company was never given the choice.

262. On the basis that in the early days of the Company matters were discussed 'over the kitchen table' at home between JS and his parents (though possibly not yet with HS, who was only a youth and not yet a director), I consider it likely that the 'opportunity' of The Posa was mentioned by JS, and that Mr Kanani's taking up the opportunity instead was also mentioned. This would have been a point of interest to BM Singh, since Mr Kanani had been an employee of the Company. However, I consider it to be very likely that JS did not disclose – even informally in this way – that he was taking a 30% stake in Winchfern in consideration of guaranteeing its liability under the lease. It is argued on behalf of JS that he probably did, on the basis that he had nothing to hide. But JS apparently did not disclose his interest to anyone at the Company (Vijay Wason did not know anything about Winchfern prior to JS's limited disclosure in 2008) or to the banks during the restructuring (it did not appear on his statement of his and his wife's assets and liabilities). There appears to have been a preference on the part of JS to keep the shareholding concealed: the shares inexplicably remained in the name of Mrs Kanani as nominee for JS and then for Amrit Singh. The fact that Shah Dodhia were asked to prepare a deed of assignment of JS's interest in the shares to Amrit and that Mrs Kaur witnessed that deed does not in my view suggest the opposite: Winchfern would have meant nothing much to either of them.

263. In reaching my conclusion that the investment in Winchfern was probably not informally disclosed by JS, I also rely on my findings of non-disclosure in relation to Expotel, to which I shall shortly turn, as further support for my conclusion.

264. In my judgment, JS was therefore in breach of his fiduciary duties by allowing himself to be in a position where his interest and duty conflicted, by profiting without the Company's informed consent and by failing to disclose the further conflict of interest and duty that existed when, as from 1987, he was a part owner of a nearby competitor hotel (The Cheshire).

265. JS sought to argue that his acts, omissions or conduct in this regard were not acts or omissions of the Company or the conduct of the Company's affairs, and so were not conduct that was unfairly prejudicial to the shareholders or some of them within section 994 of the Companies Act 2006. He contends that the Winchfern transaction had nothing to do with the Company, being a personal matter between Mr Kanani and JS, and that there was nothing that can be said to be an act or omission of the Company.

266. I have already rejected the contention that the opportunity to acquire the lease of The Posa came to JS in any capacity other than as a director of the Company. In evaluating the opportunity, as JS implicitly concedes that he did before referring it to Mr Kanani, JS was acting as a director of the Company. In deciding not to refer the opportunity to the board, he was acting as a director of the Company. The omission to refer the opportunity to the board seems to me to be fairly described as an omission of the Company. In any event, even if that is properly characterised as an omission of JS himself, the whole process whereby the Company acting by JS received the opportunity and did not take it up was the conduct of the affairs of the Company by its director and chief executive. The matter was not personal to JS, for reasons that I have given, and JS was therefore declining the opportunity (or opportunities, if one considers too the opportunity to invest in Winchfern in return for a guarantee) on behalf of the Company. This was done wrongly, in breach of his fiduciary duties, but it was also conducting the affairs of the Company. The affairs of a company include failing to take steps to protect its legitimate interests: Scottish Co-operative Wholesale Society Ltd v Meyer [1959] A.C. 324, at pp. 362-3 and 367 in particular. If that were not so, every time that a director diverts a corporate opportunity and the Company declines to do anything about it, the shareholders would be precluded from petitioning on the grounds of unfairly prejudicial conduct. Given that any non-trivial breach of fiduciary duty by one or more directors is likely of its nature to be unfairly prejudicial to some at least of the members of the company, if JS is right in his argument it would have the consequence of eliminating one of the obvious remedies for shareholders in any such case. For the reasons that I have given, I do not consider that it is right.

267. A separate argument of JS is that, if there was any conduct of the Company's affairs, it could not have been prejudicial to the shareholders, or not unfairly so. As to this, JS submits that it is clear that the Company would not have purchased the lease of The Posa; that the value of the Petitioners' shares at all times after 1993 has been unaffected by the Winchfern transaction; that there was no realistic prospect of conflict between the interest of Winchfern and of the Company, and that this disappeared in any event once Winchfern was sold in 2005, and that the profit derived by JS and Amrit was only £1.3m or thereabouts, which is de minimis in the context of the Company's affairs and this claim.

268. In my judgment, the Company would probably not have purchased or guaranteed the lease of The Posa. However, there was a real potential for conflict of interest and duty arising from JS's investment, illustrated by the fact that it was Winchfern and not the Company that acquired the Cheshire Hotel in 1987, and thereafter by the curious sharing of staff facilities between the Kenilworth and the Cheshire Hotels. It seems very unlikely that this would have happened in the informal way that it did without JS's significant interest in Winchfern.

D. Was there a continuing obligation to disclose JS's interest in Winchfern?

269. In my judgment, JS had a continuing conflict of interest and duty arising from his beneficial ownership (or his wife's beneficial ownership) of shares in Winchfern, and so was under a continuing duty (at least from 1987) to disclose that conflict to the Company's board. He had a substantial stake in a competitor hotel and allowed the Company's hotel and that hotel to share certain facilities. That continued to be the case until 2005.

E. Expotel: the facts

270. Turning to the more significant Expotel transaction, the background facts are more confused and complicated that in relation to Winchfern.

271. In the late 1970s and 1980s, Expotel Hotel Reservations Limited was a booking agency owned and run by Ranjit and Dev Anand. It focused on the corporate market for hotel rooms only. In the late 1970s, an employee of the Company, who worked at the Savoy Court Hotel, had a contact who was one of the booking clerks at Expotel. That led to the Company receiving more and more bookings through Expotel. As a result Ranjit Anand came to meet JS and agree mutually beneficial terms on which they could continue to do business. The business relationship, which became very important to the Company, led to a friendship between JS and the Anands.

272. In about 1983, the Anands wished to acquire the (then) well-known booking agency, Keith Prowse Holdings Ltd ("KP"), which specialised in tickets and travel and accommodation packages. They approached JS to see if he would give financial assistance for the acquisition in return for preferential treatment from KP and Expotel. JS provided financial support in the form of a guarantee, probably limited to £250,000. Expotel became merged into the KP group (or vice-versa) as a result of the acquisition but Expotel remained the most important part of the group for the Company's business.

273. The KP group suffered cash flow problems and in 1985 JS was asked to guarantee an overdraft in favour of Exp-o-tel Group Ltd from BCCI. He did so, on 28 October 1985, under an "all monies" form of guarantee, which entitled JS to give 3 months' notice to limit further liability under the guarantee. Whether and when any such notice was given by JS is unknown. Accordingly his total liability under that guarantee cannot be accurately stated. Be that as it may, JS's evidence is that Expotel, the Company and their business relationship flourished. On 16 March 1989, the Anands and JS stood as co-guarantors of an overdraft facility of up to £750,000 in favour of Keith Prowse Holdings Ltd. JS states that he took on these liabilities in order to benefit the Company, by maintaining or improving an important business relationship with Expotel. It is easy to see that this was probably so.

274. Later in 1989, Keith Prowse Holdings Ltd wrote to the directors of the Company offering advantageous terms to the Company and guarantees of some of the Company's debt with BCCI in return for the Company making a facility of £750,000 available to it until the end of that year. Whether that in fact happened is unclear: despite a number of documents (on which the Petitioners rely) suggesting that it did happen, it is not clear how any such loan related to the exposure that JS already had under the guarantees previously referred to. In the event, BCCI and JS differed on whether he was liable for a further advance of £750,000; but a maximum liability of JS of £1,500,000 in relation to Expotel/KP was admitted.

275. It is apparent that for all that Expotel continued to send valuable business to the Company, it was never far from serious financial difficulties. On 27 September 1990, the Company contingently agreed to take over the KP Group's debt of up to £3m, until it could obtain further facilities, and in return KP Group offered the Company an option to capitalise the £1.5m guaranteed loan into equity, which would give the

Company 51% of the voting equity in Keith Prowse Holdings Ltd. By March 1991, the KP Group was considering a sale to interested parties, including the Company.

276. On 6 August 1991, Leisure Holdings plc, an Irish company, made an offer to invest £4m of capital in the KP group on terms that included JS providing it with a 10-year interest free loan of £1.5m, replacing the existing £1.5m loans (in other words, JS would assume liability for the £1.5m to which he was already exposed and would not look to recover that from the KP Group for 10 years). In return, the KP Group would commit to providing a minimum amount of its London business to the Company for that period of time, with the Company paying commission at 1% over the best Forte rates. The funding proposal was no doubt the result of the provisional liquidation of BCCI in July of that year.

277. The Leisure Holdings proposal was put to the Company's board on the following day. JS declared his interest by reason of his existing guarantee of KP for £1.5m. With Mr Gulhati dissenting, the proposal was agreed, on the basis that the Company would write off £1.5m (and interest) over the ten years, and any repayment by KP at the end of that period would be regarded as a bonus. It is implicit in this – though not expressly agreed according to the minutes – that the Company would be meeting JS's liability to BCCI. In the event, the Leisure Holdings proposal did not proceed: among the reasons for this was that the Company's bankers did not support it.

278. Instead, the Segals came to the rescue of Expotel in September 1991, when Expotel was on the brink of administrative receivership and Ranjit Anand asked JS whether he could find a buyer. JS says that he met the intended receiver and Mr Anand at home on Friday 6th September and then met the Segals the following morning. They were interested but astutely required JS to assume some of the risk (in view of the fact that Expotel was important to the Company's business). The purchaser was to be a company called Maserace Ltd, a wholly-owned subsidiary of Kase Developments Ltd (later known as International Travel Group Ltd) ("ITG"). On 8 September 1991, a deal was struck. It is recorded in a letter of that date from the Segals and their business partner Stephen Kaye to JS and counter-signed by him and in a declaration of trust of the same date ("the 1991 deed of trust").

279. The purchase price was to be up to £1,000,000 and JS was to contribute £100,000 of this. If ITG failed within 2 years, JS would have to pay a further £750,000. If Maurice Segal ceased to be a director of ITG he would use his best endeavours to procure JS or his nominee's appointment to the board. Maurice Segal would use best endeavours to promote the Edwardian Group's investments through ITG and other companies that he controlled. This was therefore an asset sale and purchase; the liabilities of the KP Group remained where they were, as therefore did JS's exposure under his guarantees. The 1991 deed of trust declared that 50% of the shares in ITG registered in the names of Jonathan Segal and Stephen Kaye would be held in trust for JS, Shashi Shah and HS. JS explained that these beneficiaries were chosen because they were the English trustees and JS had not yet decided who should benefit from the shares in ITG.

280. It was understood that the terms agreed in haste over that weekend would later be formalised. The letter dated 8 September 1991 said so. But the 1991 deed of trust was nevertheless a formally valid declaration of trust in favour of the three identified beneficiaries. That document is at odds with JS's claim that Maurice Segal was

hypersensitive that the Company's interest in ITG should not leak to the market, though it was doubtless intended that the identity of any beneficial owner of the shares held by Jonathan Segal and Stephen Kaye should be concealed.

281. JS's case is that he "would have" discussed the deal with his parents and HS over that weekend, and that he informally told other directors about it. I have no doubt that the attempt to rescue Expotel was discussed in that way, as well as the fact that a deal had been done on the basis that JS assumed some risk. (In passing, it may be noted that JS did not in fact have to pay anything: the £100,000 up front contribution was paid by Winchfern and, since ITG prospered, the £750,000 never became payable.) JS was not able to say, however, that he told anyone that he (or he, HS and Shashi Shah) owned 50% of the shares of the 'new' Expotel. In his witness statement, he says that "I told them a deal had been done to preserve business for the Company, that I had to assume some risk to get it completed …". In his oral evidence, he sought to embellish that credible position when challenged about non-disclosure: "*I don't think there was anything hidden*"; "*I would have said that the Singh family stands to gain*".

282. If by those comments JS intended to assert (as those representing him now contend) that the shareholding was disclosed as well as the financial exposure, I unhesitatingly reject that for the following reasons. First, it is clear that JS did not disclose it to anyone else, including the banks (who in 1992 were anxious to understand his personal financial circumstances) and his own accountants, except at a later time Ramesh Shah, who helped him to conceal the holding in the Carriere trust. Second, if HS (or BM Singh) had been told at the time that he and/or JS had a shareholding in Expotel, or an interest in 50% of its shares, matters would have taken a completely different course. Direct questions about Expotel would then have been put to JS by HS between 2006 and 2008, if not earlier, before JS made partial disclosure at the June 2008 board meeting. Third, it is clear that JS did not tell Mr Gulhati about the shareholding: if he had done so Mr Gulhati would not have been placated in the way that he eventually was; he would have been furious. Fourth, if he had done so, the directors of the Company would very likely have taken a different approach to agreeing to underwrite JS's exposure under the BCCI guarantees, which they eventually and uncomplainingly did, or at least Mr Gulhati's dissent would have been recorded in board minutes, which it was not. Fifth, JS did feel honour bound to Mr Segal to keep the Singh/Company interest in ITG secret. Sixth, from JS's perspective there was no reason to tell anyone about the shareholding – at a time when, as he says, he had not yet decided who should benefit from it – unless it was necessary to do so in order to persuade the board to back the deal that had been struck. As to this, it was not necessary to do so, as the preservation of the Expotel business (which I entirely accept was JS's primary concern on behalf of the Company) spoke for itself in terms of the merits of the deal. That would have been so (as was demonstrated the following year when the board was asked to underwrite JS's exposure to BCCI and under the deal) even if it had been the Company that was at risk, rather than JS personally. Since it was JS who was at risk and not the Company, the merits of the deal for the Company were self-evident, without any reference to the 50% of ITG shares.

283. In reaching this conclusion for the reasons that I have given, I do not find that JS deliberately suppressed the fact of the shareholding in 1991 for some ulterior or malign reason; it was just that, since he felt it was unnecessary for him to disclose it,

he did not do so, as had been the case with Winchfern previously. He was, after all, the person who was in charge of the Company's affairs, and being in charge, for JS, meant keeping full control of matters.

284. The opportunity to make full disclosure of the shareholding came at a later stage in 1994, when JS, the Segals and Mr Ramesh Shah went to some trouble to hide the shares in a separate Jersey trust, the Carriere trust. The opportunity was not taken.

285. Before that stage in 1994 is reached, the shareholding was largely forgotten, according to JS's evidence, which I accept. He was very preoccupied with seeking to rescue the Company between 1991 and 1993. However, JS was also in financial difficulties personally, not least because of his £1.5m exposure as guarantor of KP's liability to BCCI. Until 1993, he was also at risk of having to pay a further £750,000 to the Segals.

286. On 5 August 1992, JS reported to the board of the Company that he was being pursued by BCCI for £1.5m plus interest and that – as pointed out in a previous letter to the Company's bankers – he would seek an indemnity from the Company for that amount. JS emphasised that the guarantees were entered into entirely for the benefit of the Company. Baker & McKenzie, the Company's solicitors, were understandably concerned that the Company in its perilous financial position was proposing to take on a further substantial liability, without any evidence that the liability was properly that of the Company. They suggested that the board should ensure that it had the full picture of JS's financial circumstances, to assess whether or not he was able to meet his liabilities. Mr Bryan Robson, a non-executive director at that time, asked JS to submit a written statement so that the board could consider the request at a later time. That matter was later dealt with, on 3 March 1993, when the board approved the Company's 1991 accounts (prepared on a going concern basis because by then heads of terms for the restructuring had been agreed with the banks) and these included provision for £1.5m in respect of BCCI's (partly disputed) claim against JS.

287. After the restructuring of the Company had been completed, JS returned to the question of the ITG shares. As envisaged in 1991, there was some tidying up to do. JS said that he agreed with Jonathan Segal that, in view of certain changes to ITG since 1991, JS's interest would now be 42% and that the Segals would set up a Jersey trust structure to hold the shares indirectly. The trust deed was drafted by the Segals' lawyers but with input from Chamberlains (Ramesh Shah) on behalf of JS. On 1 September 2004, Leonard and Nigel Day declared a trust of £100, of which the beneficiaries were one identified charity, such other charities as the trustees might select and any person or persons from a class of beneficiaries nominated by the protector. Verite was appointed protector. The trust deed was in reasonably standard form for a Jersey discretionary trust.

288. Mr Machan was told by Ramesh Shah that a Mr Segal would be gifting shares in ITG to the trusts indirectly using an offshore vehicle, to avoid any UK inheritance tax payments having to be made. Mr Leonard Day was to be appointed a non-executive director of ITG and JS sent him a letter of wishes in that regard. Mr Machan wrote to Mr Day on 7 October 1994, following a meeting of them and Ramesh Shah in Jersey, stating that Verite understood that it was the irrevocable wish of Mr Segal as settlor that the beneficiaries to be appointed to the Carriere Trust would be BM Singh and Mrs Kaur, their issue and remoter issue, widows and widowers, and the charities

named in the trust deed. That letter was countersigned by Jonathan Segal in early 1995. It appears to have been done in this circuitous way so that there was no letter from a director of ITG nominating JS or his family as beneficial owners of shares in ITG, which in turn appears to have been intended to prevent ITG from having to declare that an hotel operator had an interest in ITG.

289. JS accepted that since 1994 those administering the Carriere trust have looked to him for guidance and his wishes in relation to beneficiaries and the assets of the trust.

290. JS said that he told his parents around 1994 that he had influence over 42% of the shares in Expotel and that he had the right to nominate who should be the beneficiaries, subject to the views of the protector. He also said that he told them that if the Company recovered he intended to keep the shares as a charitable trust. I am not persuaded that either of those statements is correct. There is nothing in any of the documents to support what JS now says. I consider it to be a reconstruction of what happened, driven by the exigencies of this litigation and based on the fact that the initial trust deed identified a nominal charitable object and a conferred discretion to add others. In my judgment, the Carriere trust was not disclosed to anyone, not even to JS's and the Company's accountant, Chandrika Shah, as was later confirmed by her in 2011. Only Ramesh Shah and Mr Machan knew about it.

291. My impression is that, as with the 1991 deed of trust, in JS's mind there was no reason for anyone else to know about the ITG shareholding, so it suited him best if no one did. In that way, he had total control of the matter. He said that Chamberlains (Ramesh Shah) told him, orally, that he had nothing that needed disclosing. There is no document evidencing this advice, and Ramesh Shah was not called to give evidence about his involvement. In fiscal terms, it may well have been right that JS had nothing to disclose: he was not a named beneficiary, nor had he been appointed to an interest under the trust. But JS did not seek advice from his accountants about disclosure to the board of the Company or its auditors.

292. In 2005, by which time the Company was a great commercial success, JS acted inconsistently with his professed charitable intention when he arranged for his son, Inderneel, to be appointed a beneficiary. This, and the events that followed it, are revealing, and I must deal with them in a little detail.

293. As already discussed in Part II of this judgment, by 2005 relations between JS and HS had deteriorated and litigation was a real possibility. HS and his family had moved out of the family home and his parting of ways with JS and the Company was under active consideration. JS caused Ramesh Shah to make contact with Mr Machan at Verite. Ramesh Shah told Mr Machan of the difficulties between the brothers, though he characterised it as a 'storm in a tea cup'. Mr Machan said that Ramesh Shah told him that JS wished Inderneel to be appointed to protect the interests of the true intended beneficiaries of the trust – the trust was increasingly valuable and only one charity stood to benefit at the time. Unsurprisingly, Mr Machan considered JS's wishes and concluded that the appointment was appropriate. The appointment was arranged between him and the corporate trustees (who had replaced the Days in 2001). A deed revocably appointing Inderneel and his lineal descendants was made on 23 May 2005.

294. At the same time, Mr Machan was being put under pressure by Ramesh Shah on behalf of JS to exclude HS and his descendants as members of the class of possible beneficiaries. An email dated 24 May 2005, using coded references to the names of JS, HS and Herinder, makes clear that despite the family differences of which Mr Machan had been made aware, he did not consider it proper to exclude a principal beneficiary falling within the class and within the settlor's letter of wishes. He made a suggestion for a different way of possibly ring-fencing part of the trust fund for Inderneel's benefit.

295. Mr Machan's rectitude did not go down well. By letter dated 9 June 2005, Ramesh Shah told Mr Machan that, at a meeting with JS, he had concluded that Verite should resign as protector and appoint Ramesh Shah as its successor. Mr Machan did so, appointing Ramesh Shah in its place. Challenged about this, Mr Machan said that although he could envisage that Ramesh Shah might be prevailed on by JS to do that which he had thought improper, that was a matter for Ramesh Shah and not for him. He agreed that he could have appointed someone independent, but considered Ramesh Shah to be a suitable protector, given his knowledge of the Singh family. I was not wholly convinced by this: it seemed to me that Mr Machan was trying to retrieve his position somewhat with JS (or Ramesh Shah), or both, by appointing the latter as protector. The responsibility was then on Ramesh Shah to exercise his discretion appropriately. Predictably enough, Ramesh Shah did then exclude HS and his family from the Carriere trust in short order, on 28 June 2005. Despite the length of his witness statement, none of these matters (other than the appointment of Inderneel) was addressed by JS. There was no witness statement or other evidence from Ramesh Shah. I will come shortly to what I made of JS's explanation in cross-examination.

296. Following those events, the discussions about HS's future in the Company continued. JS's letter of 23 August 2005 asking HS whether he was really committed to the Company was followed by the conversation between Chandrika Shah and JS about HS's unsuitability to succeed him and the grooming of Inderneel to take over in 7 years or so. There was then the without prejudice family meeting on 10 November 2005, which JS subsequently discovered had been taped secretly by HS. On 28 November 2005, Ramesh Shah and the Carriere trustees executed a deed revocably excluding Inderneel and his issue from the class of beneficiaries of the Carriere trust. In the absence of Ramesh Shah and the Carriere trustees as witnesses, there was no proper explanation of this step. It is a matter of inference, in those circumstances, that it had something to do with what happened or was said at the 10 November 2005 family meeting and JS's sentiments thereafter.

297. JS's explanation was that the sole reason for the appointment of Inderneel was to test whether, as against the Segals, the trustees could appoint additional beneficiaries. The Segals in 1994 had been concerned that no connection with the Company should be visible to other hotels or room agencies. JS was unable to explain this reason that he gave in a way that made any sense, given that the 42% shareholding had been put into the Carriere trust through a BVI company in 1994 and was invisible, as would have been the appointment of beneficiaries under the trust. Further, the innocuous explanation given does not sit easily with the contemporaneous attempt to persuade Verite to exclude HS. The two were self-evidently connected. There was also no possible explanation – if JS's reason was correct – for the replacement of Verite with Ramesh Shah as protector of the trust. However, JS stoutly maintained that it was not

his intention to exclude HS and his family. At this point, his evidence under cross-examination made no sense and he looked distinctly uncomfortable.

298. JS's explanation for the deed of revocable exclusion of Inderneel and his issue made on 28 November 2005 was that, the ability to appoint new beneficiaries having been proved, it was now appropriate to undo the appointment of Inderneel, since the trusts were intended to remain charitable if the Company continued to prosper. I have no hesitation in rejecting that evidence. It seems to me very likely that Inderneel was excluded because JS wanted to be able to continue to hide either the Carriere trust, or its interest in Expotel, or both, and to argue, if necessary, that he and his family had no interest under purely charitable trust. There was no suggestion made that the removal of HS as beneficiary was for tax reasons. As will be seen, when the trust was first disclosed to the Company in June 2008, JS maintained that it was a charitable trust and not one under which any Singh family member had an interest.

299. This episode demonstrates that by mid-2005 relations between JS and HS had reached a point where JS was concerned to try to exclude HS from financial benefit under 'family trusts' so far as he could. At the same time, JS was taking steps (himself directly, by letter, at without prejudice meetings and through Mr Hart) to try to encourage HS to separate his interests from the Company. The explanation of testing out the Segals' ability to control the appointment of beneficiaries to the Carriere trust rather mirrors the argument maintained by JS that he did not tell anyone about the Carriere trust interest in Expotel because of the damage that might do to the Segals' interests. At one point he said that the Segals were the drivers of his not sharing the information as openly as he would have liked to. I reject that explanation. While both the Company and the Segals had an interest in it not being known that the Company and ITG were connected, that did not remotely prevent JS from disclosing his indirect interest to the board of the Company, to its shareholders (all of whom were either directors or connected to directors), or to its accountants and auditors. The real reason, in my judgment, why JS did not disclose it is that he did not want his family or his fellow directors to know about the interest in Expotel. JS wanted to have total control over who benefited from that hidden interest.

300. It was not until June 2008 that JS said anything openly about an interest in Expotel. That was at the time that the interest was being sold, realising over £11,000,000 for the Carriere trust beneficiaries. It seems likely that something had been said in the course of the without prejudice negotiations in 2005 that put HS on notice of the Expotel interest or the Carriere trust, but nothing had been said by JS openly. HS had been putting pressure on JS to disclose to the board his interest in Expotel, though HS himself had not disclosed his concerns to the board or to the Company's auditors.

301. What happened in 2008 sets the scene for events that led to the removal of HS as a director a year later. It marks the start of a new chapter in the Expotel story. Following the removal of HS as a director, the Company constituted Mr Hart and Mr Morley a sub-committee of the board to investigate the complaints that HS had raised about JS's undisclosed interest in Winchfern and Expotel. I deal with the circumstances of HS's removal from the board in Part IV and with the investigation in Part V of this judgment.

F. Expotel: breach of duty?

302. The Petitioners' case is that the opportunity to acquire a shareholding in Expotel was what I have previously described (in relation to Winchfern) as a 'corporate opportunity': something about which the Company had a right to know. JS had a duty to inform the Company, and thereby avoid being in a position of conflict of interest and duty, but did not do so. Proceeding with the acquisition without disclosing the opportunity to and obtaining the authority of the Company was a further breach of duty, first because JS took a profit for himself and secondly because JS put himself into a position where there was a real possibility of his own interest in Expotel and his duty to the Company conflicting in future. At the time, his fiduciary duties were equitable rather than statutory (now contained in sections 172-177 of the Companies Act 2006), but their content and effect were the same then as they are now.

303. JS's case appears to be that there was no breach of fiduciary duty because the profits (from the Expotel shareholding) were not made by reason only of the fact that JS was a director of the Company; they arose outside the scope of the fiduciary relationship. JS's case requires the non-profit and non-conflict rules to be stated more narrowly, as he consistently did in his closing submissions:

> "a director is precluded from obtaining for himself, either secretly or without the informed approval of the company, any property or business advantage either belonging to the company or for which it has been negotiating, especially where the director or officer is a participant in the negotiations. A director will not be in breach of duty where the company's hope of obtaining the contract was not 'a maturing business opportunity'…" (Closing Submissions, para 504)

That statement is an aggregate of dicta in various different authorities, on which JS relied.

304. Where a particular opportunity to acquire or invest is being negotiated by a director of a company on its behalf, the application of the rule is straightforward, and it is convenient to speak of the opportunity being the company's opportunity or of the opportunity coming to the director in his capacity as director. But the 'no conflict' and 'no profit' rules are not limited to that paradigm case, and reliance on such cases for statements of principle can be misleading for that reason. This warning was much more elegantly expressed by Lord Upjohn in Boardman v Phipps [1967] 2 A.C. 46 at 125 ("the observations of judges … in cases where this great principle is being applied must be regarded as applicable only to the particular facts of the particular case in question and not regarded as a new and slightly different formulation of a legal principle so well settled"). In the same speech, Lord Upjohn added a gloss to the classic formulation of the no-conflict rule by Lord Cranworth LC in Aberdeen Railway Co v Blaikie Bros [1986] A.C. 44, 51 (no fiduciary "shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect") by adding:

> "The phrase 'possibly may conflict' requires consideration. In my view it means that the reasonable man looking at the

> relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict" (p.124C)

305. At the time of JS's discussions with the Anands and the Segals, the Company had a thriving trading relationship with Expotel/KP, which was considered so important that – in the Company's interests – JS had previously taken on exposure of £1.5m as guarantor. When Expotel was known to be in difficulties, the Company had been offered an option to become a shareholder in return for financial support, and had resolved to provide finance as part of a different rescue package put together by Leisure Holdings. JS by his own admission was principally concerned with preserving Expotel for the benefit of the Company, and was no doubt approached by the Anands to find a purchaser because of the long trading relationship they had enjoyed with the Company and because they knew how important the survival of Expotel was to the Company. The Segals ensured that JS took on some personal risk for the same reason.

306. In that context, where JS was negotiating for the good of the Company, the Company was entitled to know what Expotel/ITG/the Segals were going to give to the Company in return. More specifically, it was entitled to know if JS personally was going to derive some benefit from the deal. There was clearly the potential for conflict between the interests of the Company, which JS had a duty to protect, and the personal interests of JS in receiving something from the deal. As soon as JS was offered the shareholding by Maurice Segal, he had an actual, not just potential, conflict of interest. The question is not whether the Company itself could have afforded to pay £100,000 up front, or to take on the risk of having to pay a further £750,000, or whether its bankers would have backed such a deal, but whether or not the Company was entitled to know the full terms of what was offered and make an informed decision whether to take the opportunity itself, or authorise JS to take it, or neither.

307. The key is whether there was an actual or a real possibility of conflict. The matter can be tested in this way. In the course of negotiations, when Maurice Segal (as JS asserts) offered him a 50% stake in ITG, JS could have declined and requested instead enhanced terms for the Company's future trading with ITG, such as a reduction of ½% in the commission rate payable thereafter to Expotel, or some other commercial advantage. That not only illustrates why there was an actual conflict of interest and duty but why JS's duty, if he was going to accept the shareholding, was to disclose his interest to the Company. It cannot possibly be said that the offer of a shareholding arose in a non-fiduciary context, so that there was nothing of relevance to disclose to the Company.

308. Disclosure was highly relevant for another reason. As soon as JS had control over 50% of ITG's shares, he was interested on both sides of any commercial deal that was negotiated in future between the Company and Expotel. JS accepted that there were very substantial transactions every single year with Expotel: as an example, the commission paid by the Company in 1994 was £608,000. As Mr Wason confirmed, that conflict remained undisclosed to the board until 2008, yet the acquisition of

ITG's shares as part of the deal with the Segals put JS into a position of conflict that needed to be disclosed to the board when any matter relating to Expotel, or booking agents generally, or the Company's strategy in relation to sales, were discussed.

309. In fact, the trust that was declared by Mr Segal and Mr Kaye in 1991 was not in favour of JS alone but for JS, HS and Shashi Shah jointly. That was described by JS as a 'holding position' until he decided who should benefit from the shares. It may be that he had in mind that the shares should be settled on something similar to the English trusts, but at all events it is clear that JS believed that he retained the power to dispose of the shares. This is demonstrated by the fact that neither HS nor Shashi Shah knew about their interest under the 1991 deed of trust: JS accepted that he did not tell them of their interest.

310. JS accepted that the holding would be controlled by him and appointed as he saw fit, subject to any advice he was given. A letter written by JS's solicitors to Jersey lawyers (Baker & Partners) on 21 December 2014 confirms that he did not intend to benefit HS or Shashi Shah personally by the 1991 deed of trust. So the shares were intended to be held for the benefit of JS, or as he might direct, though the exact legal consequences of the 1991 deed of trust still await resolution in Jersey. JS's evidence about the status of his interest was confused and confusing. He accepted that he had an enforceable interest in ITG because of the deed of trust, and yet he claimed that it was not an asset owned by him because it was informally arranged and to be dealt with formally at a later date. It is no doubt true that on 8 September 1991 more sophisticated trust arrangements were intended to be put in place later, but in my judgment JS knew very well that as from that date he had control of a substantial interest in ITG.

311. JS attempted to defend the taking of the shareholding in ITG for himself rather than for the Company by invoking Mr Segal's anxiety that there should be no public knowledge of a connection between Expotel and the Company. One can see and understand that, for both parties, knowledge of other hotels and agencies that Expotel and the Company were connected might be commercially damaging. But that did not stop Mr Segal from approving JS's 50% interest, or indeed from approving the 1991 deed of trust expressly in favour of JS, HS and Shashi Shah (3 directors of the Company). As JS accepted in cross-examination, the real issue was the risk of publication, not the identity of the beneficiary. It therefore made no difference in principle whether the shares were held on a secret trust for JS, for all the shareholders of the Company or for the Company itself. The complex structure of the Carriere trust and its BVI corporate vehicle, Dandress Ltd, set up in 1994, deliberately drew a cloak of secrecy over the matter. In any event, the preference of Mr Segal or JS's own concerns about publicity could not override JS's fiduciary duty to the Company. If he could not disclose the proposed transaction to the Company for reasons of confidentiality, it was nevertheless his duty not to put himself into a position of conflict and accordingly to decline the shareholding.

312. The conflict between JS's interest and his duty arose again, after the deal with the Segals had been agreed, when in the following year JS sought to have the Company underwrite his liability to BCCI. That liability had been incurred in order to support KP/Expotel as a trading partner of the Company. In seeking to have the Company underwrite the existing liability, JS had an obvious personal interest in the Company's doing so. To a large extent that personal interest mirrored the Company's own

interest in having its chief executive remain solvent; but as Baker & McKenzie pointed out, it carried the concomitant risk at the time of the Company itself becoming insolvent. It was therefore (as Bryan Robson had evidently appreciated) a serious matter that required careful consideration. But in making its decision, the board of the Company did not have the full picture of JS's relationship with Expotel/KP, namely that as well as having incurred a liability to support KP, so that the Company benefited, JS had personally benefited from the Company's survival and now had a substantial interest in ITG. Whether the board (including the suspicious and independent-minded Mr Gulhati) would have agreed to underwrite JS's exposure and allow JS to retain the benefit of the ITG shareholding, had it been made aware of the whole picture, is far from certain.

313. In 1994, JS's interest in ITG was formally settled in the Carriere trust. Assuming (which has not yet been decided) that this settlement supplanted the 1991 deed of trust, JS was thereby taking control (subject to the discretion of Verite, the protector) of the beneficial interest in the shares in ITG. Given that 50% of the shares were held in trust for him, HS and Shashi Shah, 3 directors of the Company, and given the Company's important business relationship with Expotel, JS was again putting himself in a position where his interest in taking the shares in ITG under his control (subject to the protector) conflicted – or at least there was a real possibility that it would conflict – with his duty to act in the best interests of the Company. The opportunity to take a large stake in a company that controlled Expotel was self-evidently something that the Company had a right to know about. The board had previously expressed interest in investing in Expotel. Although JS strongly argues that his personal contribution to the rescue of Expotel at no immediate cost to the Company can only have been beneficial to the Company, his taking personal control of a significant stake in Expotel's parent company cannot be viewed in the same way. In the first place, the Company or its shareholders might have wanted that stake for themselves. Secondly, the Company might have taken the view that JS should avoid putting himself into a position of conflict and should refuse the interest in ITG, or negotiate a better deal for the Company instead.

314. In so far as JS seeks to argue that any conduct of his in 1991 or 1994 in relation to the shareholding in ITG and the Carriere trust was not conduct of the affairs of the Company, that is incorrect for the reasons given in section B, paras 265-266 above in relation to Winchfern. Failing to take steps that should have been taken to protect the interests of the Company is conducting the affairs of the Company for the purposes of section 994 of the Companies Act 2006. A director with a conflict of interest and duty cannot decide on behalf of the company that it is not interested in an opportunity, take the opportunity himself and then say that it was a personal matter nothing to do with the company.

G. Was there a continuing obligation to disclose JS's interest in Expotel?

315. This relates to the question of whether, having acquired the shareholding in ITG, first as a joint beneficiary and then through his interest in the Carriere trust, JS was obliged to disclose the continued existence of his interest to the board of the Company.

316. As to this, Mr Croxford QC for JS argues, first, that failure to disclose his interest in Expotel to the Company or its auditors is not adequately pleaded in the petition, because what is pleaded is that there was a breach of duty when JS *acquired* the

interest in Expotel, not that there was a conflict of interest arising from Expotel's trading relationship with the Company. Mr Croxford says that had it been pleaded JS would have disclosed other documents and adduced evidence of who it was at the Company who dealt with the Expotel account, in order to establish that JS was not influencing the terms of any contract with Expotel.

317. I do not accept the validity of this argument. Paragraph 60(3) of the petition pleads that, in relation to Expotel, JS was in breach of his fiduciary duties to the Company in that his acquisition of an interest placed him in a position where his interests as a shareholder in one of the Company's major trading partners conflicted with his duties as a director of the Company. Paragraph 61 pleads that his Expotel interest placed him in a position of undisclosed conflict of interest. Mr Croxford suggested that the conflict alleged was limited to the circumstances of the acquisition, but I do not read the statement of case in that way: it naturally refers to the consequence of acquisition, namely that JS had an interest in a major trading partner of the Company that was not disclosed.

318. As to the suggested further disclosure, by letter dated 17 March 2017 HS's solicitors asked JS's solicitors for any documents relating to the preferential flow of business between the Company and Expotel, in particular any high level terms agreed which enabled percentage returns and/or negotiations between the Company and Expotel or other booking agents operating at the time to be seen. The reply on 6 April 2017 was that "if any such document had been found as a result of our searches it would have been disclosed". I am therefore satisfied that there is no further category of documents relating to the negotiation of the terms of the trading relationship between Expotel and the Company that has been left undisclosed because it lay outside the scope of the pleaded case. As to witness evidence, there was in the event evidence given by Mr Mansi and Mr Wason about who was responsible for the Expotel account. The evidence was that it was managers in the accounts department who dealt with the financial accounting and the sales and marketing team who dealt with the terms of business. Both these departments reported through senior management ultimately to JS, but JS was not personally involved in these details. There is no evidence (and I do not find) that JS was himself directly involved in negotiating the detail of the commercial terms between the Company and Expotel, though he was involved in approving the Carriere trust's nominee director on the board of Expotel: first Leonard Day and then Kirti Shah. There therefore appears to be no substance to JS's complaints of prejudice in any event.

319. JS's next argument is that there was in any event no interest to disclose. That was advanced, first, on the basis that the 1991 deed of trust was just temporary, a holding arrangement, and secondly that from 1994 JS had no appointed interest under the Carriere trust to disclose.

320. I reject both arguments. First, although the 1991 deed of trust may have been understood to be a temporary arrangement, JS clearly understood that it gave him the right to decide who was to benefit from the shareholding in ITG. Second, although JS was not an appointed beneficiary of the Carriere trust at any time, he was within the class of potential beneficiaries and was able – subject to the discretion of the protector – to cause himself or his family to be appointed. That is what happened in 2005 with his son, Inderneel.

321. Section 317(1) of the Companies Act 1985, which applied at the relevant times, provides:

> "It is the duty of a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company to declare the nature of his interest at a meeting of the company."

A 'contract' includes a transaction or arrangement, whether contractually binding or not (s.317(5)).

322. Whatever the Segals and JS might have thought about the permanence or effect of the 1991 deed of trust, 50% of the shares in Expotel were understood to be for the benefit of the Singh family and it was JS who was in practical control of how that benefit was allocated. The 1991 deed of trust is a formally valid and executed deed of trust under which JS has a joint interest in 50% of the shares of ITG. As regards the Carriere trust, the interest of the Singh family was recognised in the settlors' letter of wishes, and the settlors, the trustees (Messrs Day) and the protector (Verite until 2005) recognised at all times that it was JS's wishes in accordance with which they might act. His control over the beneficial interest in 42% of the shares – later demonstrated by the appointment of Inderneel as a beneficiary – is a sufficient interest for the purposes of disclosure of a conflict of interest and duty: see per Knox J in Re Dominion International Group plc (No.2) [1996] 1 BCLC 572 at 597:

> "It does not seem to me that this is an appropriate field in which to draw technical distinctions between vested and contingent interests and more hopes or expectations. What is needed is a realistic appraisal of the nature of the interest and to see whether it is real and substantial or merely theoretical and insubstantial."

323. The direct or indirect interest need not be a property interest or something over which the director has legal control; a financial interest or expectation of benefit suffices, as that case demonstrates, at least where the expectation of benefit is a strong one. JS's expectation of his or his family's benefit under the Carriere trust was a very strong one. He was effectively (subject to the discretion of the protector) able to decide who benefited under it.

324. JS recalled that he was advised that he had nothing to disclose. But this advice, I find, was given only by Ramesh Shah, his tax advisor, not by his or the Company's accountant. In a tax context it is perfectly understandable. It is clear from the investigation later carried out by Mr Hart and Mr Morley that Chandrika Shah, the principal accountant of JS and the Company, had given no such advice. When she learned about the Carriere trust through Mr Morley in 2011, she confirmed that she was unaware of it before and expressed concern and disappointment about that fact. I found that indication, recorded in notes of an interview with her, a telling detail in this regard. Unfortunately, Ms Shah was not called to give evidence, so the matter was not able to be explored further with her.

325. Once the interest in Expotel was disclosed, it may have been easy enough to satisfy the board members and auditors that the commercial terms on which the Company

was trading with Expotel were not adversely affected by JS's interest. But that is a separate matter from whether JS should have disclosed it in the first place. Once again, it was not for JS to decide such matters for the Company, without disclosing his potentially conflicting interest.

326. For disclosure to be required, the possibility of a conflict has to be 'sensible', i.e. real, objectively assessed, and not merely theoretical. But JS was in a position (through the nominee directors, Mr Day and Mr Kirti Shah) to influence Expotel's business affairs and had a significant financial interest in Expotel. In my judgment, there was therefore always, objectively, a real risk of JS's interest influencing in some way a decision of the Company, e.g. a decision whether or not to transfer allegiance to a different booking agent, who was prepared to offer the Company better terms or who might be more productive in terms of referrals.

327. Accordingly, I conclude that JS was in breach of duty on a continuing basis until 2008 in not disclosing to the board his interest in Expotel.

H. Was the disclosure made in 2008 accurate?

328. On 23 June 2008, the board of the Company met to approve the annual accounts for the year ended 31 December 2007. These had to be signed off by the auditors in time to deliver them to the Company's bankers by 30 June 2008. That was a condition of the Company's loan facilities. Some weeks before the board meeting, Mr Morley had been at pains to explain to the directors the importance (under s.234ZA of the Companies Act 1985) of each director making full disclosure of any information that he had that might be of relevance to the auditors' task. He had also informed them on 16 June 2008 that the auditors (who were KPMG and Shah Dodhia jointly) had indicated that they would not sign the accounts unless all of the directors approved them, and that any reason a director had for not wishing to approve the accounts should be drawn to the auditors' attention.

329. At the start of the meeting, JS provided a written statement about Winchfern and Expotel. Only Mr Morley out of the directors had had any advance notice (at most 3 hours, he said) of this proposed disclosure. HS and BM Singh were present at the meeting, as was Mr Hart.

330. The written statement was as follows:

> "I refer to your email of 29 May, 2008 and attached note from Baker & McKenzie regarding directors duties in relation to 2007 Directors' Report. I would like to stress at the outset that I am not conscious of anything that I should disclose in accordance to my duties as director. However, I am aware of certain comments that have been made by my brother which I believe are references to two historic deals.
>
> The Singh family and Mr Shah are well aware of the nature of these deals. For the avoidance of doubt, my position in relation to both deals is that I do not believe that I am required to make any disclosure. However, in light of my brother's evident wish now to use these deals in some way in connection with a family

> disagreement which has now arisen between us, it seems sensible to give some details. I add that despite their knowledge of the deals, neither my brother nor Mr Shah have raised them in their capacity as directors of EGL and I believe that illustrates their lack of relevance to EGL
>
> **Winchfern Limited**
>
> In 1983 I advised and assisted a friend of mine who has set up a company called Winchfern Limited with a view to acquiring and running a small hotel. I was gifted an interest in shares in Winchfern in return for my advice and assistance. I no longer hold any shares or interest in the business. I was advised that disclosure was not required as there was no connection or competition between Winchfern and EGL. In particular, the hotels owned by Winchfern traded in a different (more downmarket) marketing category, i.e in terms of size of premises, quality of accommodation and room rates, and were in a different franchise network
>
> **Expotel**
>
> Many years ago I gave a personal guarantee in relation to the Keith Prowse/Expotel booking agency business in exchange for guaranteed business for EGL. On the basis that that I thereafter facilitated Kase Development Limited's acquisition of that business, there was a gift of shares in that company (now renamed International Travel Group). The shares are vested in a charitable trust. I have been advised that I do not have any interest in that trust, as I am not a beneficiary.
>
> Please feel free to circulate as you feel appropriate.
>
> Jasminder Singh"

331. The disclosure in relation to Winchfern (made while asserting that no disclosure was required) was incomplete. No mention was made of the fact that JS guaranteed the lease of The Posa hotel (i.e. the shares were not just a personal gift), or that JS and then Amrit Singh held the shares beneficially until 2005 when they were sold, or of the value derived from the shares (in total in the region of £1.3m).

332. The disclosure in relation to Expotel (also made while asserting that no disclosure was required) is both limited and misleading. The impression deliberately given, I find, is that shares that were a gift a long time ago are in a wholly charitable trust in which JS has (and has had) no interest of any kind. This was untrue: the shareholding was provided as part of the transaction that involved JS taking on financial risk (as in the case of Winchfern). The shares were not therefore a personal gift. Further, the original 1991 deed of trust (which was not mentioned) was not a charitable trust, and the Carriere trust was not a charitable trust except in form only, in that it had one

named charitable object, but it was in substance a discretionary trust for the benefit of (originally) the Singh family and (since 2005) JS's family. Nothing was said of the appointment of Inderneel in May 2005. Nothing was said about the £11,000,000 or thereabouts that was realised for the benefit of the beneficiaries of the Carriere trust in 2008.

333. Mr Hart confirmed in evidence that the memorandum caused him to believe that it was a purely charitable trust, and that if he had known at that time that there was power to appoint Singh family members as beneficiaries he would have wanted further investigation to be carried out. It is notable that the memorandum does not say in relation to the ITG shares, unlike the Winchfern shares, that JS was advised that disclosure was not required.

334. Mr Morley took the memorandum at face value and was of the opinion that it should be shown to the auditors and that they would conclude that no change to the accounts was warranted. HS and BM Singh abstained on a vote to approve the accounts. Three reasons were given by HS for abstaining. First, time was needed to consider the information in the memorandum. Second, time was needed to appraise new valuations of the hotels, in particular the Mountbatten and Berkshire valuations. Third, detail was required in connection with a note in the accounts relating to liability under a guarantee given by a director to a third party.

335. Thereafter, Mr Morley sent Chandrika Shah of Shah Dodhia the disclosure memorandum and extracts from the board minutes setting out HS's and BM Singh's reasons for abstaining. Her only concern was with the valuations of the hotels. Accordingly, Mr Morley asked HS to particularise, urgently, any concerns that he had about this. The auditors apparently had no concerns about the disclosure memorandum or the note about the guarantee so they took what was stated in the memorandum at face value.

336. After HS had sent his detailed valuation concerns to Mr Morley, the latter wrote to him explaining how serious a default on the banking covenants would be, and that the shareholders might have to consider removing HS as a director. Mr Morley spoke to the KPMG partner, Mr Summerfield, and asked him to send an email stating that KPMG would not sign the accounts if directors abstained from approving them, regardless of the reasons given. Mr Summerfield did so. HS then indicated that he and his father were willing to sign the accounts on the basis that both the valuers and the auditors were satisfied with the valuations in the light of his concerns. His email makes it clear that the reason for asking about the note in the accounts relating to the third party guarantee was that HS believed it to have some connection with Expotel. HS accepted that he knew the answer to the question he asked about the note, and that what he meant to ask was how the KP guarantee may have been connected to the interest acquired in Expotel.

337. And so the immediate crisis for the Company was resolved: the 2007 accounts were signed off and there was no default under the banking covenants. But the disclosure memorandum fuelled HS's suspicions about Winchfern and Expotel, which led to a further crisis when the following year's accounts had to be approved.

I. What prejudice was caused by the breaches of fiduciary duty?

338. JS contends that even if he acted in breach of fiduciary duty, as I have held that he did, those breaches of duty caused no loss to the Company, and accordingly that misconduct of the Company's affairs was not unfairly prejudicial to the interests of the shareholders generally or to HS and Estera in particular.

339. The breaches of duty as regards Winchfern and Expotel by their very nature caused all the shareholders prejudice, in that JS was wrongly putting himself in a position where his duty to the shareholders of the Company conflicted with his own interests and then preferring his own interests. That kind of conflict is corrosive of good administration and trust between shareholders and directors. Further, the prejudice was by its nature unfair. The members did not know of JS's personal interest: they were unaware of the undisclosed conflict that the CEO of the Company continued to have. They were deprived of the right to give or refuse consent to JS taking the opportunity for his personal benefit.

340. In Re Tobian Properties Ltd [2012] EWCA Civ 998; [2013] Bus LR 753, Arden LJ identified the six fiduciary duties of directors now on a statutory footing in sections 172-177 of the Companies Act 2006 and observed, with reference to them, that "non-compliance by the respondent shareholders with their duties will generally indicate that unfair prejudice has occurred". Aikens and Kitchen LJJ agreed with her judgment. That observation was in the context of a case where the active director of a company had voted himself excessive remuneration, which the company could not afford. On the other hand, if it is clearly established that no financial loss is suffered by a company as a result of a breach of duty, there may be no unfair prejudice capable of being identified by a shareholder in a section 994 petition: see per David Richards J in Re Coroin Ltd (No.2) at para [631]. That judge made it clear that unfair prejudice does not have to be financial prejudice, while observing that where a company suffers no financial loss it may be harder to identify unfair prejudice.

341. So far as financial loss is concerned, I have found that it is improbable that the Company would have taken the opportunity to buy The Posa or offered a guarantee of Winchfern's liabilities in return for a shareholding. In addressing liability to account for breach of fiduciary duty that is an irrelevant matter, but in considering in this context the extent of prejudice unfairly caused it is material. I am not persuaded that any financial loss flowed from The Posa opportunity. The Company in 1983 would probably not have guaranteed Winchfern's lease in return for a shareholding, given how committed it was to financing its own development at that time. Moreover, I accept the evidence of JS that the location was inconsistent with the Company's plans: that is borne out by subsequent acquisitions. It may be that the Company incurred some small financial expense in the arrangement that was made for the benefit of staff at the Cheshire Hotel, once Winchfern had acquired that property in place of The Posa. Had JS's continuing conflict of interest and duty been disclosed that might have been avoided, but any such expense, even if proved, would be de minimis in the context of this claim.

342. So far as Expotel is concerned, the position is more complex. It is less clear what stance the Company or its shareholders would have taken in 1991 or 1994, if presented with knowledge of an opportunity to take a substantial interest (concealed from the market) in ITG. 1991 was a difficult time for the Company, but that had not

prevented the board from deciding on a co-venture with Leisure Holdings plc in August of that year to save Expotel (though in the event its bankers did not support the decision). The Segals' terms were payment of only £100,000 up front and any further working capital required, and £750,000 contingently on the failure of ITG within two years. There may or may not have been objections from the Segals, but the 50% shareholding could as easily have been hidden for the Company's benefit, or for the benefit of all its shareholders, as it was for JS's benefit.

343. I do not accept JS's evidence that, in 1991, he was clear that the Company would not be able to access funds to support Expotel further. That evidence is self-serving and untested: the proposal to advance as little as £100,000 to obtain a 50% shareholding in Expotel was never put before the Company or its bankers. In my judgment, the Company might well have taken advantage of the Expotel opportunity had it been informed of it. The breach of duty relating to Expotel therefore could well have caused actual loss to the Company. While Mr Segal was understandably concerned to ensure that JS's interest was not visible or published, he was not averse to the CEO of the Company having control over a substantial hidden stake in ITG. His concern was to establish a trust structure that concealed the ownership. An indirect interest taken by the Company itself, or by all its shareholders, could have been dealt with similarly.

344. The Company lost the opportunity to consider whether to take that interest, which eventually realised over £11,000,000 for the Carriere Trust. The opportunity arose in September 1991, before the restructuring of the Company. In 1994, the interest granted to JS's nominees in 1991 was itself restructured and settled offshore. That transaction should also have been brought to the Company's attention. Had that happened, I consider it likely that the Company would have wished to benefit from it, having only recently underwritten JS's liabilities related to KP on the basis that JS had acted at all times for the benefit of the Company. I therefore consider that the members of the Company in 1991 were unfairly prejudiced financially as a result of JS taking the benefit first for his nominees in 1991 and then for the Carriere trust in 1994.

345. As for JS's continuing breach (up to 2008) of his duty to disclose his conflict of interest, there is no evidence to suggest that loss was actually caused to the Company, as a result of commercial or other dealings between the Company and Expotel from 1991 to 2008, when JS's indirect interest in ITG was hidden from the Company. On the contrary, it appears to me to be likely that the Company continued to benefit considerably from the business of Expotel. However, the failure of JS to disclose his continuing conflict of interest and duty – and when he did give disclosure, doing so in a partial and misleading way that was calculated to conceal the true position – prejudiced all the shareholders in the general way that I have indicated in paragraph [339] above. The shareholders were unaware that JS was benefiting in that way from the Company's business with Expotel, and both the board and shareholders were unaware of JS's continuing conflict of interest and duty throughout the period up to 2008.

Part IV: removal of HS

346. This part of my judgment is concerned with the reasons for HS's removal as a director and employee. Given my conclusions on quasi-partnership, they are material for three reasons. First, in case I am wrong on those conclusions, to decide whether or not HS's removal as a director was justified by his conduct and so not *unfairly* prejudicial to his or Estera's interests as shareholders. Second, to decide whether HS was removed as a director or employee for raising questions about Winchfern/Expotel that JS did not want to be raised. If that were so, it might be material when considering the extent of prejudice caused by JS's breaches of fiduciary duty. Third, to decide whether or not Verite/Jemma exercised their power to remove HS in bad faith and/or effectively on behalf of JS, so that if relief is granted against JS it should also be granted against Verite/Jemma. This part comprises the following sections:

A. The facts relating to HS's removal as director. (paras 347-385)

B. What was JS's involvement in the decision to remove HS as director? (paras 386-393)

C. What was the reason for Verite/Jemma's decision to remove HS as director? (paras 394-400)

D. The facts relating to HS's removal as an employee. (paras 401-409)

E. What was JS's involvement in the decision to remove HS as an employee? (paras 410-411)

F. Was the conduct of HS such that he brought on himself his removal without a fair offer for his shareholding? (paras 412-426)

G. Unfair prejudice to HS and Estera revisited (paras 427-430)

A. The facts relating to HS's removal as director

347. Prior to the June 2009 board meeting to approve the 2008 accounts, the following events occurred with regard to Winchfern/Expotel:

i) On 4 September 2008, HS's solicitors, SJ Berwin, wrote to Mayer Brown, JS's personal solicitors, asking for a full explanation of the circumstances of the guarantee of KP and the matters referred to in the disclosure memorandum, as well as of the suggestion in that memorandum that these matters had previously been disclosed to HS, BM Singh and Shashi Shah.

ii) Following the AGM on 8 September 2008, Mr Christensen of Jemma wrote to Mr Hart expressing a desire to facilitate a resolution of the dispute between JS and HS, and expressed scepticism about HS's motives.

iii) On 26 September 2008, in the absence of any substantive reply from Mayer Brown, SJ Berwin notified them that a letter before issuing a petition under section 994 of the Companies Act was in course of preparation.

iv) In a letter dated 27 October 2008 written to the Company's solicitors, Mayer Brown disclosed on behalf of JS further information about Expotel, Winchfern and the BCCI guarantee. This volunteered that JS agreed with the Segals to meet some of the purchase price for Expotel and in return the Segals agreed that they would hold 50% of their shares on trust as directed by JS. It suggested that these matters had been discussed with HS and the Singh parents over the weekend at Tetworth Hall and that they were aware of them. The letter then states that in March 1994 the Segals agreed that 42% of ITG would be held in a trust for the benefit of the Singh family, but that the shares were transferred into a charitable trust and "no members of the Singh family are appointed as beneficiaries nor have they received any benefits from the trust since it was established". It claims that JS was advised by Chamberlains that he had nothing to disclose *to the Company* until he or any member of his family was appointed a beneficiary. The letter thus implies that the trust had to date been a charitable trust and that no member of JS's family had been appointed a beneficiary – otherwise it would have been disclosed to the Company. That, of course, was wrong, in that the trust was not solely a charitable trust – indeed its purpose, in view of the letters of wishes, was quite different – and Inderneel had been appointed a beneficiary of the trust in May 2005. The letter does not disclose that JS had effective control, subject to the view of his tax adviser, Ramesh Shah, of who is appointed a beneficiary. Nor does it disclose the 1991 deed of trust in favour of JS, HS and Shashi Shah.

v) A copy of that letter was sent by the Company's solicitors, to SJ Berwin on 31 October 2008, requesting that any further correspondence should be addressed to them.

vi) On 23 December 2008, SJ Berwin sent Mayer Brown (but not Baker & McKenzie) a letter with many specific questions about the matters raised in the 27 October 2008 letter, claiming that Mayer Brown's disclosure was inadequate. It was not copied to anyone else.

vii) On 22 January 2009, SJ Berwin wrote to Verite and Jemma, inviting them to communicate with Estera before Estera involved the Jersey Court in the decision that they had reached to commence proceedings for unfair prejudice (which implied that a Beddoe application would be made).

viii) On 3 February 2009, Mayer Brown, who had been informed of the letter to Verite and Jemma, wrote querying why no letter before action had been sent or grounds for a petition identified, and required HS to do so. The letter suggests that HS was well aware of the detail of the transactions to which the 23 December 2008 letter refers.

ix) On 3 March 2009, Mr Christensen met Mr Prosser of Estera in Jersey. Any claimed privilege in the meeting has now been waived by agreement. The dispute between JS and HS was acknowledged by Mr Prosser to be about HS's status and recognition within the Company, and his remuneration, and he considered that HS believed that he was entitled to it by reason of "Indian dynastic principles". Estera had not at that time decided whether to join in the section 994 claim. It was agreed that the difficulty was how HS would work under JS. They then considered a de-merger proposal, and Mr Christensen

suggested alternative solutions of JS and/or his trustees buying HS's shares, at a discount for a minority holding, or creating an autonomous operational subsidiary for the Mountbatten and Berkshire hotels for HS to run; a further, unattractive, possibility was the status quo. Mr Prosser agreed to meet HS to discuss these matters and agreed that he and Mr Christensen should meet again in a month or so.

348. On 28 May 2009, the run up to the approval of the 2008 accounts began with Mr Morley sending a note to remind directors of their obligations to make disclosure of all relevant matters to the auditors. The accounts were to include a valuation update, relating to a post-balance sheet fall in property values in 2009. HS replied asking for the draft accounts. These were circulated on 12 June at 9.21pm and showed that the revaluation reserve had reduced by about 20% to £339m since 2007, reflecting the fall in property values.

349. Prior to the meeting due to be held on 22 June 2009, HS was sent the valuations on 18 June 2009. He complained about the late submission. On the same day, Mr Hart requested from Mr Mansi an up to date list of incidents of bad behaviour by HS. This comprised about 14 incidents of antisocial behaviour or bad language in Company affairs or meetings over a period of the previous 8 months. Prior to this, there had been similar incidents, which had led JS and Mr Hart to ask Mr Mansi to record them. The worst of these occurred at an operations board meeting on 13 February 2009, when HS lost his temper, shouted and used expletives and banged the table repeatedly. It led to a meeting with the director of HR the following working day to try to resolve the issues.

350. The board meeting duly took place on 22 June 2009. Without prior warning or any prior disclosure to the auditors, HS read a pre-prepared statement to the effect that Mr Morley had promised that all of his queries raised the previous year would be clarified; that to date they had not been clarified, and that therefore HS intended to abstain again. The meeting quickly became very heated. It emerged that HS was referring only to the questions in SJ Berwin's letter of 23 December 2008. No one had a copy of the letter at the meeting. HS had not brought one and declined to retrieve a copy, even though Mr Hart and Mr Morley said that they had not seen it before. Mr Hart told HS directly that if the accounts were not approved the majority shareholder would remove HS and BM Singh from the board. On a vote, HS and BM Singh abstained from approving the 2008 accounts.

351. Later the same day, Mr Hart emailed Mr Morley complaining about the fact that HS had not raised his complaint prior to the meeting and suggesting that Mr Morley write to him explaining that he must urgently explain how the matters in the 23 December 2009 letter impacted on the approval of the accounts. He said that the letter should also point out that the shareholders might well be willing to remove HS based on his abstention on the accounts, the failure to disclose his complaints to the board before the meeting and other incidents of making board business more difficult, such as objecting to minutes and making information requests. Interestingly, there is no mention there of any of the bad behaviour incidents of which Mr Hart had only recently been fully apprised by Mr Mansi. Mr Morley agreed to write to HS the following morning. Mr Hart immediately emailed Mr Machan and Mr Christensen, asking them to send him a copy of the instrument by which Verite had removed Mr Gulhati as a director in 2002. The email explained that the Company was in danger of

failing to sign off its accounts in time, emphasised the importance of staying on the right side of the banks in such difficult financial times, and said that the Company might need their help quickly to achieve sign off by 30 June 2009. A telephone conference the next day was requested.

352. The next day, 23 June 2009, at 12.40pm, Mr Morley emailed HS attaching an urgent letter. HS replied that he was in meetings for the rest of the day and the next day and was having difficulty opening the attachment to the email. Mr Morley thereupon transposed the text of the letter into an email and re-sent it, commenting that nothing that he was doing at the time could be as important as approving the accounts and urging him to leave his meeting, or cancel the next day's meeting.

353. Mr Morley's letter pointed out to HS the very serious risk of expensive re-financing if the banking covenants were broken and accused HS of ambushing the board meeting and acting unacceptably as a director. He pointed out that anything material to the accounts in the 23 December 2008 letter should have been disclosed by HS to the auditors, and that the board was not aware of the letter. It ended by imposing a deadline of 2pm the next day (24 June 2009) for approving the accounts, failing which the board would ask the majority shareholders to exercise their power to remove HS and his father as directors.

354. By reply later that afternoon, HS attached a copy of the 23 December 2008 letter and Mayer Brown's reply dated 3 February 2009. He asserted that it was obvious that the questions affected the Company's accounts. He accepted, however, that the questions related to a shareholder dispute and should not prejudice the Company or affect directors' duties, and he offered to exchange letters confirming that approval of the accounts would be without prejudice to HS's complaint that the questions raised in December 2008 had not been satisfactorily answered. A postscript added that HS had a doctor's appointment the next day that he was unable to move or cancel. Mr Morley responded that if the questions revealed something that could affect the accounts then he could not be party to a side letter that agreed not to disclose them to the auditors; if on the other hand the questions did not affect the accounts (as on an initial reading he thought that they did not) then there was no reason not to approve the accounts and no occasion for a side letter.

355. A conference call between Mr Hart, Mr Machan and Mr Christensen took place the same afternoon. Mr Machan later emailed to say that he doubted that the auditors could properly refuse to sign accounts if one or more directors refused to approve them. Mr Christensen and Mr Hart took a rather different view, looking at it in practical terms. Mr Machan sent Mr Christensen a draft instrument of removal, which the latter approved the next morning. However, he also said to Mr Christensen "*I will be straight & say that I am not comfortable with the removal of Directors for the reasons provided as I am not sure we can justify.*"

356. Also that morning, Mr Hart sent to Mr Wason a draft email from Amrit Singh asking the trustees to remove HS as director if he did not sign the accounts by a deadline to be imposed, and a draft email to Mr Morley giving notice to other shareholders that Verite and Jemma were minded to remove HS if necessary to have the accounts approved in time.

357. It is therefore clear that Mr Hart and Mr Morley were preparing the ground for Verite and Jemma to remove HS if need be to obtain unanimous approval of the accounts by the directors in time. It is also clear that Mr Machan at least was giving independent thought to what directors of the Company were asking him to do.

358. Just before the deadline imposed by Mr Morley arrived, he emailed HS to reinforce his conclusion that there was nothing in HS's complaint that could require any amendment to the accounts. He stated that what had happened at the board meeting was a "thoroughly disgraceful ambush of your fellow directors". However, the deadline was put back to 2pm on the following day, 25 June 2009.

359. Later that afternoon (24 June 2009), Mr Wason sent out to shareholders the draft email that Mr Hart had prepared, slightly amended, telling them that if HS and BM Singh had not approved the accounts by 2pm the following day Verite and Jemma may exercise their power to remove, in order to protect the investment of all shareholders in the Company. It said that the joint auditors "have confirmed that they will not sign the accounts if there are any directors in office who do not vote to approve the accounts". That somewhat overstated the position of the partner at KPMG, who said in an email to Mr Morley that he "would not be comfortable signing the accounts until they have been approved by all serving directors". What Mr Summerfield did say was forwarded by Mr Morley to Mr Machan and Mr Christensen. Mr Hart later added that he expected HS to act as he did the previous year and approve just before the deadline, with BM Singh following his lead.

360. At a board meeting of Verite later on 24 June 2009, that company - having received facsimile letters from JS, Amrit Singh and Shashi Shah asking it to exercise its power to remove if the deadline was not met - passed resolutions to make removal instruments relating to HS and BM Singh and send them to the Company to be held to Verite's order. It was recorded that the trustees had very little alternative but to do so, to protect their assets. The instruments were then sent to Mr Christensen, who signed them and sent them to the Company's solicitors, to be held in escrow until authority was given to release them to the Company. The conditions included confirmation from KPMG that it would not sign the accounts until all directors approved them.

361. Pausing there, there is no apparent involvement of JS in the debate, either with his fellow directors or with the trustees. His witness statement suggests that, apart from the facsimile request to the trustees dated 24 June 2009, he was merely "copied in" and "aware" but played little part. However, I consider it most improbable, given the way in which the Company was run by JS, and given that HS was his brother and BM Singh his father, that Mr Morley and Mr Hart would have acted as they did, imposing deadlines and procuring instruments of removal, without the express approval of JS behind the scenes. JS's statement is concerned to downplay the degree of his involvement: he does not even mention the meeting with Mr Christensen on 3 July 2009, to which I will come shortly. Nevertheless, in my judgment JS was fully aware of was happening and approved of it.

362. At 10.26am on 25 June 2009, HS emailed Mr Morley and said that, on the basis that he (Mr Morley) considered that the issues raised in the December 2008 letter do not require any alteration to the accounts, he (HS) was willing to approve them and believed that his father would do likewise. Further recriminations, he said, would be pointless. That is a remarkable email in all the circumstances. If HS's concerns on 22

June 2009were limited to that question, it could easily have been resolved ahead of the board meeting, by sending a copy of the December 2008 letter to Mr Morley and the auditors and asking the question. HS said that he did not do so as he assumed that JS would have given the letter to Shah Dodhia, who would have taken it into account in preparing the draft accounts. That explanation made no sense if HS's true reason for his abstention was a belief that further matters needed to be taken into account in the final accounts.

363. The inevitable inference is that HS's abstention on 22 June 2009 was not caused by a concern that the accounts might have to be altered in view of the matters raised in the December 2008 letter. I find that HS had determined to delay the orderly signing of the accounts, and that the reason for this was connected with his complaints about Winchfern and Expotel. He wished to preserve his position in terms of being able to pursue these matters against JS and, more generally, to reach an accommodation with JS about his rights and interest in the Company. However, these were not concerns that should have impinged on the duty of a director to approve proper accounts. I do not accept his suggestion that his concern was about whether or not KPMG could properly sign the accounts in view of the matters raised in the 23 December 2008 letter.

364. At about the same time, though without knowledge of HS's email, Mr Machan expressed concern in an email to Mr Morley that KPMG were not being categoric about the requirement for all directors to approve the accounts, and that he would prefer to have an unqualified statement of refusal to sign so that it left shareholders with little alternative. Mr Morley replied that the matter had now become "almost certainly academic in relation to the present and pressing approval of the account" in view of HS's email that morning and that it seemed "most unlikely" that the Company would wish to proceed with the removal notices. At that stage, therefore, no one appeared to be pushing for HS's and BM Singh's removal regardless of the accounts being signed.

365. Later that day Mr Christensen sent an email to Mr Hart, expressing happiness at the "cave in" on the accounts and asking for the return of the instrument of removal. He also said: "It occurs to me that EGL's directors should not have to continue indefinitely with this type of nonsense." That appears to have caused further thought on the part of Mr Hart. In Mr Morley's words, "a more considered view was then taken". I consider it very likely that Mr Hart then discussed the matter further with JS. The position was that Mr Hart and Mr Morley were both incensed at what they regarded as a dereliction of duty by HS at the board meeting. Mr Hart had long since formed the view that it was better to get rid of HS. In a revealing phrase, JS said that he "would have been prepared to limp forward" with HS on the board apart from his refusal to sign the 2008 accounts. He disagreed that he joined in a decision to remove HS because of his questioning about Winchfern and Expotel. The refusal to sign the accounts (for a second year) appears to have changed everything.

366. Mr Hart replied to Mr Christensen (copying in Mr Machan) a day and a half after Mr Christensen had sent his provoking thought. He told them that JS was awaiting a call from them next week, prior to any further approach to Estera, and that "you both need to hear from JS directly his current and hardened views" and act as a united board of trustees. Clearly, Mr Hart had had a conversation with JS. In a revealing comment, he suggests that the instruments might be left with him, to the trustees' order, "in case

you get the need/the chance again". It is abundantly clear what Mr Hart had in mind and what he was seeking to bring about.

367. On 29 June 2009, HS sent an email to Mr Wason, copied to all the directors, taking issue with the terms of Mr Wason's email of 24 June 2009 and seeking to justify his conduct. He said that he was waiting to see whether the final version of the accounts, which were not provided until the day of the board meeting, provided answers to the questions in the December 2008 letter; when they did not, he abstained from approving them, but was willing to approve them later, once Mr Morley had assured him of *his* view that the accounts did not need to be altered. This is not credible, as I have previously explained. If that had been HS's concern he would have sought that confirmation earlier, and in terms, which he did not do. The email then proceeds to criticise Mr Wason's and Mr Morley's emails of giving the impression of partiality "given that JS would no doubt be well pleased if my Father and I ceased to be Directors". This caused an outburst of indignation from Mr Morley in response. It may well have been the matter that gave momentum to Mr Hart's ambitions to remove HS.

368. On the following day, Mr Christensen spoke to JS. This, and a meeting to take place on 3 July 2009, are referred to in an email of 30 June 2009 from Mr Christensen to Mr Hart, in which he also asked for the instrument of removal to be returned, pointing out that a fresh instrument could be provided, if needed, in short order.

369. On 2 July 2009, having first consulted Mr Hart and Baker & McKenzie on a draft, Mr Morley sent HS a reply to his email of 29 June 2009. It was copied to all directors and shareholders of the Company. The letter accuses HS of deliberately failing to comply with his duty of disclosure, if he believed that any of the December 2008 questions could affect the accounts, and of deliberately disrupting the meeting and ambushing the other directors if he did not have that belief. Mr Hart commented on a final draft: "…his disruptive conduct has brought me and probably others near to the point where it can fairly be considered that he ought to be removed from the board, in the best interest of the company". It is apparent that Mr Hart was looking for something to tip the balance. He contacted Mr Mansi who sent him some further, recent emails regarding HS's conduct in operations board meetings, including regarding a decision to make a Mr Ashwin redundant.

370. On 3 July 2009, Mr Christensen met JS and his lawyer, as arranged. Mr Christensen said that at that meeting only options for settlement of the dispute between HS and JS were discussed, not the removal of HS from the board. JS said that he was not expressing a strong view that HS should be dismissed; he was asking the directors and the trustees to find harmony and leaving the matter to the independent directors (by which he meant Mr Hart and Mr Morley).

371. I find that the possible removal of HS was discussed at the meeting on 3 July 2009, for the following reasons. Given what had already happened, it is very difficult to conceive that removal was not discussed alongside the options for settling the dispute. The discussion followed on from the meeting between Mr Christensen and Mr Prosser of 3 March 2009, when various possible solutions to the problem were discussed. Continuing with the status quo was agreed to be unattractive and had recently become very much less attractive. The other options were reducing because JS was no longer attracted to HS leading an autonomous part of the business within the group structure.

Mr Christensen was willing to pursue a further meeting with Estera; JS wanted this to involve Verite too this time, so as to demonstrate a united front. It would have been only natural for JS and Mr Christensen to discuss the "what if" position, given that an instrument to remove HS had recently been prepared and delivered to the Company as in escrow; it was clearly on Mr Christensen's mind that the directors of the Company should not have to put up with HS's conduct at the board meeting any longer, and for JS the conduct of HS at the recent board meeting affected the question of whether it was possible to "limp on" with HS.

372. In my judgment, the outcome of the meeting was probably an understanding between JS and Mr Christensen that Mr Christensen would do what he could to achieve a satisfactory settlement, but that if he could not, or if Estera would not meet, a more drastic solution might have to be adopted. Mr Hart's email to Mr Christensen and Mr Machan of 7 July 2009 records that, after the 3 July 2009 meeting, JS had told him that Mr Christensen indicated that he would be contacting him for his views about the problem caused by HS's conduct. That strongly implies that Mr Christensen would be seeking views on the appropriateness of removing HS at the same time as he was pushing Estera to have a meeting. That, at least, is clearly how Mr Hart interpreted what JS told him, as his email of 7 July 2009 sets out at considerable length the reasons why HS's conduct makes it appropriate to remove him straightaway.

373. At the same time as JS and Mr Christensen were meeting on 3 July, Mr Hart was developing his own thinking in an email to Mr Morley. This was that HS had deliberately put his own interests in his 'shareholder dispute' before his duty as a director and the Company's interests, and that there were other material incidents of disruptive behaviour, including the Ashwin matter of which he had recently been informed. "I expect that I am not the only one involved in the conduct of the affairs of our group who feels the point has now been reached where it can fairly be considered that Herinder ought to be removed from the board, in the best interests of the company". He expressed the view that BM Singh should be invited to retire, and if necessary be removed, in the same interests. He proposed to make his views known to Shashi Shah, Amrit and JS, and then to Verite and Jemma and HS, but wished to know Mr Morley's thoughts before doing so. Mr Morley differed from Mr Hart "in emphasis but not in conclusion". He agreed that the majority shareholders should be persuaded to threaten removal while the recent events were fresh in everyone's minds, commenting that the other instances of poor behaviour will be useful as persuasive facts.

374. At this stage, therefore, Mr Hart and Mr Morley had formed their own views that it would be in the best interests of the Company if the majority shareholders removed HS. However, they clearly did not assume that the shareholders would necessarily do so. Further, although they were aware that JS's views about what HS would be offered were "hardening", they probably did not know that he would support the removal of HS now that the accounts were in fact signed off.

375. Mr Christensen then drafted a letter to Mr Prosser at Estera, which he sent to Mr Machan on 6 July 2009 for his comments. The draft alluded to the possibility of HS's removal from the board, so as to minimise the risk of disruption to the company's business, if Estera would not agree to meet. Mr Machan's reply makes it clear that he had not yet had a report from Mr Christensen on the lunchtime discussion with JS of the previous week and that his own attitude to the damaging effect of the difficulties

with the accounts was hardening in any event. Quite why Mr Machan had become much more hawkish is not obvious, nor was it explained with any particularity by Mr Machan in his evidence. In his witness statement he refers at some length to Mr Morley's reply of 2 July 2009 to HS's letter, which may well have been responsible for the change in attitude.

376. The letter to Estera was duly sent by Mr Christensen but no reply was received. A week later Mr Christensen telephoned Estera and left a message for Mr Prosser, but no reply was received.

377. On 6 July 2009, JS sent his own comments to shareholders and directors of the Company, following Mr Morley's email, regretting the disruption that had been caused to the business of the Company and setting out the history of the attempts made through the trustees to resolve the dispute. This email appears to me to have been very carefully written, to make it clear that the problem with resolution was that despite JS's willingness to engage Estera was not responding, and also that the trustees had JS's full support to do what they considered to be in the best interests of the Company to prevent family disputes compromising the business. In other words, something had to be done and the option of negotiating a solution was being obstructed by Estera. JS's preference – reflected by Mr Christensen's email to Estera of the same day – was for a negotiated settlement, but failing that some other solution to the problem was required. Mr Machan interpreted JS's email as requiring "one final attempt" to be made with Estera.

378. The next day, Mr Hart emailed Mr Machan and Mr Christensen setting out his views on the "disgraceful conduct" of HS at the board meeting. He said that HS knowingly put in jeopardy the survival of the Company, and explained that there were other conduct issues too that the trustees should know about. He also sent them his exchange with Mr Morley about removal of HS, and HS's response to Mr Morley's letter of 2 July 2009, suggesting that the moderate response was "incredibly insulting" and "might even be a legally defamatory publication". By this stage, Mr Hart was crusading for HS's removal and determined to lose no opportunity. (Mr Morley's more measured reaction to HS's response was that at least HS had recognised that he was in a hole and had stopped digging.) I consider that while Mr Hart was giving vent to his own true feelings, he was doing so from a position of security, namely that he believed from conversations with JS that he was acting in a way that JS would, if necessary, support.

379. On 8 July 2009 Mr Hart sent Mr Machan and Mr Christensen another batch of emails relating to previous occasions of bad conduct by HS, accompanied by his own prejudicial commentary ("Would you expect and accept any of this sort of behaviour by one of your director colleagues, let alone all of it?"). The email noted that HS was away on holiday, so a reply to Mr Christensen's email to Estera was unlikely before HS returned, but nevertheless invited Mr Christensen and Mr Machan not to wait for more than a few days for a reply and then to exercise independent judgment as a professional trustee to remove HS. In short, Mr Hart was seeking to persuade the trustees to strike while the iron was hot, before any conciliatory response was forthcoming that might delay matters.

380. Although Mr Prosser and Mr Boxall considered that a meeting with Mr Christensen might be beneficial, neither of them troubled to sending any response, not even a

holding response, to Jemma. It is not easy to misread the tone of urgency and seriousness in the last paragraph of Mr Christensen's letter of 6 July 2009, but Estera appeared to do so. Whether they made contact with HS in India, or even tried hard to do so, was not clear: HS's first written communication with them was on receipt from Mr Wason of a notification of his removal.

381. In the meantime, it appears that Mr Christensen and Mr Hart had a conversation, probably provoked by some of Mr Morley's concerns about possible consequences of the removal of HS that were contained in his email to Mr Hart (which Mr Hart had forwarded on 7 July 2009). An email of 13 July 2009 from Mr Hart to Mr Christensen, copied to Mr Machan, referred to Mr Christensen's recently mentioning to Mr Hart the principle of quasi-partnership leading to no discount. Mr Hart then referred to two authorities and concluded that in the light of them the trustees might wish to apprise themselves of certain factual information relating to Estera's shareholding and HS's salary before any meeting with Estera. On 15 July 2009, Mr Hart sent Mr Christensen and Mr Machan another batch of emails relating to HS's conduct. On 17 July 2009, he emailed again, stating that Estera seemed to have ignored the letter of 6 July 2009 for two working weeks, which confirmed that there was no reason not to proceed immediately with signing and sending the instrument of removal.

382. Mr Christensen took a more measured approach and sent Mr Prosser a chaser the following week, on Monday 20 July 2009. He said that since 6 July 2009 his attention had been drawn to a number of incidents that called into question whether HS should remain on the board; that he would like to discuss it face to face with Mr Prosser, and that the meeting had to be without further delay, failing which Verite and Jemma would have to proceed as indicated in the 6 July 2009 letter, i.e. remove HS as a director. This email was received by Mr Prosser on holiday. He forwarded it to Mr Boxall and suggested a meeting between the two of them the following week. A copy sent to Mr Hart led Mr Hart to telephone Jemma to find out when Mr Christensen planned to sign the instrument of withdrawal. The answer was: on the following day, but that the trustees first wished to speak to the other directors of the Company.

383. On 21 July 2009, Mr Christensen and Mr Machan arranged telephone calls to speak to JS, Mr Morley, Shashi Shah and Amrit Singh about the proposed removal of HS. According to Mr Machan's file note, JS indicated that he did not wish to express an opinion, in view of family influences, but that he did accept that HS was becoming increasingly disruptive as a board member. The other three directors all stated that HS should be removed. Mr Christensen's file note records that JS was told that the trustees wished him to know what the trustees intended to do and to hear if he had any objection, to which he said that as chairman he had no objection and agreed that it was probably in the best interests of the Company, but as HS's brother he was troubled and wished that Estera might be more constructive; however he would understand if the trustees did proceed as indicated.

384. In oral evidence, Mr Christensen stated that he did not communicate with JS before taking the decision to remove HS – he didn't think it was necessary to talk to JS when he was hearing from Mr Hart and Mr Morley about a board matter. In any event, as I have found, Mr Christensen knew broadly what JS's attitude was as a result of their meeting on 3 July 2009. The attempt to elicit contact from Estera having failed and the status quo being unacceptable, the choice was whether to wait longer to remove

HS. Mr Christensen said that his own reasons were not so much because of the accounts issue, though that was serious at the time, but because of the other inappropriate conduct of which he had heard from Mr Hart. He insisted that his decision was his own independent decision, and that the trustees had decided to remove HS regardless of JS's views – however Mr Christensen already knew that JS would not be opposed to any such decision. In reality, JS was able to stand reasonably aloof from the indignities of the process because he knew that Mr Hart and Mr Morley were of the view that HS should be removed and that they would do and say what was necessary. In my judgment it is highly improbable that the trustees would have proceeded as they did without first being assured of the views of the chief executive of the Company and their main beneficiary, to whose wishes they were to have appropriate regard. What they would have done if JS had opposed removal is unknown and a matter of speculation.

385. The instrument of removal was delivered to Mr Wason on 22 July 2009 and thereby took effect.

B. What was JS's involvement in the decision to remove HS as director?

386. Based on the factual findings that I have made above, I conclude that JS was fully aware of the process leading to the decision of Verite/Jemma to remove HS and to a large extent in sympathy with it. It suited his purposes for the process (in the context of a family dispute) to be seen as being driven by others, rather than by himself. Happily for him, there were others who felt very strongly that HS should be removed, so JS did not have to drive the issue forwards.

387. At the 22 June 2009 board meeting, Mr Hart threatened HS with removal if he did not sign the accounts. Since Mr Hart was at all times relatively untroubled by the true position as regards Winchfern and Expotel and Mr Morley similarly, it cannot sensibly be said that this was the result of anything other than the crisis in approving the accounts. Within two days, an instrument of removal had been sent to the Company's solicitors, and this too was on the basis of HS's refusal to sign the accounts. When the accounts were signed, the immediate crisis went away but the issue did not altogether disappear. The reason it did not was that it had now happened in two successive years. A one-off occurrence, more readily explainable as a misunderstanding or misjudgement, could easily have been overlooked on the basis that it would not recur, but that was not the case with HS's refusal to approve the accounts.

388. Mr Christensen's initial suggestion that the board should not have to put up with such conduct, and Mr Morley's agreement (with different emphasis) with Mr Hart's suggestion that it was in the best interests of the Company for HS to be removed, were both a result of the crisis produced by HS's refusal to sign the accounts. Mr Hart already wanted to be rid of HS, but it is clear and understandable that he too was considerably disturbed by the threat to the Company's financial well-being that was posed by the failure by HS and BM Singh to approve the accounts. In my judgment, this concern (which Mr Morley shared) was entirely genuine. I am satisfied on the evidence that this threat was too much even for JS, who was otherwise prepared to indulge his brother further than his co-directors were. The issues raised by the non-

approval of the accounts did not simply disappear when HS and BM Singh finally gave way on the matter. A further reason why they did not disappear was that HS poured more fuel on the fire by his letter of 29 June 2009, which provoked Mr Morley's severely critical response. That was sent to the shareholders, who as a result understood the seriousness of the criticism that was made against HS.

389. I reject the explanation contended for on behalf of HS that the removal was entirely driven by JS's anger at HS for daring to raise questions about the Winchfern and Expotel transactions. It is true that Mr Gulhati was removed in 2002 shortly after he asked uncomfortable questions about JS's loan account and the BCCI guarantee, but Mr Gulhati had been a long-standing annoyance in the Company and at the time was considerably overpaid for what he did. I do find that, on that occasion, Mr Hart, Mr Morley and JS all determined to have him removed at least possible cost to the Company and that JS prevailed upon Verite to use its voting power to remove him. Those were very different circumstances from the removal of a family member as a result of an act that posed a real threat to the Company's solvency (even if HS himself knew that he would not press the matter that far and Mr Hart was confident that he would not do so).

390. Moreover, HS had raised the Winchfern/Expotel issue in detail in 2008 and indicated by SJ Berwin's December 2008 letter that he was not going to let the matter drop. If JS was incensed by such action, he (or Mr Hart on his behalf) would have prevailed on Verite/Jemma to act sooner, based on the 2008 refusal to sign the accounts and/or sundry items of misconduct being noted and supplied by Mr Mansi to Mr Hart. I find that although JS was considerably annoyed by the Winchfern/Expotel challenge, it was not the reason why HS was removed. Indeed, I find that JS's anger about the matter, which Mr Christensen perceived at their meeting on 3 July 2009, was principally about HS's 'ambush' of the board meeting, the undermining of the orderly business of his Company and the unwarranted threat to its financial stability. By 3 July 2009, the auditors and the directors were unanimous that any complaints of HS about Winchfern and Expotel did not impact on the accounts of the Company.

391. Although JS supported (in a subtle and mostly passive way) the removal of HS, he did not cause it to happen or suborn the trustees to do his bidding. As a result of the 3 July 2009 meeting with Mr Christensen, removal was contingent on Estera not responding positively to the request for further discussion to take place. It would have been obvious to JS and the trustees that the removal of HS would be likely to precipitate the legal proceedings that for some time had been threatened. Mr Hart and Mr Christensen were already discussing authorities on quasi-companies and share valuations. So a negotiated solution was strongly in JS's and the Company's best interests. But negotiations could not be compelled. For whatever reason, HS and Estera were reluctant to engage in them. So an alternative solution was, ultimately, required.

392. In my judgment, it can fairly be said that Mr Hart was the primary cause of Mr Christensen deciding to remove HS and Mr Morley (by his letter dated 2 July 2009) was the primary cause of Mr Machan's decision. However, the origin of their concern in both cases was the crisis with approving the accounts and the governance of the Company, which had caused them both to sign an instrument of removal in June 2009.

393. I have no doubt that Mr Hart was astute enough to be sure that JS would not oppose the removal of HS, that Mr Christensen was careful to ensure that he would have JS's support for all the steps that he was proposing to take, and that Mr Machan (via Mr Hart or Mr Christensen, or both) was similarly aware that a decision to remove HS was not likely to face any or any substantial opposition. But JS's desire to resolve the problem with HS was not the sole or main reason for the removal of HS as a director. I find that JS was not simply directing Verite/Jemma to do what he wanted them to do, though he was happy for Mr Hart to influence their thinking. Mr Christensen and Mr Machan were both concerned to establish the wishes of the CEO and their main beneficiary, but subject to that they did make their own decisions. They made them on the basis of their own opinions about the accounts difficulties, the facts as they were presented to them by Mr Morley, Mr Hart and JS, and in the light of the views of the other directors of the Company, which they obtained on 21 July 2009 prior to signing the instrument of removal.

C. What was the reason for Verite/Jemma's decision to remove HS as director?

394. I have substantially dealt with this question under sections A and B above.

395. The reason for removing HS was the view of Mr Christensen and Mr Machan that HS had become a disruptive presence on the board and in the conduct of the Company's affairs (on the basis of the evidence presented to them), and that HS's presence on the board imperilled or at least prejudiced the orderly conduct of the Company's business.

396. On the basis of the information that was provided to them, that was a conclusion that a trustee could properly reach.

397. I reject the allegation that they were no more than a cipher for JS, acting in accordance with directions or requirements communicated to them.

398. On behalf of HS, it is argued that Mr Machan, given his previous role as protector of the Carriere trust, was aware - contrary to what Mayer Brown stated in their letter dated 27 October 2008 - that the trusts of the Expotel shares being referred to were a trust for the benefit of JS and his family, and indeed that JS's son, Inderneel, had been appointed a beneficiary by Mr Machan in 2005. Mr Machan therefore knew, it is argued, that what HS was complaining about had a solid foundation of fact, and therefore that the removal of HS was being pursued on a false basis.

399. Despite answers that Mr Machan gave in cross-examination - apparently agreeing that he knew that there was an investment in ITG held by the Carriere trust and that it was not a purely charitable trust – I am not persuaded that he had in mind, at the time of signing the instruments of removal, the justification for HS's complaints about Winchfern and Expotel or the fact that, contrary to Mayer Brown's letter, JS had an interest in the Carriere trust. He would not have had this in mind when signing the instrument of removal in June 2009 as the only issue then was whether the auditors could properly refuse to sign the accounts if one or more directors did not approve them. If they could and intended to do so, it was accepted that HS had to be removed so that the accounts could be approved.

400. A month later, the issues were (in Mr Machan's mind) whether the conduct of the Company's business was being prejudiced by improper conduct, as explained in Mr Morley's letter. As Mr Morley explained, the issue of whether anything of which HS was complaining was a reason for not signing the accounts had been resolved by that time: it was not a reason. That was the point on which Mr Machan fastened in cross-examination and I accept that that was the main point that he took from Mr Morley's letter of 2 July 2009. The question of whether complaints about non-disclosure of transactions in 1983 and 1991/1994 were justified was not, on the face of it, relevant to the reasons why Mr Machan was being asked to exercise Verite's power to remove HS. Whether HS had a legitimate grievance about Expotel or not, Mr Machan understood that there was nothing in the complaint that HS had raised at the board meeting that affected the final form of the accounts. Had JS been seeking to persuade Verite to remove HS because he was wrongly making allegations about Expotel the position might have been different, but that was not the case.

D. The facts relating to HS's removal as an employee.

401. For some years prior to the removal of HS as a director, Mr Hart had been attempting to agree with HS a job description for HS's responsibilities in the Company (apart from his role on the board). This had not been successful. It was something of a charade. HS was indignant that Mr Hart was treating him as if he were a mere employee, and therefore was not co-operative; it suited Mr Hart's purposes for there to be no clearly defined role for HS. So he did not press the matter. And the description did not materialise.

402. After HS's removal from the board, Mr Hart emailed HS on 25 September 2009 confirming that HS had no responsibility for taking forward any of the projects on the Company's list and implying that HS would be hearing from him further after he had had a discussion with JS about HS's role. On 30 October 2009, HS (perhaps unwisely) prompted Mr Hart to tell him when he might hear from him further. Mr Hart replied on 3 November 2009, stating that HS did little more than explore possibilities for improving business processes and bring them to the operations board for discussion. He invited HS to set out in writing his perception of the work that he did as a senior management team member. No response having been received, Mr Hart wrote again on 23 November 2009, explaining that it was a Companies Act and Employment Rights Act requirement to have a summary of the terms of engagement of a director and employee of a company. HS replied that he found Mr Hart's request "more than a little strange", that he had been considering his response carefully and would answer within a week.

403. HS wrote a very lengthy email by way of answer on 4 December 2009, calling Mr Hart's request puzzling and completely artificial. He set out the roles that he had had since 1993 as well as commentary on attempts to frustrate his work. He suggested that he had become increasingly marginalised by JS since the summer. Mr Hart sent a terse and rather sarcastic reply on 21 December 2009. This was doubtless coloured by recent events at the 2009 AGM and HS's request for an investigation into JS's misconduct. For the time being, Mr Hart was distracted by the removal of BM Singh as a director and the initial discussion about a formal investigation into JS's conduct.

404. However, on 21 April 2010, Omar Ismail on behalf of JS and Mr Hart sent HS and others notification that an appraisal would be taking place. He requested a list of 12

key areas of HS's responsibilities. HS by reply dismissed the proposal as being an attempt to undermine him and make his position more difficult in regard to the shareholder dispute. Mr Hart summoned HS again to a meeting with him and Mr Morley to discuss HS's current work for the Company.

405. This was eventually fixed, shortly after HS's pre-action protocol letter of claim was received, for 9 July 2010. Prior to that meeting, Mr Hart sent HS information via the Company's employee portal about the nature of the appraisal exercise and the questions to be addressed. Prior to the meeting, Mr Hart had drafted a letter of possible redundancy but in fact the 9 July 2010 meeting was limited to an appraisal. At a follow-up meeting on 16 July 2010 – which Mr Hart described in an email as Part 2 of the meeting – HS was informed by Mr Hart that the Company was considering making him redundant and that a period of consultation would follow. The confirmatory email of 20 July 2010 identifies that the role that might not be required by the Company going forwards was what HS called his "Special Projects" role.

406. A further meeting was fixed for 11 August 2010 and eventually took place on 14 September 2010. On the same day, a board meeting of the Company took place, attended only by Mr Hart and Shashi Shah and by Mr Morley on the telephone. Mr Hart reported that at the redundancy consultation meeting, HS had made a number of unsatisfactory requests to see documents relating to the management subsidiary company that employed him. The board of the Company resolved to remove HS as a director of the board of the management company. Following that, the board of the management company met the next day (attended by the same three people and Mr Wason as company secretary) and terminated HS's employment. A formal letter of redundancy was sent, contending that HS's role was business support work that duplicated work done by the senior staff in individual disciplines within the Company and that, contrary to the Company's culture, this amounted to costly duplication of effort. HS was told that there were no alternative vacancies for him.

407. HS gave notice of appeal on 22 September 2010. He contended that the decision was unfair and not truly on grounds of redundancy but because HS had continued to make allegations relating to Winchfern and Expotel to which JS had no answers. He specifically challenged the board of the management company to explain how his role was duplicated and to identify who else performed his role, how his performance compared with those persons and what criteria were used to make the comparison. Mr Hart replied, accepting the notice of appeal, and informed HS that the appeal would be heard by a panel none of whom were involved in the redundancy decision. This did not prevent Mr Hart from then providing his own response to HS's grounds of appeal, typed in bold beneath them on HS's email, which he forwarded to the appeal panel. The panel comprised Mr Abraham, Mr O'Connor and Shashi P Shah.

408. The panel rejected HS's appeal and sent its letter of decision the same day as the hearing. Mr Abraham, who chaired the panel, gave evidence about the nature of the exercise that he considered he was conducting. It was embarrassingly clear from his answers that he had no idea of the criteria for redundancy, nor of the appropriate way in which to conduct an appeal hearing. It was also clear that no attempt had been made by the panel to appraise HS's grounds of appeal.

409. For whatever reason, HS did not pursue his complaint at an employment tribunal.

E. What was JS's involvement in the decision to remove HS as an employee?

410. In my judgment, the redundancy exercise was no more than a means of removing HS as an employee of the management company at least cost to the Company. It was devised and orchestrated by Mr Hart with the acquiescence and support of Mr Morley and JS. Although JS took care to absent himself from the board meetings that made the decisions to remove HS as a director of the subsidiary and then make him redundant, I find that he was fully aware of what was happening and supported it. The Company would not have taken the decisions that it did without his prior approval.

411. HS's position and role in the Company had always been an unusual one, but the notion that it was a particular job that had become redundant, or that it duplicated others' jobs, was a fiction. The appeal procedure was not fairly or properly conducted by the management company, which of course was the creature of the Company. If, contrary to my primary decision, HS as a shareholder had equitable rights to be an employee in senior management of the Company, then his removal as an employee was unfairly prejudicial to his interests and JS and the Company are jointly responsible for that conduct.

F. Was the conduct of HS such that he brought on himself his removal without a fair offer for his shareholding?

412. This question is material if I am wrong in concluding that equitable considerations did not constrain the exercise of Verite/Jemma's rights in July 2009. If they did then the removal of HS was prima facie unfairly prejudicial to HS's rights as a member, absent an offer to buy his shares at a fair price (see O'Neill v Phillips at pp. 1106H-1107C). However, a number of authorities establish that, in certain circumstances, the removal of a quasi-partner without making such an offer can be objectively justified. Those circumstances are, essentially, where the quasi-partner has brought his removal on himself by conduct that objectively justified the other members in excluding him in that way: see per Nourse J in Re R.A. Noble & Sons (Clothing) Ltd [1983] BCLC 273 at 292.

413. Lack or loss of competence in business affairs, a breakdown of the relationship of trust and confidence and even personal misbehaviour do not of themselves justify exclusion without a fair offer. The court does not indulge in what Lord Hoffmann once referred to as a "contest of virtue". Nor can removal without a fair offer be justified solely on the grounds of what the majority consider to be in the best interests of the company: per Lord Wilberforce in Ebrahimi at p.381.

414. In Re a company No. 002470 of 1988, ex p. Nicholas [1992] BCC 895, Harman J held that the exclusion of a quasi-partner was not unfair where the partner was responsible for friction and difficulties in the conduct of the company's business such that management relations had broken down. In Woolwich v Milne [2003] EWHC 414 (Ch), Sir Donald Rattee held that Mr Woolwich was not unfairly excluded where, by doing specific matters that he had previously agreed not to do, he placed the efficient conduct of the business of the Company in jeopardy and posed "a significant threat to the future well-being of the company's business" (p.48).

415. The authorities do not establish any bright line between what does and does not justify exclusion without an offer, but it is clear that the conduct in question must be misconduct in the affairs of the company, not merely personal misconduct. It must be so serious as to undermine the basis for the equitable considerations that bound the parties. The right approach, in my judgment, is to ask whether the exclusion without a fair offer is proportionate and justified by the misconduct in question, but bearing in mind that incompetence, mere misconduct and a breakdown of confidence are not sufficient to justify removal without a fair offer.

416. The first question that I have to decide is whether and to what extent HS acted wrongly and culpably as regards his refusal to sign the Company's accounts in June 2009, and how serious any such misconduct was.

417. In my judgment, HS was fully entitled to raise questions in June 2008 about the disclosure memorandum that JS produced at the board meeting. He was also entitled to raise questions about the valuations of the Berkshire and Mountbatten hotels, even though his specific motive for doing so may have been to look after his own interests in settlement negotiations. The valuations had been obtained by the Company and provided to the directors far too late to enable them fairly to investigate and ask questions prior to the board meeting. The question raised about the note in the accounts relating to a third party guarantee was not justified, since HS knew very well the answers to the questions that he raised. This matter was only raised at the time because of a perceived connection with JS's Winchfern/Expotel disclosure memorandum.

418. In my judgment, HS was also justified in pursuing his questions in correspondence throughout the second half of 2008. But if the matter was to be pursued as an issue affecting the Company, rather than as a dispute between JS and HS personally, the December 2008 questions should have been sent or copied to the Company's solicitors. Again, if the information provided by Mayer Brown in October 2008 or the unanswered questions from December 2008 were relevant to the Company's accounts, as HS stated that they were, he should have disclosed his concerns specifically to the directors of the Company, and to the auditors, in advance of the June 2009 board meeting. He was in breach of his duty to the Company in failing to do so, if he genuinely considered (as he asserted at the time) that the matters concerned the Company's accounts. In my opinion, Mr Morley's criticisms of HS at the time (June/July 2009) were well-founded: either the issues did not in his judgment affect the accounts, in which case he should approve the accounts, or he should have disclosed his concerns in good time to the directors and the auditors. It was wrong for HS to disclose his concerns only at the meeting and then abstain from approving the accounts for that reason.

419. I am driven to the conclusion that HS took this step in an attempt to further his interests (in some way, as he saw it) in his dispute with JS. Had HS been genuinely concerned about the content of the accounts he could and would have gone about things differently. His falling into line a few days later, simply on the basis of Mr Morley's considered opinion that no alteration of the accounts was needed, demonstrates that the Winchfern/Expotel issue was being deployed for ulterior reasons. In fact, HS had no intention of not approving the accounts before the deadline, as Mr Hart rightly predicted, but the threat not to do so was nevertheless serious, given the shortness of the deadline. There was a real risk that if the audited

accounts were not delivered on time the Company's banks would use the opportunity to renegotiate the terms of their lending, or possibly even give notice of default. Mr Morley was right that June 2009 was no time to take a risk of that nature. HS's abstention was likely to cause alarm and disconcert the other directors, in particular JS, and it did so.

420. Although the immediate crisis was soon averted, the matter was still serious, given that it had happened in two successive years and that it was rightly perceived to be a case of HS putting his own interests before those of the Company. Mr Machan initially considered that removal on this ground could not be justified; but he did not have the full picture of what was happening at the time. When Mr Morley's letter of 2 July 2009 provided this, Mr Machan took a very different view. Further, Mr Machan was initially influenced by his belief that the auditors could not lawfully refuse to sign the approved accounts if one or more directors abstained, provided that the board approved them. That may have been right in theory, but it soon became clearer that KPMG were minded to do just that, so there was at the very least a real risk that the audited accounts would not have been delivered in accordance with the Company's banking covenants.

421. It was, in short, a serious matter, and HS was culpable in having put his personal interests before his duty to the Company. But did it, on reflection, justify the Company's shareholders in removing HS as a director without an offer to buy his shares?

422. In my judgment, the shareholders were objectively justified in thinking that if the dispute between JS and HS continued and HS remained a director the same (or some other similar) misconduct would recur. Mr Christensen's initial reaction was that the directors ought not to have to put up with such behaviour. Mr Machan agreed with Mr Morley that such conduct potentially put the wellbeing of the Company at serious risk, contrary to the interests of its shareholders. On the other hand, it could be said that the Company could reasonably deal with and manage the issues arising, give HS an appropriate warning about any recurrence, and be prepared to deal with the same issue (either at the end of year AGM or at the next board meeting to approve accounts), including having instruments of removal ready to be deployed, if necessary, so as to guarantee that the Company's finances were not put at risk by any similar action in future.

423. I have already concluded that other conduct of HS on which the Respondents rely (as notified by Mr Hart to Messrs Machan and Christensen between about 6 and 15 July 2009) was insufficient on its own to justify removal without a fair offer. Indeed, the Petitioners point out that with the limited exceptions of Beverley Stewart's letter in November 2005 and the meeting following the operations board incident in February 2009, there had been no attempt by the Company to raise the issue of misconduct with HS formally, or to discipline him. It is also material that some of the more egregious behaviour, particularly after 2005, is likely to have been the product rather than the cause of the dispute between HS and JS and the result of the stress of trying to resolve that in prolonged negotiations carried on in parallel with and in the same environment as HS's work.

424. The conduct of HS generally is, however, part of the background to the main events of late June 2009 on which the Respondents principally rely as a justification for

removing HS without an offer for his shares. It lends colour to the refusal of HS to approve the accounts and explains some of the factual findings about HS's motives that I have made. It was also part of the picture that Verite/Jemma had to consider in making their decision to remove HS.

425. On balance, I conclude that if a quasi-partnership still existed in July 2009, removal of HS from the board of the Company without a fair offer for his shares was not justified by HS's conduct. My reasons are the following.

i) First, if a quasi-partnership based on a relationship of trust and confidence had come into existence and was still extant in June 2009, it was nevertheless in course of disintegration at the time of HS's removal. This was a result of what had happened from 2005 to 2008, the events of June 2008, the subsequent correspondence and the workplace incidents from autumn 2008 to June 2009, as logged by Mr Mansi. The conduct of HS was bound up with the process of disintegration of the (assumed) relationship of trust and confidence still underlying the Company. A breakdown of trust and confidence is not a justification for exclusion without a fair offer.

ii) Second, the conduct, though serious, did not in fact at any time imperil the Company's finances. Apart from the fact that HS was always going to approve the accounts, the Company had the remedy in its own hands. Had HS made it clear that he was not going to approve the accounts before the deadline, or had he simply failed to do so in good time, the Company could and would have removed him (and BM Singh) as directors.

iii) Third, once the accounts were in fact safely approved, the Company could adequately manage the issue for the future in the ways that I have indicated, so that there need be no peril on a future occasion (if JS, the Jasminder trustees and/or the Company had not by then made a fair offer for HS's and Estera's shares). The majority shareholders or the Company therefore had time to formulate a fair offer for HS's shareholding and were not rushed into removing him before they had a chance to address that.

iv) Fourth, the underlying issues of breach of duty by JS could and should have been addressed by the Company prior to the December 2009 AGM. The underlying cause of HS's complaint was JS's breaches of duty, as I have found them to exist, and it therefore behoved the Company to deal with these matters satisfactorily, and to deal with the December 2008 questions of which it was given a copy on 23 June 2009. Unfortunately, as will be seen, having removed HS, the Company did not deal with matters appropriately at all, thereby making the position worse for itself, but that does not detract from the point that it could and should have addressed the matters raised promptly in July 2009.

v) Fifth, although HS's conduct was culpable, it is impossible to ignore that the matter that drove him to act as he did was the wrongful conduct of JS, and that retrospectively HS's concern about JS's conduct has been found to be justified.

vi) Sixth, the other conduct issues, though unattractive, are not either in themselves, or weighed together with the non-approval of the accounts, sufficient to justify HS's exclusion at that time without a fair offer for his shares.

426. The reason why I reach my conclusion only on balance, and not as a clear cut conclusion, is that it is clear that HS put his own personal interests ahead of the Company's interests in refusing to approve the accounts in good time, thereby breaching his own duties as a director of the Company. That is a serious matter. But here the question is not whether his removal was justified but whether his removal without a fair offer for his (and Estera's) shareholding was justified. Had a fair offer been made, there could not, in the circumstances, have been any legitimate complaint about his removal.

G. Unfair prejudice to HS and Estera revisited

427. I indicated at the outset of this part of my judgment that my findings might have a bearing on my conclusions about prejudice caused by JS's breaches of duty and on whether or not relief should also be granted against Verite/Jemma.

428. I have concluded that Verite/Jemma did not remove HS at JS's instigation because HS raised a challenge to the Winchfern/Expotel transactions. Nor did they decide to remove HS for that reason. They removed him because they perceived that HS was putting his personal interests before his duties as a director of the Company, to the prejudice of the Company and the wellbeing of its other directors and employees, and, further, because all the other directors of the Company told them that they considered that HS should be removed.

429. In that light, it cannot be said that JS's breaches of duty caused HS's removal as a director. They caused HS concern about JS's conduct, which HS was entitled to raise but sought to make use of in his dispute with JS about his proper role and standing in the Company. As a result of the particular (and ill-judged) way in which HS chose to seek to exploit the breaches of duty, HS was removed as a director for the reasons I have given. In considering the extent of prejudice to HS and/or Estera as shareholders caused by JS's breaches of duty, it is therefore inappropriate to include HS's removal as a director.

430. Given that Verite/Jemma reached their own decision about the removal of HS, as majority shareholder, and did so for the reasons just summarised, there is no case for relief to be granted against them, as well as against JS, in connection with JS's breaches of duty. Whether it is appropriate to grant any relief against Verite/Jemma on any other basis is a question to which I will return in the final part of this judgment.

Part V – investigation into Winchfern and Expotel

431. This part of the judgment comprises the following sections:

A. The conduct of the investigation (paras 432-458)

B. The committee's report (paras 459-469)

C. Conclusions on the investigation process (paras 470-479)

D. The board's decision (paras 480-483)

E. The shareholders' reaction to the board's report (paras 484-491)

F. Was the investigation and report conduct unfairly prejudicial to HS and Estera? (paras 492-514)

A. The conduct of the investigation

432. Following HS's removal as director, new solicitors, Magwells LLP, started to act for him in place of SJ Berwin. They wrote substantively to Mayer Brown for the first time on 9 October 2009, expressing HS's surprise and shock at his removal; asserting that the Company was a classic quasi-partnership; asking for JS's explanation of why HS was removed, and asking for answers to the December 2008 questions. There ensued correspondence between Magwells and Mayer Brown and Magwells and Mr Christensen, of a largely formal and unproductive kind, containing assertions and counter-assertions.

433. On 14 December 2009, HS sent Mr Wason an email relating to the forthcoming AGM. He asked Mr Wason to circulate it to the board. The email complained that neither JS's solicitors nor the Company had responded to his questions about Winchfern and Expotel:

> "…Jasminder has refused to disclose full details of these transactions, but it is my firm belief, based on the limited factual information that he has made available, that at the very least the opportunity to make these investments was in each case a corporate opportunity which could and should have been made available to EGL. As such, I believe that on that basis at least Jasminder is a 'constructive trustee' of these assets for EGL and that EGL has personal claims against him."

It goes on to say that there is no credible suggestion that JS ever disclosed to the Company the personal benefits that he was obtaining, and that it was essential that it is established whether JS acted in breach of duty, whether the shares in Winchfern and Expotel are assets of the Company and whether it may have further claims against JS.

434. It was this email that the Company treated as the complaint that needed to be investigated. It caused Mr Hart to ask JS to provide any further information that might be relevant to what he had disclosed in June 2008, and Mayer Brown did so. Their response (as summarised to HS in an email from Mr Hart of 19 February 2010) was that Expotel was not a corporate opportunity because JS was approached by KP's directors and receivers; the business of Expotel was quite different from the Company's business, and Expotel's business model would not allow it to be owned by

an hotel operator. As for Winchfern, JS's response was that he was approached as a personal friend and the opportunity did not come within the business and strategy of the Company. Mr Hart then effectively asked HS to demonstrate why what Mayer Brown say was wrong and when HS first knew about the matters of which he was complaining. It indicates that advice from specialist counsel would then be taken on all the responses provided.

435. On 15 April 2010, Magwells replied on behalf of HS. They provided much information about the basis and extent of HS's knowledge and suspicion of Winchfern and Expotel. They invited Mr Hart to explain the nature of the investigation that was proposed. They pointed out that JS's fiduciary duties were not limited to an obligation not to divert a 'corporate opportunity' but included a duty to avoid conflicts of interest and duty and to avoid unauthorised benefit from his position as a director. Magwells asserted that his holding of stakes in Winchfern and Expotel were *in the absence of full disclosure to the Company and authorisation by the Company*, obvious violations of those rules. There was no reply from Mr Hart.

436. On about 18 May 2010, Mr Hart sent instructions to Counsel. The instructions reveal that Mr Hart thought that both JS's and HS's responses to his letters asking for further information were lacking in candour. They asked for advice on what further steps should be taken to try to investigate the matters alleged by HS and they raised the possibility of a claim against JS being made, or HS being authorised to bring a claim in the name of the Company. Mr Hart saw Counsel in conference on 3 June 2010, and appears (from a subsequent email between them) to have been advised to involve an independent firm of accountants. There are no surviving notes of the advice given.

437. On 4 June 2010, the board of the Company formally appointed Mr Hart and Mr Morley, as non-shareholder directors, as a committee of the board for the purpose of making further investigation into the allegations made by HS, including further enquiries of parties who were likely to be in a position to provide relevant information.

438. On 17 June 2010, Mr Hart wrote to Mayer Brown and Magwells. He noted the nature of the allegations made against JS, including that an opportunity had not been offered to the Company by JS and that it was taken instead by JS without appropriate prior disclosure. Mr Hart sought, in his oral evidence, to maintain that his and Mr Morley's only remit was to decide whether or not legal action should be started against JS. Mr Morley too contended that non-disclosure by JS was not the issue, which was whether or not there was a corporate opportunity that was diverted. Both were wrong to treat their remit as being so narrow.

439. Mr Hart's letter then stated that he intends shortly to appoint the forensic services department of well-reputed firm of accountants, with whose assistance a list of questions would be prepared for each person who appears likely to be able to provide relevant information. The responses, whether given in writing or orally, are to be provided by the person to whom the questions are put, not by a lawyer. It then stated that one of the reasons for conducting the investigation in that way was to satisfy not just the board but all the shareholders that an independent investigation has properly taken place. These were admirable statements of principle and intention. They recognise the importance to shareholders of an open and fair investigation into serious allegations. Unfortunately, what then happened is that the investigation did not

proceed in the way that was originally envisaged. An independent firm of accountants was not engaged; evidence was not obtained without involvement of lawyers; the investigation proceeded in a most unsatisfactory and non-transparent way; the board did not get to see the report of Mr Hart and Mr Morley, but received an inadequate oral report, and the shareholders were provided with a short and inaccurate resume of the non-disclosed report. When asked about this original letter from Mr Hart, Mr Morley accepted that in the light of what happened "it doesn't look good". The whole investigation was conducted on a privileged basis, apparently following the advice of Counsel that it might be so conducted.

440. Shortly before Mr Hart's letter, Magwells sent a letter before action to Mayer Brown and to Verite and Jemma. It stated that there was no alternative to initiating a section 994 petition unless agreement could be reached quickly, and that it appeared that litigation was inevitable.

441. By 15 August 2010, Mr Morley had done an initial draft of matters to be put to JS for comment. He emailed these to Mr Hart. He commented that he had been unable to find any disclosure of related party transactions between Expotel and the Company that would be appropriate while shares in ITG were being held for the benefit of JS's family, until they became held on charitable trusts. He also commented that, on the basis of Mayer Brown's 27 October 2008 letter, related party disclosure in the Company's accounts would have been appropriate, starting with the year ended 31 December 1995, and that KPMG would likely take a very dim view if disclosure should have been made. At that stage, Mr Morley was therefore still of the understanding from Mayer Brown's letters that the trust was originally for the benefit of JS's family but later became a wholly charitable trust. But it is clear that he recognised at that stage the potential seriousness of a conflict of interest between JS as director of the Company and JS and his family as possible beneficiaries of shares in Expotel.

442. In the light of the letter before action and Mayer Brown's response to it, Magwells then wrote to Mr Hart saying that since the matters under investigation would soon be reviewed by the court it was "plainly inappropriate to proceed with a thoroughly belated and inadequate internal investigation into serious allegations". They also commented that the proposed procedure appeared to be an elaborate attempt to avoid beginning at the obvious starting point, namely requiring JS to answer the December 2008 questions. Mr Hart then wrote to the shareholders seeking their views on whether the investigation should continue, and in the light of responses received the Company decided to proceed. The Jasminder trustees rightly emphasised to Mr Hart the danger of allegations being seen to be swept under the carpet.

443. On 18 October 2010, Mr Hart sent Mr Willis at Mayer Brown, on a without prejudice basis, 38 questions relating to Winchfern, and suggested that Mr Willis might like to provide a memorandum providing the answers. If that were done, he said, there might be no need for a meeting with JS and no need for accountants to be involved in the process. He invited a discussion. This was in stark contrast with the sentiments and procedure in Mr Hart's letter of 17 June 2010. On 22 October 2010, he told Mr Willis that a set of questions relating to Expotel was in course of final preparation and would be sent on a without prejudice basis. He said:

> "My aim is to get the wp answers from JS by the end of next week. I don't mind if we achieve that in two steps (written answers then a meeting) or one step (answers provided at a meeting). After our wp meeting, I hope we will have agreed the terms of the answers which can then be sought and provided immediately on an open basis"

At this stage, therefore, Mr Hart contemplated a without prejudice meeting to agree the terms of the answers to be provided.

444. Asked about why the questions and answers were prepared first on a without prejudice basis, Mr Hart said he thought that the cover of without prejudice communications might enable JS to be more candid. The same approach was not taken with questions that were prepared and sent to HS.

445. In a without prejudice email dated 25 October 2010, Mr Hart told Mr Willis and JS that if the investigation could be concluded promptly and demonstrated that the allegations of HS were not well-founded and Magwells could plainly be told so, that might help to avoid the use of the same allegations in the section 994 proceedings that HS was threatening. He proposed, in the interests of speed, a meeting later that week at which JS's answers to the questions could be provided orally. Mr Willis disagreed, and suggested that the answers be provided in writing, with a view to a later meeting. The without prejudice answers were provided by Mr Willis on 15 November 2010, with an offer of some meeting dates. A date for a without prejudice meeting was then fixed for 1pm on 22 November 2010.

446. At 9.14am that day, Mr Hart sent Mr Willis an email suggesting that the Winchfern answers were lacking in detail, and continued:

> "Attached is a second WP draft (dated 21 November) of our 38 questions. I have now filled out some of the questions, so that we have not overlooked relevant details. We also want to try to ensure that there is no room for unwarranted complaint that our questioning and enquiring has not been appropriately thorough.
>
> I have also included in this attached draft your replies to the first draft of our questions, supplemented (in response to some of the questions) by some additional factual information which I expect you will be able to include in your final response, after which you have checked the accuracy of it with JS and Chandrika and possibly Ramesh too."

It is necessary to remind oneself, in the light of that email, that Mr Hart and Mr Morley were supposed to be conducting an independent investigation intended to provide the truth to the shareholders.

447. It was common ground that, for whatever reason, the planned meeting did not happen and instead Mr Willis replied to Mr Hart's email the following day, saying that although at Mr Hart's request JS had been content to provide answers on a without prejudice basis, it was not appropriate for the Company to be proposing answers from its own investigations. He invited Mr Hart to send the questions on an open basis.

448. Mr Morley said that he thought that including suggested wording in the answers to the draft questions was a good idea. He thought that was a good way of getting along swiftly. Mr Hart too sought to justify his unusual approach on that basis, and in the interests of having answers that were as full as possible when Mr Willis answered them for JS, as he put it in an email to Mr Willis on the following day. As to the involvement of lawyers in drafting responses to questions, Mr Morley said in evidence that they must have changed their minds during the investigation. The same was also self-evidently true of the involvement of forensic accountants, who were never involved.

449. The final, "open" questions were sent by Mr Hart to Mr Willis on 13 December 2010, in an email that in my judgment was phrased so as to give no indication to anyone later reading it that there had been a without prejudice exchange of questions and answers. Answers were provided on 28 January 2011. The answers confirm that, in relation to Expotel, JS did not tell his parents or HS anything beyond the terms of the deal to save Expotel and the fact that he had assumed some risk. As regards the trusts of the ITG shareholding, JS contended that the 42% shareholding was agreed for the benefit of his family in March 1994 but then transferred into a charitable trust in September 1994, pursuant to an agreement with the Segals. He confirmed that he did not disclose the interim position to the Company. He said that the settlor of the trust expressed the wish to the protector that JS should be able to nominate members of his family as beneficiaries, but that no members of his family were defined in the trust deed as being within a class of beneficiaries. As he was not a beneficiary, JS considered that he had nothing to disclose. JS's answers say nothing about the 1991 deed of trust, the power of appointment, the appointment of Inderneel in 2005 or the exclusion of HS's family in 2005.

450. Mr Morley said in evidence that he read the full answers when received from Mayer Brown. In relation to Winchfern he formed the view that no further inquiry was necessary. He couldn't remember what conclusion in that regard Mr Hart and he reached about the answers to the Expotel questions. Neither Mr Hart nor Mr Morley asked JS any questions face to face. Mr Morley said that he considered that JS's lawyer's answers to questions would be sufficient to reach conclusions about JS's state of mind in relation to both matters.

451. Some attempts were made by Mr Hart and Mr Morley to speak to others who might have relevant knowledge. Mr Hart wrote to Chandrika Shah suggesting that he should come and talk to her and to Ramesh Shah, regarding (among other matters) the investigation. Chandrika Shah told Mr Morley that Ramesh Shah, who replied to her, would not like to see Mr Hart or discuss the Expotel matter. No further attempt was made by Mr Hart or Mr Morley to contact Ramesh Shah. Mr Morley met Chandrika Shah. She said that she only became aware of a trust of shares in Expotel in about 2004 to 2006, when HS started to make allegations. When she enquired at that time she was told that it was a charitable trust. On that basis, no disclosure was required. She had not been involved in advising JS on the transaction in 1991 or 1994. Mr Morley's note of his exchanges with Chandrika Shah ends: "It was clear from comments made during the questions, and from the tone of the responses that CS was unhappy that JS had not disclosed the trust to [Shah Dodhia] in 1991/1994".

452. Mr Morley told Mr Hart that Ramesh Shah was declining to answer questions and that Chandrika Shah had expressed unhappiness with non-disclosure of relevant material

about Expotel in 1991 and 1994. Mr Hart said that he thought this was a matter of real concern. He accepted, at first when questioned about it, that one purpose of the investigation was to identify whether there were any areas of concern about potential non-disclosure by JS of his interests in Winchfern and Expotel and his conflict of interest. Mr Hart claimed that his report provided information about wrongdoing by JS to the board so that the board could decide what to do about it. But later he suggested that the investigation was only to recommend a decision on whether to start proceedings against the Company. And as it turned out no one other than Mr Hart and Mr Morley ever saw the report.

453. Mr Hart did not try to talk to or send any letter to Bryan Robson, who was a director in 1991 and 1994. He said that he formed the view that he was not likely to be a person who could speak with any precision about the Expotel or Winchfern matters, as he "had the understanding" that he was not in good health and was unlikely to be helpful. Mr Hart said that he had "a very brief exchange" with Mr Shashi Shah, who was vague about matters, and a brief and uninformative conversation with Mr Wason.

454. The final questions sent to HS were not finalised by Mr Hart until 23 August 2011. Delay had been caused partly by Mr Hart's wish to have JS's answers first and partly by issues about waiver of privilege in without prejudice discussions between JS and HS between 2006 and 2008. The questions sent in August were not answered by HS until 3 February 2012. Meanwhile, Mr Hart sent fresh instructions to Counsel on 19 September 2011 to advise in conference on the strength of the Company's case against JS in the light of JS's answers to their questions (and no other answers to any questions or proofs taken from others involved). Instructions to advise on delay by the complainant (HS) and limitation were included. There is no note of Counsel's advice retained by Mr Hart or the Company.

455. A travelling draft of the report dated 9 December 2011 concludes that JS took decisions in good faith, that the opportunities in Winchfern and Expotel were not ones that the Company could or would have taken up, and so they were not 'corporate opportunities'. It says that although HS or others might form a different view, there should be no claim by the Company in relation to Winchfern because the prospects of success were very uncertain and it would distract management from the business of the Company and do reputational damage. (A note indicated that Counsel's advice should be sought on whether or not the report should state that that was also Counsel's view.) The draft states that it was not appropriate for the Company to be the buyer of Expotel, so it was not a 'corporate opportunity'; that JS gave assistance in a personal capacity and that the shareholding was only given proper effect in 1994. The same conclusions were reached on Expotel as in the case of Winchfern. The report concluded with a recommendation that the board should take no further action and authorise Mr Hart to write to the shareholders with a summary of their conclusions and recommendations. Annexed to the draft report is a list of documents considered in the investigation, including files notes of discussions with Shashi Shah, Mr Wason and Mr Robson (each of which was described as giving no information worthy of reference in the report). Remarkably, the same description is given to the interview with Chandrika Shah.

456. On 3 February 2012, Magwells sent Mr Hart a very long letter addressing and purporting to answer the questions that Mr Hart had provided the previous year. It pointed out that HS was constrained in being able to answer fully because JS had not

agreed to a full waiver of privilege in relation to the 2006-2008 without prejudice discussions. The letter put before Mr Hart all the facts of which HS was aware, including the conclusions that were said to follow from them, except those facts that were derived from privileged discussions. Magwells emphasised that since 1991 there had been an undisclosed conflict of interest in that the Company had been doing business with Expotel with the board unaware that JS or his family was a 50% or 42% beneficial owner of Expotel.

457. Mr Hart forwarded the email attaching that letter to Mr Morley on Monday, 6 February 2012, commenting that he had not yet read it. Mr Morley replied that he had read it and some of it actually answered the questions.

458. The investigation process seems to have ended on 9 February 2012. There is an unsigned document, headed "Legally Privileged" and "EGL Board Committee (AH/RM) Report as at 9 February 2012". There is no later version of this document nor any signed version.

B. The committee's report

459. The report starts by emphasising that all the communications relating to it are legally privileged, the privilege being not the Company's but Mr Hart's and Mr Morley's. It also notes that there was no need for the support of the forensic services of an accountancy firm. It states that various people were approached for information, including Shashi Shah, Vijay Wason, Chandrika Shah and Ramesh Shah.

460. The report records advice from Counsel about the nature of a 'corporate opportunity' in 1983 and 1991, and that whether or not an opportunity is a corporate opportunity is a matter for the subjective decision of the director, acting in good faith. The factual conclusions reached are the same as those of the earlier draft, both for Winchfern and Expotel, namely that JS acted in good faith in determining that the opportunities were not corporate opportunities.

461. In relation to each matter, the report acknowledges that others, after knowing the facts found in the report, might come to a different view and start a legal claim against JS. The report then addresses whether that step should be taken and concludes that it should not. The conclusion that action should not be taken against JS in relation to Winchfern is stated in the same terms as in the earlier draft, save that it is added that the reasons are not just those of Messrs Hart and Morley but are also the view of Counsel. The conclusion that action should not be taken against JS in relation to Expotel is stated in the same terms as in the earlier draft but this time, significantly, there is no equivalent statement that it represents the views of Counsel too.

462. The report recommends that the Company should not issue a court claim against JS and that Mr Hart should be authorised to write to shareholders with a summary of the conclusions and recommendations.

463. It is notable that the report did not state that Ramesh Shah had refused to talk to Mr Hart and Mr Morley, nor did it refer to anything that Chandrika Shah had told Mr Morley, or Mr Morley's perception of her unhappiness at JS's non-disclosure of his

interest in the trusts of the ITG shares. It does not identify the terms of the 1991 deed of trust or state that the 1994 trust arrangement originally resulted in 42% of the shares in ITG being held on trust for JS's family prior to the supposed transfer into a charitable trust in September 1994 (as JS's answers to Mr Hart's written questions stated). Nor did it state that JS's disclosure to the board in June 2008 had been inadequate and misleading. All of these matters were known to Mr Hart and Mr Morley. Moreover, elementary and obvious further questions in response to JS's lawyers' written answers to the initial questions would have exposed the claimed 'charitable trust' for what it was. Mr Hart's answer to criticism about the failings of the report was that the limited purpose of the report was to find out what had happened and then to decide whether or not to recommend court action. He sought to justify that by reference to the email from Magwells of December 2009, but only by referring to one particular sentence of the email.

464. The annexe to the draft report, which sensibly listed all the documents that the sub-committee had seen, was expunged from the final version. Mr Morley said in evidence that he disagreed with the statement in the annexe to the draft report that Chandrika Shah's interview provided nothing worthy of note. He considered that her comments were of some significance, but all the same the interview was not referred to in the report and the annexe was removed.

465. Mr Morley said that he did not read the totality of the documentation prepared and assembled by Mr Hart. This evidently included Mr Hart's file notes of his meetings with Mr Wason and Mr Shah, which do not survive. This was surprising, given that Mr Morley did play some part in speaking to potential witnesses and that he and Mr Hart were committee of only two, who were going to prepare a report on their investigation. Mr Morley also adopted Mr Hart's approach to destroying unwanted documents at the end of the process – in this he said that he followed Mr Hart's advice.

466. It is clear from the report and Mr Hart's answers to questions in evidence that he chose to treat the report as being confined to the question of whether court action should be taken against JS. That is very different from the sentiment he had expressed back in June 2010 about the importance of a full and open investigation, for the benefit of the board and all shareholders, into the allegations of wrongdoing. It is also different from his acceptance at one stage in his evidence that potential non-disclosure and conflict of interest was part of the purpose of the investigation; the question of whether action should be taken was, he said, the second purpose. Notwithstanding that, he sought to characterise matters other than the decision about whether to recommend proceedings against JS as "academic pursuits".

467. The report does not address the issue of non-disclosure, whether to the board or to the auditors. Mr Morley justified this on the basis that he considered HS's complaint to be that since 2008 the board had failed to pursue JS for some kind of financial redress, not that the interests in Expotel and Winchfern were not disclosed to the board in 1991 or 1994 or to the board or the auditors at any later stage. The purpose of the report, he said, was to address the question of whether the Company should be pursuing JS for redress.

468. Mr Morley managed to persuade himself that what was discovered did not amount to a relevant breach of duty. He did though accept that if his bank had been relying on

JS's statement of assets and liabilities he would have expected JS's interest or expectation under the Carriere trust to be disclosed and would have been furious if he had discovered later that it had not been disclosed. He accepted that there was a real risk that the auditors of the Company would conclude that proper disclosure had not been made. He said that a secondary reason why the non-disclosure was not reported to the board was because it might be damaging to the Company and its relationship with its bankers and auditors.

469. Mr Hart said in evidence that he regarded it as debatable whether Winchfern and Expotel were "corporate opportunities" for the Company, but considered that JS probably had not violated the Companies Act requirements of avoiding conflicts of interest. That conclusion is in my judgment unjustified, but even so it contrasts greatly with the conviction with which the conclusions in the shortened report to shareholders were expressed.

C. Conclusions on the investigation process

470. In my judgment, the process was flawed from the outset, lacked real independence, lacked transparency, was conducted unfairly and inadequately, and reached inadequate conclusions. Moreover, it resulted in no report to the board that was capable of being scrutinised: no one other than Mr Hart and Mr Morley saw the 9 February 2012 version of the report (or any earlier version). And it resulted in a misleading report being provided to shareholders. I will explain my reasons for these conclusions more fully.

471. Mr Hart and Mr Morley had been the directors of the Company principally responsible for encouraging the shareholders to remove HS as a director, knowing of the complaints that HS had made against JS. I have already summarised in paras 365-382 above the lengths to which Mr Hart went to ensure, so far as he could, that HS was removed as quickly as possible. I have found that even prior to the events of June 2008 Mr Hart had already formed the view that HS should be removed from the Company. He and Mr Morley had also been heavily involved in the without prejudice negotiations between 2006 and 2008, on JS's and the Company's side. At the time of the appointment by the board of the committee to investigate HS's complaints, Mr Hart was in the course of orchestrating HS's redundancy as an employee of the Edwardian group, which itself was an unfair process. It was also known by Mr Hart and Mr Morley that HS, through his solicitors, had already threatened proceedings against JS for unfairly prejudicial conduct, and indeed a letter before action was written shortly after the investigation process started. In those circumstances, Mr Hart (and to a lesser extent Mr Morley) could not be, and were not seen to be, independent in carrying out an investigation into whether HS was right in alleging misconduct by JS. A fair, open and credible investigation required someone with real independence to conduct it.

472. From the outset, it was clear that the interests of the other directors and the majority shareholders of the Company were served by a rapid and comprehensive rejection of the complaints of HS. That was so not just because of the faith that they had in JS and his undoubted ability as chief executive, but because – as Mr Hart himself explained to JS's solicitors in his email of 25 October 2010 - a speedy rejection of the complaints might serve to dissuade HS's lawyers from including the same matters of complaint in any section 994 petition that they issued. It is clear to me that Mr Hart

had that desirable outcome in mind from the first stages of the investigation, even though in the event the investigation proceeded slowly.

473. Mr Hart's first letter on behalf of the Company to the main protagonists on 17 June 2010 made all the right noises about the importance of a properly conducted investigation for the benefit of the board and majority shareholders, but this proved to be no more than idle words. Instead of the steps indicated that would be likely to deliver a fair and reliable report, Mr Hart and Mr Morley instead adopted a procedure that was calculated to give the best possible chance of producing the outcome that the board and the shareholders desired. So a cloak of secrecy was thrown over the investigations by the use of privilege and the destruction of working documents relating to the investigation once it had concluded. The forensic skills of a firm of accountants were dispensed with. The aspiration for answers to questions to be provided by the protagonists themselves, not by their lawyers, was quickly forgotten, as was the intention to have a meeting with JS to discuss and investigate further his answers to the questions.

474. Remarkably, one side (JS) but not the other was offered the benefit of an initial exchange of questions and answers on a without prejudice basis, presumably so that the investigators could ensure that the questions and answers were appropriately worded. Not satisfied with that, Mr Hart then suggested better answers that JS might provide and actually wrote them into the draft answers previously provided. The 'open' answers of JS were then referred to Counsel for his advice on the strength of the claims against JS, before any evidence had been obtained and considered from others, including HS, who was not even supplied with the questions that he was to answer until after this process of obtaining and considering JS's evidence was concluded. A draft of the report – very similar in content and identical in conclusion to the final version – was prepared before HS's answers had been received and considered.

475. No proper attempt was made to obtain detailed evidence from others highly likely to have important evidence to give, in particular Ramesh Shah, whose professions that he would rather not talk about Expotel do not seem to have encouraged Mr Morley or Mr Hart to think that it was probably very important that they did speak to him. They could of course have done so by getting the Company or even JS to require Ramesh Shah to speak to them; or they could at least have formulated questions for him in writing and sent them to him. Important evidence given to Mr Morley by Chandrika Shah was considered by Mr Hart to have no value at all to the investigation (contrary to Mr Morley's view) and was not referred to in the report.

476. Important questions relating to the alleged breaches of fiduciary duty were marginalised by Mr Hart and Mr Morley, in particular the questions of whether JS had a conflict of interest and duty and when JS had made disclosure to the Company of his intended or actual interests in Winchfern and Expotel. HS's complaints fairly raised the issue of non-disclosure, but the report instead focussed only on whether, subjectively, JS believed that the opportunities were not 'corporate opportunities' and whether bringing a claim against JS would be advisable. The conclusion on corporate opportunities was reached without any interview of JS, on what were plainly deficient answers to the questions that he had been asked. Anyone carrying out a serious investigation would have wanted to explore why it was that JS's interest under the 1991 deed was not disclosed between 1991 and 1994 and why it was that JS asserted

that from September 1994 the Carriere trust was merely a charitable trust under which he had no disclosable interest, when he acknowledged that the protector was Ramesh Shah who was to have regard to his wishes as regards appointment of members of his family as beneficiaries. But these aspects were brushed under the carpet.

477. In my judgment, the report was seriously flawed because the committee of the board was anxious to reach the conclusion and recommendation that it did. The committee carried out the investigation in a procedurally unfair way, without any independence of mind or scepticism or any serious attempt to get to the truth of the allegations. The report deliberately did not address all the complaints but focused instead on the end question of whether proceedings against JS should be brought. Questions that should have been addressed and answered were whether JS had disclosed his interests to the Company and whether he was arguably or probably in breach of fiduciary duties owed to the Company, as well as whether any action ought to be taken in consequence. The shareholders would then have been fully informed. Instead, they were taken straight to the board's conclusions that Winchfern and Expotel were not corporate opportunities and that no action should be taken against JS.

478. The deficiencies in the investigation and report are serious. Given the qualifications, seniority and experience of Mr Hart and Mr Morley, they cannot be explained away by lack of understanding or incompetence.

479. The inadequacies of the report were then compounded by the non-publication of the report to anyone, the nature of the board meeting that considered what to do about the undisclosed report, and the inaccurate summary of the undisclosed report that was provided to the shareholders.

D. The board's decision

480. The reason why the final version of the report is unsigned and in an "as at 9 February 2012" form is doubtless that Mr Hart was aware that no one else was going to see a final report. Mr Hart and Mr Morley assert that they had been advised that they could conduct the investigation on a privileged basis (not that they had to) and they took that opportunity. That means that no one at the Company would have been entitled to scrutinise the report.

481. A board meeting was convened for the day after the report was finished. For that meeting, Mr Hart prepared a summary of its conclusions and recommendations in the form of a draft letter to shareholders. It is evident from an email of 10 February 2012 to Counsel that Mr Hart had prepared a first draft of it even before HS's answers to the questions for him were received and considered. With that email, Mr Hart sent the final version for Counsel's approval. It is not known whether Counsel reverted to Mr Hart before the board meeting: Mr Hart does not say and there either were no documents referring to or containing Counsel's advice or they have been destroyed.

482. At the board meeting, only Mr Hart, Mr Morley (by telephone) and Mr Shashi Shah were present. Mr Hart, in the chair, announced that the committee had produced a report, which was legally privileged. He proceeded to tell the board of the primary conclusions of the report and the recommendation that the board pass certain

resolutions. He then referred to the draft of a proposed letter to shareholders, which was produced for consideration. The board voted in favour of the proposed resolutions, namely to take no further action in respect of the "corporate opportunity" allegations and resolved that Mr Hart be authorised to send the letter to the shareholders.

483. There is an element of unreality about this process. The board did not see the report, but Mr Hart reported orally its primary conclusions. That oral report was made to the two authors and Mr Shashi Shah. No doubt what was said tallied with what was in the draft letter to shareholders that was placed before the meeting. In no real sense was the board considering the report but simply being asked to endorse two actions that the committee was recommending. Since two out of the three members of the board in attendance were the committee, the outcome was inevitable. Mr Shah, when interviewed by Mr Morley, had had no recollection of the matters under investigation and was unable to assist. He was given no chance to scrutinise the report. To add to the unreality of the process, there appears to have been no subsequent board meeting at which the minutes of the meeting of 10 February 2012 were approved, though these minutes are signed by Mr Hart.

E. Letter to shareholders

484. The letter to shareholders, as sent on 10 February 2012, states that shares in Winchfern were given to JS and later assigned to Amrit Singh, and that shares in ITG were later given – at JS's prompting – to a non-UK charitable trust. In both cases this was said to be because JS gave personal assistance to the owners of those companies. It says the conclusion reached by the committee was that in neither case was JS involved with a 'corporate opportunity' of the Company because of the nature of those companies' businesses, which were inappropriate for the Company. The chances of success in a claim against JS were said to be speculative, not warranting the costs involved. They would be the more uncertain because the committee had concluded that HS and others had some knowledge of JS's involvement for some years before JS's disclosure. Proceedings would be a distraction for JS and the board, such that they would be materially damaging to shareholder value. There would also be reputational damage.

485. The letter says nothing about the 1991 deed of trust in favour of JS, HS and Shashi Shah, or about JS's ability to designate beneficiaries of the Carriere trust. The reference to a non-UK charitable trust is therefore misleading, in just the same way as JS's reference to a charitable trust was misleading in his 2008 memorandum of disclosure. Nor does the letter say, as the final version of the report said, that the author recognised that others, after considering the facts that the committee found, might come to a different view about the corporate opportunity issue. Like the report, it says nothing about non-disclosure. By omitting to refer to the prolonged non-disclosure of JS's interest in the 1991 trust and the Carriere trust, the letter was perpetuating the very matter of which HS had complained. Finally, the letter says nothing about the value of the interests in Winchfern and ITG, which would have been of interest to shareholders considering whether or not to accept the recommendations of the board.

486. In my judgment, the letter to shareholders gave a misleading picture. This was not by accident. It was drafted so as to minimise any inference of possible wrongdoing on

the part of JS and to emphasise the undesirability of challenging JS in any event. This is illustrated by the fact that a later formal resolution of the Jasminder trustees noted that the report had concluded that the complaints by HS were "unfounded", a conclusion that no reader of the final version of the sub-committee's report could fairly have reached.

487. Mr Morley described the report to shareholders as being a "sort of precis" that was "slightly incomplete" and "could have been more fully expressed". This is significantly to understate the problems with the shareholder report, which covered up the extent of the breaches of duty by JS in the same way as JS's own 2008 disclosure memorandum did.

488. When he read the letter to shareholders, Mr Machan was satisfied and agreed with its recommendations. It was suggested to him that he knew about the Carriere trust and that accordingly that JS had either not told the full truth to the committee or, if he had, that Mr Hart and Mr Morley were concealing the full picture. Mr Machan denied that he had the Carriere trust in mind. I consider that, by this time, almost 7 years after Verite ceased to be the protector of the Carriere trust, it is unlikely that Mr Machan would have studied the letter as a private investigator might have done. His concern was as trustee of the Jasminder trusts and with the best interests of its beneficiaries, present and future. He said that he and Mr Christensen met and decided that no further action was required. It was abundantly clear from Mr Christensen's evidence that this was because JS was considered to be an excellent CEO and the Company was flourishing. They did not want any distractions from its business activities.

489. Mr Christensen said that he did not read the letter to shareholders as suggesting that the trust holding the ITG shares was exclusively charitable. He said he would have had in mind that there could have been power to add other beneficiaries, and so would not have assumed that it was only charitable. He was asked why he didn't then enquire about this point. He answered that it did not occur to him to ask and that he didn't feel it was appropriate to make any further inquiry. He did say that a 3-page report at the end of a year and a half's investigation, with the full report being retained because of privilege, was inadequate and an issue of concern to him, but nevertheless a challenge to it was, in effect, unthinkable.

490. I find that the truth is that Mr Christensen and Mr Machan read what they wanted to read and were pleased with the conclusion and recommendation. Notwithstanding the failings of the investigation that are now evident, they were entitled to assume that a competent and fair inquiry had recommended that there was nothing of substance in the complaints and that no further action should be taken. They did not want to have to take any action. It would probably have been contrary to the interests of the Jasminder trusts to do so in any event.

491. I do not consider that the Jasminder trustees can be criticised for failing to challenge the recommendations in the letter to shareholders. Despite Mr Machan's previous involvement as protector of the Carriere trust, they had no reason to think that two highly qualified directors of the Company had not carried out a proper process. They were entitled but not bound to ask further questions. Their only duty was to act in the best interests of all their beneficiaries.

F. Was the investigation and report conduct unfairly prejudicial to HS and Estera?

492. The investigation was carried out by Mr Hart and Mr Morley as a committee of the board of the Company. The investigation and report was an act of the Company and conduct of the Company's affairs. So too was the letter written by Mr Hart with the authority of the board to the Company's shareholders.

493. In my judgment, the misleading and inadequate terms in which the shareholders were informed of the findings of the Company was prejudicial to all the shareholders, as being contrary to the good administration of the Company and the interests of the shareholders (as originally recognised by Mr Hart) in having matters of complaint about a director of the Company fairly and fully investigated and reported on. There can be no doubt in the circumstances that the prejudice was unfair prejudice. It was unfair because neither the board nor the shareholders had the benefit of that to which they were entitled, namely a fair and full investigation into JS's conduct as regards Winchfern and Expotel. As a result, the shareholders did not have the opportunity to consider, on a properly informed basis, whether to hold JS to account for the consequences of his breaches of duty.

494. It is argued on behalf of JS that the board's decision was a management decision, which the court should be unwilling to second-guess. I accept that the court is normally unwilling to accept that managerial decisions made by the board of a company can amount to unfairly prejudicial conduct, but that is where a managerial decision has been taken bona fide in the interests of the company as a whole. Here, the decision of the board was carried by Mr Hart and Mr Morley, who were responsible for the report and (since Mr Shah did not see the report) the only people who were in a position to understand its conclusions. Far from the board's decision not to bring a claim against JS being a "managerial decision made bona fide by independent directors acting in accordance with their duties and in the interests of the Company and its members as a whole", as JS's written closing submissions contends, the decision was infected by materially incomplete answers given by JS, and by the flawed and unfairly prejudicial approach of Mr Hart and Mr Morley to the conduct of the investigation, the preparation of their report and the conclusions that they reached.

495. In any event, it is not just the decision of the board to take no further action on which the Petitioners rely but the misleading way in which the matter was presented to the shareholders, thereby preventing them from making a properly-informed decision whether or not (and how) to hold JS to account. It was that in particular that was unfairly prejudicial to the shareholders as a body, and to HS and his trustees in particular, given the price that he had paid personally for persisting in his justified complaint about JS's interest in Winchfern and Expotel. The decision for the shareholders was not a binary one of whether to remove or sue JS or hold their peace, but whether to raise the matters of concern at the next AGM, or in correspondence before then, and whether or not to seek to persuade JS to make some restitution to the Company, or to amend the articles of the Company to seek to address their concerns. The shareholders had previously expressed concern that the allegations against JS should not be seen to be brushed under the carpet. They may well have concluded in any event that they should not take the risk of killing the Company by kindness, and that JS did far more good for the shareholders than damage; but they would not necessarily have let the matter go, or ratified JS's profits, and would have reached a decision on a fully-informed basis.

496. This unfair prejudice to shareholders was caused by JS's incomplete disclosure to the committee and by the conduct of the committee and the board of the company.

Part VI: Remuneration

497. The sections of this part of the judgment are the following:

A. Introduction to the remuneration issues (paras 498-514)

B. The exceptional remuneration awarded to JS in 2011 and 2012. (paras 515-525)

C. JS's remuneration in 2014. (paras 526-528)

D. Did the Company exercise its powers for an improper purpose? (paras 529-542)

E. Was JS's total remuneration in 2011, 2012 or 2014 unreasonably high? (paras 543-562)

F. Were the acts of the Company unfairly prejudicial to HS and Estera? (paras 563-565)

A. Introduction to the remuneration issues

498. The challenge made by the Petitioners is limited to the remuneration of JS in the years 2011, 2012 and 2014, when on any view – in comparison with other years – exceptional remuneration was awarded.

499. The issues raised in the petition (as further defined at an interim hearing in this case) are limited to whether the Company was unfairly distributing profits by way of remuneration to JS as a director instead of declaring a dividend (in other words, an allegation that the Company has exercised its powers for an improper purpose, irrespective of quantum of remuneration), and whether the amount of the remuneration awarded to JS in those years was unreasonably high.

500. In order to put the particular issues into context, it is necessary to consider the basis on which JS was remunerated prior to 2011 and the history of dividends declared by the Company. It is also necessary to consider the particular factual context in which the decisions as to his 2011 remuneration were made.

501. The following table sets out in bare summary the aggregate remuneration of JS and total dividend declared by the Company from 1996 to 2016. For the years from 2007, it also includes the profit before tax shown in the Company's accounts for that accounting year. The figures are taken from separate summaries provided by Counsel for HS and JS, in which there is some difference in the figures for JS's aggregate remuneration, but not to a significant degree or which affects the analysis of the disputed years.

Year	Profit	Remuneration	Dividend
1996		£600,000	£0

1997		£662,326	£5m
1998		£1,848,532	£0
1999		£941,240	£1m
2000		£937,000	£0
2001		£1,064,592	£0
2002		£1,003,957	£0
2003		£1,072,000	£0
2004		£1,011,000	£0
2005		£1,145,000	£0
2006		£1,308,000	£0
2007	£14.7m	£1,039,000	£0
2008	£3.3m	£1,045,062	£0
2009	£11.0m	£1,046,486	£0
2010	£20.9m	£1,017,000	£2m
2011	£17.4m	£3,101,000	£3m
2012	£12.6m	£2,957,000	£3m
2013	(£22.3m)	£1,575,000	£3.3m
2014	£12.3m	£2,142,000	£3.5m
2015	£32.1m	£2,328,000	£4m
2016	£13.1m	£2,202,000	£6m

502. There is therefore a pattern of dividends not having been declared by the Company for extended periods of time. The explanation for this is that these were at times precluded by agreement with the Company's bankers, and at other times frowned upon by the banks, or alternatively that the board wished to stay on the right side of its bankers and decided not to declare a dividend. That was particularly so during the difficult times of the 1990s and again during the credit crunch between 2008 and 2010. At other times, the view was taken by the Company that the profits earned should be reinvested or retained as working capital, rather than distributed. That was particularly so in the mid-2000s, when the Company had extended itself by borrowing very large sums for the purchase and extensive refurbishment of the May Fair Hotel, which became the Company's flagship hotel on completion in 2009.

503. The remuneration of JS has historically been on the basis of a fixed salary and a large amount of benefits in kind. From 2005-2013 the fixed salary was £900,000, and increased significantly thereafter. The benefits in kind are not limited to conventional benefits in kind, such as a company car and medical insurance, but have included large sums by way of personal expenditure, made by the Company in the first instance, and then treated retrospectively at the end of the year as benefits in kind awarded to JS. On particular occasions, the benefits in kind have been very large and attributable to expenditure on particular events or a particular need for cash, such as the purchase and refurbishment of Tetworth Hall, the Singh family's home, and the exercise of the share options in 1998. JS was generally not offered a bonus or a long-term incentive package, though on rare occasions special one-off bonuses were awarded retrospectively, the last being a sum of £270,000 in 2006 (in which year bonuses were awarded to most of the directors).

504. In 2003, Mr Hart and Mr Morley had been appointed to be the Company's remuneration committee. In 2003, an independent consultant, the Monks Partnership, made recommendations about the appropriate range of total remuneration for JS based on market evidence, namely £430,000 to £900,000. As from 2005, JS's basic salary was fixed at £900,000. In addition, in 2007, 2008 and 2009, he was awarded benefits in kind, retrospectively in the way that I have briefly described, in amounts somewhat in excess of £100,000 each year. During those years, there were no extraordinary amounts. The reason why, despite the appointment of the remuneration committee, benefits in kind were still being dealt with retrospectively, by approving expenditure that JS had already caused the Company to make, was that Mr Hart's initial judgment in 2002 that such matters should be regularised and properly agreed and awarded was not actioned. The only possible inference is that JS did not want this to happen and was content with the existing system. It is fair to say that it also happened to the benefit of other family directors at the time, namely HS and BM Singh, while they remained directors.

505. The remuneration committee of the Company did not and does not function in the way that one would expect. Mr Morley said that there were no regular or scheduled meetings for the remuneration committee. They met ad hoc, when either the board required it or they considered it appropriate. There are no minutes and the committee does not make recommendations to the board on an annual or any other regular basis. When the committee submitted proposals it did so orally only at the board meeting – Mr Morley said that it was handled "pragmatically".

506. The Company has never had a dividend policy, save to the extent of the various historic agreements in shareholder agreements in the 1990s and the wishes expressed by JS in memoranda of wishes. These, it may be recalled, included a wish that there should be no regular dividend policy while there were (non-family) minority shareholders of the Company, but that in defined circumstances the trustees should exercise their influence to seek to declare dividends of a limited amount. JS frankly accepted in cross-examination that the absence of a dividend policy was intended to suppress the value of minority shareholdings.

507. In 2010, in addition to the fixed salary and benefits in kind for JS and remuneration for other directors, the Company declared a dividend of just over £2m in aggregate. This was the first dividend declared since 1999.

508. In 2011, in addition to his fixed salary of £900,000, JS was awarded benefits in kind of £2,186,157. In 2012, in addition to his fixed salary, JS was awarded benefits in kind of £2,042,242. In both those years, dividends of £3,000,000 were declared. The benefits in kind awarded reduced in the following year to £660,044 and in 2014 were £726,705, though in that year JS's fixed salary was increased to £1.4m.

509. To put the dividends into proper perspective, in 2010 the Company's profits before tax were £20.9m; in 2011 £17.4m, and in 2012 £12.6m.

510. The Company has continued to declare dividends on an annual basis: £3.3m in 2013, £3.5m in 2014, £4m in 2015 and £6m in 2016.

511. The factual context in which the remuneration was awarded in the years in issue is important. There had been a number of significant changes in the Company's affairs. In the first place, it had become much more profitable. Earnings before interest, tax, depreciation and amortisation had risen from about £28.5m in 2009 and £31.4m in the preceding year to £52m in 2010, and profits before tax had similarly increased from £11m in 2009 to nearly £21m in 2010. That was, however, an exceptional year: both figures declined in the following years and the 2010 profits before tax figure has only since been exceeded in one year, 2015. The net asset value of the Company almost doubled to £823m in 2011, but that was attributable to two main factors: the revaluation of the completed May Fair Hotel, whose value had been based on cost in previous years before the redevelopment was completed, and the recovery of property values in 2011 as compared with the depressed values during the worst years of the credit crunch.

512. The second important change in the Company's business by 2011 was that HS had been removed as a director and manager in 2009 and 2010 respectively, and BM Singh had been removed as a director and manager in 2010. To the extent that the family shareholders of the Company (with the support of their respective trustees) were content to derive their income in the form of remuneration rather than as dividends, that approach could no longer work satisfactorily. If other family shareholders and their trusts were to receive any income from the Company in future, it had to be by way of dividends.

513. The third important change is that as from the AGM of 2009 the remuneration of the directors of the Company was no longer voted on by the shareholders of the Company. It had been, up to that point, but Mr Hart decided in 2009 that that was no longer appropriate, since the directors were in fact employed by Edwardian Management Services Ltd, a subsidiary company, not by the Company itself, and the Company was the only shareholder of the subsidiary. JS said that he had nothing to do with the change; it was decided by Mr Hart and Mr Morley. Accordingly, as from 2010 the remuneration of the directors of the board of the Company was decided by the directors of the board, with the shareholders only being apprised of the decision in the AGM, as part of the accounts, rather than being invited to approve it specifically.

514. Mr Morley said that he did not appreciate that the remuneration committee was to report to Edwardian Management Services Ltd rather than the Company. In practice, it reported to the board of the Company though the remuneration of the directors was paid by the subsidiary.

B. The exceptional remuneration awarded to JS

515. Against the background summarised above, I now examine more closely the circumstances in which JS's remuneration for 2011 and 2012 was awarded.

516. On 15 March 2011, it was reported at a board meeting as "any other business" that expenditure in respect of the forthcoming wedding of Inderneel Singh would be in the region of £500,000. It was doubtless expected that, as with HS's wedding previously, there would be a good number of guests of the Company invited and that some or all of the expenditure would be passed through the Company in one way or another. But the minutes say nothing more at this stage. JS said in his witness statement that the expenditure on the wedding and on renovations at Tetworth Hall for that purpose would be large, and he looked to the Company for additional remuneration to help him meet those expenses. He makes similar comments in relation to the marriage of his daughters, Siraj and Krishma, in 2012 and 2015 respectively. It is therefore clear that JS believed that, as he had a pressing need for more money in those years, the Company should give him more remuneration. He rationalised this on the basis that in other years, when he had no such needs, he took less money from the Company by way of remuneration than perhaps he might have done, thereby helping the liquidity of the Company.

517. At the 2 June 2011 board meeting, the previous information about the £500,000 cost for the wedding was confirmed (again, as "any other business"), and allusion was made to refurbishment works following a fire at Tetworth Hall. Inderneel's wedding took place in July 2011.

518. At the 16 December 2011 board meeting, the directors discussed an addition to JS's remuneration for 2011. It was noted that the Company had performed exceptionally well in 2010, and that in 2011 the Company had acquired two new hotels "at a significant reduction to their market values". 2011 profits were (as it turned out, wrongly) predicted to match 2010 profits. The decision on what further remuneration should be awarded was deferred until the New Year. The board also decided to get specialist external advice on remuneration for all directors before making decisions. The amount spent on the wedding was confirmed at £650,000 and on refurbishment of Tetworth Hall £1,350,000. It is clear from the minutes that this round £2m of expenditure had been paid by the Company. Whether to approve that sum as benefits in kind was deferred until after consideration of the other remuneration issues in the New Year.

519. Mr Hart then commissioned MM&K Ltd to produce a report. This was done orally on 20 December 2011. Following the meeting, Mr Hart sent MM&K some further information, telling him that JS's basic pay had been the same since 2001 (this was incorrect: his total remuneration had been much the same, but the basic pay had increased in 2005) and that in view of two good years for the Company "a bonus for JS of an amount near £2M" was being considered. MM&K met JS to get further background information and then sent Mr Hart a draft report in January 2012.

520. Following some changes requested by Mr Hart on 29 February 2012, the final report was sent in March. This considered that the median market rate for JS's remuneration (based on a comparator range of companies) would be a salary of £600,000 with a bonus of up to £600,000 and a long term incentive of up to the same amount. For top

decile performance the basic salary would remain the same but the bonus and incentive could increase to £900,000 each. It noted that the market would not accept a fixed salary of £900,000 plus benefit that would be payable regardless of performance, and that a substantial part of the pay would be performance related. It then set out reasons why a bonus in the range of £1m to £2m could be paid to JS for 2011 based on outstanding performance in 2011. Oddly, for future years, MM&K suggested a bonus of 50% of salary if good performance is achieved, with a maximum of 100% of salary, which does not fit with their recommendation of a bonus of up to £2m based on a high fixed salary of £900,000.

521. The report was taken to the board on 14 March 2012. The comments made at the December board meeting about performance in 2010 and 2011 were repeated, and for these it was considered that a bonus of "up to £2m" should be awarded to JS, but by way of benefits in kind reflecting the expenditure of £2m on Inderneel's wedding and Tetworth Hall. The board then, having considered the report of MM&K, approved JS's salary for 2012 at £900,000, with nothing said about performance-related pay. Under "AOB", it was noted that Siraj Singh would be getting married in June and that costs would be incurred by the group. Both JS and Mr Hart say that the bonus was later changed to £2.1m, but there is no clarity about how or when this happened.

522. At the 12 June 2012 meeting, under "Matters Arising", the board acknowledged that bonuses were traditionally based on annual performance, but nevertheless, in view of the negotiation of bank facilities by JS for the Leicester Square project, it was appropriate to review the bonus voted previously for 2011. The board voted a further bonus of £1.3m, to be allowed to be taken by way of (unidentified) benefits in kind if so desired, such bonus to be reviewed at the end of the year based on group performance. The only evidence that it was reviewed is the board meeting of 16 May 2013, at which the 2012 accounts were approved: the minutes of this meeting record that a "benefit and bonus to JS of £1.95m was approved".

523. The P11D form completed for JS's expenses and benefits on 5 July 2012 (for the financial year ended 5 April 2012) in fact included a sum of £2,297,028 in addition to sums for medical insurance and an annual allowance for use of a Bentley Mulsanne car.

524. JS was asked why the remuneration was not achieved by way of declaring appropriate dividends, and his answer was that it was up to the independent directors to consider his request for additional remuneration when he needed it. When pointed out that if a dividend had been declared HS and his trusts would have received about one quarter of what was paid to him, JS said "I didn't think of that". JS accepted in principle that exceptional expenditure needs of a director should be funded by payment of dividends, not by payment of a large bonus.

525. What happened was that JS spent the money during the year in question, with the acquiescence of the board, and then the remuneration committee or the board considered at the appropriate time how that should be dealt with. There were theoretically three options, as Mr Morley set out in his witness statement: treat it as a Company expense; treat it as a benefit in kind to JS, and require JS to repay it, or part of it. Mr Morley accepted that the £1.3m voted in June 2012 was to cover the costs of JS's daughter Siraj's wedding, though the minutes attributed it to the success that JS had had in negotiating advantageous funding for the Leicester Square development.

Mr Morley accepted that JS's remuneration was adjusted to fit the expenditure already made, but felt that nevertheless the bonus was justified. In substance, however, JS was spending the Company's money and the board was subsequently finding a way to justify that in terms of JS's remuneration package, otherwise than by declaring a dividend that could benefit all shareholders. No witness could identify any occasion on which JS was required to reimburse the Company to any extent in relation to any such expenditure. Mr Morley thought there was one occasion when an item of between £100,000 and £200,000 was required to be reimbursed, but could not identify it.

C. JS's remuneration in 2014

526. By 2014, JS's basic pay had increased to £1.4m. Although this was the first increase in basic pay since 2005, in view of the MM&K report of March 2012, which recommended basic salary of £600,000, there was little objective justification for such a large increase.

527. At a board meeting on 25 September 2014, the board noted the negotiation of new banking facilities and achieving planning permission for the proposed Leicester Square hotel. The board awarded a bonus of £500,000 for the year ended 31 December 2014, by cash or benefit in kind if appropriate.

528. Further benefits in kind during that year were provided to JS to the value of £226,705.

D. Did the Company exercise its powers for an improper purpose?

529. The power of the board under the Company's constitution to remunerate its directors must be exercised bona fide in the interests of the Company, not in the interests of the directors or for some other improper purpose. The interests of the Company in this regard are that its directors are adequately but not excessively remunerated in order to retain them, incentivise them to perform to the best of their ability and reward them for good performance.

530. As a matter of law, when considering the doctrine of improper purpose, the relevant inquiry is for what purpose the power was conferred and for what reason the power was exercised in the way that it was. The second part of the test is therefore a subjective one: for what purpose or purposes was the power in fact exercised? See Eclairs Group Ltd v JKX Oil & Gas plc [2015] UKSC 71 at [15]. If there is more than one purpose for which the power was exercised it is necessary to consider whether, without the improper consideration, the decision would have been made. If it would then the decision will stand; if it would not then the decision is unlawful: ibid., para [21].

531. In March 2012, the board awarded JS additional remuneration of £2m over and above his salary of £900,000 plus benefits and pension. The minutes of the board meeting state that it was awarded in respect of performance of the Company in 2010 and 2011. The amount of the bonus was apparently informed by the MM&K report of the same month. But the evidence of Mr Morley was that the award of £2m, which later became an award of £2.1m, was made for more than one reason: to reward JS for the performance of the Company, and because JS had caused the Company to spend the money in question on benefits to JS and so JS had the need of and requested further

remuneration to pay for them. Mr Morley explained that HMRC would not have agreed the entertainment as legitimate deductible expenses of the Company itself. Accordingly, unless the Company gave JS the additional remuneration he required, it would have had to require him to repay the money to the Company.

532. The pattern of remuneration being addressed after the event had been long established at the Company. There was no proper remuneration committee and the Company did not (at least before 2012) decide in advance of each year what remuneration would be paid to its directors. JS and other family directors simply caused the Company to spend money for their benefit, as they saw fit, and then sought to validate what had been done at the end of the year. It must be borne in mind that until 2009 HS was as complicit in this unorthodox approach to remuneration as JS was.

533. Thus, when the question of further remuneration to JS for the 2011 year first arose (other than the mere indication to the board that £500,000 would be likely to be spent on Inderneel's wedding), the money had already been spent by the Company. This was not a case of agreeing in advance a reasonable package of conventional benefits in kind, nor a case of an agreed bonus structure that depended on performance. The Company was faced with a *fait accompli* of the expenditure and with JS's request for further remuneration to match it. In ordinary years, the relatively modest expenditure was simply awarded as benefits in kind retrospectively. Mr Morley drew comfort from the fact that it was at least of approximately the same amount in each ordinary year, so was at least reasonably predictable.

534. But in 2012 the board was faced with a real problem. Having been told only that there would be £500,000 of expenditure on Inderneel's wedding and that works were being carried out on Tetworth Hall, it was then told in December 2011 that this expenditure was £2m in aggregate and that JS was asking for remuneration in that amount to cover it. Having just had two tremendously profitable years, as the board noted, one obvious solution would have been to declare a handsome dividend for 2011 of sufficient amount to provide £2m to JS and the Jasminder trusts. Assuming that the Jasminder trusts would have distributed the dividend in accordance with JS's wishes, it would only have required an extra £3m or so of dividend on top of the £3m dividend declared out of profits for 2011 of £17.38m.

535. Instead, the board gave itself some thinking time and Mr Hart commissioned MM&K to advise on remuneration, specifically telling them that the Company was minded to award JS a bonus of an amount near £2m. That figure, of course, had nothing at all to do with the performance of the Company or appropriate reward ex post facto (with no risk) for previous years' successes and everything to do with JS's exceptional need for £2m with which to defray the costs that had already been incurred on his behalf. In my judgment, there was no question of the board requiring JS to repay any part of that expenditure and the board was not inclined to declare a dividend that would have the effect of providing substantial additional income to all shareholders equally.

536. Although the MM&K report managed to make a recommendation of a retrospective bonus of between £1m and £2m, it also stated that JS was overpaid to the extent that none of his fixed salary of £900,000 was at risk. So, logically, the board should have taken into account that advice in fixing the amount of any bonus, if it were a genuine exercise of awarding a retrospective bonus (where none of the bonus was at risk). Instead, the board awarded a bonus at the upper limit of what was recommended

(which it later increased to £2.1m for unexplained reasons). It did so because that was the figure that it needed to award to satisfy JS's requirements. It is clear that the board was not acting on the advice given by MM&K. In the first place, it did not take into account in awarding the bonus the advice about the excessive fixed salary. Secondly, it did not act on the advice that MM&K gave about an appropriate remuneration package for the following years. MM&K's recommendation was a fixed salary of £600,000 and a bonus of 50% of that for good performance, and up to a maximum of 100% of salary, where that element of the remuneration package was at risk, depending on the performance of the Company.

537. In my judgment, the MM&K report was no more than an excuse for the board to do what it was always minded to do, namely grant JS benefits in kind equal to the amount of the expenditure that had already been incurred by him. The purpose of the board in awarding the bonus was not to remunerate its chief executive appropriately and not excessively but to give him the £2m that he needed for personal reasons. But for JS's need for the money for personal reasons and the board's willingness to provide it, there would not in my judgment have been a bonus of anything like £2m awarded, even though there was some justification in terms of previous performance of the Company for awarding a bonus.

538. Were there any doubt about those conclusions, it would be dispelled by what happened shortly afterwards. At the 12 June 2012 board meeting, not quite 3 months after JS had been awarded a retrospective 'bonus' of an unprecedentedly large amount, the board awarded a further bonus of £1.3m. This time there was no external advice; just the board's feeling that JS had done a good job of negotiating favourable bank facilities with HSBC.

539. This was nothing to do with the performance of the Company: not even half of 2012 had yet gone by. Neither was it anything to do with the proper remuneration of JS. It was, in truth, just a disguised distribution of the Company's accumulated profits because JS had need of a further large amount of money, in connection with the marriage of his daughter that was taking place the following month. Moreover, JS was later awarded a retrospective bonus for 2012 (though no particular performance was identified as justifying it and indeed pre-tax profits fell from £17.3m to £12.6m) when, in May 2013 a further "benefit and bonus" of £650,000 was awarded (which on its own would have been more generous than the 'at risk' bonus recommended by MM&K). It is in my judgment clear that this money was awarded because JS needed the money, not because it was an appropriate but not excessive way in which to remunerate him as chief executive for his work in 2012.

540. I am also satisfied that, if the Company considered that it was important that JS had the money he requested, it could and should have declared larger dividends for the years 2011 and 2012, thereby acting in accordance with the reasonable expectations of all the shareholders rather than in the interests of one shareholder and director. Harman J made these highly pertinent remarks in Re a Company (ex p Glossop) [1988] 1 WLR 1068 at 1076:

> *"*it is, in my judgment, right to say that directors have a duty to consider how much they can properly distribute to members. They have a duty, as I see it, to remember that the members are the owners of the company, that the profits belong to the members, and that, subject to the proper needs of the company to ensure that it is not

trading in a risky manner and that there are adequate reserves for commercial purposes, by and large the trading profits ought to be distributed by way of dividends. No doubt in practical terms shareholders will have a difficult case to make if directors, not considering their own personal pocket, not benefiting themselves in some capacity (e.g. by paying out to themselves remuneration in excess of that which should legitimately be paid so that their remuneration is limited to that which would be paid to ordinary people in the market performing those functions), simply pile up profits in the company and do not distribute them by way of dividend. Nonetheless members can, in my view, if those facts were adequately proved, make the company the subject of a petition for a just and equitable winding up; because the proper and legitimate expectations of members have not been applied, but have been defeated."

Those observations seem to me to apply in this case.

541. As for the remuneration awarded in 2014, totalling £2,126,705, there is no evidence about why it was considered appropriate to increase the fixed salary of JS so substantially, to £1.4m, in that year. It only appears to have been approved by the board as a result of its retrospective approval of the 2014 accounts. In the following years, the fixed salary was reduced to £1.2m. Neither is there any evidence other than what is contained in the board minutes as to why a bonus of £500,000 was awarded in September 2014, before the end of the accounting year. New banking facilities and obtaining planning permission for a development may be a matter of celebration within the company, but it is not obvious why, regardless of overall performance, it merited a bonus mid-way through the year.

542. In my judgment, the directors of the Company were unfairly distributing profits of the Company to JS, by way of apparent benefits in kind, rather than declaring dividends. That was done for the purpose of relieving JS from a liability to repay large sums of money to the Company, not for the purpose of paying him reasonable and appropriate remuneration. It was done in that way so that only JS and not other shareholders benefited from the distribution. The Company therefore exercised its powers in that respect for an improper purpose.

E. Was JS's total remuneration in 2011, 2012, or 2014 unreasonably high?

543. In 2011, JS was awarded by way of remuneration a fixed salary of £900,000, standard benefits in kind of around £90,000 (which were awarded in each year and to which no objection of any kind has been taken) and a retrospective bonus (taken by way of further benefits in kind) of £2,100,000. None of this remuneration depended on future performance of the Company or JS.

544. In 2012, JS was remunerated by a fixed salary of £900,000, approximately the same amount of standard benefits in kind as in the previous year, and a bonus (taken by way of further benefits in kind) of £1,950,000, £1,300,000 of which was awarded in June 2012 and the remainder in March 2013. None of this remuneration depended on future performance.

545. In 2014, JS was remunerated by a fixed salary of £1,400,000, significantly increased benefits in kind (over £225,000) and a bonus of £500,000, awarded in September 2014. Once again, none of this remuneration depended on future performance.

546. I heard expert evidence from two witnesses on the question of whether (and if so to what extent) the remuneration paid to JS in those years was in excess of a reasonable level for an executive performing JS's role in the Company.

547. Mr Simon Patterson was called on behalf of the Petitioners. He is the managing director of the London office of Pearl Meyer & Partners, a remuneration consultancy, and is a graduate of University College London and UCLA's Anderson School of Management. He has worked for Booz Allen & Hamilton, PwC, SCA Consulting, Marsh & Maclennan Corp and then founded his own firm, which was acquired by his current employers. He has acted as expert witness on remuneration issues on a number of high profile cases. Mr Patterson produced an expert report dated 5 September 2017 and a responsive supplementary report dated 17 January 2018.

548. Mr David Brooks was called on behalf of the Respondents. He is a senior consultant and director of TBP2 Limited, the current holding company of the consulting business of Meis Ltd, which Mr Brooks founded, and another company called Inbucon. Before founding Meis, Mr Brooks was a partner of Mercer Consulting and head of its UK executive compensation practice. He has acted as an expert witness for a wide range of organisations since 2005. Mr Brooks produced an expert report dated 5 September 2017 and a responsive supplementary report dated 17 January 2018.

549. Mr Patterson and Mr Brooks prepared an undated but signed joint statement, identifying the matters on which they agreed and disagreed. They agreed that JS's remuneration in 2011, 2012 and 2014 was not representative of the long-term trend of his remuneration; that a CEO would normally be entitled to receive a long-term incentive award as part of his remuneration, which would generally include base pay, benefits, pension, annual bonus and such an incentive; and that a distinction can ordinarily be drawn between benefits and bonuses. As for data, they agree that benchmarking of remuneration provides a range within which the amount of remuneration could be considered reasonable, and that for these purposes the valuation of the Company should be assumed to be approximately £1bn. They also agreed that it was appropriate to consider data from listed companies that are similar to the Company in terms of market capitalisation, revenue and sector, and that use of these criteria was preferable to use of only one of them.

550. Mr Patterson's benchmarking exercise focused on FTSE-250 companies, which vary in market capitalisation but have a median size of £869m, slightly smaller than the Company. The top half of the FTSE 250 had a median capitalisation of £1.4bn, somewhat larger than the Company. Mr Patterson took the data for FTSE 250 companies for 2012, the year in which MM&K reported to the board of the Company and the middle year of the three years in issue. He considered the median and upper quartile base salary for the position of CEO in those companies, which was £490,000 to £579,000 respectively based on the whole of the FTSE 250 and £533,000 to £643,000 for the top half of the FTSE 250. That meant that he considered that JS was significantly overpaid with a base salary of £900,000, given that he did not consider that the performance of the Company was at higher than upper quartile levels. As for bonuses, Mr Patterson did not consider that the performance of the Company in 2011, 2012 or 2014 – with profits reduced from 2010 – merited a bonus of anything like the sums awarded, which in any event he considered to be retrospective benefits in kind rather than true bonuses. He applied his own metric comparing overall return to shareholders with the CEO's remuneration to consider whether performance justified

such bonuses/benefits and concluded that it fell far short of justifying it. He considered that the payment of bonuses for transactions (such as acquiring a new property or negotiating a new facility) was bad practice in any event, and that bonuses should depend on performance. He concluded that JS's remuneration had been significantly in excess of market norms for many years and in excess of what was merited for a company the size of the Company and its performance. He also noted that JS was substantially incentivised by his direct and indirect shareholding in the Company, and so in his case (as opposed to the hypothetical case of an incoming CEO) there was little need to incentivise his retention and performance.

551. On the appropriate level of bonuses (properly so-called) and long-term incentives, Mr Patterson considered that 33%-50% of fixed pay was appropriate for achieving a pre-set target and a maximum of 100% for outstanding performance.

552. Mr Brooks used a number of different data cuts, derived from his company's own data bases, based on comparisons of the Company to the market in terms of: market value of between £750m and £1.25bn; turnover of between £100m to £200m (the Company's being in the region of £150m on average); number of employees of between 2000 and 4999 (the Company having 2,086 on average) and the whole of the FTSE 250 and Small Cap travel and leisure companies. He also used three data cuts derived from private equity data bases, including all organisations in Europe and all organisations in the real estate sector. For each such cut, Mr Brooks identified the total remuneration package of the CEO (or equivalent officer) of each company, and then a range between the median figure and the upper decile figure for each cut. Since these figures are based on 2016 data, Mr Brooks then discounts back by 2% p.a. compound to identify equivalent figures for each of the years 2011, 2012 and 2014.

553. By averaging all the results produced, Mr Brooks derives a median and upper decile figures for each of the years in issue. Having done that, Mr Brooks analyses the non-private equity data cuts to identify the figures for base pay, benefits, pension and the percentage ranges for bonuses and long-term incentives that would be required to recruit a CEO to perform JS's functions at the Company. This leads him to conclude that a total package worth between £2.467m (median) and £3.678m (upper decile) would be required in 2014 (which I shall call "the maximum figures"). Of that package, £1.8 m to £2.8m would be 'at risk', in the sense of being maximum sums for bonuses and long-term incentive that depended on the performance of the Company or the CEO. Base pay was in the range of £516,000 to £634,000. These figures (reflecting the maximum that could be earned) fall to be compared on Mr Brooks's own figures with £1.737m (median) and £2.643m (upper decile) as representing actual earnings based on actual results (including the private equity results) from the data sampled (which I shall call "the actual figures").

554. In asking himself whether JS was excessively remunerated above what is reasonable, Mr Brooks then performs a further averaging exercise. He takes a simple average of the maximum figures and the actual figures and compares these with the figures for JS's remuneration over the period 2006-2014 ("the extended period"), the period 2010-2014 ("the review period") and for the particular years in issue: 2011, 2012 and 2014 ("the review years"). This produces the result that, based on the median results, JS was overpaid by about £2.1m for the review years and by £691,000 for the review period, but underpaid by £2.2m for the extended period. Based on the upper decile

results, the underpayment would be £975,000 for the review years, £4.4m for the review period and £11m for the extended period.

555. Mr Patterson criticised Mr Brooks's approach, in particular his selection of data cuts and averaging process. He considered that number of employees was a particularly unreliable data cut, as to a lesser extent was sector, because the range in size (market capitalisation) and turnover of companies in the same sector and with the same number of employees was enormous, and therefore the results produced were distorted. This is borne out by the significant range (from median to upper decile) of remuneration produced by Mr Brooks's data cuts, which is much wider than the range based on turnover and market capitalisation. In short, Mr Patterson considered that market capitalisation provided the best comparison, as there was proved to be a strong correlation between size and pay.

556. In my judgment, both Mr Patterson and Mr Brooks were clearly expert in their fields, having considerable relevant experience, both as consultants and expert witnesses, and with detailed knowledge of their subjects. I derived considerable assistance in understanding the issues from each of them, and I found them to be conscientious in their approach. They were, however, very different personalities. Mr Patterson was uncompromising and opinionated, somewhat brash in his presentation, and used questions put to him as a springboard for a rehearsal of his views rather than as an opportunity to address the particular point that was put to him. There was, however, no doubt in my mind that what he said he genuinely believed to be true, though his focus was mainly on certain points, such as the appropriateness of the FTSE 250 as a comparator and JS's performance not warranting remuneration at the upper decile or even upper quartile level of that index of companies. Mr Brooks was much quieter and more modest in his demeanour, and thoughtful and more detailed in his thinking and analysis. He was predisposed, nevertheless, to give very long answers to questions, rather than answer then directly. He focused very much on the question of what advice he would give to the board of the Company were it seeking to recruit a CEO, which may be relevant to the question of what was reasonable pay for JS in the years in issue but was nevertheless not the same as that question.

557. I found Mr Patterson's opinion on what would be reasonable as base pay for JS in the years in question compelling. Indeed, it was supported to a large extent by Mr Brooks's own data cuts, which produced an averaged median figure of £548,000 and an upper decile figure of £674,000. I observe too that Mr Patterson's opinion that £600,000 was a reasonable sum for base pay matches the view expressed by MM&K in February 2012. I therefore accept Mr Patterson's opinion that JS was already substantially ahead, in terms of 'no risk' remuneration, by virtue of receiving base pay at the annual rate of £900,000. I also found Mr Patterson to be persuasive on the connection between further remuneration by way of bonus or long-term incentive scheme and the risk of not being paid if the required performance is not achieved. Although I accept that bonuses can be and are paid retrospectively on occasions, the more substantial 'maximum' bonus figures that have significantly influenced Mr Brooks's remuneration package – that would be needed to attract a new CEO – are based on outstanding performance in excess of targets. The executive is 'at risk' of not receiving those sums, and the bonus of up to that maximum amount serves as an incentive to achieve outstanding results. The 'the actual figures' for total remuneration obtained in Mr Brooks's data cuts are very significantly less than 'the

maximum figures' for a good reason, namely that sufficient performance is often not achieved to merit the higher bonus or incentive award. Similarly, where a bonus is awarded retrospectively, rather than in advance subject to achieving designated goals, I agree that the amount of the bonus awarded would be correspondingly less, since it is not remuneration that is 'at risk'.

558. Accordingly, in my judgment, Mr Brooks is wrong to average the actual figures and the maximum figures and use the average as a comparator with the sums retrospectively awarded to JS in 2012 and 2013. I accept Mr Patterson's opinion that a bonus of up to 100% of the base pay is a reasonable allowance for exceptional performance. The figures of 150% to 188% used by Mr Brooks may well be appropriate as maxima for 'at risk' bonuses agreed as part of a remuneration package for upper quartile and upper decile performing companies, but that does not truly inform the question of whether retrospective bonuses/benefits of the amounts awarded to JS in 2012, 2013 and 2014 were in excess of what was reasonable. Mr Brooks disagreed that it was appropriate to adjust his figures for the fact that none of JS's remuneration was 'at risk', but that was because he was approaching the issue as one of the package that would have to be offered by the Company to recruit a CEO in place of JS, and not as one of what pay was reasonable to award to JS (in particular by way of retrospective bonus/benefit) for the years in question.

559. Further, I accept Mr Patterson's opinion that an averaging of data derived from comparisons of employee numbers and sector (without any prior exercise in selecting within these categories) together with the data derived from comparisons of turnover and market capitalisation will produce less reliable results. In fact, these two data cuts significantly increase the median and upper decile averages in Mr Brooks's tables, as to a lesser extent do the inclusion of the private equity figures, which Mr Patterson criticises as introducing a comparison with something that is basically not comparable to a company such as the Company. This averaging process, and then the further averaging with Mr Brooks's remuneration package figures (which assume that the maximum bonus and long-term incentive payments are achieved) serves to inflate significantly the true comparison figures for overall remuneration.

560. Mr Brooks expressed the opinion that in order to consider what was reasonable pay for particular years it was necessary to look at the level of pay before, between and after them, to get a proper perspective. That was, presumably, on the basis that much lower base pay or the absence of a bonus in previous years might more readily justify increased remuneration in the years in question. I accept that a consideration of the context is important. The fact that an executive has foregone a bonus in a previous year owing to poor performance may justify a more generous bonus in a later year. However, I cannot accept that, as Mr Brooks contended, it was wrong to consider the reasonableness of JS's remuneration in the 'review years' without taking directly into the calculations the remuneration in the 'review period' or the 'extended period', as he defined them. That then becomes an exercise in considering the reasonableness of the pay over those periods instead of the reasonableness of the pay in the years in issue. The result is demonstrated by Mr Brooks's own conclusions: overpayment of £2.098m for the review years based on median figures becomes an underpayment of £2.246m for the extended period, and underpayment of £975,000 based on the upper decile figures becomes an underpayment of £11m. That is a huge distortion of the picture about 2011, 2012 and 2014 caused by painting instead a picture about the

years 2006-2014. There is no suggestion, nor was it part of the Respondents' case, that JS had been underpaid in previous years. To the extent that the Company sought to justify the bonuses/benefits awarded to JS in 2012, 2013 and 2014, it was on the basis of transactions and performance in those years.

561. In my judgment, although Mr Brooks was the more sophisticated of the two experts in terms of analysis and use of data, he has erred in his selection of data cuts that have informed his average figures; in feeding into his calculations a maximum remuneration package for a replacement CEO, with a large 'at risk' element of pay; in making no adjustment for the fact that JS was awarded his bonuses/benefits retrospectively, and in not taking into account the very substantially higher basic pay that JS enjoyed as compared with any reasonable comparable. In my judgment, in agreement with Mr Patterson, he has also rather overstated the performance of the Company in the years in question. The extremely high remuneration packages for the CEOs of individual FTSE 250 companies that were considered in cross-examination were, in most cases, for the top-performing companies in the data base, where the packages included significant elements of 'at risk' pay, and were not appropriate as a comparator for the remuneration of JS, as CEO of the Company, by way of retrospective bonuses for 2011. Although Mr Patterson's evidence was at times lacking in finesse, I consider that his judgements were soundly made, even though he should have included a comparison with companies with similar turnover as well as his market capitalisation comparison. As Mr Brooks's data cuts show, however, that is likely if anything to have reduced the figures extracted from the data.

562. Accordingly, in my judgment, remuneration by way of basic pay and bonus in excess of £1,800,000 in aggregate was unreasonable in amount for the years 2011, 2012 and 2014. The aggregate figures allow for a generous 100% bonus each year, based on the excessively high basic salary of £900,000. Those figures do not include payments made to JS for pension and standard benefits in kind, to which there had been no challenge.

F. Were the acts of the Company unfairly prejudicial to HS and Estera?

563. The effect of the informal accounting procedures of the Company was that in 2011 JS had caused it to spend some £2m on renovations to Tetworth Hall and on Inderneel's wedding that could not be justified as business expenses in its accounts. It therefore had to be financed by JS in some way. Allowing for £900,000 that could have been justified as a retrospective bonus for each of the previous years, that left a shortfall of £1.2m for 2011 and £1.05m that was in effect a distribution of profits to JS in the guise of director's remuneration. JS did not have the cash available with which to repay the Company. Had the additional sums been distributed lawfully by way of increased dividend, so as to provide JS with those sums in hand (directly and through the Jasminder trustees), HS, Estera and the other shareholders would have benefited rateably. In his written closing submissions, JS states that the Petitioners lost £854,705 if aggregate remuneration of £1.575M (the unchallenged 2013 figure) was approved. In the event, I have held that up to £1.8M could have been justified as reasonable for the years in question, so the amount of lost dividends will be correspondingly smaller, but nevertheless very substantial.

564. There is therefore no doubt that the other shareholders were prejudiced unfairly by the improper distribution of the Company's profits to JS in the form of benefits in kind.

Although JS did not vote on his own bonus, I have no doubt that he required it to be paid and he benefited from it. The other directors of the Company would not have voted as they did without the knowledge that JS wished it to be done.

565. JS submits, first, that the loss of dividend is *de minimis* given the size and value of the Company and its profits, and secondly that it cannot justify the grant of relief by way of share purchase order. I disagree with the first proposition, which strikes me as rather provocative in the circumstances. For a minority shareholder in a company with no dividend policy, no practical ability to sell and realise a fair value for his holding, and no ability to influence the amount of dividends, a payment of over £750,000 by way of dividends is not to be dismissed so lightly. JS's and the Company's conduct were in effect depriving HS and Estera of their fair share of the profits. As to the second proposition, this might be a sound conclusion were the remuneration issue the only matter of complaint. However, the question of what relief is appropriate needs to be considered in the round, taking account too of the breaches of fiduciary duty by JS and the misleading of the shareholders by the Company in the form of the report of the investigation, and the general picture that these matters present of the way in which JS and the Company treat its minority shareholders. I will do that in Part VIII of the judgment, after considering in Part VII whether or not the Petitioners' delay in issuing proceedings complaining of these matters should debar them from the grant of any or any particular relief.

Part VII - Delay

566. The Respondents contend that even if conduct of the Company's affairs that would otherwise form a ground for relief under section 996 of the Companies Act 2006 is proved, the Court should not grant HS or Estera any such relief because of delay until November 2015 in issuing the petition.

567. I address the issues raised in the following sections:

A. Legal relevance of delay (paras 568-572)

B. Extent of and reasons for delay (paras 573-595)

C. Should HS and/or Estera be refused relief on the ground of delay (paras 596-609)

A. Legal relevance of delay

568. The argument that relief should be refused on the ground of delay has to be addressed in the context of the unfairly prejudicial conduct that I have held to be established. This is, first, the breaches of fiduciary duty by JS in acquiring his interests in Winchfern and Expotel and in failing thereafter to disclose his continuing conflict of interest and duty arising from his interest in Expotel in particular. The original breaches occurred when the shareholdings in those companies were acquired – in 1983 and 1991 respectively – and the continuing breach through non-disclosure only ceased in about the summer of 2008, when the Expotel shares were sold. Then there

is the Company's conduct of the investigation into these matters (from about June 2010 to February 2012) and the misleading report given to the shareholders in February 2012. Finally, there is the distribution of profits to JS by way of disguised and unreasonably high remuneration instead of as dividends, which occurred mainly in 2012 and to a smaller extent in 2014.

569. The Respondents contend that, no later than the end of October 2008, when HS and Estera received Mayer Brown's letter dated 27 October 2008, the Petitioners had all the information that they needed if they were to issue a petition based on JS's breaches of fiduciary duty. That was only a month after SJ Berwin had written to Mayer Brown stating that a letter before action was being finalised with the assistance of leading and junior counsel. In the Jersey proceedings in February and April 2008, HS had sworn affidavits stating that he was on the brink of bringing a Section 994 petition and intended to do so as soon as possible, subject to resolving the position of the Herinder trustees. A letter before action was sent by Magwells only on 11 June 2010. The Respondents observe that no further information relating to Winchfern or Expotel was available to HS/Estera before a draft petition was sent on behalf of the Petitioners'solicitors to JS's and the Company's solicitors on 23 December 2014. (Later, on 9 April 2015, JS's solicitors sent the Petitioners solicitors fuller information about the Expotel matter – in particular about the 1991 deed of trust and details of the Carriere trust.)

570. The argument about delay was presented in a number of different ways. First, that as a result of acquiescence of the Petitioners since knowledge of likely breaches of duty and HS's exclusion as a director and employee, it cannot be said that any such conduct was unfairly prejudicial to HS or Estera. The Company has prospered over that time, its shareholdings have increased in value and regular and increasing dividends have been paid, so it is to be inferred that HS and Estera have been content to remain shareholders notwithstanding the matters of which they now complain. The second way in which the argument was put was that the equitable defence of laches either applies or should be applied by analogy, and/or that the provisions of the Limitation Act 1980 should be applied by analogy, as they would to a claim for breach of fiduciary duty that does not involve either fraud or a claim to recover trust property (i.e. a six year limitation period). The third way in which it was put is that any relief granted should take account of the delay, in particular by fixing any valuation of HS's and Estera's shares at the time at which proceedings should have been brought or would have been resolved had there been no delay.

571. In my judgment, the right approach is to consider how the delay in question should affect the exercise of the court's discretion under section 996 to make such order as it thinks fit. There is no statutory time limit for issuing a petition, nor does the equitable doctrine of laches strictly apply where the relief sought is not equitable relief. However, unjustified delay resulting in prejudice or an irretrievable change of position (the essential ingredients of a defence of laches) are likely to be significant factors in the exercise of the court's discretion to grant or refuse a particular remedy. So too is any evidence that the Petitioners have previously acquiesced in the state of affairs of which they now complain, which is the basis of a number of the authorities to which I was referred. If, in view of the delay and the reasons for the delay, it is unfair or inappropriate in all the circumstances for the Petitioners to obtain the relief that they seek, the Court will exercise its discretion to refuse it.

572. As I have rejected the Petitioners' claim based on the marginalisation of HS's role in, then his exclusion from, the management of the Company's business, I do not need to consider how much sooner HS could or should have brought proceedings relying on those grounds. Moreover, although the Petitioners were threatening proceedings based on HS's earlier marginalisation, proceedings were in fact only brought relying on his later removal as a director, which took place in July 2009. There is, in my view, much to be said for the Respondents' arguments that in so far as peremptory removal was relied on as a ground for relief, the proceedings should have been brought promptly thereafter. However, in considering whether and if so how delay may affect the relief to which HS/Estera are otherwise entitled, I only need to consider further the grounds of unfairly prejudicial conduct that they have successfully established, as summarised in para 568 above.

B. Extent of and reasons for delay

573. So far as Winchfern and Expotel are concerned, I find that HS was suspicious of JS's involvement in Winchfern by 2005, as a result of the unexplained sharing of facilities between the Cheshire Hotel (owned by Winchfern) and the Company's nearby hotels and then seeing Amrit Singh's tax return (referring to a shareholding in Winchfern) in Vijay Wason's office in 2005. This in turn made HS suspicious about the relationship between JS and Expotel, a suspicion that was fuelled by things said (that remain undisclosed) in the course of without prejudice negotiations in 2005 and 2006. However, HS did not have anything concrete in relation to Expotel that could be relied on openly until JS's memorandum of disclosure of 23 June 2008. Without Expotel, the Petitioners' case based on Winchfern alone would have been much weaker, or at least the appropriate relief would have been of a limited nature, given its historic nature and relatively limited value. The memorandum of disclosure of course gave HS nothing of substance in relation to Expotel, since it was deliberately misleading in what it said and intended to deflect further scrutiny. Only the fuller (though still incomplete) disclosure in Mayer Brown's letter dated 27 October 2008 (also received at about that time by Estera) gave HS/Estera sufficient information on the basis of which to allege that JS had breached his duty to the Company.

574. HS's response was to cause SJ Berwin to write asking many more questions (the 23 December 2008 letter). In my judgment, that was a reasonable response in the circumstances, since the 27 October 2008 letter begged as many questions as it answered. No substantive response was ever received to the 23 December 2008 letter. Instead, Mayer Brown's reply in February 2009 was, in substance, that HS should either hold his peace or give full details of the claim that he had been threatening to bring. Nothing more was done by HS until the board meeting of 22 June 2009, when the unanswered questions were again raised (though not considered, as HS did not bring a copy of them to the meeting).

575. On 22 January 2009, SJ Berwin had written to Verite and Jemma on behalf of HS and Estera to the effect that a decision had been taken to issue proceedings for unfair prejudice. Faced with a refusal by Mayer Brown on 3 February 2009 to provide more answers, HS/Estera could reasonably have been expected to pursue the proceedings at that stage (or, at least, Estera could have been expected to apply for Beddoe relief in Jersey, which it did not in fact do until 2013). That is a delay that in my judgment demands some explanation. The fact that HS was then removed as a director in July 2009 can only have given considerable impetus to the decision to issue proceedings

rather than delaying them. The removal produced a rather cursory protest (relying on quasi-partnership allegations) from Magwells in October 2009, and then, provoked by the imminence of the AGM a list of concerns sent by HS to Mr Wason on 14 December 2009. This made particular reference to Expotel and Winchfern, with a request that the Company decide how it was going to deal with the allegations that JS was a constructive trustee for the Company, among other matters. That email shows that HS had already formed a clear view that there had been 'corporate opportunities' that JS had taken for his own benefit, yet no proceedings followed. Something evidently happened to put the proceedings on hold for a considerable period of time.

576. There are a number of rival candidates, which were explored at some length in the evidence.

577. The first was that HS/Estera reasonably waited for the Company's investigation to be concluded and considered before seeking to take matters further. Although, owing to the protracted nature of that investigation, it fills much of the lengthy delay in issuing proceedings, I reject that as an explanation of the delay. First, HS's wish was only that the board required JS to answer the questions in SJ Berwin's 23 December 2008 letter. He did not ask for an internal investigation. Secondly, when Mr Hart replied to HS's email on 19 February 2010, it explained (with brief reasons) that JS denied that there was any 'corporate opportunity' in either case and asked HS to provide his evidence to demonstrate otherwise and to explain when and how he came to know about the Winchfern and Expotel matters. It was clear even at that early stage that the Company would not conduct anything resembling a truth-seeking exercise likely to satisfy HS. Thirdly, Magwells on behalf of HS/Estera sent Mayer Brown a formal, 42-page letter of claim on 11 June 2010 making it clear that there was no alternative to court proceedings unless agreement could be reached. That step would not have been taken if HS/Estera wanted first to see the outcome of an internal investigation. Fourthly, when the Company (by Mr Hart) wrote formally on 17 June 2010 explaining the procedure that would be adopted in the investigation to be conducted by Messrs Hart and Morley, Magwells protested that it was plainly inappropriate to proceed with an internal investigation when the subject matter would be aired before the court in the near future, and accused Mr Hart of tactical manoeuvring in the light of the letter before action. Fifthly, the procedure adopted by the investigation (of which Magwells were informed from time to time) was such that HS/Estera cannot have had and did not have any faith in a fair and transparent investigation taking place that would be likely to vindicate HS's complaints. In short, there was no point in their waiting for the outcome of the investigation. As matters dragged on throughout the second half of 2010 and the whole of 2011 without any result, any residual feeling (if any) that it might be better to wait must have dissipated entirely. Magwells sought to negotiate an unlimited waiver of the privilege attached to the 2005-2006 without prejudice negotiations, which might have been advantageous to HS in bringing court proceedings, but JS refused to agree a waiver beyond the confines of the investigation.

578. The second reason relied on by HS and Estera is lack of funds with which to bring a petition such as this. Since HS and Estera were both asserting in 2008 and early 2009 that proceedings were imminent and awaited only the conclusion of the negotiations, it is somewhat difficult to accept that proceedings were not issued in 2009 because of funding constraints. HS's brother-in-law, Deepak Abbhi - himself a wealthy

businessman in America, as his wife said in evidence - funded the litigation arising from Verite's and then HS's representations in Jersey, and he also funded the BM Singh proceedings on behalf of the claimants in those proceedings and HS, the second defendant to them. HS asserted that they withdrew their financial support in about late 2009, as a result of their surprise at how 'hard fought' the Jersey proceedings were and how expensive they had become. That explanation does not ring true. Although hundreds of thousands of pounds were spent on the Jersey litigation, which itself was spread over 2 years, those proceedings relating to whether or not Verite had a conflict of interests were of a different scale altogether from these proceedings, as well as being in a different jurisdiction. No rational person could have been relying on the Jersey proceedings to give any indication of the likely costs of successful or unsuccessful Section 994 proceedings in this court. Nor would he or she have regarded JS's attempt to intervene in the Jersey proceedings as being revelatory of a determination to fight his interests. HS, Estera and Mr Abbhi must have been fully aware that JS would strongly contest any Section 994 petition that was issued at a time when lengthy negotiations for an agreed resolution had failed, and that the costs of fighting such proceedings could not be judged by the level of costs incurred in the Jersey proceedings. In any event, Mr Abbhi was not deterred from funding claims against JS: he funded the BM Singh proceedings. It is also clear from heavily redacted correspondence relating to funding arrangements that in and before October 2013 Mr Abbhi was negotiating through his solicitors with Mr Mervis (then at King & Wood Mallesons) on behalf of the Petitioners for funding the proposed petition and that some kind of term sheet was in circulation. A proposed term sheet was provided to Mr Mervis on 5 November 2013, suggesting that it be executed as a deed and the matter moved forward as rapidly as possible.

579. It is evident from these redacted documents that commercial litigation funding was being sought from a number of well-known and some less well-known companies over the period 2011 until 2015. Harbour Litigation Funding Ltd ("Harbour") had been approached as early as October 2008. But no documentary (or other) evidence about funding arrangements then exists until August 2011, when a funding offer was made by Harbour to Magwells. There is no evidence as to why the Petitioners did not take up that offer of funding. The only witness from Estera called to give evidence, Mr Prosser, was not involved at all in such matters. These were dealt with principally by a Ms Rive of Estera, but she was not called to give evidence. HS was not himself directly involved and had no real recollection of such matters.

580. Harbour made another offer of funding on 3 October 2011, subject only to its committee's approval, but the offer was evidently not taken up. When Harbour was re-approached in April 2013, it was cautious about spending yet more time on the matter "if the claimant is not prepared to accept our terms … There is no more negotiating to be done …". Notwithstanding that, Harbour spent much of April and May 2013 chasing SJ Berwin to approve or complete budget documents, leading to a final and best offer being made by Harbour (including a consideration fee) on 15 May 2013, which the Petitioners then declined as unacceptable, according to Mr Prosser's witness statement.

581. The Petitioners were also involved in prolonged negotiations with Calunius and Woodsford from about November 2011, leading to heads of agreement for joint funding in February 2012, basic terms having been agreed in December 2011. At

that time, insurance brokers commented that they understood from Calunius and Woodsford that the ball was in HS's and Estera's court. Matters apparently dragged on until October 2012, when Calunius chased SJ Berwin asking: "Is there actually anything now preventing Herinder from signing the CFLA?" Revised heads of terms were sent in November 2012 with a request that Mr Mervis sign them. These were signed by HS and Estera in December 2012, but then a number of further matters were raised by SJ Berwin in January 2013, resulting in Woodsford commenting on 22 February 2013: "My immediate reaction is that the trustees' offer is unattractive and, given the unfortunate history, there will be little appetite on the funders' side to expend yet more time attempting to restructure the terms". This resulted in Woodsford making a final offer on 28 February 2013 with five days for acceptance. On 19 March 2013, Mr Manduca of Calunius stated to Mr Mervis: "Simply do your clients still want to proceed with us as I have not heard from you?" This was against the legal background of after the event insurance premiums becoming irrecoverable in costs as from 1 April 2013, so in March 2013 an urgent decision whether or not to proceed was evidently required. The deal did not proceed and there is no explanation of why it did not.

582. In his witness statement, Mr Prosser asserted that by early March 2012 "the entire ATE insurance market had rejected the case". It is evident that that assertion is false, and moreover it became evident that Mr Prosser had no proper factual basis for making it. In February 2012, QBE Insurance expressed interest in providing ATE cover once the terms of a funding arrangement were in place, and QBE knew that Calunius and Woodsford were engaged. A letter in the same month from UIB brokers said that they had had limited interest from insurers but had an adverse cost solution using litigation financiers rather than insurers. Mr Prosser could not help with the identity of these financiers or which other insurers had expressed interest. It is reasonably clear that Calunius were expressing interest in May 2012 in bearing some of the adverse costs risk. In August 2012, XL Bermuda were keen to quote and willing in principle to take on the whole of the risk. Indicative terms were sent out on 3 September 2012, open for acceptance for 2 weeks. On 3 October 2012, Woodsford sent Mr Mervis two offers: one "for own costs only" and the other "for own and adverse costs". No one was able to enlighten the court about the nature of these offers, or why these or XL Bermuda's terms were not accepted. In December 2012, XL Bermuda sent to HS and Mr Mervis updated draft policy wording, and Mr Mervis responded that signed heads of agreement with funders were in place. XL Bermuda chased for news in February and March 2013 but no response is in evidence and no one could explain what happened.

583. The large quantity of correspondence relating to funding, to parts of which I have briefly referred and which were dealt with at considerable length in JS's written closing submissions, were redacted for privilege. As a result, many pages of the documents are largely unintelligible. It is impossible to obtain a full and complete picture of exactly what was happening at the time, partly for that reason and partly because the Petitioners called no one to give evidence who had any real knowledge of the toings and froings. Disclosure of the funding documentation and the claim of privilege was addressed on an interim application a month or so before the trial began. The Petitioners were warned that their very extensive assertion of privilege might result in there being no sufficient evidence before the court to satisfy it that all reasonable attempts to obtain funding had been made and that the issue of the petition

was delayed because of the problems of obtaining funding. Clearly, no adverse inference can be drawn from an insistence on maintaining privilege; but it is rather a question of whether or not there is sufficient material available in evidence to satisfy the court that there is a good explanation on these grounds for the lengthy delay. The Petitioners indicated on the hearing of the interim application that they accepted this distinction and the risk that the court might not be able to conclude that the funding was the real problem.

584. The parts of the correspondence that can be seen through the veil of privilege seem to me to tell a reasonably clear story. There is no need to fall back on the burden of proof. Family funding was in principle available to HS/Estera, but this was diverted to the BM Singh claim, which was issued in February 2011. With the exception of an early flirtation with Harbour, there was no attempt to obtain litigation funding until about August 2011. Thereafter, negotiations for funding were pursued by the Petitioners but without any sense of urgent need to put funding in place. It is clear that several potential funders who were willing in principle to fund lost patience with the delays and quibbles emanating from the Petitioners' side. On the basis of the information available, it is impossible to infer that all the funding offered was on terms so outlandish that it was not reasonably available to the Petitioners, and I do not draw any such inference. I conclude, rather, that offers of funding were made on reasonably standard commercial terms for complex and lengthy litigation, but that the Petitioners were reluctant to take them up when they were offered. The failure to take up offers of ATE insurance prior to 1 April 2013 is particularly bemusing, in the circumstances. Given the indications that funding and insurance were available, subject to due diligence, the only proper conclusion to draw is that the Petitioners were not ready or willing at that stage to proceed with their petition and therefore declined or simply failed to take up offers of funding that were available between 2011 and 2013.

585. When, in late 2014, the decision was taken to proceed with the petition, the Petitioners may well have found funding hard to come by, owing to their previous dealings with the main commercial litigation funders. I am therefore unsurprised that it took some time in 2015 to locate funding from an unconventional source.

586. The true explanation for the failure to take up litigation funding at an earlier stage is in my judgment the third of the rival explanations, namely that HS, in conjunction with his parents, had decided that the action that should be brought against JS was the BM Singh Claim. The ground for this was formally laid on 3 November 2010, when BM Singh and Mrs Kaur wrote to JS and HS expressing dismay that JS had not acted correctly as 'karta', and exercising BM Singh's right to sever the proprietary interests of himself, JS and HS, so that each was entitled to a one-third share. Although this did not happen until 2010, HS had for some time been making common cause with his parents (and his sister) against JS. It was the parents who in December 2005 appointed Estera and Jemma as co-trustees in order to enable Verite to resign as trustee of the Herinder trusts. In July 2006, BM Singh and Mrs Kaur tried to revoke their 1994 memorandum of wishes in respect of the Herinder trusts, to express wishes in respect more favourable to HS. At the board meetings of June 2008 and June 2009, BM Singh and HS had abstained together from approving the Company's accounts, for identical reasons. In 2010, BM Singh had sought to appoint Deepak Abbhi as a co-trustee of the Jasminder trusts.

587. From 2006 until 2010, when a conflict of interests was identified by leading counsel, the same solicitors (in England and in Jersey) and counsel had been acting for HS and for his parents. It is therefore very likely indeed that both sets of proceedings were in contemplation and in discussion between BM Singh, Mrs Kaur, HS, Estera and their lawyers over that period. Notably, HS's 'end of the road' letter of January 2006 refers repeatedly to BM Singh's wishes, to the concept of the Indian joint family and asserts that JS has not "honoured your responsibility and duty to the family to run the business as a 'father figure' as entrusted to you by Dad". Further, HS accepted that preparatory meetings with the lawyers and the Indian law expert acting for BM Singh and Mrs Kaur took place at HS's house in Putney, and that he was encouraging and supporting his father to bring his claim.

588. It is an inescapable inference and one that I draw that HS and Estera decided not to issue their unfair prejudice petition but first to support HS's parents in pursuing the BM Singh Claim. This was issued in February 2011. Although HS was a defendant to that claim, HS accepted in substance all of his father's case and did not oppose the relief that he claimed. The basis of BM Singh's Claim, with JS as the 'karta' having absolute rights, sits uneasily with the notion (as was at the forefront of HS's complaints as he saw them at the time) that HS himself was entitled to equal status to his brother and substantial rights to manage the Company. The two claims could not have co-existed without HS's case in one or other amounting to an abuse of process, or at best seriously undermining both.

589. HS maintained that it was a coincidence only that, within 4 days of the Court of Appeal refusing permission to appeal against Sir William Blackburne's order in the BM Singh Claim, a draft section 994 petition was sent to JS. I reject that contention. It is obvious not just from the timing but from the other factors that I have identified above that the decision was taken to put the petition on hold, after the letter before action had been written in June 2010, and pursue instead the BM Singh Claim, which stood if successful to give HS and BM Singh each one third of the property in JS's name. If it failed, as it did, with HS having distanced himself sufficiently from the concept of 'karta' in those proceedings HS would then be able to bring his own claim (with Estera) based on his own rights as a shareholder of the Company.

590. I therefore conclude that HS and Estera delayed bringing the petition and did not accept funding agreements available to them in 2012 (or seek such agreements earlier) for that reason. As already noted, the ground for the BM Singh proceedings started to be laid in November 2010. The claim was issued on 10 February 2011 and the judgment of Sir William Blackburne deciding the preliminary issues against the claimants is dated 8 April 2014. Permission to appeal was finally refused on 19 December 2014. The proceedings therefore took up nearly 4 years, during which time HS and Estera remained as shareholders of the Company under the management of JS and without representation on the board.

591. During that period of 4 years, HS and Estera were still actively considering their claim, as the correspondence with litigation funders demonstrates, though I find that they were not willing to commit to a funding agreement and issue it while the BM Singh Claim was proceeding and so did not reach agreement with any funder. There was throughout 2011 significant correspondence relating to the investigation between Magwells for HS and the board's committee and the Company's solicitors, mainly in relation to waiver of privilege. It was not until October 2012 that Magwells protested

about the decision of the Jasminder trustees to accept the board's recommendations in the shareholder report. Thereafter, HS and Estera continued to attend the Company's AGM, usually in December of each year, and received dividends each year from 2010.

592. Apart from the allegations of breaches of fiduciary duty, of which HS/Estera had sufficient knowledge in October 2008, the other allegations of unfairly prejudicial conduct that I have found proved are the conduct of the investigation into those breaches by the Company, which ended in February 2012 and the improper remuneration of JS in 2012 in particular. Clearly, a petition based upon those matters could not have been issued before 2012. Oddly, the shareholder report sent by Mr Hart in February 2012 met with no response from any of its recipients until 8 October 2012. On that date, the boards of Verite and Jemma noted that the report had concluded that the complaints of HS were "unfounded" and resolved to send a response. This made it clear to the directors of the Company that, given the report's summary of the facts, the Jasminder trustees agreed with the recommendations and were content that the matter was closed.

593. On 29 October 2012, Estera wrote to the Jasminder trustees' solicitors explaining the flaws in the investigation and report and suggesting that it was not credible or reasonable to rely on them. The response was that any complaints should be addressed to the Company and that Verite and Jemma had "placed their faith in the judgment of the Committee comprising two independent and experienced directors familiar with the background to the Company … and accepted their conclusions as being in the best interests of the Company". Estera tried again on 21 December 2012 and got the response on 4 January 2013 that the Jasminder trustees were strongly supportive of the management team and the board of directors in particular, given the strong financial and operational performance of the Company.

594. On 10 December 2012, the increased remuneration of the board, in particular JS, was raised at the AGM. HS would have been aware of the significant increase in 2011 remuneration then, at the latest.

595. In those circumstances, given that litigation funding was apparently available to HS and Estera in 2012, there was no justification for delaying the issue of the petition beyond January 2013 or shortly thereafter. So far as the breaches of fiduciary duty are concerned, it is arguable that a petition should have been issued much sooner. The factual knowledge of the Petitioners (sufficient to issue the petition on this ground) was complete by February 2009, when it was clear that no more detail would be forthcoming, and in view of HS's removal as a director in July 2009 one would have expected a petition to have been issued no later than the end of 2009. It is likely that family funding from Mr Abbhi would have been available had the petition been given priority over the BM Singh claim, but in any event Harbour had apparently been willing to enter into a funding agreement in 2008 and remained willing to do so in 2011 and 2012, so there is no reason to think that they would not have been willing in 2009 or 2010.

C. Should HS and/or Estera be refused relief on the ground of delay?

596. Against the background of my findings about the Petitioners' delay, I must decide whether or not HS and Estera should be denied all relief on account of their delay, or denied the relief that they principally seek, a share purchase order.

597. I have found that HS and Estera did delay, in relation to Winchfern and Expotel for at least the 4 years' duration of the BM Singh Claim if not longer, and in relation to the other acts of unfair prejudice for a period of about 3 years from the end of 2012 to the end of 2015. In this regard, I draw no distinction between HS and Estera, who were clearly acting together with shared knowledge of all material matters. I have also found that the delay was deliberate, so that the BM Singh Claim could first be brought. It can in that respect be characterised as tactical delay, though not in order that HS and Estera could continue to benefit for the time being from their shareholding in the Company (although they did in fact receive dividends each year for the four years in question).

598. The fact that a lengthy delay is deliberate and tactically motivated may be a significant argument in favour of denying the Petitioners relief, the more so if the period of delay has caused real prejudice to the Respondents or to the Company. The question however remains whether, as a matter of discretion, it is inappropriate or unjust in the circumstances for the Respondents (or some of them) to be ordered to buy the Petitioners' shares, or for the Petitioners to have other relief given that that claim should have been made 3 or 4 years earlier.

599. Although the Respondents contend that prejudice has been caused by delay owing to the dimming of memories of witnesses and the deaths of BM Singh and Mrs Kaur in 2015, I find that there is most unlikely to have been substantial prejudice in this regard. The events of 1983 and 1991-1994 would still have been historic and beyond the limits of good recall had the petition been issued in 2011 and tried in early 2014. As for the vivid events of 2008-2010 and the investigation conducted between 2010 and 2012, it seemed to me that all those whose evidence I heard had good recollections of those events, which in any event were substantially evidenced by documents. The documents that were lost because they were deliberately destroyed (in the case of the Hart/Morley investigation) or not correctly filed (in the case of Estera documents) would still have been lost by the time of an earlier trial.

600. It is true that BM Singh and Mrs Kaur could have been called as witnesses in 2014, but as is evident from Sir William Blackburne's detailed comments on their evidence in the BM Singh Claim (given to him in November 2013), with the infirmity of their advancing years they were unable to provide evidence of any value to the Court at that time, either in writing or orally. I therefore do not accept that there is likely to have been specific prejudice to the Respondents in this regard. It is most unlikely, given the history of the dispute, that BM Singh and Mrs Kaur would have made witness statements for the Respondents.

601. There was no other prejudice caused by the delay or alleged change of position, on which any Respondent relied.

602. After careful consideration, I have reached the conclusion that despite the deliberate delay of HS and Estera in bringing these proceedings, they should not be debarred

from relief on this ground. In reaching my conclusion, I have sought to weigh the reason for and seriousness of the delay against the nature of the unfairly prejudicial conduct that I have found proved and the consequences for the Petitioners of refusing relief against that background. My reasons for reaching a conclusion in favour of the Petitioners are the following.

603. First, this is not a case in which the Petitioners have acquiesced in the unfairly prejudicial conduct, or elected to stay shareholders of the Company, notwithstanding the matters of complaint. The Petitioners warned in January 2009 that legal proceedings were being prepared and they served a detailed letter of claim in June 2010. HS continued to protest about JS's failure to answer the questions in the 23 December 2008 letter and come clean about his interests in Winchfern and Expotel. JS only did so fully for the first time in April 2015, shortly after a draft petition had been sent to him. HS/Estera protested twice against the Hart/Morley investigation on the basis that the subject-matter was going to be aired in court proceedings. When the shareholder report was eventually published, HS and Estera protested about its conclusions on Winchfern/Expotel and about the shortcomings of the investigation. Although thereafter the focus switched to the BM Singh Claim, HS and Estera did nothing to suggest to JS, the Jasminder trustees or the Company that they were dropping their complaints about Winchfern/Expotel and the investigation and were content to continue as shareholders without any resolution of those issues. The most that can be said is that the Respondents heard nothing more about the petition until December 2014, when a draft petition was served. Although the BM Singh Claim and an unfair prejudice petition would have sat uncomfortably together, Estera was not a party to the BM Singh Claim. HS was a defendant, albeit one who largely accepted his parents' claim. HS/Estera had therefore not elected to pursue a different and inconsistent remedy, albeit they decided to enable the BM Singh Claim to be pursued first.

604. Second, although the Company's financial position has strengthened considerably since the end of 2009, to the benefit of its directors and shareholders, the position of HS and Estera as minority shareholders is essentially unchanged. They have no representation on the board of the Company, which has no dividend policy and no proper remuneration policy. Their ability to sell their shares is not excluded by the articles, but the ability to achieve a fair value is constrained by the pre-emption rights enabling existing shareholders to acquire some or all of the shares to be sold. In practice, a minority shareholder would have to find a buyer in the market at a particular price – a difficult enough exercise for a shareholder of a company without any policies in place to protect the legitimate interests of any minority shareholder - and then wait up to 3 months for the existing shareholders to decide whether or not to take any of the shares at that price. Given the existing shareholdings, where JS and the Jasminder trusts together own something short of 75% of the ordinary shares, it seems inherently likely that some at least of any shares offered would be taken up by them at the specified price, leaving the market purchaser with a reduced number at a lesser value. In practical terms, therefore, even if not legally, HS and Estera may be locked in to the Company unless they sell at a large discount to the fair value of their holdings, in which case the existing shareholders will benefit unfairly at their expense.

605. Third, HS and Estera did not deliberately delay their proceedings in order to take advantage of the rising fortunes of the Company. They did not elect to remain

shareholders and benefit from that status. The reason for the delay in issuing proceedings was (for whatever misguided or ill-advised reason) to allow the BM Singh proceedings to be brought first. While that can rightly be criticised as a tactical decision made in order to try to obtain the best chance of obtaining relief against JS, it was not a tactical decision to try to benefit from remaining a shareholder notwithstanding a claim to be bought out. It is in that type of case that a minority shareholder is taken to have made an election and is denied relief. Moreover, although the Company's financial position has undoubtedly improved since 2009, that was for particular reasons relating to the revaluation of its properties that I have already explained, rather than because of any change of direction of the Company's business since 2009. I do not consider it at all likely that HS or Estera had such increases in mind at the end of 2009 as a reason for delay. As from the end of 2012, the increase in the Company's value has been much more modest.

606. Fourth, the Company and JS have acted in a seriously prejudicial and unfair way in their treatment of HS and Estera's interests as shareholders. That prejudice has come about as a result of JS's considerable control and influence as CEO, his willingness to conceal matters that should be disclosed to the board, the board's weakness and willingness to support JS rather than act truly independently, its willingness to leave wrongdoing covered up and mislead shareholders about the true nature of it, and its willingness to appoint corporate profits by way of excessive remuneration to JS instead of as dividends benefiting all shareholders proportionately. In my judgment, the Company's affairs are likely to continue to be run by JS, Mr Hart and Mr Morley in that way. JS and Mr Hart have consistently applied a policy of attempting to reduce the value of minority shareholdings. JS admitted as much in evidence and Mr Hart accepted that the removal of Mr Gulhati as a director in August 2002 was the first step towards the objective of removing him from the Company as cheaply as possible. As a result, a denial of a remedy would be likely to perpetuate the unfair treatment of the minority shareholders. Given the absence of a dividend policy, there is no assurance at all that the annual dividends will continue to grow and be paid regularly after this litigation is ended.

607. Fifth, JS and the Company can be adequately protected or compensated in other ways for the effect of culpable delay on the part of HS and Estera in bringing proceedings. To the extent that there is culpable delay, the valuation date for the Petitioners' shares can be adjusted, so that the shares are valued on approximately the date that they would have been valued had there been no such culpable delay. A further adjustment could be made, if appropriate, on account of dividends received by HS and Estera over that period of culpable delay as compared with the value to JS or the Company of any payment for their shareholdings over the same period. This seems to me to be an appropriate and proportionate way of depriving the Petitioners of any benefit accruing from their unjustified delay in bringing their claim.

608. Sixth, as I have found, the delay did not in fact cause substantial prejudice to JS, the Jasminder trustees or the Company. If a share purchase order is made, the Company will have had the use of the Petitioners' capital during the period of delay for the price of relatively modest dividends paid to them.

609. Accordingly, in summary, it would be disproportionate in the circumstances to deny the Petitioners a remedy. Their conduct in delaying the issue of the petition does not

make it inequitable for them to be granted a remedy, given the nature of the wrongdoing and the consequences of refusing a remedy.

Part VIII: Remedy

610. Having found the acts or conduct of the Company's affairs that are unfairly prejudicial within the meaning of section 994, and having decided that the Petitioners' delay does not debar them from all relief, I must now consider what relief should be granted.

611. The relief principally sought by the Petitioners is an order that JS and/or Verite and Jemma buy their shares in the Company at a fair price, on the basis that no discount is applied to reflect their status as a minority holding; further or alternatively that the Company buy their shares on that basis. As previously noted, the discretion afforded by section 996 is a very wide one. On the facts of this case, it encompasses at least the following questions:

i) Are the Petitioners debarred from relief on 'clean hands' grounds? (paras 612-618)

ii) Should there be an order that JS or the Jasminder trustees or the Company buy the Petitioners' shares? (paras 619-631)

iii) If so, at what date should the shares be valued? (paras 632-636)

iv) Should the shares be valued at their market value or at a proportionate value of the Company's net assets on such date, or on some other basis? (paras 637-653)

v) Should there be any further adjustment for the effect of the breaches of fiduciary duty or the excessive remuneration or for any other reasons? (paras 654-655)

I shall address each of these in turn.

(i) Clean hands

612. The Respondents argue that HS should be denied relief because, in 2002, while a director of the Company, he became involved with a company called Mobile Access Technologies Ltd ("MAT") and had a shareholding and remunerated role for MAT. He sold his shares for a modest sum of £75,000 in October 2004. The business of MAT was in late 2000 and early 2001 the subject of discussion between the Company and HS because HS was considering whether or not the Company should invest in it, as part of his work on non-core development.

613. The Company decided not to invest because MAT insisted on terms that were not acceptable to the Company and because the start of the recession in 2001 made the climate unattractive for the Company to invest in dotcom-type companies. It was about 18 months after the proposal had been dropped that HS became involved with MAT.

614. The Respondents argue that HS was thereby in breach of his fiduciary duties as a director of the Company, and did not make disclosure until 2006. When disclosure was made to JS was a matter of some contention. It is therefore said that HS does not come to court with clean hands, complaining as he does of JS's breaches of fiduciary duty when he was himself in breach in 2002.

615. This argument was advanced in a very half-hearted way by each of the Respondents. Fewer that 4 pages of the written closing submissions out of a total of more than 800 pages written by the Respondents were devoted to it. Even assuming that HS was in breach of the no conflict rule in failing to disclose his continued interest in MAT, I do not consider that this single and relatively minor incident of breach of duty should have the effect of denying him relief, and it certainly does not (and is not argued to) deny Estera relief.

616. The clean hands doctrine does not strictly apply in a section 994 petition, save to the extent that equitable relief is sought, but similar principles can be applied since the statutory jurisdiction to grant relief is discretionary: see Interactive Technology Corporation Ltd v Ferster [2016] EWHC 2898 (Ch).

617. The relevant question is accordingly whether, in all the circumstances and taking into account other relevant matters, the wrongdoing of HS makes it unjust or inappropriate to grant him relief as a shareholder of the Company. In my judgment the answer to that question is: no. The involvement with MAT was of a different character from JS's interest in Expotel. The Company had no dealings with MAT. The Company had been given the opportunity to invest in MAT but had declined it (with that decision being taken by its board, not by HS). The investment that HS made was some considerable time after the Company had declined to invest. The degree of involvement by HS was relatively minor and the value small. None of those factors would be an answer to a claim for him to account for the proceeds of his breach of fiduciary duty, if such it was, but they are all strong reasons why his conduct should not stand in the way of his being relieved from the consequences of JS's and the Company's conduct.

618. I therefore reject the argument based on the clean hands doctrine.

(ii) Should there be an order that JS or the Jasminder trustees or the Company buy the Petitioners' shares

619. The next question is what relief in principle is appropriate.

620. The nature of the unfairly prejudicial conduct is such, in my judgment, that an order for purchase of the Petitioners' shares is the natural relief to grant. The Petitioners, though in principle able to sell their shares, are in practice heavily constrained from achieving a fair value. That would be so to some degree even if there had been no unfairly prejudicial conduct on the part of the directors of the Company. But the cumulative effect of the unfairly prejudicial conduct means that the shares must effectively be unsaleable in the open market. The Company, acting by its directors, has proved itself willing to engage in conduct that is unfairly prejudicial to minority

shareholders. I summarised the position in paragraph 606 above and that is the picture that would be seen by a putative purchaser of the shares.

621. An order requiring JS to restore to the Company the profits derived from the Winchfern and Expotel shareholdings and to repay the excessive remuneration (or to treat it as his and Verite/Jemma's share of a dividend that should be paid to all shareholders) would undo the particular financial prejudice caused by the breaches of duty that have been proved. But in my judgment it would not undo the prejudice that HS and Estera (and other minority shareholders) have suffered, as a result of oppressive conduct by the board, and are at risk of suffering in future. The Company's senior management has demonstrated that it is willing to act in a way that is calculated to prejudice minority shareholders. Although reasonable dividends have been paid since 2010, and increasing year by year, there is no guarantee for minority shareholders that these will continue to be paid regularly or in the same or similar amounts. The Company deliberately has no dividend policy. Further, there is no proper remuneration committee and the shareholders have no opportunity to control the amount of remuneration paid to the directors, since they are employed by the Company's wholly-owned subsidiary.

622. In my judgment, therefore, more limited orders to reverse the wrongful financial benefits derived by JS would not be sufficient to remedy the unfairly prejudicial conduct of the Company's affairs. Although there is no legal restriction on the Petitioners being able to sell their shares at whatever price they can obtain, in practice it will be impossible for them to obtain anything but a greatly discounted price, by reason of the proven conduct of the Company towards minority shareholders, the absence of any dividend policy and the pre-emption rights in the articles of association.

623. Accordingly, in my judgment, the relief granted must be the purchase of HS's and Estera's shares. Although, technically, it can be argued that Estera was not unfairly prejudiced by the Winchfern and Expotel transactions, its shareholding has been unfairly prejudiced by the cumulative effect of the matters complained of. Further, Estera is a trustee of the Herinder trusts, in succession to Verite, and the beneficial interest in the trust's shares has not changed since Verite acquired them. Since 1993 in broad terms and since 1999 specifically, the Herinder trusts have been understood to be for the benefit of HS's family, by agreement with JS. It is artificial, in those circumstances, and in the context of this claim, to focus on prejudice to Estera as shareholder rather than prejudice to the beneficiaries of the trust, in particular HS. Put another way, HS's interests as petitioner extend to his interests under the Herinder trusts, by analogy with the cases of R & H Electric Ltd v Haden Bill Electrical Ltd and Gamlestaden Fastigheter AB v Baltic Partners Ltd discussed at paras 227 to 229. Moreover, there has been prejudice to the interests of Estera's beneficiaries since 2005, as I have found. I therefore hold that Estera as well as HS should be granted relief in the form of an order for purchase of its shares at a fair value.

624. The next and important question is who should be ordered to purchase the shares of HS and Estera. The Jasminder trustees say that they were not in any way involved in JS's breaches of duty, nor did they conduct the investigation into those breaches and nor did they decide or approve JS's remuneration. That is all true. Mr Machan was aware in 2005 at the latest that JS had an interest in the Carriere trust, in the sense that the trustees would expect to respect his wishes as to who should be appointed as a

beneficiary, but he was not involved in any way with JS's failure to declare his conflict of interest to the board of the Company. While Verite and Jemma were keen for the investigation to take place, rather than have the allegations of HS 'swept under the carpet', they had no control over the way in which the investigation was carried out. Nor, despite their knowledge of JS's interest in the Carriere trust by 2012, did they have any reason to believe that the investigation had not been competently and diligently carried out by two directors of the Company.

625. On the face of it, the board delegated the investigation of HS's complaints to two highly experienced and suitably qualified members of the board to investigate. Verite and Jemma cannot in my view be criticised for accepting the recommendations of the board, based on the investigators' report, as summarised in the report to shareholders with which they were provided. The course recommended would have appeared to be in the best interests of their beneficiaries. It is said by the Petitioners that Verite and Jemma both knew that JS was interested in the Carriere Trust, which until 2008 held shares in Expotel, and that accordingly they must have been aware that HS's allegations of breach of duty were well-founded, and that therefore the investigation and its conclusions were questionable. In the way in which the issue was skilfully developed in court, with the benefit of detailed analysis and 20/20 hindsight, one can see the force of the argument. But Mr Machan and Mr Christensen were not called on to act as forensic detectives. Their only duty was to act in the best interests of all their beneficiaries.

626. In relation to improper and excessive remuneration, Verite and Jemma had no means of controlling the remuneration of JS, since Mr Hart had adroitly (but legally correctly) ensured that the remuneration of employees of the Company's subsidiary was dealt with by the board of the Company and not referred to the AGM of the Company for approval, only notified in the Company's accounts.

627. Despite these matters, the Petitioners contend that relief should also be granted against Verite and Jemma on the basis that they were sufficiently implicated in the unfairly prejudicial conduct.

628. The Petitioners rely on the cases of F&C Alternative Investments (Holdings) Ltd v Barthelemy [2011] EWHC 1731 (Ch); [2012] Ch 613 and Apex Global Ltd v Fi Call Ltd [2013] EWHC 1652 (Ch); [2014] BCC 286. In both cases the relevant criterion for the grant of relief against a respondent was identified as being whether what was done involved unfairness in which the relevant person was sufficiently implicated, or to which he was so closely connected, as to warrant relief being granted against him.

629. I accept that these cases establish that the court has power to grant relief against persons sufficiently implicated in unfairly prejudicial conduct of a company's affairs, or who benefited or stood to benefit from it and condoned it, even if they are not the principal perpetrators. But in my judgment the principle does not apply on the facts of this case. To be fair to the Petitioners, it was advanced mainly to deal with their case that Verite/Jemma were responsible for wrongful removal of HS as a director, acting at the direction of JS. However, I have held that there were no equitable considerations binding anyone to maintain HS a director of the Company, so that the removal of HS as a director was not unfairly prejudicial as such to his interests as a member of the Company. I also held that they did not act at the direction of JS. The argument of culpability by association does not apply with any force in relation to the

unfairly prejudicial conduct that I have found proved. So no relief should be granted against Verite/Jemma.

630. Relief should in my judgment be ordered against JS and the Company. JS was responsible for his own breaches of fiduciary duty, and it was his concealment of the true position with Winchfern and Expotel that led to the investigation. He then provided Messrs Hart and Morley with an incomplete picture. The complete picture was only revealed by JS's solicitors for the first time in April 2015. JS was therefore closely implicated in the misleading report of the Company to its shareholders and the beneficiary of it, and he was the direct beneficiary of the improper exercise of the Company's powers to award him remuneration. Without his wish to be reimbursed for expenditure that he caused the Company to make, the so-called bonuses of 2012 and 2013 would not have been awarded. The Company was itself responsible, through its investigation committee and its board, for the failed investigation and the misleading report to shareholders, and responsible through its board for the improper exercise of its remuneration powers.

631. Accordingly, in my judgment, the share purchase order should be made against JS and the Company.

(iii) At what date should the shares be valued?

632. The next question is what date of valuation should be taken. The starting point is the date of judgment, being the date on which the shares are ordered to be purchased and so as close as possible to the date on which the actual sale and purchase will take place: Profinance Trust SA v Gladstone [2001] EWCA Civ 1031; [2002] 1 WLR 2014, at [60], [61]. However, the Court has discretion to substitute a different date, where it would be just to do so. This is often done, in favour of a petitioner, where, as a result of the prejudicial conduct of the majority, the Company's value (and the minority shareholding with it) has been significantly reduced by the date of trial. But there is no reason in principle why it cannot be done in other circumstances that justify the selection of a different valuation date. The judgment of Robert Walker LJ in the Profinance Trust case gives some examples of such circumstances.

633. In deciding that the Petitioners' delay should not debar them from relief, I made the point that the Respondents could be protected from any unfair consequences of delay in other ways. One obvious way is by taking an earlier valuation date, reflecting the date at which an order would have been likely to have been made had there been no culpable delay. In my judgment, it would not be just to allow HS or Estera to benefit from their calculated delay in bringing proceedings by ordering a valuation of the shares at today's date. Although they did not delay to benefit from an anticipated uplift in value, they did delay tactically, in order to seek to benefit in other ways. The Respondents are fully entitled to say that the Petitioners could and should have brought their case to court much sooner. Had they done so, the starting point for a valuation date would have been much earlier in time.

634. In those circumstances, I consider that the four years of delay caused by the decision to pursue the BM Singh Claim before issuing the petition should be taken into account. It is arguable that the delay is greater – I have expressed the view that, following the 27 October 2008 letter and HS's removal as a director in July 2009, one would have expected proceedings to be issued in early 2010 at the latest, so far as a

claim based on JS's breaches of duty is concerned. However, two of the instances of unfairly prejudicial conduct that I have found proved did not happen until the first half of 2012. Those instances are by no means makeweights in comparison with the breaches of fiduciary duty: they are serious matters in themselves, calculated to prejudice minority shareholders, in particular HS and Estera, and which implicate not just JS but the whole of the board of the Company.

635. The Petitioners were not fully aware of all these matters until the AGM in December 2012, though the board's report to shareholders was sent out in February 2012. Balancing these competing factors, I consider that an adjustment of 4 years should be made on account of delay. This will result in a valuation date of June 2014, rather than the date of this judgment.

636. The Court has jurisdiction in these circumstances to award 'notional interest' on the share value, in determining the price to be paid, to reflect the fact that the seller did not in fact receive the value of the shares at the valuation date. In this case I do not consider that notional interest is justified. First, the delay in receipt was the result of the Petitioners' own deliberate delay. Second, interest rates have been at an historic low throughout the period of delay. Third, HS and Estera have in fact received significant dividends during that period. It is likely that an allowance in one direction for notional interest and a countervailing allowance for the dividends in fact received would approximately cancel each other out.

(iv) Should the shares be valued at their market value, or at a proportionate value of the Company's net assets on the valuation date, or on some other basis?

637. The authorities do not speak with one voice on the correct approach to valuation where a share purchase order is made in relation to a non-quasi partnership company, as is the case here. On the one hand, in Strahan v Wilcock [2006] EWCA Civ 13; [2006] 2 BCLC 555, Arden LJ said:

> "Shares are generally ordered to be purchased on the basis of their value on a non-discounted basis where the party against whom the order has been made has acted in breach of the obligation of good faith applicable to the parties' relationship by analogy with partnership law, that is to say where a 'quasi-partnership' relationship has been found to exist. It is difficult to conceive of circumstances in which a non-discounted basis of valuation would be appropriate where there was unfair prejudice for the purposes of the 1985 Act but such a relationship did not exist. However, on this appeal I need not express a final view on what those circumstances might be."

The comment was, as it indicates, *obiter*, but is made by a very experienced judge with expertise in company law.

638. In more recent first instance decisions, however, the view has been expressed that there is no inflexible rule; that a "non-discounted" basis of valuation may well be appropriate in some non-quasi partnership cases, and that material factors are whether the seller is to be treated as a willing or unwilling seller and whether the shares were bought by the Petitioner at a discount: see Re Sunrise Radio Ltd [2010] 1 BCLC 367,

where Judge Purle QC concluded that purchase at a pro rata ("non-discounted") value was appropriate, and Re Blue Index Ltd [2014] EWHC 2680 (Ch), where Mr Hollington QC reached a similar conclusion.

639. The authorities are replete with references to "discounted" and "non-discounted" bases of valuation. A "non-discounted" basis of valuation is a valuation of the entirety of the company, which is then apportioned pro rata between the shareholders. A "discounted" basis of valuation is generally taken to refer to the market value of the minority shareholding, valued separately, which is generally less – sometimes much less – than a pro rata share of total shareholder value. The market value may depend not just on the size of the holding but on the content of the company's articles of association. For example, pre-emption rights in favour of existing shareholders, giving them the right to acquire shares at the same price offered in the market by a would-be purchaser, will suppress the market value of the shares. Absent such a provision, the market value may be very significantly higher, particularly if the holding in question would be of special value to another shareholder. Further, a 2% shareholding will be considerably more valuable to an existing shareholder with 49% or 74% of a company's shares than it will be to an outside investor.

640. Any basis of valuation selected must be fair in all the circumstances. It must also provide a remedy that is proportionate to the unfair prejudice suffered by the Petitioners. The prejudice suffered by the Petitioners is, ultimately, that the value of their shares has been suppressed. They could be sold in the market, subject to the other shareholders' rights of first refusal, but the value of the shares will have been affected, not just because there is no benefit from the Expotel shareholding but because of the conduct of the directors, sc. their willingness to treat minority shareholders unfairly, as I have found. A valuation of the shares at their true market value, reflecting the pre-emption rights in the Company's articles, will therefore lock in the prejudice that the Petitioners have suffered, rather than grant relief from it. That would be unfair. Correspondingly, a sale of the shares to JS or the Company at such a valuation will give the purchaser a significant windfall benefit from the unfairly prejudicial conduct, as the purchaser will obtain the shares at a price depressed by virtue of that conduct.

641. The Petitioners argue for a pro rata, "non-discounted" valuation on the basis that the Petitioners are involuntary sellers and that the purchasing Respondents will be obtaining the full, non-discounted value of the shares, and so otherwise benefiting hugely from their own wrongdoing. Further, they submit that HS has been a shareholder and participant in the Company from the outset, and that the shares of HS and Estera were intended to be operated as a single block of majority shareholding, held for the joint benefit of those shareholders.

642. In my judgment, those factors do not justify making an order for purchase on a pro rata basis. While such an order may be appropriate in certain circumstances when a company is not a quasi-partnership, such as the circumstances in Re Sunrise Radio, there is no presumption in favour of it, as there is in the case of a true quasi-partnership. The shares of HS and Estera do not have and never did have that enhanced value, as a minority shareholding, and there are no considerations binding the other shareholders that require them or any of them to treat the shares as having a pro rata value. Further, it would not be accurate, at any time after 2006, to characterise HS or Estera as unwilling sellers of their interest in the Company: I find

that they were in principle willing to sell, but only at a price that JS was unwilling to pay, namely a pro rata share of the value of the Company. The purchasers would benefit from their wrongdoing if they were able to acquire the shares for their suppressed market value, having regard to the articles of association, but that does not of itself lead to the conclusion that a pro rata valuation is appropriate.

643. It is true that Estera's shares, when acquired by Verite pursuant to the share options at (effectively) a discounted price, were then intended to be held and voted with Verite's other shares as a single block of shares. But, to a large extent, HS has chosen to have his and Estera's shares treated as a separate minority holding, first by agreement with JS, through the February 1999 memorandum of wishes and the May 1999 revocable declarations, and then in 2005 to 2008, contrary to JS's wishes, by the appointment of Estera as a trustee of the Herinder trusts and the subsequent removal of Verite as co-trustee. HS and Estera cannot now argue that their interests should be treated and valued as if they are part of a majority holding.

644. The Respondents' case is that the shares should be ordered to be purchased at their market value: that is, at whatever price the shares would actually command if sold as a minority shareholding in the market on the valuation date, subject to the articles of association. That, they say, is the true value of the shares, and that is all the Petitioners are entitled to.

645. In my judgment, the Respondents' argument is too simplistic and ultimately wrong, for the following reasons. First, the shares in question are not being sold on the open market, subject to the restrictions (such as they are) in the articles. They will be sold privately to JS or (at their election) to the Jasminder trusts, or to the Company, by virtue of the court order. As such, market forces will not come into play, nor will the pre-emption rights in the articles that would apply on a sale in the open market. The price for the shares should not be suppressed on that account.

646. Second, the shares are not being purchased by an unconnected investor in the market but by JS, the Jasminder trusts or the Company. The shares are very much more valuable to each of them than they are to investors in the market. A purchase by JS or the Jasminder trusts will have the effect of raising their combined shareholding above 75%. Any purchase by the Company at a price below the pro rata value of the shares will have the effect of increasing the value of the other shares in the Company, which will principally benefit JS and the Jasminder trusts. Those are considerations that do not exist on an open market sale.

647. Third, a purchase of the shares by JS or the Company at their open market value would create a very substantial windfall to JS or the existing shareholders. It would therefore have the surprising effect of enabling JS to benefit significantly in financial terms from the unfairly prejudicial conduct that has given rise to the relief against JS and the Company. That outcome cannot be just, certainly not on the facts of this case where the shares of HS and Estera will inevitably have a much higher value to JS and the Jasminder trusts than their market value.

648. What I have to determine is a basis for a *fair* price for JS (or the Company) to pay HS and Estera for their shares, in circumstances where a share purchase is appropriate and necessary to relieve HS/Estera against unfair prejudicial conduct that they have suffered as shareholders. That question is not, in my judgment, a simple choice

between a pro rata share of the Company's overall value and the market value of the shares. Those are, as it were, the two extremes of price that could be ordered to be paid, but between them there are various possibilities for specifying a basis of valuation that results in a fair price as between these minority shareholders and the Respondents against whom relief is granted. I do not read Arden LJ's obiter dictum as implying that market value is the only alternative in cases where a non-discounted valuation is inappropriate.

649. A purchase of the shares of HS and Estera by JS, the Jasminder trustees on his behalf, or the Company, will release what a valuer calls 'marriage value'. That is generally understood to mean the additional value created by putting two interests, properties or shareholdings together, rather than valuing them individually as separate holdings. If a minority shareholder sells his holding to another minority shareholder, and the result is that the buyer then has more than 50% of the shares, the shares that he holds are more valuable as a single holding than the aggregate of the values of the buyer's and seller's separate holdings. This is what Arden J, as she then was, referred to as the 'control premium' in a case called Re Macro (Ipswich) Ltd [1994] BCC 781 at 837G, and as the 'value gap' at 837H. In order to realise any part of the marriage value, the seller and buyer have to reach agreement, otherwise neither will benefit from any part of the marriage value. For that reason, where parties negotiate at arm's length for the sale and purchase of property, they generally agree to share the marriage value, unless there are other circumstances that give one of the parties the whip hand in negotiations.

650. In Re Eurofinance Group Ltd [2001] BCC 551, Pumfrey J held that since the court had a wide discretion to order a sale at a price that is fair in all the circumstances of the case, the valuation of a petitioner's shares upon a sale to the respondent should be determined on the basis of a notional sale between them and not on the basis of a sale to an independent third party. The shares in that case had special value to the respondents but probably no or very little value to a third party. There arguably was no market and therefore no market value. He said:

> "I think that when arriving at a 'fair value' in the absence of a market it is necessary to assume that the notional sale is taking place between the actual participants in the transaction, since the whole purpose of the valuation is to be fair as between the parties." (p.577A)

In my judgment, Pumfrey J's remarks, though made in the context of a case where there would be no market for a company's shares, should not be taken as being limited to such a case. His emphasis is on identifying a basis of valuation that is fair for a sale and purchase between the parties concerned in a given case.

651. Even if (which is untested) there is a market for HS's and Estera's shares, to adopt the depressed market value for the shares is not, for the reasons that I have given, a fair basis of valuation. A fair basis would in my judgment be the price that would be likely to be agreed between commercially-minded but reasonable persons in the actual positions of HS and JS in notional arm's length negotiations, having regard to any marriage value that would be released on such a sale and purchase. In my judgment, that price would be the market value of HS's and Estera's shares plus 50% of any marriage value that would result from adding those shares to the existing holding of

JS. Although JS is himself a minority shareholder, he is the CEO of the Company, has effective control of the board of the Company and, together with the Jasminder trusts, has voting control of the Company in general meeting. The acquisition of HS's and Estera's holdings will result in JS and the Jasminder trusts together having total control of the Company, taking their combined holdings above 75%. The share valuations should in my judgment proceed on that assumption, since that is the reality of the way in which JS and the Jasminder trusts are able to control the Company. That is so even though Verite and Jemma have professional duties as trustees to the whole class of beneficiaries of the Jasminder trusts, not just JS. They are required to have regard to JS's wishes, which have since 1998 included treating the English and Jersey trusts' shares as one voting block of shares, and otherwise having regard to JS's wishes.

652. Accordingly, it seems to me that the expert valuers must in due course address the following valuations (but I will hear Counsel on the exact wording of the issues for them):

i) The market value of HS's and Estera's holdings on the valuation date ("A");

ii) The value of JS's current holding on the valuation date, taking into account his interest in and ability to influence the Jasminder trustees and their holding ("B");

iii) The value of an aggregate holding comprising JS's, HS's and Estera's current holdings, held by JS on the valuation date, taking into account JS's interest in and ability to influence the Jasminder trustees and their holding ("C").

The price payable to HS/Estera will then be A plus one half of C-(A+B).

653. The price will be same regardless of whether JS or the Company buys the shares. JS and the Jasminder trusts would derive all or substantially all of the benefit of a purchase by the Company.

(v) Should there be any further adjustment for the effect of the breaches of fiduciary duty or the excessive remuneration or for any other reasons?

654. If I had determined that the price payable for HS's and Estera's shares was simply their market value on the valuation date, it would have been appropriate to make a notional adjustment to the assets of the Company on that date, so as to take away (as far as possible) the financial effect on the minority shareholdings of the unfairly prejudicial conduct. There would therefore have been needed a deemed increase in the cash reserves of the Company to reflect the financial benefit derived by the Carriere trust from the Expotel shareholding in 2008 (about £11,000,000), the amount of overpaid remuneration for the years 2011, 2012 and 2014 (£2.3m in aggregate (being the total base salary and 'bonus' for each year) less £1.8m of reasonable remuneration for each year), and simple interest on those amounts from their respective dates at an appropriate cash investment rate. The further impact on the value of minority shareholdings of the oppressive conduct of the directors of the Company could not be quantified and adjusted for in that way.

655. Since the basis of valuation that I have decided to be appropriate involves identifying the market value of HS's and Estera's shares, as one component of the price payable, it is appropriate to make the same notional adjustments in the assets of the Company, and to make them too when the values of JS's shareholding and the aggregate shareholding in the hands of JS is determined, so that the same basis of valuation is consistently applied.