Neutral Citation Number: [2024] EWHC 329 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
INSOLVENCY AND COMPANIES LIST

CR-2022-BHM-000217
CR-2023-BHM-000546
CR-2023-BHM-000547

BETWEEN:

ALLDEY MICHAEL LOVERIDGE — **Applicant**

- and-

(1) CRAIG POVEY
(2) CHARLES TURNER
(as joint administrators of Breton Park Residential Homes Limited)
(3) BEWDLEY CARAVAN SALES LIMITED
(4) KINGSFORD CARAVAN PARK LIMITED
(5) BRETON PARK RESIDENTIAL HOMES LIMITED (IN ADMINISTRATION) — **Respondents**

BETWEEN

ALLDEY MICHAEL LOVERIDGE — **Applicant**

- and-

(1) IVY MARINA LOVERIDGE
(sued personally and in her capacity as personal representative of Alldey Loveridge, deceased)
(2) MIAD GROUP LIMITED
(3) KINGSFORD CARAVAN PARK LIMITED

Respondents

Priory Courts
33 Bull Street
Birmingham, B4 6DS

Date: 16 February 2024

HIS HONOUR JUDGE RICHARD WILLIAMS
(Sitting as a judge of the High Court)

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Representation:

John Randall KC and Robert Mundy (instructed by Nicholls Brimble Bhol Solicitors) for Alldey Michael Loveridge

Peter Shaw KC (instructed by Lewis Onions Solicitors) for the joint administrators of Breton Park Residential Homes Limited

Dan McCourt Fritz KC and Ramyaa Veerabathran (instructed by Lodders Solicitors LLP) for Ivy Marina Loveridge

Jennifer Meech (instructed by Thursfields Solicitors) for Bewdley Caravan Sales Limited and Kingsford Caravan Park Limited

Samuel Davis (instructed by Westridge Legal) for Melinda Doherty

Hearing dates: 29 November 2023 and 16 February 2024

(draft judgment sent to the parties' legal advisers by email dated 9 February 2024)

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JUDGMENT

Introduction and background

1. These linked proceedings are the latest round of litigation arising from a bitter dispute, which first arose in 2019, over the Loveridge family business that is owned and operated through five companies and three partnerships.

2. One of the family companies is now in administration. The administrators have decided to put into effect a rescue of that company as a going concern by accepting an offer of refinance, which is to be funded through the cash reserves of another family company.

3. This is my judgment following the hearing of several applications primarily to:

    a. direct the administrators to abandon the proposed company rescue and proceed instead by way of a sale of its business and assets; and/or

    b. prohibit by way of an interim injunction the cash reserves of the other company being used to refinance and thereby rescue as a going concern the company in administration.

    In order to understand fully these applications, it is necessary to understand how the parties have arrived at this point. For ease of reference, and with no disrespect intended, I shall refer to the family members by their first names.

4. Michael is the son of Ivy and her late husband Alldey, and is the brother of Audey. In earlier litigation, Michael pursued an unfair prejudice petition and a partnership claim, which were concluded by way of:

a. On 19 November 2021, the amended unfair prejudice petition was struck out.[1]

b. In May 2023, on the first day of the trial, the partnership claim was settled on confidential terms.

5. So far as is relevant to the present proceedings:

   a. Breton Park Residential Homes Limited ("***Breton***") carries on the business of owning and operating a residential caravan site near Telford in Shropshire. Audey and Ivy were/remain co-directors, and Audey was the sole registered shareholder.

   b. Kingsford Caravan Park Ltd ("***Kingsford"***) carries on the business of owning and operating a residential caravan park near Wolverley in Worcestershire. Michael, Ivy and Alldey were co-directors and equal shareholders.

   c. Bewdley Caravan Sales Limited ("***Bewdley***") carries on the business of trading in caravans and mobile/residential homes. Michael, Ivy and Alldey were co-directors and equal shareholders.

   d. The family companies participated in interest-free inter-company loans repayable on demand.

   e. On 19 April 2019, Audey and his wife, Melinda, separated.

   f. On 30 April 2019, Audey transferred his shareholding in Breton 50% to Michael and 50% to Ivy ("***the Breton Share Transfers***").

   g. In May 2019, Melinda petitioned for divorce and made an application ("***the Financial Remedy Proceedings***") for financial orders under the Matrimonial Causes Act 1973 ("***the 1973 Act***").

   h. Also, in "May 2019 Audey encountered irreconcilable differences with his wife. Michael became involved in what the judge called a heated discussion with Audey. Michael's wife, Suehelen was concerned at developments and called the police. The act of calling the police was regarded by some in the family, particularly by Ivy, as an act which was not consistent with the family ethic of resolving matters themselves rather than involving outside agencies. The arguments between the brothers Michael and Audey, and between Michael and his mother, Ivy, got worse."[2]

   i. In July 2020, Melinda made an application in the Financial Remedy Proceedings for an order pursuant to s.37 of the 1973 Act ("***the Section 37 Application***) that the Breton Share Transfers be set aside on the ground that they were made with the intention of defeating her claim for financial relief.[3]

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[1] ***Loveridge and another v Loveridge (No 2)*** [2021] EWCA Civ 1697

[2] ***Loveridge and others v Loveridge (No 1)*** [2020] EWCA Civ 1104 (at para [11]).

[3] On 28 September 2023, Ivy obtained an order from the Family Court permitting disclosure into these proceedings of certain orders made in the Financial Remedy Proceedings.

j. By order dated 11 October 2019 made in the Financial Remedy Proceedings, Michael was invited to intervene in the Section 37 Application.

k. By order dated 20 July 2020 made in the Financial Remedy Proceedings, Michael was again invited to intervene in the Section 37 Application.

l. Michael was removed as a director of Bewdley with effect from 23 September 2020;

m. Michael was removed as a director of Kingsford with effect from 9 December 2020;

n. By order dated 14 January 2021 made in the Financial Remedy Proceedings, Michael was joined as a party and directed to file and serve any witness statement in response to the Section 37 Application by 26 February 2021.

o. By order dated 14 September 2021 made in the Financial Remedy Proceedings, Michael was directed to file and serve (i) his statement of case in respect of the Section 37 Application and (ii) his witness statement in support, by respectively 28 October 2021 and 21 December 2021.

p. On 29 January 2022, Breton was served with statutory demands by Kingsford (£942,296.42) and by Bewdley (£126,024) in respect of outstanding inter-company loans.

q. By order dated 4 March 2022 made in the Financial Remedy Proceedings, Michael was put on notice that, at the next hearing on 11 March 2022, the other parties would be seeking an order preventing him from pursuing a case on the Section 37 Application.

r. By order dated 11 March 2022 made in the Financial Remedy Proceedings, Michael was debarred from pursuing a case on the Section 37 Application unless he filed and served (i) his statement of case in respect of the Section 37 Application and (ii) his witness statement in support, by respectively 28 March 2022 and 7 April 2022.

s. On 13 April 2022, Alldey died. As a consequence, Ivy became sole director of both Bewdley and Kingsford, whilst also effectively becoming the majority shareholder of both companies; 1/3rd in her personal capacity and 1/3rd as the personal representative of Alldey's estate.

t. On or about 28 April 2022, Kingsford applied on behalf of itself and Bewdley for an administration order in respect of Breton. In her witness statement in support of the application, Ivy explained that –

> "[39.] As a result of the family proceedings, there is a risk that control of Breton…. will pass to Audey and/or his estranged wife. The Applicant and Bewdley… are not prepared to leave significant debts outstanding where this is a real possibility, nor continue to provide security and guarantees for RBS for [Breton's] outstanding loan to RBS. It is for this reason that the Applicant and Bewdley… have requested repayment of the outstanding debts…"

u. By order dated 5 May 2022 made in the Financial Remedy Proceedings, it was recorded that Michael had failed to comply with the previous directions such that he was now debarred from pursuing a case on the Section 37 Application. It was ordered that the Financial Remedy Proceedings, including the Section 37 Application, be stayed until the conclusion of the Breton administration proceedings.

v. On 27 July 2022, an administration order was made in respect of Breton, and Messrs Povey and Turner were appointed as joint administrators ("***the Administrators***").

w. The Administrators proposals were dated 16 September 2022 and recorded the following –

   i. assets largely comprising freehold land and buildings, which had been professionally valued, in the region of £3,950,000 to £4,400,000;

   ii. secured liability of £1,600,000 to Royal Bank of Scotland;

   iii. preferential liability of some £1,500 to HMRC;

   iv. unsecured claims totalling some £1,250,000, which sum included the claims of Kingsford and Bewdley, and a disputed claim by Michael of £156,000 in respect of alleged management fees; and

   v. notwithstanding that Breton was balance-sheet solvent, the Administrators took the view that there was insufficient working capital to discharge the debts, and so it was proposed that the business and assets be sold to produce a better result for Breton's creditors than would be achieved in liquidation.

x. On 8 October 2022, the Administrators' proposals were approved without modification by the deemed consent procedure pursuant to s.246ZF of the Insolvency Act 1986 ("***the 1986 Act***").

y. In April 2022, the Administrators began marketing Breton's business and assets for sale, which resulted in five offers ranging from £3,300,000 to £5,750,00 with the highest offer being made by Michael.

z. On 18 July 2023, the Administrators applied for an extension of the administration period for one year. In her written evidence in response, Ivy opposed the application on the basis that such an extension was unnecessary, since Breton could be rescued as a going concern without the need for any extension having regard to her refinancing proposal. That proposal, in short, was that a special purpose vehicle, MIAD Group Limited ("***MIAD***"), was established and which would grant Breton a secured loan facility of £3,950,000. That facility would allow for (i) Breton's creditors to be paid in full, (ii) the surplus to be used as working capital, and (iii) Breton to be rescued as a going concern. The draft loan facility agreements provided for interest at 3% until the date of repayment (27.09.24) and 5% thereafter.

aa. On 22 August 2023, Kingsford loaned £4 million to MIAD for the purpose of making the onward loan to Breton.

6. My first involvement with the case was at a hearing on 24 August 2023 dealing with an application then made by the Administrators for:

    a. an order extending the period of the administration from 5 September 2023 to 30 November 2023 pursuant to Paragraph 76(2)(a) of Schedule B1 to the 1986 Act; and

    b. a direction pursuant to Paragraph 68(3)(c) of Schedule B1 to the 1986 Act, permitting the administrators (insofar as reasonably practicable) to achieve the statutory objective of rescuing Breton as a going concern, which would, if achieved, constitute a substantial revision to the proposals previously approved by Breton's creditors pursuant to Paragraph 53 of Schedule B1 to the 1986 Act.

7. The respondents to the Administrators' earlier application were Kingsford and Bewdley. I was invited to approve a draft consent order, which in summary provided for:

    a. An extension of the administration to 30 November 2023.

    b. A direction that the Administrators perform their functions (insofar as reasonably practicable) to achieve the objective of rescuing Breton as a going concern.

    c. In the event that Ivy's proposed refinancing completed, a practical mechanism whereby the monies advanced be used to discharge all of Breton's liabilities and the administration costs and expenses. In respect of Michael's disputed debt, the sum of £156,000 be paid to solicitors and held by them pending settlement of Michael's claim by agreement between Breton and Michael, further court order or 5 September 2024, whichever was the earlier.

    d. A direction that the proposed refinancing did not complete before 14 days' notice of the order has been provided to Michael. The rationale being that the Administrators wished to give Michael the opportunity, if he wished, to put forward any alternative proposal and bearing in mind that he had already made an offer to buy the business and assets of Breton when he understood that the approved proposals were effectively a sale rather than preserving Breton as a going concern.

8. I approved the draft order and the transcript of my judgment recorded my reasons for doing so as follows:

    "[13.] So as things stand today, Michael has made an offer to purchase the business and assets of the Company for the sum of £5,750,000 and Ivy has proposed a refinance which, if completed, would enable the Company to be rescued as a going concern. Both Michael and Ivy have evidenced that their offers are fully funded such that each option is viable and realistic.

    [14.] However, the statutory scheme (Paragraph 3 Schedule B1 1986 Act) produces a hierarchy of objectives, such that the administrators must perform their functions with the objective of rescuing the Company as a going concern (sub-paragraph 3(1)(a)) unless they think that it is not reasonably practicable, or that the objective

specified in sub-paragraph 3(1)(b) would achieve a better result for the creditors as a whole.

[15.] In short, if the administrators now consider that Ivy's proposed refinancing would lead to the creditors being paid in full and the Company being rescued as a going concern, they are bound to perform their functions in order to bring about that result. However, that necessarily entails a substantial revision to the proposals previously approved by the creditors, albeit by the deemed consent procedure.

[16.] Therefore, the critical issue for me today, as I see it, is whether there is proper justification for bypassing Paragraph 54(1) Schedule B1 1986 Act requiring the administrators to seek prior approval of the creditors to the revised proposals.

[17.] I am persuaded that there is a proper justification for making the direction sought pursuant to Paragraph 68 Schedule B1 1986 Act reflecting the changed circumstances and for the following reasons:

a. in the event that I did not make the direction sought today, then effectively what would happen is that the administrators would seek by way of the deemed consent procedure approval from the creditors of the revised proposals;

b. in the event that there were no objections, then the revised proposals would be approved by way of deemed consent;

c. in the event that Michael objected, and it would in practice only be Michael, then a creditors' meeting would be called for a majority decision to be taken;

d. Kingsford and Bewdley combined account for 85% of unsecured creditors (including Michael's claim, which although disputed, would be admitted for voting purposes). Kingsford and Bewdley are controlled by Ivy, who is promoting the refinancing. It is, therefore, inevitable that any meeting, if called, would approve the revision to the administrators' proposals;

e. the order sought is permissive - it does not mandate the administrators to go with Ivy's proposed refinancing;

f. the terms of the order provide that notice be given to Michael so that he have an opportunity to put forward any alternative proposal. There was some debate as to whether or not such an alternative proposal was likely or realistic, but either way, Michael will be given that opportunity, which is only fair in all the circumstances; and

g. if I do not make the direction sought, then inevitably there will be further delay and cost in the context of an administration where the costs to date are already some £500,000.

[18.] In my judgment, the draft order strikes a careful, reasonable and proportionate balance between progressing the administration whilst at the same time giving Michael an opportunity to put forward any alternative proposal in circumstances where the rescue of the Company as a going concern is now a realistic option consistent with the first statutory objective. For all those reasons, I approve the draft order submitted on behalf of the parties."

9. On 31 August 2023, the Administrators gave notice to Michael that completion of the proposed loan by MIAD was reasonably likely to achieve the objective of Breton being rescued as a going concern.

10. On 13 September 2023, Michael applied under Paragraph 74 of Schedule B1 to the 1986 Act for a direction that the Administrators do not cause or authorise Breton to enter into the proposed loan, since it would cause unfair harm to his interests as a member of Breton ("***the Insolvency Application***").

11. On 27 September 2023, Michael issued (i) an unfair prejudice petition alleging that, by lending £4 million of Kingsford's money to MIAD, Ivy was in breach of her director's duties to Kingsford by acting for her own purposes; and (ii) an application for an interim injunction ("***the Injunction Application***") restraining Ivy and MIAD from paying away the £4 million pending determination of the unfair prejudice petition.

12. The Insolvency Application and the Injunction Application were originally listed to be heard by me on 3 October 2023, but at the request of the parties I adjourned the hearing to 29 November 2023. In doing so, I made an order of my own motion that:

    > "The Applicant's solicitors shall serve a copy of this order on Audey Loveridge and Melinda Rose Doherty, along with copies of [the Insolvency Application and the Injunction Application] and the evidence filed in support of those applications. Any application by Audey Loveridge and Melinda Rose Doherty to be joined as a respondent in either application shall be made within 14 days of service."

13. On 6 November 2023, Melinda applied ("***the Joinder Application***") to be joined as a respondent to both the Insolvency Application and the Injunction Application.

14. On 9 November 2023, the Administrators applied for a further extension of the administration to 31 May 2024 ("***the Extension Application***").

15. The Insolvency Application, the Injunction Application, the Joinder Application and the Extension Application were all heard at the same time, and this is my judgment on those applications. I am unable in the course of this judgment to refer to all the evidence and argument relied upon but I have taken it all into account in reaching my decisions.

<u>The Joinder Application</u>

16. Michael and Ivy consent to Melinda being joined as a respondent to the Insolvency Application, but object to her being joined as a respondent to the Injunction Application because she has no interest in or connection to Kingsford.

17. The Administrators, Bewdley and Kingsford are neutral on the Joinder Application.

18. It was submitted on behalf of Melinda and Ivy that the Joinder Application is governed by Civil Procedure Rules ("***CPR***") r.19.2, which confers a discretion on the court to join a party, but only if the following conditions are satisfied:

    a. "it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings"; and

b. "there is an issue involving the new party and an existing party which is connected to the matters in dispute, and it is desirable to add the new party so that the court can resolve that issue".

19. It was submitted on behalf of Michael that the Joinder Application, so far as it relates to the Injunction Application, is governed by The Companies (Unfair Prejudice Applications) Proceedings Rules 2009 ("***the 2009 Rules***"), which provide that the "court shall give such directions as it thinks appropriate" [r.5].

20. However, I note that r.2(2) of the 2009 Rules provides that "Except so far as inconsistent with the Act and these Rules, the Civil Procedure Rules 1998 apply to proceedings under Part 30 of the Act with any necessary modifications." Therefore, in determining the Joinder Application, so far as it is now contested, I apply CPR r.19.2, whilst recognising that any case management powers must be exercised in a manner consistent with the overriding objective of dealing with cases justly and at proportionate cost.

21. Melinda has applied in the parallel Financial Remedy Proceedings for an order that the Breton Share Transfers be set aside pursuant to s.37 of the 1973 Act, which raises a statutory presumption that where, as here, the Breton Share Transfers were made for no consideration within the period of 3 years prior to the commencement of the Financial Remedy Proceedings, they were made with the intention of defeating Melinda's claim.

22. It is Ivy's case in the Financial Remedy Proceedings that she is, and always has been, the sole beneficial owner of the shares in Breton, and she seeks a declaration to that effect. I am in no position to form a view upon the merits of the respective cases being run in the Financial Remedy Proceedings. However, if Melinda is successful on the Section 37 Application then the Breton Share Transfers will be void ab initio[4] and the Breton shares remain vested in Audey such that they will be a matrimonial asset available in the Financial Remedy Proceedings. The outcome of either the Insolvency Application or the Injunction Application will determine the nature of this financial resource in terms of whether it is treated either as a capital asset or also as an income producing asset. In the circumstances, Melinda is closely connected to/interested in both applications.

23. In addition, the Financial Remedy Proceedings are private such that she may be able to provide information relating to the Financial Remedy Proceedings (so far as she is able whilst preserving confidentiality), which may assist me in determining the Insolvency Application and/or the Injunction Application.

24. For these reasons, I am persuaded that it is just, proportionate and desirable that Melinda be heard on the Insolvency Application and the Injunction Application, and so I grant the Joinder Application.

The Extension Application

25. All parties are now agreeable to the administration of Breton being extended to 31 May 2024. Accordingly, I made that order at the end of the hearing on 29 November 2023.

[4] ***AC v DC (Financial Remedy: Effect of s.37 Avoidance Orders) (No 1)*** [2012] EWHC 2032 (Fam).

The Insolvency Application

26. The Administrators submit that their role is solely to perform their statutory functions as officers of the court pursuant to the proposals approved by the creditors or as directed by the court. However, they further submit that there are serious difficulties with the Insolvency Application insofar as it impinges on their fulfilment of the statutory objectives in Paragraph 3 Schedule B1 of the 1986 Act.

27. Ivy and Melinda actively oppose the Insolvency Application albeit in doing so they largely adopt the arguments put forward on behalf of the Administrators.

28. Bewdley and Kingsford are neutral on the Insolvency Application.

The extent to which the Administrators are mandated to rescue Breton as a going concern

The applicable statutory framework

29. Paragraph 3 of Schedule B1 to the 1986 Act provides:

> "(1) The administrator of a company must perform his functions with the objective of –
> (a) rescuing the company as a going concern, or
> (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or
> (c) realising property in order to make a distribution to one or more secured or preferential creditors.
> …
> (3) The administrator must perform his functions with the objective specified in sub-paragraph (1)(a) unless he thinks either–
> (a) that it is not reasonably practicable to achieve that objective, or
> (b) that the objective specified in sub-paragraph (1)(b) would achieve a better result for the company's creditors as a whole."

30. Therefore, the Administrators are statutorily mandated to perform their functions to rescue Breton as a going concern without the realisation of its assets unless they think that such a rescue is not reasonably practicable or the Paragraph 3(1)(b) objective would achieve a better result for Breton's creditors.

The respective arguments

31. Michael argues that:

    a. The statutory requirement for the Administrators to seek to rescue Breton as a going concern is qualified in that any rescue scheme must be *reasonably* practicable.

    b. When a company is balance-sheet solvent, as is Breton, administrators have a duty to have regard to the interests of the company's members as a whole when deciding how to act - ***Re Hat & Mitre PLC (in Administration)*** [2020] EWHC 2649 (Ch).

    c. Despite owing that duty, the Administrators do not appear to have taken into account the interests of Breton's members when deciding whether the

proposed rescue was reasonably practicable. The members' interests are entitled to serious consideration and fair treatment because Breton's present creditors are to be fully repaid whichever of the competing routes to concluding the administration is taken.

d. Parliament cannot have intended Paragraph 3 of Schedule B1 to mean that administrators must prefer a company rescue if they could put it into effect, whatever the downside for the company's members.

e. Whilst the court will give due deference to the commercial decisions of administrators, the standard of review is no more than Wednesbury unreasonableness - ***Davey v Money*** [2018] EWHC 766 (Ch).

32. The Administrators argue that:

a. Paragraph 3 of Schedule B1 sets out a mandatory legislative scheme whereby the Administrators must perform their functions for the purpose of rescuing Breton as a going concern unless that objective is not reasonably practicable or there would otherwise be a better result for creditors as a whole.

b. The refinancing proposal is reasonably practicable (MIAD has demonstrated that it has the available funding) and would produce an outcome that (i) all creditors are repaid in full or, in Michael's case, his claim as a creditor secured, and (ii) the administration costs and expenses are paid in full.

c. In these circumstances, there is no legal jurisdiction for the court to direct the Administrators to perform their functions for a Paragraph 3(1)(b) purpose (better result for creditors) in place of an achievable Paragraph 3(1)(a) purpose (rescue as a going concern).

d. In a balance-sheet solvent administration, administrators must have regard to the interests of the members as a whole only where there is no difference in whether or not the purpose of the rescue of the company is capable of fulfilment - ***Re Hat & Mitre***. Michael proposes that the court abandons the rescue of Breton. Therefore, this is not a case in which the interests of the members as a whole are to be taken into account in choosing a way forward which has no impact on the chosen statutory objective.

e. Even if there was jurisdiction to make the order sought by Michael, in choosing which of the statutory objectives to fulfil, the Administrators are given a wide latitude. The court's task is to focus on what the Administrators thought was reasonably practical, rather than to substitute its own view.

f. The court should only interfere with such a choice if it is shown that the Administrators' thought process was either in bad faith or perverse – ***Davey v Money***. Quite properly, neither are alleged here – and nor could they be.

g. Either way, it is simply impermissible for the court now to seek to intervene and cause a departure from the statutory order of priority in circumstances in which it is otherwise capable of fulfilment.

<u>Choice of statutory objective</u>

Standard of review

33. There is no suggestion that the Administrators have acted in bad faith when choosing the higher ranking objective of rescuing Breton as a going concern.

34. However, and with each relying upon the same authority (***Davey v Money***):

    a. Michael argues that the Administrators' decision when choosing the higher ranking objective of rescuing Breton as a going concern can be challenged on the alternative ground of Wednesbury unreasonableness.

    b. The Administrators argue that the only alternative ground of challenge is that of perversity, rather than unreasonableness.

35. In ***Davey v Money***, Snowden J held (with my emphasis added):

    "[255] Given the range of interests to be addressed under paragraph 3 of Schedule B1, the use of the expression that the administrator "thinks" rather than, for example, "reasonably believes" is a clear indication that Parliament intended a degree of latitude to be given to an administrator in deciding upon the objective to be pursued, and that he is not lightly to be second-guessed by the court with the benefit of hindsight. In ***Lightman & Moss on the Law of Administrators and Receivers of Companies***, 6th ed (2017), para 12-022 it is suggested, by reference to case law and the legislative debate upon this provision, that the appropriate standard of review by the court should be one of good faith and rationality. This would mean, for example, that an administrator's decision not to pursue the first objective will only be open to challenge if it were made in bad faith or <u>was clearly perverse in the sense that no reasonable administrator could have thought that it was not reasonably practicable to rescue the company as a going concern</u>. I agree with that approach."

36. In ***Re Zinc Hotels (Holdings) Ltd*** [2018] EWHC 1936 (Ch), Carr J held (with my emphasis added);

    "[98.] I should add that a decision of an administrator as to which objective to pursue is <u>only capable of challenge on grounds of a lack of good faith or irrationality</u>, see the judgment of Snowden J in ***Davey v Money*** [2018] EWHC 766 (Ch); [2018] Bus. L.R. 1903 at [255]. In the present case, on the evidence before me, I consider that there is no serious question to be tried that the decision of the administrators was either irrational or taken in bad faith.

37. In my judgment, the use of descriptors such as "clearly perverse" or "irrationality" do not impose a higher threshold for intervention, but merely act as a reminder of (i) the wide latitude given to administrators when exercising commercial judgments and (ii) a warning to judges that, when exercising what is ultimately a supervisory jurisdiction, they are not entitled to substitute their own views. That said, the court can and should intervene if satisfied that no reasonable administrator could have thought that it was reasonably practicable to rescue Breton as a going concern in all the circumstances.

Members' interests as a relevant consideration

38. Where, as here, a company in administration is balance-sheet solvent such that the position of creditors is unaffected by the decision that administrators take:

    a. Michael argues that the duty to have regard to the interests of the company's members as a whole arises when administrators are deciding whether it is reasonably practicable to rescue the company as a going concern.

    b. The Administrators argue that the duty to have regard to the interests of the company's members as a whole only arises where there is more than one way to rescue a company such that there is a choice to be made between the viable routes for achieving the first statutory objective. That is not the case here, since there is only Ivy's offer of rescue on the table.

39. Again Michael and the Administrators rely upon the same authority in support of their competing arguments (***Re Hat & Mitre***). In particular, the Administrators rely upon the following extract from the judgment of Trower J (with their emphasis added):

    "[204.] In my view, where a Company in administration is balance-sheet solvent, the Administrators have a duty to have regard to the interests of the Company's members as a whole when deciding on the appropriate course of action. Paragraph 74 of Schedule B1 itself makes this plain. It is drafted in a way that gives members a remedy where the acts of the administrators cause unfair harm to them and it contemplates that the interests of the members as a whole are central to the question of what if any relief should be granted. That duty will be particularly significant where the position of creditors is unaffected by the decision that they take. <u>It follows that, if there is more than one alternative way forward, but there is no material difference between them in either achieving or failing to achieve the first statutory objective (paragraph 3(1)(a))</u>, I think that administrators should normally adopt the course of action which is most likely to be in the interests of the members as a whole."

40. However, it is necessary to consider that quoted extract in its wider context. In ***Re Hat & Mitre***:

    a. The company's only business was its ownership of two linked commercial properties leased to an associated company, which had not paid the rent for a number of years.

    b. The administration was complicated by a shareholder dispute where the minority shareholders accused the majority shareholders of having not acted as directors in the best interests of the company (by allowing it to become significantly financially exposed to the associated company), which gave rise to potential claims by the company against the majority shareholders arising out of that alleged misconduct ("***the antecedent claims***").

    c. The majority shareholders offered funds to discharge the company's liabilities, to provide working capital and bring the administration to an end, but the minority shareholders objected to that proposal because it would hand back control of the company to the majority shareholders once the creditors had been paid in full.

    d. Having investigated the antecedent claims, the administrators considered that they had substance. The administrators therefore proceeded on the basis

that, if the company was rescued as a going concern and handed back to the control of the majority shareholders, the minority shareholders could and would apply to court under Paragraph 74 of Schedule B1 on the ground that they were being unfairly prejudiced.

e. Ultimately, the administrators chose to (i) abandon a rescue of the company as a going concern, (ii) market the properties for sale and (iii) allow the antecedent claims to proceed. The majority shareholders claimed that by doing so the administrators were acting in a way that would unfairly harm their interests as members. In particular, they complained that "the administrators were acting unfairly because they had regard to the interests of the minority shareholders (i.e. those for whose benefit the antecedent claims might be pursued) and there was no authority that they owed duties to stakeholders other than the company's creditors as a whole."

41. Trower J decided (with my emphasis added) that:

> "[206] ….. the Administrators having given careful thought to their duties…. were correct to conclude that they were required to have regard to the impact which their decision on how to proceed may have had on the antecedent claims…… [and] it would not be in the interests of the Company's members as a whole for the Administrators to take any steps which impaired the Company's ability to pursue those claims.
>
> [207] It follows that, in my judgment, the Administrators have not caused unfair harm to the Applicants as members in the way that they have approached a difficult administration. Their relief under paragraph 74 of Schedule B1 must be dismissed.
>
> ……
>
> [210] Finally, I should add this by way of postscript…. [it was] submitted that the creditors would and could be paid out of the proceeds of sale of the Property, but thereafter the obvious course would be for the Company to go into liquidation, at which stage the antecedent claims could be pursued by liquidators or sold to a third party litigation funder or indeed sold to any one or more of the existing shareholders……
>
> [211] However, it is not obvious to me why the Company should not go into liquidation before the Property is sold. The Administrators are under a duty to apply to the court under paragraph 79(2) of Schedule B1 where they think that the purpose of administration cannot be achieved in relation to the Company. <u>It is of course their case that the first objective cannot be achieved, and I have held that they were justified in reaching that conclusion</u>."

42. Therefore, in ***Hat & Mitre***, Trower J concluded that the administrators were justified in abandoning the objective of a rescue as a going concern of a balance-sheet solvent company in circumstances including where such a rescue would be contrary to the interests of the members as whole in that it would impair the company's ability to pursue the antecedent claims.

Conclusion

43. I conclude that I do have jurisdiction to intervene, if persuaded that no reasonable administrator could have thought that it was reasonably practicable to rescue Breton as a going concern when having regard to the interests of the members as a whole in circumstances where Breton is balance-sheet solvent and the creditors will be paid in full in any event.

Paragraph 74 of Schedule B1 to the 1986 Act

The applicable statutory framework

44. Paragraph 74 of Schedule B1 provides:

> "(1) A creditor or member of a company in administration may apply to the court claiming that–
> (a) the administrator is acting or has acted so as unfairly to harm the interests of the applicant (whether alone or in common with some or all other members or creditors), or
> (b) the administrator proposes to act in a way which would unfairly harm the interests of the applicant (whether alone or in common with some or all other members or creditors).
> (2) A creditor or member of a company in administration may apply to the court claiming that the administrator is not performing his functions as quickly or as efficiently as is reasonably practicable."

Standing

45. It is not disputed that in order to engage the court's jurisdiction under Paragraph 74 of Schedule B1, Michael must show that his interests are being unfairly harmed as a shareholder of Breton rather than as a bidder seeking to purchase Breton's site.

46. Ivy and Melinda argue that:

    a. the inevitable outcome of the parallel Financial Remedy Proceedings is a determination (binding on Michael) that Michael has no beneficial shareholding in Breton. Audey and Melinda claim that the shares should revert to Audey, and Ivy claims that she is the sole beneficial owner. Michael is debarred from advancing any case to the contrary; and

    b. on a proper analysis, Michael has no relevant interest to protect. The shares of which he is the legal owner are owned beneficially by either Ivy or Audey. Ivy expressly opposes the Insolvency Application, and Audey supports the company rescue that the Insolvency Application is brought to frustrate.

47. Michael argues that:

    a. His solicitors wrote to the Family Court on 7 March 2022 explaining that –

        > "……..
        >
        > [Michael] has instructed us to write to the court concerning the Section 37 MCA 1973 application …… relating to Breton Park Residential Homes Limited. During the last 2 years [Michael] has expended a very large amount of time and money in litigating his

claims in the partnership and Company disputes. The process has taken a toll on his health and family life, and he is not minded to exacerbate the situation by actively participating in yet further proceedings.

Our client does not wish to predetermine any judicial decision which is made by the court on this application and is prepared to accept the final decision made on the Applicants pleaded case.

……..

Despite the fact that [Michael] has adopted a neutral stance in respect of this application he reserves the right to attend at the final hearing… and make representations as to costs (if necessary) after the issues have been determined…….”

b. He did not waive his right to apply under Paragraph 74 of Schedule B1 by choosing not to take part in the Financial Remedy Proceedings (in part because of the feared impact on his health). Unless and until Melinda obtains an order pursuant to the Section 37 Application, Michael remains a member of Breton. The Insolvency Application is not, as Ivy suggests in her 5th witness statement, an "abuse of process".

48. The conduct of the Financial Remedy Proceedings is governed by the Family Procedure Rules ("***FPR***"), which state:

a. "the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved" – FPR r.1.1(1);

b. the "court must seek to give effect to the overriding objective when it… exercises any power given to it by these rules" – FPR r.1.2(a);

c. the "parties are required to help the court to further the overriding objective" – FPR r.1.3; and

d. the "court must further the overriding objective by actively managing cases…. [which] includes–
(a) setting timetables or otherwise controlling the progress of the case;
(b) identifying at an early stage–
(i) the issues; and
(ii) who should be a party to the proceedings;
(c) deciding promptly –
(i) which issues need full investigation and hearing and which do not; and
(ii) the procedure to be followed in the case;
(d) deciding the order in which issues are to be resolved;
……..
(j) dealing with as many aspects of the case as it can on the same occasion;
………" – FPR r.1.4.

49. The Family Court:

a. identified at an early stage of the Financial Remedy Proceedings that the beneficial ownership of the Breton shares was an issue that needed full investigation;

b. identified that Michael should be joined as a party to the Financial Remedy Proceedings to resolve the issue of the beneficial ownership of the Breton shares; and

c. gave directions for the filing and serving of statements of case/witness evidence to enable the court to determine the issue of the beneficial ownership of the Breton shares.

50. It is clear from the orders made in the Financial Remedy Proceedings that Michael failed repeatedly to (i) comply with court directions and (ii) attend court hearings. For example, the order dated 14 September 2021 records that "The Court took the view that on the balance of probabilities [Michael] has full notice of these proceedings and has chosen not to attend." The Family Court decided that Michael's continuing default was serious enough to make a debarring order.

51. In my judgment, it would be wholly contrary to the fair administration of justice to allow Michael to argue that his interests as a member of Breton would be harmed by the proposed rescue in circumstances where he has absented himself from the Financial Remedy Proceedings such that he is no longer permitted to argue that he has a beneficial interest in the Breton shares. Indeed, Michael was specifically warned of the potential wider implications of him failing to engage with the Section 37 Application. On 9 March 2021, Ivy's solicitor (in connection with the earlier unfair prejudice petition) wrote to Michael's solicitor in the following terms:

> "We are informed by [Ivy's] representative in Audey's divorce proceedings that Michael has been joined to the matrimonial case, specifically the s.37 application made by Audey's wife in regards to the transfer of Breton Park's shares. We are further informed that Michael has failed to file his evidence in response before the prescribed date (being 24 February 2021)……….
>
> Please can you confirm whether Michael intends to take an active part in those proceedings (as required by the family court) as this will obviously have a bearing on the position in respect of Breton in the company claim. Any decision by the family court will be binding on your client even if he fails to engage with those proceedings. It would also be odd for him to not defend her application (as the Court can order the transfer of his shares back to Audey Loveridge) yet maintain his claim in the Unfair Prejudice proceedings (which can only be pursued if he is a shareholder)."

52. Further, Melinda confirmed at this hearing that she would now be applying to lift the stay in the Financial Remedy Proceedings, which are at the Pre-Trial Review stage.[5] It was previously directed that the final hearings of the substantive claim and the Section 37 Application be heard at the same time. It strikes me as unreal to proceed on the Insolvency Application by reference to Michael's interests as a member when in short time there will be a hearing in the Financial Remedy Proceedings to determine the Section 37 Application, which determination will be

[5] Following this hearing, the court staff referred to me Melinda's application to lift the stay. I declined to deal with it and re-referred the application to another judge as I did not wish to run the risk of having had sight of documents on the Family Court file, which were not before me at this hearing and which might, or might be seen to, influence this decision.

binding upon Michael. In light of the debarring order, there can realistically be only one of two outcomes – either Ivy is the beneficial owner of the shares, or Audey is the beneficial owner of the shares and in which case they are a financial resource available to meet Melinda's assessed reasonable needs. Therefore, the reality is that Michael is pursuing the Insolvency Application without any legitimate interest as a member for doing so, but rather in an attempt to pursue his interest as a prospective purchaser of the site.

53. I am not satisfied that Michael has standing to bring the Insolvency Application.

Unfair Harm

54. In the event that I am wrong, and Michael does have standing to bring the Insolvency Application, he argues that:

    a. Whilst unfair harm will usually take the form of unequal or differential treatment to the disadvantage of the applicant (or applicant class), a lack of commercial justification for a decision causing harm to members as a whole may be unfair, since that harm is not one which they should be expected to suffer - ***Hockin and others v Marsden and another (joint administrators of London & Westcountry Estates Ltd)*** [2014] EWHC 763 (Ch).

    b. A member's complaint must concern harm to his interests as a member, and harm suffered in another capacity does not count. However, where there may be a surplus, a member can complain that an administrator has turned down an advantageous offer to sell an asset, and it does not matter that the member is also the prospective purchaser – compare ***Re Edennote Ltd*** [1996] 2 BCLC 389.

    c. Whilst the court will give due deference to the commercial decisions of administrators, "if the administrators are proposing to take a course which ….. is conspicuously unfair to a particular creditor or creditors or contractor of the company, then the court can and, in an appropriate case, should interfere" – ***In re CE King*** [2000] 2 BCLC 297.

    d. Asking whether a decision causes unfair harm is not the same as asking whether the decision was perverse – ***Hockin***. Nor is it the same as asking whether the administrators have breached their duties. As the editor of ***Goode on Principles of Corporate Insolvency law*** (5th ed, 2019) puts it at 11-100, "It is neither necessary nor sufficient for the grant of relief under para. 74 that the administrator has acted or proposed to act unlawfully or in breach of some legal duty to the applicant. For those breaches, other remedies are available."

    e. Accepting Ivy's proposal will unfairly and conspicuously harm Michael's interests as a member by –

        i. reinstating the control of Breton to one faction in a bitter dispute, locking in Michael;

        ii. reinstating the company to the control of a dysfunctional board of directors in which Ivy's fellow director, Audey, has not actively engaged;

iii. saddling the company with a debt owed to and subject to a debenture in favour of MIAD, which will tighten Ivy's grip over the company and allow her to appoint receivers or administrators in the event of any default;

iv. allowing Ivy to mismanage the site and/or to run the site for her own interests; and

v. reducing the value of Michael's shares, which otherwise, would appear to be worth around £1.35 million, since that is the sum that would be returned to each of the two 50% shareholders.

f. Moreover, Ivy's re-financing proposal would be conspicuously unfair on Melinda, since it will prevent the Administrators realising Breton's assets such that, whatever order the Family Court may make in relation to Breton's shares, Ivy will be able to exercise increased control of Breton through her company, MIAD, and its debenture.

55. The Administrators argue that:

a. Michael's proposal that he purchases the assets of Breton is not in the interests of the members as a whole. It is in his interests as a bidder seeking to acquire Breton's business for his own benefit. Whilst Michael may be disappointed in his capacity as a potential purchaser that his offer was not accepted, that is not a ground on which the Paragraph 74 jurisdiction can be invoked.

b. In addition, Michael is not prejudiced in his capacity as a member. The effect of the MIAD refinance is to replace Breton's existing creditors (including costs and expenses of the administration) with the loan from MIAD. The net balance sheet value available for distribution to members is the same both before and after the refinance.

c. Further, it is difficult to see how Michael has been financially harmed. Had his offer of £5.75 million been accepted (if it could have been) then after payment of creditors and administration expenses half of the net proceeds would have been available for distribution to Ivy as 50% shareholder and 50% would have circulated back to Michael. He would not have been in a better financial position in his capacity as a member. If anything he would have been worse off as half the surplus that he had funded after payment of liabilities would have been paid to Ivy.

d. The existence of a shareholder dispute ought to play no part in the decision made as to which of the statutory objectives are to be fulfilled. Whether or not there has been mismanagement in the past or there are historic transactions to which Michael objects is not a factor in whether or not Breton can be rescued as a going concern. It is not the function of the administration process to be a forum for considering, let alone resolving disputes amongst shareholders. If it is Michael's contention that (after discharge of the administration) the affairs of Breton ought not to be in Ivy's hands then it is open to him to bring proceedings under s. 994 Companies Act 2006 ("***the 2006 Act***") or by way of a statutory derivative claim.

Applicable legal principles

56. In ***Hockin***, the former directors of the company alleged that the corporate insolvency resulted from the bank having mis-sold an interest swap agreement. There was a challenge to the administrators' decision not to pursue claims against the bank, which unfairly harmed the interests of the 1st applicant ("***Diane***") as a creditor, who then sought a direction that the claims be assigned to the applicants. It was held by Nicholas Le Poidevin QC (sitting as a deputy High Court judge):

> "[14] Mr Tamlyn submitted, correctly in my view, that because para 74 could be invoked only by a creditor or a member, the reference in it to unfair harm was a reference to unfair harm to an applicant as a creditor or member. It was not intended to provide a facility for someone who merely wished to purchase a claim as an investment.
>
> ……..
>
> *Perversity*
> [15] Mr Tamlyn went on to submit that it was open to the court to interfere with the administrators' decision not to pursue the claims only if the decision was perverse……..
>
> [16] I do not accept Mr Tamlyn's submission……, I consider that the wording of para 74 precludes it………, it lays down its own test for interference, a test of unfair harm. That is evidently not the same thing as a test of perversity. To adopt a test of perversity in place of the statutory test would plainly be impermissible……
>
> *Differential treatment*
> [17] Mr Tamlyn also submitted that para 74 could not be invoked unless the applicant was complaining of some discrimination between one creditor and another or between one member and another. Unfairness within the paragraph meant, he said, unequal or differential treatment given to Diane (or a class to which she belonged). He accepted that his submission would have the consequence that an idiotic decision by an administrator which affected all creditors equally was incapable of challenge under para 74.
>
> [18] The submission has to get over the express wording of para 74(1), which twice refers to harming 'the interests of the applicant (whether alone or in common with some or all other members or creditors)'. In support of it Mr Tamlyn cites ***Re Coniston Hotel (Kent) LLP*** [2013] EWHC 93 (Ch), [2013] 2 BCLC 405 in which Norris J said (at [36]),
>
>> 'Paragraph 74 does not exist to enable individually disgruntled creditors to pursue administrators for compensation. Its focus is "unfair harm": and that, I think, will ordinarily mean unequal or differential treatment to the disadvantage of the applicant (or applicant class) which cannot be justified by reference to the interests of the creditors as a whole or to achieving the objective of the administration. (The reference to an administrator acting unfairly to harm the interests of "all other members or creditors", so that unequal or differential treatment had not occurred, would (I think) only arise in relation to issues concerning the expenses of the administration, or where the administrator was also an office holder in another insolvency and acted unfairly prejudicially as regards the stakeholders in company A in promoting the interests [of] the stakeholders in company B).'

That passage was taken literally in a decision in Northern Ireland, ***Curistan v Keenan*** [2013] NICh 13, where an application under the Northern Ireland equivalent of para 74 was rejected because the decision challenged did not discriminate against the applicant.

[19] Paragraph 74 requires unfair harm, not merely harm, and the requirement of unfairness certainly prevents a creditor complaining of a disadvantage to his own interests when the disadvantage is justifiable by reference to the interests of the creditors as a whole. But I do not myself see why the requisite unfairness must necessarily be found in an unjustifiable discrimination. A lack of commercial justification for a decision causing harm to the creditors as a whole may be unfair in the sense that the harm is not one which they should be expected to suffer. I am not sure that Norris J had such a case in mind in the passage quoted from ***Coniston***. In ***Coniston***, the applicants (who appear to have been acting in person earlier in the proceedings) had muddled claims for professional negligence against the administrators for acts before the administration commenced with claims for harm suffered by them as members or creditors and the decision, given on a striking-out application, was one of case management.

[20] My view is that a differential treatment is not the only form of unfairness capable of satisfying para 74 and so I do not accept Mr Tamlyn's submission."

57. ***In re Meem SL Ltd (in administration) Goel and another v Grant and others*** [2017] EWHC 2688 (Ch), the administrators decided to sell by auction a claim which the company had against its directors for unlawful means conspiracy. Two of the company's shareholders, who also claimed to be creditors, contended that the proposed sale would unfairly harm their interests by allowing the claim to be bought in order to stifle it. Having undertaken a review of the relevant authorities, including ***Hockin***, David Halpern QC (sitting as a deputy High Court judge) concluded:

[44] The conclusions which I draw from these authorities are as follows:

(i) The paradigm case under paragraph 74 arises where the administrator treats the applicant (either alone or together with further creditors) less favourably than another creditor or creditors. This constitutes harm, but it is not necessarily unfair harm. In order to be unfair, the applicant has to show that the decision cannot be justified by reference to the interests of the creditors as a whole or to achieving the objective of the administration. Mr Lilly might well be correct in saying that unfair harm which consists of differential treatment does not have to be perverse, but it is unnecessary for me to reach any concluded view on that point.

(ii) I accept that the concept of unfair harm in paragraph 74 is not limited to differential treatment but can include a decision of the administrator to sell an asset at an undervalue, thereby causing harm to all creditors. However, in a case where there is no differential treatment of creditors, the court will not interfere with the administrator's decision to sell an asset unless the decision does not withstand logical analysis. This probably means the same thing as perversity.

(iii) A cause of action is typically a difficult asset to value. If it appears that it might have a substantial value, no reasonable administrator would sell it for a fixed price without properly considering its value or finding a sensible way of

bypassing the need to do so. In many cases it will not be possible to consider its value properly without obtaining expert assistance.

(iv) However, it does not follow that the administrator is necessarily acting unreasonably if he sells it by auction. Whether or not this is unreasonable will depend on an analysis of the facts in each case. In an appropriate case, the process of testing the market by holding an auction may make it reasonable to proceed without seeking valuation advice, particularly where the claim is a difficult one to value.

……."

58. In my judgment, and so far as relevant to the present case where Breton is balance-sheet solvent and the creditors will be paid in full in any event, the applicable legal principles are as follows:

    a. A bidder in a bidding process does not have standing in that capacity to apply to the court under Paragraph 74 of Schedule B1, although a bidder, who is also a member, may do so provided that his complaint concerns unfair harm to his interests as a member.

    b. Unfair harm under Paragraph 74 of Schedule B1 is not limited to differential treatment but can include a decision of the administrator causing harm to the members as whole.

    c. In a case where there is no differential treatment of the members, the court will not interfere with the administrator's decision unless the decision "lack[s] commercial justification" or "does not withstand logical analysis". This probably means the same thing as perversity in the sense that no reasonable administrator would have decided the same in all the circumstances. It is arguable that this standard of review is more objective and less deferential than that under Paragraph 3 of Schedule B1, which expressly refers to what the administrator "thinks" such that the court is there considering the administrator's thought process - ***Lightman & Moss on the Law of Administrators and Receivers of Companies***, para 12-022. In any event, the court is not entitled to substitute its own view whether carrying out a review under either Paragraph 3 of Schedule B1 or Paragraph 74 of Schedule B1.

    d. Unfair harm under Paragraph 74 of Schedule B1 often takes the form of differential treatment. Unfair harm which consists of differential treatment does not have to be perverse before the court will intervene. However, whilst differential treatment may constitute harm, it is not necessarily unfair harm. In order to be unfair, the applicant has to show that the decision cannot be justified by reference to the interests of the members as a whole.

Alleged unfair harm to the members as a whole – no differential treatment

59. The Administrators obtained a professional valuation of the site in the bracket of £3.95 million to £4.4 million. The Administrators arranged a professional marketing exercise, which produced 4 arms-length offers in the range of £3.3 million to £3.685 million. Michael's offer is £5.75 million, which exceeds (i) the top of the professional valuation by £1.35 million (c. 30%) and (ii) the best other offer by

£2.06 million (c. 55%). A rescue of Breton will therefore deprive the members of the opportunity of the company realising its assets on such favourable terms.

60. Michael argues that, if his bid had been accepted, Breton's shareholders could have expected to receive £2.7 million in dividends from the company. Therefore, by making this application, Michael seeks to advance the interests of the members as a whole by increasing the funds that will be available for distribution.

61. However, what is unfair must be judged by reference to all the circumstances of the case, and so it is important to consider and weigh in the balance the full extent of the practical consequences of an immediate sale of Breton's assets. Such a sale would deprive the members of the opportunity of the company generating future earnings from those assets whilst at the same time benefiting from growth in land values.

62. The available evidence demonstrates that Breton has been, and is likely to continue to be for the reasonably foreseeable future, a profitable business:

    a. Based upon Breton's accounts for the last 3 years, Ivy has produced a cashflow projection for the next 12 months, and from which it is expected that Breton will be able to generate a gross profit of over £211,000 against gross income of over £290,000 including rents of over £177,000.

    b. At paragraph 25 of his first witness statement Michael confirms that Breton "was and is a good business".

    c. Michael relies upon a witness statement from Breton's former accountant, Mr Warman, who states as follows:

    > "[27.] The results for 2021, 2022 and 2023 do then improve but in reality are no better than financial years 2015 to 2018. These results ought to be taken into account when considering the rather bold suggestion that the company had shown "significant improvement once Michael was not involved. Comparing those years too, the post-tax profits were:
    >
    > a. 2015: £79,552
    >
    > b. 2016: £93,216
    >
    > c. 2017: £108,520
    >
    > d. 2018: £140,796
    >
    > ……..
    >
    > g. 2021: £165,213
    >
    > h. 2022: £41,727
    >
    > i. 2023: £109,592"

63. The Court of Appeal recorded by way of introduction in ***Loveridge (No 1)*** (with my emphasis added*)* that:

> "[1] The Loveridge family own and operate <u>a very successful caravan park business</u> in Worcestershire, Warwickshire and Shropshire. They do so in part through five companies and in part through three oral partnerships at will."

64. Further, an immediate sale of Breton's assets would be contrary to the expressed wishes of those persons who would otherwise most likely benefit from the surplus arising on such a sale:

    a. Following the debarring order made against Michael in the Financial Remedy Proceedings, there will be a determination in the reasonably foreseeable future that the shares in Breton (including the 50% shareholding legally owned by Michael) are beneficially owned by either Ivy or Audey, who have both expressed the wish to preserve Breton as a going concern.

    b. In the event that the Section 37 Application is successful, the shares in Breton will be a matrimonial asset subject to the sharing principle and available to meet Melinda's financial needs on divorce. Whilst Melinda fears that the administration process was simply another attempt by Ivy to defeat her financial remedies claim, it is striking that Melinda believes that she will potentially suffer severe financial prejudice if Breton's assets are sold thereby depriving her of a valuable capital and income resource.

65. It is also striking that, by letter dated 31 March 2023, Michael, via solicitors, made his own offer of refinance and no doubt himself recognising the value in maintaining Breton as a going concern:

    > "Our client would be prepared to advance £3.6 million to [Breton] as a loan in return for a charge over the Breton site and its assets. Our client has been in discussions with his lenders, and we understand funds are in place to effect the proposal.
    >
    > The terms of the charge would be negotiated with the Administrators, and our client is confident he would be able to offer more favourable terms to the Company both in respect of repayment terms and interest rates, than any offer from Bewdley. It is intended that the loan would pay off the secured and preferential creditors as well as the Administrators expenses. The loan would also settle claims made by the Unsecured Creditors subject to these being scrutinised and proven….."

66. In all the circumstances, Michael has not established that the Administrators' decision to pursue the rescue of Breton as a going concern over a sale of its business and assets (even at a price substantially in excess of the professional valuation or best other offer) lacks commercial justification or does not withstand logical analysis.

67. Michael further argues that the interests of the members as a whole will be harmed by returning the site to the management of Ivy. It is Michael's evidence that, whilst Breton is a good business, it requires constant attention. Following Michael's exclusion, Breton has been mismanaged particularly around maintenance, repairs and residents' bills.

68. It is Ivy's evidence that Michael did contribute to the success of the business prior to the family dispute, but it is self-serving and false for Michael to claim sole

responsibility for that success. The whole family played their part including Ivy, who saw to accountants, lawyers, paperwork, banks, paid bills and organised amenities. After Michael was removed as a director of Breton, he continued to interfere with the running of the business and refused to return the books/records he had removed from the site office. It was only in late 2020 that these were finally returned following an application compelling him to do so. This interruption did interfere with Ivy's ability to manage the site during that time.

69. There is no love lost between Melinda and Ivy, but Melinda does not accept Michael's portrayal of Ivy and her management of Breton, which she believes has continued to thrive.

70. Whilst an administrator of a company is given a wide measure of latitude in the way he goes about the exercise of his powers so at to achieve the statutory purpose, Paragraph 4 of Schedule B1 provides that the administrator "must perform his functions as quickly and efficiently as reasonably practicable." It would, in my view, be wholly contrary to the role of the Administrators in achieving a speedy and cost effective outcome to embark upon an investigation into the allegations and counter allegations of historic mismanagement of the Breton site particularly when:

    a. The Administrators' primary focus is not on the past but rather whether Breton can continue to trade as a going concern if returned to Ivy's management.

    b. The Administrators have considered the likely viability of Breton's business over the reasonably foreseeable future by reference to the business plan produced by Ivy.

    c. As noted by the Court of Appeal in ***Loveridge (No 1)*** (at para [70]) "the businesses of the companies are not complex…… it involves owning and operating sites, collecting rents and general site maintenance."

Alleged harm to Michael's interests as a member by way of differential treatment

71. Michael complains that the proposed rescue will allow Ivy to resume control of Breton and thereafter potentially to run the site in her own interests and contrary to Michael's own interests.

72. The test of unfair harm requires unfair harm, not merely harm. In my judgment, the Administrators are seeking in good faith to carry out their functions in order to achieve the primary statutory objective of rescuing an otherwise profitable company as a going concern. Therefore, any risk of harm to Michael's interests that might be caused from returning Breton to the control of Ivy is justifiable by reference to the interests of the members as a whole and would not have been caused unfairly within the meaning of Paragraph 74 of Schedule B1. If any such harm did arise, it would then be open to Michael to bring proceedings under s.994 of the 2006 Act in relation to Breton. Administration is not designed for and is entirely unsuited as a remedy to deal with shareholder disputes.

Summary of conclusions on the Insolvency Application

73. The Administrators are not mandated to pursue a rescue of Breton simply because it is capable of fulfilment. The court has jurisdiction to intervene if satisfied that no reasonable administrator could have thought that it was reasonably practicable to

rescue Breton as a going concern when contrary to the interests of the members as a whole in circumstances where Breton is balance-sheet solvent and the creditors will be paid in full in any event.

74. Whilst the court has jurisdiction to make the order sought, Michael does not have standing to bring the Insolvency Application. In light of the debarring order made in the Financial Remedy Proceedings, Michael is pursuing the Insolvency Application without any legitimate interest as a member for doing so, but rather in an attempt to pursue his interest as a prospective purchaser of the Breton site.

75. In the event that I am wrong and Michael does have standing to bring the Insolvency Application:

    a. I am not persuaded that the Administrators' decisions to (i) pursue the rescue of Breton as a going concern over a sale of its business and assets to Michael, and (ii) return the Company to the management of Ivy are decisions that no reasonable administrator could have reached in all the circumstances and having regard to the interests of the members as a whole. Breton has been, and when returned to the management of Ivy is likely to continue to be for the reasonably foreseeable future, a profitable business. Ivy, Audey and Melinda (the likely beneficiaries of the surplus arising on any sale of the business and assets to Michael) have all expressed the view that maintaining Breton as a going concern is more valuable than the short-term monetary gain arising from an immediate realisation. Michael has failed to establish that the Administrators' decisions here lack commercial justification or do not withstand logical analysis.

    b. Nor am I persuaded that any risk of harm to Michael's membership interests as a result of returning Breton to the control of Ivy would be unfair within the meaning of Paragraph 74 of Schedule B1 in circumstances where –

        i. the Administrators are seeking in good faith to carry out their functions to achieve the primary statutory objective of rescuing Breton as a going concern, which is justifiable by reference to the interests of the members as a whole; and

        ii. there would be adequate remedies available to Michael in the event that he were to suffer harm as a result of Ivy then running Breton in her own interests and contrary to Michael's interests as a member.

76. The Insolvency Application is dismissed.

<u>The Injunction Application</u>

77. The Injunction Application is opposed by Ivy and Melinda with Melinda largely adopting the arguments of Ivy.

78. The Administrators, Bewdley and Kingsford are neutral on the Injunction Application.

Applicable legal framework

79. The long established test to be applied when deciding whether to grant an interim injunction is laid down in ***American Cyanamid Co v Ethicon Ltd*** [1975] AC 396:

a. Is there a serious issue to be tried?

b. If so, would damages be an adequate remedy for the party injured by the grant of or the refusal of an interim injunction?

c. If not, then where does the balance of convenience lie?

80. A helpful summary of the applicable principles was given in ***National Commercial Bank Jamaica Ltd v Olint Corp Ltd*** [2009] UKPC 16:

> [16.] …….. It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for [her] and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in ***American Cyanamid*** ……., that means that if damages will be an adequate remedy for the [claimant], there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the [claimant] could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that [her] freedom of action should not have been restrained, then an injunction should ordinarily be granted.
>
> 17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid ……..:
>
>> "It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.""

Serious issue to be tried

81. Michael argues that:

a. As a director of Kingsford, Ivy owed duties to –

i. only exercise her powers for the purposes for which they were conferred – s.171 (b) of the 2006 Act; and

ii. act in the way she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole – s.172 of the 2006 Act.

b. This is a blatant case of Ivy, in breach of her duties under s. 171(b) and s. 172 of the 2006 Act, using Kingsford's monies for her own purposes and unrelated to Kingsford's established business.

c. A breach of s.171 or s.172 by a shareholder-director "will generally indicate that unfair prejudice has occurred" ***- In re Tobian Properties Ltd*** [2012] EWCA Civ 998 (at para [22] per Arden LJ).

d. If Ivy has breached her duties under s.171 and s172, then –

   i. It is (at least) seriously arguable that the loan from Kingsford to MIAD is void such that MIAD would hold the £4 million it received from Kingsford on constructive trust and ought not to be allowed to lend it to Breton; or

   ii. If the loan from Kingsford to MIAD is not void, Kingsford would be entitled to rescind it such that the court could effect the reversal of the transaction in exercise of its wide powers under s.996 of the 2006 Act to grant relief on an unfair prejudice petition; and

   iii. Michael seeks orders that MIAD repay £4 million with interest to Kingsford, and pending such repayment MIAD be restrained from making any payment or loan to Breton.

e. Whilst Ivy argues that Michael has no standing to seek injunctive relief to protect Kingsford's proprietary interests where he has not sought permission to bring a derivative claim, in ***Ntzegkoutanis v Kimionis*** [2023] EWCA Civ 1480[6], the Court of Appeal confirmed (at para [55(i)]) that the court had "power to grant relief in favour of the company on an unfair prejudice petition".

82. Ivy argues that:

a. It is her evidence that she has acted in accordance with her duties as Kingsford's director in advancing the loan to MIAD.

b. Even if she was in breach of any of her duties as director, such a breach does not, of itself, amount to unfair prejudice – ***Re Jermyn St Turkish Baths Ltd*** [1971] 1 WLR 1042. There needs to be something more. None of the allegations that Michael makes are remotely capable of amounting to unfair prejudice.

c. The essence of Michael's complaint is that "Ivy would be using money which is one-third mine to get control of Breton… against my wishes". This assertion is based upon two misconceptions –

   i. Kingsford's money belongs to Kingsford. Ivy, as the majority shareholder, is supportive of Kingsford's loan to MIAD provided that Kingsford's commercial interests are protected by way of interest being payable, security and the funds only being used by

[6] This decision was published after the hearing before me. However, further written submissions were made on behalf of Michael and Ivy by reference to this decision.

MIAD for the purpose of an onward loan to Breton subject to the provision of security as a condition precedent. It is entirely within the prerogative of those in control of Kingsford to exercise their commercial judgment in the management of the company; and

ii. In the previous company proceedings, the Court of Appeal ruled that there was no maintainable basis for Michael's assertion that he was entitled to participate in Breton's management. Therefore, he has never had any right to influence the management of Breton, let alone take control of Breton. Ivy is simply seeking the rescue of Breton as a going concern, which would result in its management being restored to her.

d. Michael further asserts that the proposed refinancing would somehow unfairly harm his interests as a shareholder in Kingsford because he does not think it is in Kingsford's interests to lend money to rescue Breton, but –

i. It was the longstanding practice of the Loveridge family (including Michael before the falling out in 2019) to use inter-company lending to develop and strengthen the family business as a whole.

ii. In any event, Ivy has taken steps to ensure that Kingsford makes a commercial return from the loan and its interests are secured over MIAD's assets. Kingsford will also have the indirect benefit of security over Breton's site, which on Michael's case, is worth £5.75 million.

e. Michael is not seeking permission to bring a derivative claim on behalf of Kingsford, and so Michael has no standing to seek injunctive relief to protect the proprietary interests of Kingsford, which is the professed basis for the Injunction Application. ***Ntzegkoutanis*** is distinguishable on its facts. In particular, in the present case, Michael is seeking to exit the very company whose interests he says he wishes to protect by means of an injunction. In ***Ntzegkoutanis***, the relief sought by the petitioner was for the respondent's shares to be sold to the petitioner.

83. It is no part of the court's function at this stage of the litigation to try to resolve conflicts on the written evidence as to the facts on which the case of either party may ultimately depend or to decide difficult questions of law which call for detailed argument. Those are matters to be dealt with at the trial or upon any earlier application for strike out and/or summary judgment. At this stage, the court must only be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. Therefore, unless the material available to me at this hearing fails to disclose that Michael's substantive claim has any real prospect of succeeding at trial, I should go on to consider the remaining ***American Cyanamid*** questions.

84. I am satisfied for the purposes of the Injunction Application that there is a serious issue to be tried. It would be wrong for me to express any firm views on the merits at this provisional stage, but I note in particular that:

a. In her written evidence, Ivy states that as "Kingsford and Breton … are both Loveridge family companies which we have historically managed so as to extend financial support to other companies in the family business as and

when needed, I believe that these transactions will promote the success of Kingsford in the form of the commercial benefit of receiving interest payments and, in the longer term, by enabling the restoration of Breton …to a financially healthy state, thereby contributing to the overall strength of the group of Loveridge family companies."

b. In ***Loveridge (No 2)***, Michael had sought to argue that there was an understanding between him, Ivy and Alldey that the inter-company loans would remain outstanding "indefinitely" such that the calling in of those loans was subject to equitable constraints. The Court of Appeal held (at para [93]) that "…. There has of course been a material change of circumstances. The relationship between the parties has wholly broken down. ……… I do not see how it is arguable that any understanding that the parties had about the loans could realistically be interpreted as surviving this." Arguably, and applying the same logic, any practice of providing inter-company financial support similarly cannot have survived the family breakdown, particularly when Ivy claims that Michael has no beneficial interest in the shares in Breton.

c. If not paid away to MIAD, Kingsford's cash reserves would be available to invest in Kingsford's own business by way of capital expenditure.

d. In his written evidence Michael states that he "visited Kingsford on 21st September [2023] and was very concerned about the state of the park, in fact, I was shocked at the dilapidation".

e. In ***Ntzegkoutanis***, Newey LJ summarised the relevant legal principles applicable as to when it is legitimate for an unfair prejudice petition to claim relief in favour of the company to which the petition relates -

> [55. (iv)] Where…….an unfair prejudice petition seeks both relief in favour of the company and relief that would not be available in a pure derivative claim, and the petitioner appears to be genuinely interested in obtaining the latter, I do not think that it would ordinarily be appropriate to strike out either the petition or any part of the relief sought. It is not difficult to conceive of a situation in which it would make sense for a petitioner to include in an unfair prejudice petition a claim for, say, an order for a respondent to buy or sell shares and an order for a payment to be made to the company on the basis of a breach of duty by a respondent. In such a case, it would "not seem … to be very convenient" "from a practical point of view" (to echo Hoffmann J in ***Re a Company*** (No. 005287 of 1985) to insist that the claim for relief in favour of the company be the subject of a separate claim form. Even supposing that, on the particular facts, it would make more sense for the order in favour of the company to be pursued in a distinct derivative claim, it seems to me that it would rarely be right to deem the petition or any relief sought in it to be abusive if all the heads of relief were being pursued otherwise than to evade the requirements of Part 11 of the 2006 Act. As Judge Eyre QC remarked in ***Hut Group***, "the same acts can be both mismanagement which is unfairly prejudicial to a minority shareholder and misconduct in breach of a director's duties and causing harm to the company". If a petitioner considers, for example, that such facts could warrant a share purchase order or, failing that, at least the grant of relief in

favour of the company, I should not have thought that it would be improper to claim both in an unfair prejudice petition. As Vos J said in ***Fi Call***, sections 994-996 of the 2006 Act "provide a wide and flexible remedy" and "[a]rtificial limitations should not be introduced to reduce the effective nature of the remedy introduced by ss.994-996.""

Adequacy of a monetary award to Michael

85. The next ***American Cyanamid*** question is whether Michael would be adequately compensated if Ivy is permitted to continue with her proposed refinancing of Breton but Michael subsequently succeeds at the trial of his unfair prejudice petition.

86. Michael accepts that, if he succeeds at trial, it is likely that the court would order Ivy to buy his shares in Kingsford at fair value, adding a premium designed to reflect any loss caused by Ivy's breaches of duty. However, Michael argues that it would not be fair to confine him to such a monetary award.

Risk that the loan is not repaid in full

87. Firstly:

    a. Michael argues that there are good reasons for thinking that Breton may be unable to repay MIAD the £4 million. Michael states in his written evidence that he expects Breton to be badly run by Ivy.

    b. Ivy argues that she has adduced credible evidence of her ability to run Breton profitably and well. But even if that proved not to be the case, Kingsford's exposure to Breton's credit risk is short term, since the intention is for Breton to obtain long term refinancing from a commercial bank within 18 months.

    c. Michael argues that whether a bank would be prepared to provide substitute lending of £3.5 million to Breton after 18 months is speculative at best, and involves an unsafe assumption as to what value a bank would place on the site. If Breton is unable to repay MIAD then MIAD will be unable to repay Kingsford. It might be expected that Breton would be able to pay something to MIAD even if put through an insolvency process, and that MIAD might then be able to pay something to Kingsford even if MIAD is itself put through an insolvency process. If, in the meantime, the court orders Ivy to buy Michael's shares in Kingsford, it will have to estimate the amount that Breton would be able to repay MIAD, and MIAD be able to repay to Kingsford. This exercise is likely to be difficult, and inherently uncertain.

    d. Ivy argues that there is no reason to fear that Kingsford will not be repaid in full, since on Michael's own case Breton's site is worth nearly £1.75 million in excess of the loan amount.

88. Ultimately, I consider that an analysis of the risk of default is academic for the purposes of the Injunction Application. By virtue of s.996 of the 2006 Act, the court has a wide discretion as to the nature of the relief to be granted in that it can "make such order as it thinks fit". That wide discretion extends to prescribing on a buy-out the method and assumptions for valuation including that the valuation be carried out on the basis of hypothetical factual assumptions seeking to put the petitioner back in

the position that that they would have been had the unfairly prejudicial conduct not occurred in the first place.

89. Therefore, if the loan remains unpaid at the time of the trial of Michael's unfair prejudice petition and the court finds Ivy's conduct has been unfairly prejudicial, the court can and no doubt will simply order that the valuation of Michael's shares be calculated on the hypothetical assumed basis that Kingsford did not advance the £4 million to MIAD. There is no suggestion that Ivy would not be able to pay any such adjusted higher figure. Indeed, by her solicitors' letter dated 29 November 2023, Ivy made an offer to purchase Michael's shares in Kingsford on the following terms:

    a. The fair value of Michael's shares be calculated as 1/3rd of the market value of Kingsford's total issued capital without any minority discount being applied.

    b. The market value be calculated on the hypothetical assumed bases that –

        i. Kingsford did not advance the £4 million to MIAD; and

        ii. Kingsford did not advance a director's loan to Ivy in the sum of £3.2 million.[7]

    c. In the absence of agreement, the fair value to be determined by a jointly instructed expert.

    d. Each party to bear their own costs of the unfair prejudice petition, which was issued without Ivy having been given a reasonable opportunity to purchase Michael's shares.

    e. The offer to remain open for a period of 4 months.

90. This offer was expressed as an ***O'Neill v Phillips*** offer such that, if not accepted, Michael's petition may fall to be struck out as an abuse of process in the event that the court was subsequently to conclude that continued prosecution of the claim would serve no useful purpose in that the offer cures the alleged prejudicial conduct by providing all the relief that Michael could reasonably expect to obtain at the trial of the petition.[8]

<u>Prevented from buying Breton's site</u>

91. Secondly, in his written evidence, Michael states that:

> "Unless Ivy is stopped from using Kingsford's money to refinance Breton ….. [this will] prevent me buying the site at Breton… I do not think the court could

[7] The director's loan is the subject of other allegations contained in the unfair prejudice petition and which are not relevant to the Injunction Application.

[8] Michael's earlier unfair prejudice petition in relation to Kingsford was struck out as a result of his failure to accept an ***O'Neill v Phillips*** offer dated 30 October 2020. It was held that the "petition in respect of Kingsford falls to be struck out as an abuse of process, because the offer provided all the relief that Michael would have been entitled to seek under the amended petition" - ***Loveridge (No2)*** (at para [138]). However, it was expressly noted earlier (at para [133]) that "this does not mean that a remedy could not arise in the future if there is a further act of unfair prejudice."

adequately compensate me for my loss. It will be difficult for the court to calculate what that loss will be."

92. In ***Loveridge (No1)*** Floyd LJ observed in relation to Michael's earlier unfair prejudice petition that:

"[41] A number of uncontroversial propositions can be derived from the authorities cited to this court:

(i) For a petition to be well founded the acts or omissions of which the petitioner complains must consist of the conduct of the affairs of the company: ***Re Neath Rugby Ltd, Hawkes v Cuddy*** [2007] EWHC 2999 (Ch), [2008] BCC 390 at [202] per Lewison J;

(ii) The conduct of those affairs must have caused prejudice to the interests of the petitioner as a shareholder: ibid;

(iii) The prejudice so caused must be unfair: ibid;"

93. Floyd LJ in ***Loveridge (No. 1)*** (at para [45]) and Falk J in ***Loveridge (No 2)*** (at para [67]) both made the point that it is necessary to consider the various business entities through which the Loveridge family decided to carry on business separately.

94. In ***Loveridge (No 2)*** Falk J continued:

"[68] This does not mean that an overly strict approach should be taken to determining whether Michael has suffered a particular detriment in respect of a particular company. In the context of ss 994–996 it is clear that the conduct must be unfairly prejudicial to the interests of one or more members as members, but in ***O'Neill v Phillips*** [1999] 2 BCLC 1 at 15, [1999] 1 WLR 1092 at 1105 Lord Hoffmann stated, by reference ***to R&H Electrical Ltd v Haden Bill Electrical Ltd*** [1995] 2 BCLC 280 ('R&H Electrical'), that 'the requirement that prejudice must be suffered as a member should not be too narrowly or technically construed……...

……..

[103] Whilst the requirement that conduct must be unfairly prejudicial to the interests of a member in his capacity as such must not be too narrowly construed, there are some limits to it…….

[104] Mr Anderson relied on ***R & H Electrical*** [1995] 2 BCLC 280. In that case Mr Pitt was a 25% shareholder of Haden Bill and controlled a loan creditor of it, R & H. It was held that Mr Pitt had a legitimate expectation of being able to participate in the management of Haden Bill for so long as R&H remained a significant creditor, such that Mr Pitt's ouster from management should be remedied by having his shares bought out and the loans repaid. Robert Walker J concluded that the fact that R & H was a separate legal entity from Mr Pitt, and that it was said that the prejudice was to R&H rather than to Mr Pitt as a shareholder, did not make a difference. There was a relationship based on mutual trust, and the loans were procured by Mr Pitt and formed an essential part of the arrangements entered into for the venture (at 294–295).

[105] In reaching his conclusion Robert Walker J relied on an earlier decision of Hoffmann J in ***Re a Company*** (No 00477 of 1986) [1986] BCLC 376, (1986) 2 BCC 99. In that case a husband and wife had sold a company in exchange for shares in the respondent on the basis of various understandings, including that they would continue to participate as directors and the husband would be employed as managing director. Hoffmann J declined to strike out the petition on the grounds that the wrongs complained of were wrongs done to the petitioners as vendors or as a wrongfully dismissed employee.

[106] In each of those cases the court's approach allowed account to be taken of broader considerations, going beyond the interests of an individual strictly in his capacity as a shareholder, in determining whether the actions taken were unfair. Similarly in ***Gamlestaden*** [2008] 1 BCLC 468, in circumstances where a joint venturer had invested in the joint venture by means of loans as well as shares, it was decided that there was locus standi for the application where the relief would be of real value in facilitating recovery of part of the investment even though the company was insolvent (paras [33] and [36]–[37]). But common to all of these cases was the petitioners' relationship with the company in question, and the petitioners' objective of safeguarding the value of their investment in it, whether by share capital or otherwise."

95. In summary:

    a. in order for a petition to be successful there must have been conduct that is unfairly prejudicial to the interest of the petitioner as a member of the subject company;

    b. the requirement that conduct must be unfairly prejudicial to the interest of a member in his capacity as such must not be too narrowly construed albeit subject to limits; and

    c. whilst unfairly prejudicial conduct can impact upon the interest of the petitioner beyond his capacity as a member of the subject company, that impacted interest must still be sufficiently connected to and bound up with his company membership.

96. In complaining that he will be prevented from buying Breton's site, Michael is seeking to safeguard his personal interest as a potential purchaser of that site, rather than seeking to safeguard the financial worth of his investment in Kingsford. The prejudicial impact upon Michael's interest as a potential purchaser of Breton's site is not sufficiently connected/bound up to his membership interests so far as they relate to Kingsford. Therefore, any difficulty over quantification does not arise because the loss of opportunity of Michael buying Breton's site could not in any event found a claim for relief brought in connection with Kingsford pursuant to s.994 of the 2006 Act.

<u>Breton prevented from otherwise using its cash reserves</u>

97. Thirdly, in his written evidence, Michael states that:

> "If Kingsford uses its money to enable Ivy to refinance Breton… it will not be able to use that money for other purposes. It will be difficult for the court to calculate how much better off Kingsford would have been if had used its money for other purposes…."

98. I disagree. In ***Loveridge (No 1)*** it was noted (at para [70]) that "There is no evidence that these companies have plans to expand". Michael's petition fails to identify any alternative purpose(s) for which the cash reserves could reasonably be applied, if not paid away to MIAD, although as noted earlier in my judgment Michael does make passing reference in his written evidence to the alleged "dilapidation" of the Kingsford site, which potentially would be a target for capital expenditure. Ultimately, he and Ivy can give evidence at trial on this issue so that the court can decide, on the balance of probabilities, what Kingsford would have done with its cash reserves, if not paid away to MIAD, and then on that basis undertake an evaluation of what Kingsford lost, if anything, as a result. Again, the buy-out figure for Michael's shares can be adjusted by adding a premium to reflect any such assessed loss.

Conclusion

99. As Arden LJ observed in ***Pringle v Callard*** [2007] EWCA Civ 1075 (at para [26]) an interim injunction ought to be refused "where the remedy sought at the end of the day is a buyout and where the matters complained of on an interim basis can be taken into account in the process of the valuation of the shares for the buyout."

100. Having determined that a monetary award (by way of appropriate upward adjustment(s) to the buy-out figure for Michael's shares) would be an adequate remedy for the relief sought under the unfair prejudice petition, the Injunction Application is dismissed.

Balance of convenience

101. In the event that I am wrong about a monetary award being an adequate remedy for Michael, then Ivy explains in her written evidence that:

> "the value of [Breton] to me in retaining and operating its site cannot be measured in monetary terms. Caravan sites can be difficult to source and acquire, and the opportunity to purchase another site similar to Breton…, which is close to my other sites and my home, and one where I have spent years developing the site, my relationships with the residents, employees, supply chain …… is not something that could be replicated."

It strikes me that, if Michael cannot be adequately compensated by a monetary award for the lost opportunity of buying the Breton site, then neither can Ivy be adequately compensated by a cross undertaking in damages for the lost opportunity of retaining the Breton site.

102. The hearing bundles ran to 1285 pages, and the authorities bundles ran to 896 pages. Stripping back all the evidence and legal argument, this is essentially a continuing battle between Ivy and Michael over control of the site at Breton.

103. As already noted, there is a statutory presumption that the Breton Share Transfers to Ivy and Michael were made with the intention of defeating Melinda's financial remedies claim. Melinda says that, if the Section 37 Application is successful, the shares in Breton will be the only substantial asset available in the Financial Remedy Proceedings to meet the financial needs of both her and Audey. Further, if the site is sold in the meantime, both Melinda and Audey "will potentially suffer financially severe prejudice and detriment [as]….. they will lose a capital and income

resource." Notwithstanding that Melinda has now been joined as a respondent to the Injunction Application, this is not a loss that in my view can be fairly compensated by any cross-undertaking in damages.

104. Therefore, the risk of irremediable financial harm to Melinda would have tipped the balance in me withholding the interim injunction even if I had been persuaded that neither Michael nor Ivy could be adequately compensated by a subsequent monetary award for the wrongful refusal or grant of the interim injunction.

Overall Conclusions

105. The Joinder Application is granted.

106. The Extension Application is granted.

107. The Insolvency Application is dismissed.

108. The Injunction Application is dismissed.