Case Nos: 2575 of 2007
19741 of 2009

Neutral Citation Number: [2011] EWHC 635 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/03/2011

Before :

MR JUSTICE DAVID RICHARDS

- -

Between:

In the matter of ABBINGTON HOTEL LIMITED and
In the matter of the COMPANIES ACT 2006

FRANK DIGRADO	**Petitioner**
- and -	
(1) ANTONIO D'ANGELO	**Respondents**
(2)ABBINGTON HOTEL LTD	

AND BETWEEN:

(1) ANTONIO D'ANGELO	
(2) ROSETTA URSO	Petitioners
- and –	
(1) FRANK DIGRADO	
(2) SOFIA DE ROBBIO	
(3) ABBINGTON HOTELS LTD	Respondents

- -

Mr Hashim Reza (instructed by **JP Fletcher & Co**) for the **Petitioner and Respondents** to the cross-petition

Mr Peter Griffiths and Mr James Knott (instructed by **Messrs Penningtons Sols**) for the **Respondent and Cross-Petitioners**

Hearing dates: 7, 8, 9, 10, 13, 14, 15, 16, 20 December 2010

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Judgment

Mr Justice David Richards :

Introduction

1. These proceedings under s.994 of the Companies Act 2006 concern Abbington Hotel Limited (the company). It was incorporated in January 2006 as the vehicle for a joint venture for the acquisition of the Abbington Hotel, a 25 bedroom hotel in Hitchen Road, Stevenage, Hertfordshire. The shareholders are Frank DiGrado and his wife Sofia and Antonio D'Angelo and his wife Rosetta, with the 100 issued shares split equally between the two couples. Mr DiGrado and Mr D'Angelo are and have at all material times been the only directors.

2. The proceedings comprise a petition and a cross-petition. The petition was presented on 4 April 2007 by Mr DiGrado. The primary relief sought is an order for the sale by Mr D'Angelo of his shares to Mr DiGrado at a price to be fixed by a valuer or by the court.

3. The cross-petition was presented by Mr and Mrs D'Angelo on 16 October 2009, seeking an order for the sale of Mr and Mrs DiGrado's shares to Mr and Mrs D'Angelo or vice versa. Until trial the primary relief sought by Mr and Mrs D'Angelo was an order for the sale of Mr and Mrs DiGrado's shares to them, but their position at trial was that the appropriate order was for a sale of their shares to Mr and Mrs DiGrado.

4. Both sides now therefore seek the same outcome. It has in fact been clear to all concerned since September 2006, by which time relations between the parties had irretrievably broken down, that a purchase by one couple of the other couple's shares was the only sensible outcome and for most of that time it was agreed that it should be a purchase by the DiGrados of the D'Angelos' shares. I remain baffled why this outcome could not have been achieved at an early stage, without all the costs in time and money which have been involved in these hard-fought proceedings. I suspect that the depth of bitterness between the parties has prevented even the modicum of compromise needed for a resolution.

5. Given that the outcome is not in doubt if a case for the exercise of the court's jurisdiction under ss994 – 996 can be made out, the issues have been whether either side can establish that there has been unfairly prejudicial conduct of the company's affairs or unfairly prejudicial acts or omissions, actual or proposed, of the company, and if so, the date as at which the shares should be valued, together with any principles applicable to the valuation which can properly be decided at this stage. A direction was earlier given that valuation itself, if it arises, should be reserved to a later hearing.

Outline of the parties' cases

6. There is a significant degree of overlap on the issues raised by the two petitions and the defences to each of them.

7. The major area of dispute on the facts relates to the parties' agreement or understanding as to the purpose of the acquisition of the hotel and the roles in the company's business to be undertaken by the parties. The period relevant to this runs

from November 2005 to the autumn of 2006. Mr and Mrs DiGrado say that the hotel was purchased with the intention of running it as a going concern, with a view to improving and expanding the business, and ultimately selling it. Mr and Mrs D'Angelo's case is that it was purchased with a view to selling it as quickly as possible at a profit to a developer for residential development. The hotel would continue in business only until a quick sale could be achieved, as a means of servicing the bank loan taken out for the purchase, with expenditure kept to a minimum. Consistently with these different aims, Mr and Mrs Di Grado say that Mr DiGrado and Mr D'Angelo would together work in the business while Mr and Mrs D'Angelo say that there was no need for either of them to have very much involvement in the business, as the hotel already had a competent manageress who could run the day-to-day business of the hotel until the intended sale.

8. The hotel was purchased by the company on 7 April 2006 for £880,000. The purchase price and other costs were funded by loans of £233,505 made by Mr and Mrs DiGrado and by Mr and Mrs D'Angelo. The balance was funded by a 20 year secured loan of £450,000 from Lloyds TSB. At the rear of 23 Hitchin Road (on the same site) is a one-storey bungalow with four letting bedrooms that is used as a bedroom annexe to 23 Hitchin Road. A neighbouring house, No 28 Essex Road, is used as a five-bedroom annexe to 23 Hitchin Road. 28 Essex Road does not belong to the company but has been held personally by Mr DiGrado and Mr and Mrs D'Angelo as tenants in common since 10 April 2006. They let 28 Essex Road to the company at a rent payable to each of £425 per month.

9. Following the purchase of the hotel in April 2006, Mr DiGrado and later his wife and their 13 year old son, moved into the hotel, and he and his wife worked in the hotel. Mr D'Angelo continued with his existing work at an estate agency and, while he worked at the hotel on two days dealing with the financial side, he did not become involved in the business on a day-to-day basis as Mr DiGrado says was agreed. Tensions quickly developed between them and the relationship deteriorated over the months following the purchase.

10. In August 2006, Mr D'Angelo took steps with a view to a sale of the hotel property, subject to planning permission, to a developer at a price of £1.2m, which after tax would have netted a profit of about £90,000 to each couple. While Mr D'Angelo did not directly involve Mr DiGrado in these steps, and indeed produced purported minutes of a meeting on 17 August 2006 which had not in fact occurred authorising the sale, he says that he was simply carrying out the original plan and an agreement already reached in July 2006 with Mr and Mrs DiGrado. Mr and Mrs DiGrado deny any such agreement. Mr DiGrado reacted very strongly when he became aware of the minute and of the steps being taken to sell the property. He was opposed to the sale and it did not therefore proceed.

11. Mr DiGrado says that he regarded Mr D'Angelo as having acted in bad faith, producing a false minute and taking other steps to advance a sale without his agreement and contrary to their underlying arrangement as regards the hotel. He says that it justifiably destroyed all confidence in Mr D'Angelo. Mr D'Angelo for his part complains that, by blocking the sale, Mr DiGrado was not only going back on what was agreed in July 2006 but undermined in a fundamental way the agreed purpose in establishing the company and purchasing the hotel.

12. These are the major areas of factual dispute. What is clear is that by September 2006 there was a complete breakdown in relations, such that there was no real prospect of harmonious co-operation in the business. Mr D'Angelo continued to attend the hotel, principally to go through financial records, but he was not otherwise involved in the business. It is not seriously in dispute that by March 2007 Mr DiGrado had taken steps to prevent any significant involvement by Mr D'Angelo. Mr D'Angelo says that this was an exclusion from participation in management, while Mr DiGrado says that he had in effect excluded himself.

13. Mr DiGrado's petition alleges:

> "*10. The relationship between the Petitioner and the 1st Respondent and his wife deteriorated from after the purchase of the hotel business. There being a difference of opinion as to whether to continue to run the business as a hotel or to sell the hotel for development. This divergence of opinion was contrary to the agreement between the parties that the business should be bought and run as a hotel business from the location of the Abbington Hotel.*
>
> *11. The 1st Respondent has by his conduct breached the terms agreed between the shareholders by which the Company should be conducted. In addition he has breached his duties of trust and good faith that he owes as a trustee and director to the Company.*"

Particulars are given of paragraph 11 under three headings. The first relates to the minute of the non-existent meeting and alleges:

> "..
>
> *11.2 The resolution above was false. No such meeting had taken place. No such decision had been made by the shareholders in meeting or otherwise.*
>
> *11.3 It is averred that the resolution was created by or with the knowledge and acquiescence of the 1st Respondent in circumstances where he knew that it was falsely representing the consent of the Company.*"

Under the second heading, misuse of the bank account, it is alleged that in November 2006 and March 2007 Mr D'Angelo withdrew sums of £7,425 and £8,860 from the company's account, and also paid a total of £2,463 to his wife supposedly as salary when she was not in fact an employee or providing any services. These payments are said to have been unauthorised and for the personal benefit of Mr D'Angelo or his wife, and not for the benefit of the company. It is now accepted by Mr DiGrado that the unauthorised amount of the withdrawal in November 2006 was £7,000. Allegations of harassment of the staff made under the third heading were abandoned in April 2009.

14. In the defence served on behalf of Mr D'Angelo, the underlying purpose was alleged as follows:

> "*(b) The purpose for which the hotel had been purchased was to redevelop the site as soon as a purchaser had been found and to continue to run the hotel as a business in the meantime in order to preserve cashflow to finance the bank borrowings ("the True Purpose").*
>
> *(c) The True Purpose was the idea of the First Respondent who had identified the site in 2005 while the Petitioner was living in Italy. The First Respondent explained the True Purpose to the Petitioner and invited the Petitioner to join the venture in November 2005 and the Petitioner agreed to the terms of and accepted the invitation to join the venture on the basis of the True Purpose.*"

As to the minute, it was admitted that the date and place were incorrect but the "resolution had in fact been made by the shareholders at a meeting on 13 July 2006 at the Three Moorhens Public House." More generally, it was alleged that Mr DiGrado had by his conduct breached the terms agreed between the shareholders with respect to "the True Purpose".

15. As regards the payments of £7,000 and £8,860, it is pleaded that the first of these was for the same amount as a withdrawal from the company's account by Mr DiGrado in November 2006 without Mr D'Angelo's knowledge or consent. Mr DiGrado accepts that he withdrew £7,000 without Mr D'Angelo's consent but says that he was entitled to do so by way of remuneration for his work at the hotel. As to the payment of £8,860, Mr D'Angelo pleads that he was aware that Mr DiGrado had received benefits in kind from the company in excess of £30,000 and that he calculated that £8,860 was the minimum share of entitlements to which he was entitled. As to the payments to his wife, he says it was agreed at the outset that Mrs DiGrado and Mrs D'Angelo would each receive salaries of £350 per month.

16. The defence goes on to allege unfairly prejudicial conduct on the part of Mr D'Angelo. In addition to the allegation that Mr DiGrado breached the agreed basis on which the company was established, a number of specific allegations are made. Some of these have not been pursued, but those which remain are as follows. First, the withdrawal of £7,000 in November 2006 was made without authority or justification. Secondly, Mr DiGrado has excluded Mr D'Angelo from the hotel and prevented him from accessing the company's books and has refused to disclose the financial or trading position of the company. He has prevented Mr D'Angelo from carrying out his duties as a director and "has treated the company as his personal fiefdom and as his private chattel to the prejudice of the other shareholders". Thirdly, Mr DiGrado removed the company's accountants and appointed new accountants without authority. Fourthly, Mr DiGrado has used food and drink paid for by the company for himself and members of his family, without paying for it. Fifthly, Mr DiGrado has allowed numerous members of his and his wife's families to stay free of charge at the hotel. Sixthly, Mr DiGrado has caused the company to cease the payment of rent for hotel annexe premises purchased personally by Mr DiGrado and Mr and Mrs D'Angelo.

17. These various allegations of unfair prejudice on the part of Mr DiGrado are relied on in the defence for a contention that even if Mr DiGrado established his case of unfair prejudice, he has disqualified himself from any relief by his own acts.

18. Much of this defence is reiterated in Mr D'Angelo's cross-petition, either in the same or in slightly different terms. The allegation of Mr D'Angelo's exclusion from management is expanded with some further details and is stated as progressive from August 2006 and complete from March 2007. The various matters relied on are alleged to have:

> "*(1) destroyed all trust and confidence between Mr D'Angelo and Mrs Urso on the one hand and Mr DiGrado and Mrs De Robbio on the other and all possibility that the business can be carried on like a partnership, and/or*
>
> *(2) put an end to the basis on which Mr D'Angelo and Mrs Urso, Mr DiGrado and Mrs De Robbio entered into association with each other and it is now unfair the association between them should continue.*"

There is also an allegation of deadlock because Mr and Mrs DiGrado will not conduct the affairs of the company with Mr and Mrs D'Angelo or hold company or board meetings.

19. The relief sought in the cross-petition is, first, the sale of Mr and Mrs DiGrado's shares to Mr and Mrs D'Angelo or to the company "at their actual value less the difference between the value which [Mr and Mrs D'Angelo's] shares in the Company would have had if the affairs of the Company had not been conducted in a manner which was unfairly prejudicial to them and their actual value". This would appear to involve a double discount for the reduction in value caused by the alleged unfair prejudice, but this does not matter now that Mr and Mrs D'Angelo have abandoned this relief. The alternative is an order that Mr and Mrs DiGrado purchase Mr and Mrs D'Angelo's shares "at the value which their shares would have had if the affairs of the Company had not been conducted in a manner which was unfairly prejudicial to them".

Background facts

20. Mr DiGrado and Mr D'Angelo had been, until their ill-fated business venture, close lifelong friends. As children they lived in the same street in Hitchin and have known each other for some 45 years.

21. In 1972 Mr DiGrado moved with his family to Italy where he lived until 2006. He and Mr D'Angelo remained close friends, seeing each other at least once a year. Mr DiGrado was Mr D'Angelo's best man and Mr D'Angelo is godfather to Mr and Mrs DiGrado's son.

22. Mr DiGrado's background was in hotels. His parents owned and ran a hotel in Hitchin and then two in Italy. He worked in the hotels, even as a boy, and he had his first managerial role in 1992 in his parents' hotel in Italy. He met his wife Sofia there. She was working as a chamber maid, and they married in 1994. She had no

connections with England. His relationship with his parents and family became difficult. It appears that they did not approve of his choice of wife. They have passed on their hotel to Mr DiGrado's sister and he was working there on a low salary.

23. Before 2006 Mr DiGrado had for some time wanted to return, with his wife and son, to live in England and thought that a hotel venture might be the best way to achieve this. He had discussed his hopes generally with Mr D'Angelo. He had also invested on a buy-to-let basis in four one-bedroom flats and one two-bedroom flat in or near Hitchin.

24. Mr D'Angelo has always lived in England, except for a period in 1989 - 1991. He and his parents bought and ran a guesthouse in the 1980s, and also bought a number of flats and houses which they refurbished and sold. In 1986 he and his wife bought a guesthouse which they ran for three years, together with a newsagents shop from 1987 to 1989.

25. In 1989 they sold both businesses and bought a hotel in Italy which Mr and Mrs D'Angelo ran until 1991 when they returned to England. As well as working for a charity, Mr D'Angelo invested in houses and flats for refurbishment and sale or letting. In 2004 he joined Acorn Estate Agents as a part-time property negotiator and continues to work there.

The agreed basis of the purchase of the hotel

26. In November 2005 Mr and Mrs D'Angelo went to stay with Mr and Mrs DiGrado in Italy. Shortly beforehand Mr D'Angelo had seen the Abbington Hotel for sale on an agent's website at £900,000. While staying with Mr and Mrs DiGrado, he showed it to Mr DiGrado. They discussed the possibility of purchasing it together but, as the website showed that it was under offer, they decided not to pursue it at that time. It was back on the market by the start of 2006 and Mr DiGrado came to England on 4 January 2006, staying about a week with Mr and Mrs D'Angelo. They viewed the hotel, and another larger hotel, and decided to pursue a purchase of the hotel. Mr D'Angelo's case is that it was agreed in discussions between them during these visits and remained at all times their agreement that the hotel would be purchased for a quick re-sale.

27. On 3 January 2006, Mr D'Angelo instructed Adrian Hicks of Foreman Laws, solicitors, at the beginning of January 2006, Mr Hicks emailed two colleagues, stating that "Tony is looking to buy [the hotel], then get planning and sell to a developer (who will demolish and reconstruct)" or alternatively sell it to a developer, conditional on planning consent. At that stage he was looking for advice, among other things, on whether the staff could be made redundant before completion.

28. It quickly became apparent that Mr D'Angelo was prepared to proceed with the purchase, even if residential redevelopment was not possible. This was the evidence of Colin Eades, an architect consulted by Mr D'Angelo. He noted on 10 January 2006 "Abbington – all systems go – buy as commercial even if nothing on residential". There was no suggestion of commercial re-development, which would not seem a likely prospect in a residential area, so "buy as commercial" can refer only to buying and running it as a going concern.

29. That Mr D'Angelo quickly envisaged that the hotel would be purchased and run as a going concern, although he might seek to obtain permission for residential development, was confirmed in a number of ways. While Mr Eades prepared some sketch plans for residential development following instructions in early January 2006, this was not pursued further by Mr D'Angelo. Mr Hicks emailed Mr D'Angelo on 9 January 2006:

> "*..I now gather that the purchase price will be £880,000 and you will be taking the Hotel on an unconditional basis. I gather that there are some employees and for all intents and purposes you will be purchasing not only the property but the business as well.*"

Mr Hicks' evidence was that in January 2006 it became clear that Mr D'Angelo wanted to run the hotel as a going concern, and was purchasing it for that purpose. Planning permission for residential development might be "the prize at the end of the day" but it would be run as a hotel for some appreciable time. The only time that Mr Hicks discussed development with Mr D'Angelo was early in January 2006, and then not again until late July 2006. The vendors' agent sent a memorandum of sale to the parties on 9 January 2006 which made clear that it was a sale of the business.

30. The basis and purpose of the purchase of the hotel as a going concern which would be run as such by Mr D'Angelo and Mr DiGrado was discussed at a meeting between Mr D'Angelo, Mr Hicks and Judith Farley of Mr Hicks' firm on 23 January 2006, when no mention was made of possible redevelopment. Mr Hicks emailed Mr D'Angelo the following day, dealing with various topics including:

> "*Shareholders agreement*
>
> *We identified at our meeting the need to regulate each shareholder's rights and responsibilities. In the absence of a formal shareholders agreement, disputes could arise concerning matters such as rights to sell or continue the business and the rights of parties to transfer shares and be "bought out". You will need to let me know what you agree in this regard should you require Foreman Laws to put the agreed terms into a formal agreement. This will in our view be essential to cater for how the shareholders will deal with a dead lock situation if one party wants to continue running the hotel and the other wants to sell the site. The last thing you will want is to get into a shareholders dispute that will be costly in legal fees.*
>
> *Service agreement*
>
> *If Mr Di Grado is to take on a managerial role at the hotel you may like to consider setting up a formal service agreement with him setting out his role and his entitlements.*"

If Mr Hicks' very sensible advice on the need for a shareholders' agreement had been taken, these lengthy and expensive proceedings would have been avoided. Unfortunately, Mr D'Angelo did not pass on this advice to Mr DiGrado.

31. In order to raise finance to fund the purchase of the hotel, it was necessary to prepare a business plan. In January 2006, Mr D'Angelo instructed Nicholas Furr, an accountant introduced by Mr DiGrado, to prepare a draft plan. Mr Furr raised a number of questions to which Mr D'Angelo responded by email on 27 January 2006, all of which were concerned with running the hotel as a going concern. Mr Furr finalised the business plan on 30 January 2006. It contains no suggestion that the hotel is to be purchased for resale as a development property. On the contrary, it very clearly represents that it is to be run as a going concern. It emphasises the experience of Mr D'Angelo and Mr DiGrado in the hotel and restaurant business, saying of Mr DiGrado that "we believe that his cooking and management skills will be invaluable to this project" and adding that the two of them "believe with their combination of business acumen and the ability to provide quality food they will be able to expand the existing business they are intending to purchase". It states that the company has been formed "with the sole purpose of buying and running the Abbington Hotel in Stevenage" and goes on to state that "upon purchase Abbington Hotel Limited intend to increase turnover and net profitability by undertaking" an increase in the quality of the restaurant food, gaining a tighter control over expenditure and doing more of the work themselves. Attention is drawn to major local developments in the following few years, such as the expansion of Luton airport, which "it is hoped will increase the room occupancy and restaurant sales". A cash flow forecast and profit and loss account for the year to 31 March 2007 is included in the business plan.

32. On Mr D'Angelo's instructions, Mr Furr sent the business plan on 30 January 2006 to NatWest Bank. Notwithstanding the contents of the business plan and of an email on 12 April 2006 from Mr Furr to Mr D'Angelo in which he suggests that support for Mr DiGrado at the hotel would be for the good of "the long term future of the business", Mr D'Angelo maintained in evidence that Mr Furr knew that he and Mr DiGrado were going to buy the hotel in order to sell it to a developer. There is no other evidence to support this and Mr D'Angelo did not call Mr Furr to corroborate it. I reject Mr D'Angelo's evidence on this.

33. In February 2006, discussions proceeded with Lloyds TSB Bank plc, rather than NatWest, for a loan. The business plan was given to Lloyds and to the valuers instructed by Lloyds. The valuation of the property was prepared on a going concern basis. It is clear that the valuers relied on the business plan and proceeded on the basis that Mr D'Angelo and Mr DiGrado were purchasing in order to run a hotel and restaurant business. For example, their report states:

> "*14.10 We note that your customer proposes to take a more 'hands-on' approach to the running of the hotel and indeed it is our opinion that, bearing in mind the nature and size of the business, it would be more suitable to an owner operator, rather than a management run style of operation. If such an approach was taken, clearly there would be a reduction in wage costs as reflected in your customer's financial projections.*

> *14.11 We consider that there is opportunity to revitalise the business and note that your customer proposes to improve the quality of restaurant food and promote this side of the business to attract non residents. Also, there is the opportunity to reintroduce wedding catering and attract other private functions, together with the possibility of business conferences. Taking account of this, together with the revised room tariffs as discussed earlier, your customer anticipates an increase in turnover to £319,914 with a net profit for finance costs of £181,746.*"

34. Lloyds agreed to provide a 20-year loan of £450,000 secured on the hotel. Christopher Dummett, a Lloyd's commercial bank manager and the relationship manager for the company, gave evidence. He was clear that the loan was made for the purpose of enabling the company to purchase the hotel, with a view to it then being run as a going concern. There was no suggestion that it would be purchased in order then to sell it for development. If that had been the purpose, and assuming that Lloyds would have been prepared to make a loan on that basis, it would have been a short-term loan of 6-18 months, at a higher interest rate or with larger arrangement fees. The property valuation prepared for the bank was on the basis of a going concern. A different valuation would have been required if the intention was to sell it for redevelopment.

35. Mr Dummett met Mr D'Angelo and Mr DiGrado for the first time at the hotel on 9 May 2006. Far from any suggestion that they might sell the hotel, they told Mr Dummett that the hotel was a long term investment and an on-going business for all concerned. They told him of an intention to upgrade the hotel.

36. It therefore came as a surprise to Mr Dummett when in August 2006 he received notification that the company had decided to sell the hotel.

37. I accept Mr Dummett's evidence. Indeed it was not for the most part challenged. Mr D'Angelo's evidence was that he did not correct the impression given by the business plan of the purchase as a long-term business investment, to which the valuation report for Lloyds referred at some length, and that he did not disclose any plans to sell it quickly to a developer, because he knew that either Lloyds would not make a loan at all or the finance offered by Lloyds would be more expensive and he and Mr DiGrado would not be able to afford it. Unless he put it forward as a going concern purchase, he knew that the hotel would not be purchased at all.

38. The purpose of the purchase had a significant impact for VAT purposes. As Mr D'Angelo knew, if the hotel was purchased for resale to a developer, VAT would be chargeable on the purchase price, but this would not be the case if it was purchased with a view to running it as a business. The company registered for VAT and prepared its returns on the latter basis. Mr D'Angelo's justification for this was that they had no developer or other purchaser lined up to buy the hotel and they would carry on the hotel business until a purchaser was found, but the intention was to find a purchaser as soon as possible.

39. Mr Hjertzen was not professionally involved with the company before the hotel was purchased, but as Mr D'Angelo's accountant they discussed it. Mr D'Angelo's

evidence was that he told Mr Hjertzen that the purpose of the purchase was to sell on the property as quickly as possible. This was denied in evidence by Mr Hjertzen. He said that the first time that Mr D'Angelo mentioned development of the property, or a sale to a developer, was in July 2006 but later qualified this, consistently with his witness statement, to say that in late 2005 and in March 2006 Mr D'Angelo had told him that the aim was to find a purchaser but in the meantime to run the hotel as a going concern. Nonetheless, Mr Hjertzen "was surprised when I found out that Tony and Mr DiGrado intended to sell the Hotel so quickly after purchasing it". If Mr D'Angelo's intention was immediately to find a purchaser, he certainly did not tell Mr Hjertzen. Mr Hjertzen recorded in a note of a telephone conversation with Mr D'Angelo on 12 July 2006 that he needed to "hear the reasons as to why the intention should swing from running a hotel on a commercial basis to redevelopment in a matter of months". In fact, Mr Hjertzen and Mr Hicks shared the understanding that the hotel was bought to be run as a business, not sold for redevelopment. In an email dated 7 August 2006 to Mr Hjertzen, Mr Hicks wrote:

> "*I am grateful for you confirming that Tony also instructed you to deal with this as a TOGC. He certainly did to me. He basically said the same thing to the two of us i.e. he wanted to make a go of it hence his Italian partner coming over (a man experienced in the running of these things) and him taking on the employees and spending £40,000 on fixtures and fittings.* "

40. In April 2006 Mr DiGrado came to England and started working at the hotel. Mrs DiGrado followed later. While there is some dispute as to whether she was living for some time at the hotel in June 2006 or only later, it is clear that she and their 13-year old son moved to England in July 2006. They had waited until the end of the school year in Italy before moving on a permanent basis. They took steps with Mrs D'Angelo's help to find a school for their son in England, for the new school year. There was no reason for Mr DiGrado to move with his family to England if the plan was to sell the property to a developer as quickly as possible. Even if the intention had been to run the hotel until a sale was quickly arranged to a developer, there was no purpose in moving his wife, and more particularly his son, on a permanent basis to this country.

41. Mr D'Angelo relies on the contacts he made with two developers soon after the purchase and the interest shown by them. Representatives of two developers, Callaghan Homes and Wheatley Homes, visited the property on 5 May 2006 and 8 May 2006 respectively. Both made follow-up visits with their architects in the following weeks and met both Mr D'Angelo and Mr DiGrado at the property.

42. Mr DiGrado recalls these visits in May 2006 and recalls the representative of Callaghan Homes explaining how a development might proceed. Mr Simon Woods, the representative of Wheatley Homes, gave evidence and remembers a discussion he had on his visit to the property with Mr D'Angelo, to which Mr DiGrado listened. While Mr DiGrado denied any conversation with Mr Woods, it may well be that he has confused the two conversations. Since he accepts the conversation to similar effect with, as he thinks, the Callaghan Homes representatives, this difference in recollection is not especially significant.

43. Mr DiGrado says that he was interested to hear what the developer said and would have contemplated a sale at a sufficiently high price, but he did not regard £1.2m as anything like enough. It would produce a profit after tax of about £85-90,000 for each of Mr D'Angelo and himself, which he did not regard as a sufficient exchange for his livelihood in running the hotel. The hotel was, he believed, in a good position and it would not be easy to find an alternative.

44. On the totality of this evidence, I am satisfied that Mr DiGrado and Mr D'Angelo agreed to purchase the hotel with a view to running it and improving it as a going concern. They would aim to sell it after a period of years in which they would, they hoped, have built up and enhanced the business, and so be able to sell it at a good price. Mr DiGrado was always willing to consider a very good offer, from a developer for example, but it was not their agreement or understanding that they would aim to sell it quickly.

45. Mr D'Angelo would have the court believe that while he presented the intention of the purchase to his solicitors and HMRC as being to carry on the business as a going concern, so as not pay VAT on the purchase price, and to Lloyds Bank, so as to obtain the necessary funding, his true intention in common with Mr DiGrado was to sell the property at a profit as soon as possible.

46. Whatever Mr D'Angelo's private views may have been, I am satisfied that the agreement or understanding with Mr DiGrado was as described by Mr DiGrado. His understanding, and his agreement with Mr D'Angelo, was consistent with the picture presented to the solicitors, HMRC, Mr Furr, Mr Hjertzen and Lloyds Bank. Mr DiGrado accepts that in the discussions, in November 2005 or perhaps very early in January 2006, the possibility of purchasing the hotel with a view to a quick re-sale was briefly considered as an option, but I am satisfied that not only was this objective not agreed by Mr DiGrado but that after only a very short period it became the common understanding of Mr DiGrado and Mr D'Angelo that the hotel should be purchased for the purpose of running it as a going concern and developing its business, with a view to a sale in due course. Mr DiGrado did not rule out the possibility of an earlier sale, but only at a very good price.

47. It is against the background of this agreement between Mr D'Angelo and Mr DiGrado that the events of, and leading up to, July – September 2006 must be seen.

April – July 2006

48. Following completion of the purchase and Mr DiGrado's move to England in April 2006, relations between him and Mr D'Angelo deteriorated. It is unnecessary to explore the precise causes and indeed, in closing, both counsel agreed that the evidence did not provide any clear answer. One feature which undoubtedly played its part and which is relevant to the course of subsequent events was a disagreement as to the appropriate extent of their involvement in the day to day management of the business.

49. Mr DiGrado's case is that they agreed that both of them would be actively engaged on a day to day basis. However, when Mr DiGrado moved to England, he found that while he devoted his time to the hotel including acting as the night porter so requiring him to live in one of the rooms there, Mr D'Angelo continued to work at Acorn as

much as he had done before and did little at the hotel apart from going through the financial records.

50. Mr D'Angelo's case is that it was unnecessary for either of them to work full-time in the business, which in any event could not bear the cost of two directors' salaries. The business had been managed under its previous absentee owners by a competent manageress, Ms Sandra Farrow, and her employment was continued after the purchase.

51. The business plan presented to the bank is consistent with Mr DiGrado's account, referring to the two of them "doing more of the work" themselves and their backgrounds in hotel and restaurant businesses. This was itself based on what Mr D'Angelo had told Mr Furr in his email of 27 January 2006:

> "*Frank and I will be there to do all that is needed, therefore saving on all wages apart from a couple of chambermaids at minimum wage per hour.*"

52. The budget includes monthly salaries for each of them. The bank's valuation report noted that they "proposed to take a more 'hands-on' approach to the running of the hotel". It was originally intended that Ms Farrow would resign but in the event she continued in her employment.

53. I am satisfied that Mr DiGrado moved to England in April 2006, in the belief encouraged by Mr D'Angelo that each of them would devote a substantial amount of time to the business, and in particular that he would be working in it on a full-time basis. Again I find it difficult to understand why else he would have moved, and on arrival that is precisely what he proceeded to do. There is a telling email sent on 12 April 2006 by Mr Furr to Mr D'Angelo, referring to a call from Mr DiGrado who is "getting stressed" and continuing:

> "*I think it is just a case of hand holding until he gets settled and picks up how things are done in the UK. Although it may cost a little in lost wages at Acorn, I feel as a support exercise and the long term future of the business that you should organise a couple of days off Acorn.*
>
> *You will not be able to achieve any more by being at Abbington, in fact it may put your workload behind, but it will show Frank that you care (which I know you do).*"

Although Mr DiGrado worked on a day to day basis at the hotel, Mr D'Angelo refused to agree that he should receive any remuneration.

54. The disagreements between Mr D'Angelo and Mr DiGrado were such that by early July 2006 Mr D'Angelo had decided that the best way out was to arrange a sale to Callaghan Homes or Wheatley Homes. This may have been why he invited them to the property in May 2006 but in any event the idea had become firm by early July. He spoke on 12 July 2006 to Mr Hjertzen whose note of the conversation includes:

> "*Following his call into the office last week to tell me that he was not getting on very well with his co-director and for general advice on how he should proceed things have moved on apace.*
>
> *The situation seems to be that he has had two offers to develop the site.*
>
> *When he first acquired the hotel the original intention was to develop but the time span on this was to be relatively long. Accordingly the intention was that he would run the hotel as a going concern and that his friend from Italy who is a co-director and shareholder would spend part of his time managing it.*
>
> *I understand from Tony without knowing the figures that the deal suggested by one of the developers at least is very attractive and is something that is clearly of interest to Tony. However, he is concerned as to the taxation implications of this especially with regard to VAT.*
>
> *He has had a meeting with his solicitor who has told him that there could be problems, without specifying what these might be; but by going on to say that they can be sorted out, again without going into detail! It seems that the thrust of the lawyer's argument is that the capital goods scheme, should this apply, can be circumnavigated because the redevelopment is the only way forward to get out of the managerial/personality problems facing the shareholder/directors.*"

Meeting on 13 July 2006

55. Mr DiGrado was in Italy from 19 June to 10 July 2006, when he returned with his wife and son. Mr D'Angelo and Mr DiGrado arranged to meet with their wives at a local pub, The Three Moorhens, on 13 July 2006.

56. The discussion at the pub covered two important topics. Mr DiGrado raised his concern that he needed an income from the business. Mr D'Angelo raised the topic of a sale of the property. As to remuneration, Mr D'Angelo refused to agree that Mr or Mrs DiGrado should be paid a salary. He suggested instead that the company should pay a dividend of £3,500 to each family. Mr DiGrado says that he regarded this as unfair because he felt that he had been doing most of the work but reluctantly agreed to it because he needed the money. I accept this evidence. It is not in dispute that the dividend was agreed. Mr D'Angelo also suggested that each of their wives be paid a salary of £351 per month, although Mr D'Angelo did not envisage that either of them would work in the business. It was always his view that they should not do so. Again Mr DiGrado agreed to the payment of these salaries, as a means of obtaining some income but I accept his evidence that he did not think that Mrs D'Angelo should be paid if she was not going to work in the business.

57. Mr D’Angelo raised the topic of a sale of the hotel. Mr DiGrado says that this came up towards the end of the meeting and that Mr D’Angelo mentioned that there were people interested in buying the hotel for £1.2m. He strongly denies that he agreed to any such sale, and says that on the contrary he would not agree a sale at that price because it would not produce a sufficient profit.

58. Mr D’Angelo’s case is that they agreed at the meeting to sell the hotel for £1.2m. In his first affidavit in Mr DiGrado’s petition, made on 15 June 2007, he said that they agreed to a sale to Wheatley Homes for £1.2m. He corrected this in his witness statement dated 15 November 2010, saying that on 13 July 2006 they only had an oral offer from Callaghan Homes for £1.2m, but Mr Woods of Wheatley Homes had indicated to him that they would be willing to make a similar offer. Mr D’Angelo says in the witness statement that at the meeting the four of them agreed to go with the highest offer, all being agreed to the principle of a sale.

59. On 30 September 2010 Mr D’Angelo disclosed for the first time a handwritten note of the meeting. In his witness statement dated 15 November 2010 Mr D’Angelo said that it was prepared in about December 2006, having taken legal advice. He and his wife wrote down “what we could remember of the meeting”. The original was given to their then solicitors. As regards the sale of the hotel, the minute states:

> “*Mr D’Angelo said that Callaghan Homes had made an offer to buy Abbington Hotel and he was also waiting for a final offer to come through from Wheatley Homes. Mr D’Angelo proposed that we should proceed with whichever offer was the best. Mr and Mrs D’Angelo and Mr and Mrs DiGrado agreed to accept the best offer for the business*”

60. It is notable that this account is at odds with the account he gave in his affidavit made six months after the minute, in June 2007.

Offers for the property

61. It was not until two weeks later, by a letter dated 27 July 2006, that Callaghan Homes put forward in writing a price of £1.2m but it was not an offer to purchase. Callaghan Homes proposed the grant to it for £100 of an option to purchase at £1.2m. I found unconvincing Mr D’Angelo’s evidence that he did not understand these “technicalities”, given his experience with property and his job as a property negotiator.

62. On 3 August 2006, Simon Woods of Wheatley Homes wrote to Mr D’Angelo not with an offer matching Callaghan Homes’ offer, but with an offer to purchase the hotel for £1.1m, subject to contract and board approval, and subject to satisfactory detailed planning consent. Mr Woods’ evidence, which I accept, is that he would have spoken to Mr D’Angelo before sending the letter either on the same day or within a few days beforehand. Mr Woods also said that fairly promptly after receipt of the letter Mr D’Angelo rang to say that he had received another offer at a similar level and that Wheatley Homes would need to offer more. This led to an increased offer of £1.2m, subject to the same conditions as before, contained in a letter dated 15 August 2006. Mr Woods rang Mr D’Angelo with details of the increased offer on the

same day as the letter. Both letters were addressed to Mr D'Angelo at Acorn, at his request.

1 August 2006

63. On 1 August 2006, Mr and Mrs DiGrado went to see Mr D'Angelo at Acorn's office following an acrimonious telephone conversation between Mr DiGrado and Mr D'Angelo. The visit was unannounced and, according to Mr and Mrs DiGrado, its purpose was to obtain the company's chequebook so that the staff could be paid. The meeting was very bad-tempered. It is unnecessary to go into any detail, but it is clear that all three of them said some very unfortunate things. Its principal significance is that it marked a new low in their relations.

64. Mrs DiGrado rang Mrs D'Angelo after the meeting. She was very upset and, according to Mrs D'Angelo, she got very angry and said that she could not wait for them to sell to the builders and go their separate ways. Mrs DiGrado denied saying this but Mrs D'Angelo's evidence was not challenged in cross-examination. Mrs D'Angelo's evidence was that Mrs DiGrado was hysterical and shouting during the conversation, and it was difficult to make out what she was saying.

August 2008: progress of the sale of the hotel

65. On 1 August 2006 but before this meeting, Mr Hicks emailed Mr D'Angelo with advice on the VAT position if the hotel were sold to Callaghan Homes, whose letter dated 27 July 2006 Mr D'Angelo had sent to Mr Hicks.

66. Mr Hicks and Mr Hjertzen spoke on 7 August 2006, following which Mr Hicks wrote as follows to Mr Hjertzen:

> "*It was useful to speak to you just now. I am surprised Tony didn't tell me about the "falling out". I had the impression this was a friendly relationship and that the two of them had decided to sell the property under option. I am now suspicious about whether or not Frank actually knows that Tony is negotiating with a third party. Heaven knows (without the benefit of a shareholders' agreement) how they're going to resolve this if Frank and his wife wish to go ahead with the business. I recall Judith mentioning to Tony about the possibility of a SHs agreement but he didn't instruct us to proceed with it.*"

67. Neither Mr Hjertzen nor Mr Hicks contacted Mr DiGrado to find out whether in fact he knew about Mr D'Angelo's negotiations to sell the hotel.

68. On 11 August 2006, Mr D'Angelo had a meeting with Mr Hjertzen and Mr Hicks to discuss the sale of the hotel. Although the meeting was with them as respectively the company's accountant and solicitor and concerned a proposed sale by the company, Mr DiGrado was not notified of the meeting. They discussed the offers for the hotel and the differences between options and conditional contracts. Mr Hicks left after about 20 minutes and I accept his evidence, disputed by the others, that he was asked by them to do so.

69. Mr D'Angelo wanted to discuss with Mr Hjertzen his difficulties with Mr DiGrado. He told Mr Hjertzen that he was not happy with the way that Mr DiGrado was running the hotel and felt it was unfair that Mr DiGrado and his family were living at the hotel and consuming food and drink purchased by the company. Their evidence is that it was left that Mr Hjertzen would write to Mr DiGrado about Mr D'Angelo's concerns. There was no discussion during this meeting as to whether Mr DiGrado knew of the proposed sale nor of any steps which might be taken to keep him informed.

70. On 15 August 2006 Mr Woods of Wheatley Homes spoke to Mr D'Angelo and told him of the new offer at £1.2m. Matters then proceeded quickly. On the same day Mr Hicks wrote to the bank to say that he was in the process of selling the property and requesting the title documents. Cheryll Whittaker of his firm was instructed on behalf of Wheatley Homes and on 16 August 2006 they emailed each other to clear any conflicts issues and to discuss the terms of the planning consent condition.

71. On 16 August 2006 Mr Hicks also spoke to Mr D'Angelo and advised him that there would need to be a resolution of the company to authorise the sale. Mr D'Angelo did not tell Mr Hicks that agreement had been reached over a month earlier on 13 July 2007, which he might be expected to have done if he believed that agreement had then been reached. Mr Hicks drafted a minute as follows:

> "*MEETING OF THE SHAREHOLDERS OF ABBINGTON HOTEL LIMITED*
>
> *Those present: [please fill in details]*
>
> *It was resolved by a majority of [ ] that Antonio D'Angelo be authorised to sign the Contract relating to the sale of premises at 23 Hitchin Road Stevenage and that [ ] and Antonio D'Angelo be authorised to sign the Transfer document in relation to the said sale.*
>
> *The sale will be to Wheatley Homes Limited at a price of £1.2m.*"

72. On 17 August 2006, Mr D'Angelo completed the minute. Under the first line ("meeting of the shareholders of Abbington Hotel Limited") he wrote in "at 23 Hitchin Road, Stevenage, Herts on Thursday 17 August 2006 at 13.30 hrs". He recorded his wife and himself and Mr and Mrs DiGrado as being present, and the resolution as being passed 4 to nil. He filled in Mr DiGrado's name as the second authorised signatory on the transfer. In fact, no such meeting took place.

73. Mr D'Angelo went on holiday with his family on 20 August 2006, before a draft contract had been supplied to or agreed with Wheatley Homes.

74. NatWest Bank had sent a letter dated 15 August 2006 to Mr D'Angelo at the hotel, referring to his negotiations with Callaghan Homes and confirming that in principle the bank had agreed to fund the purchase at £1.2m. Mr DiGrado saw this letter and later rang Mr Callaghan to tell him that he was not interested in selling the hotel.

75. On or about 21 August 2006 Mr Dummett at Lloyds Bank rang Mr DiGrado for his consent to release the title documents to Mr Hicks, so as to progress the impending sale of the hotel. Mr Dummett's evidence, which I accept, of Mr DiGrado's reaction is:

> "*During the course of a telephone conversation between Mr DiGrado and me in about the third week of August 2006 it became apparent that Mr DiGrado did not have any knowledge of the impending sale of the Hotel. In fact, he appeared clearly shocked by my mentioning a sale of the Hotel. Mr DiGrado informed me that no meeting had taken place between the shareholders and or no resolution had been passed for the sale of the Hotel. Mr DiGrado advised me that he had not given authority for a sale of the Hotel to proceed.*"

76. On 25 August 2006 Mr Hjertzen sent to Mr DiGrado the letter, which he had agreed with Mr D'Angelo on 12 August 2006, setting out concerns at the way in which the hotel was being managed. Mr DiGrado had never met Mr Hjertzen and reacted strongly to this letter, believing that Mr Hjertzen was in truth acting for Mr D'Angelo.

77. Mr DiGrado met Mr Hicks on 31 August 2006. Mr Hicks gave him a copy of the minutes signed by Mr D'Angelo. Mr DiGrado told Mr Hicks that no meeting had been held on 17 August 2006 and that there had been no agreement between Mr DiGrado and Mr D'Angelo to sell the hotel.

78. This unquestionably marked the end of any business relationship between Mr DiGrado and Mr D'Angelo. Mr DiGrado considered himself cheated and betrayed by Mr D'Angelo's activities in August 2006 with a view to a sale. Mr Hjertzen arranged for them to meet with him on 20 September 2006. His assistant took a full note of the meeting and his own impression of the meeting in his witness statement is illuminating:

> "*There was quite a lot of jumping up and down and a certain degree of black humour between Tony and Mr DiGrado. Accusations were made by both Tony and Mr DiGrado although not so much about anything specific, just general personality traits. They behaved very childishly in many ways. Once again their positions moved back and forth a lot and there seemed to be quite a lot of competitiveness between them.*"

79. The note discloses a considerable amount of detailed discussion about many aspects of the business and it is obvious that they were unable to agree about anything. While it would appear that at the meeting Mr DiGrado indicated a willingness to purchase Mr and Mrs Angelo's interests on the basis of a value of £1.2m for the hotel, he was not in the event willing to pursue it.

80. In trying to trace the deterioration in relations between Mr D'Angelo and Mr DiGrado, Mr Griffiths submitted that it had broken down by 1 August 2006 and that the false resolution was not the cause of the breakdown. Plainly there were a number of contributing factors and a scientific analysis of the precise moment of the

breakdown is impossible. Nonetheless I am satisfied that Mr D'Angelo's conduct in seeking to progress a sale of the hotel and his production of the false minute caused the breakdown in relations to be irretrievable.

Findings as regards Mr D'Angelo's actions in August 2006

81. The critical issue is whether, in negotiating a sale of the hotel, instructing solicitors for that purpose and completing and signing the minute of 17 August 2006, Mr D'Angelo was giving effect, or genuinely thought he was giving effect, to an agreement reached at the Three Moorhens on 13 July 2006 or whether he was set on a course to negotiate a sale behind Mr DiGrado's back.

82. I have concluded that it is the latter. I am satisfied that Mr DiGrado did not agree to a sale on 13 July 2006, or at any other time. First, it was contrary to the understanding on which the hotel was purchased, that they would run and develop the hotel with a view to a sale in due course. Secondly, the fact that Mr D'Angelo has put forward a false case on the issue of that understanding to provide a rationale for an alleged decision in July 2006 to sell, tells against him. Thirdly, I find it entirely plausible that Mr DiGrado would not find the profit resulting from a sale at £1.2m as sufficient to justify an end to the original arrangement, which had involved the relocation of himself and his family to England. Fourthly, it is clear from Mr Dummett's evidence that Mr DiGrado was genuinely shocked when told that Mr D'Angelo had agreed a sale to Wheatley Homes at £1.2m. Fifthly, Mr D'Angelo's evidence as to any agreement reached on 13 July 2006 has been inconsistent.

83. Finally, I should say that I do not think that any weight can be placed on what Mrs DiGrado may have said in the course of a hysterical telephone call to Mrs D'Angelo on 1 August 2006. It provides no solid support that an agreement to sell was reached on 13 July 2006.

84. I am further satisfied that Mr D'Angelo did not believe that in August 2006 he was putting into effect what he thought had already been agreed. The factors mentioned above are relevant to this, too. Additionally, if that is what he genuinely thought, it is surprising that no steps were taken to inform Mr DiGrado. Even if he could not himself speak to Mr DiGrado, he could have written to him about it or asked Mr Hicks or Mr Hjertzen to do so. The false minute of 17 August 2006 was, in my judgment, a deliberate attempt to mislead Mr Hicks into believing that Mr DiGrado had agreed and authorised the sale when in fact he had not done so. To go so far as to fill in the time of a meeting which never happened is some measure of the extent of deception to which Mr D'Angelo was willing to go.

85. Neither Mr D'Angelo nor Mr DiGrado, nor indeed their wives, were entirely satisfactory witnesses, but on both the understanding as to the basis of the purchase of the hotel and the events of July-August 2006 I found Mr D'Angelo to be particularly unconvincing. Mrs D'Angelo supported her husband's account of the conversation at the pub on 13 July 2006, but she accepted that her recollection depends on the note of 13 December 2006 which was prepared by Mr and Mrs D'Angelo jointly. She has no interest in business matters and it was clear from her oral evidence that she had no substantial recollection of the discussion concerning offers for the hotel. I cannot place much weight on her evidence.

September 2006 – March 2007

86. From September 2006 onwards there are few material disputes of fact. In early September 2006, Mr DiGrado changed the company's internet banking password to prevent Mr D'Angelo having on-line access. Mr D'Angelo made clear that he intended to retain the company chequebook and paying-in book in his possession. In early October 2006, Mr DiGrado demanded that he and his wife should be paid remuneration of £250 and £150 per week for their work, which he put as being 80 hours and 70 hours per week respectively, back-dated to 7 April and 7 August 2006, that no remuneration should be paid to Mrs D'Angelo because (as was the case) she did not work in the business, and that no further dividends should be paid before the end of the year. He was willing for Mr D'Angelo to be paid at the same hourly rate of £4 which he attributed to himself. Mr D'Angelo rejected all these demands, and was not willing for Mr DiGrado to receive any remuneration, except such dividends as might be agreed. Mr Hjertzen advised Mr D'Angelo on 5 October 2006 that "if Frank insists on his wages, then I don't think these can be stopped but that conversely, Frank cannot really stop anything that Tony wants to do".

87. In November 2006 Mr DiGrado procured the company to pay him £7,000, by way of remuneration for the previous seven months. Mr D'Angelo responded on 17 November 2006 by drawing the same amount from the company.

88. On 5 March 2007 Mr D'Angelo paid himself £8,860. His explanation in evidence for doing so was that Mr DiGrado had been using the hotel to accommodate not only himself and son but various members of his and his wife's families and this was in effect a balancing payment to himself.

89. It is undoubtedly the case that relations of Mr and Mrs DiGrado stayed at the hotel from time to time. Mrs DiGrado denied that she or her family or relatives who stayed normally consumed food and beverages paid for by the hotel. She did her own buying and cooking, using so far as possible the ingredients she used in Italy. It is impossible to come to any firm conclusion about this, but it is to be noted that in expert evidence on the valuation issue filed on behalf of Mr and Mrs DiGrado, the expert had allowed £460 per month as the cost of food and beverages consumed by them but paid for by the company. The expert believes that she was given those figures by Mr and Mrs DiGrado's solicitors. She allowed a figure of £900 per month for accommodation occupied by Mr and Mrs DiGrado, as an allowance against a notional joint monthly salary of £3,500.

Exclusion of Mr D'Angelo

90. It is Mr D'Angelo's case that from September 2006 he was progressively excluded from participation in the management of the company.

91. There is really no dispute about the primary facts on which the allegation of exclusion is based. Mr DiGrado accepts that while Mr D'Angelo was away in early September 2006, he changed the password for internet access to the company's bank account, although Mr D'Angelo was able to obtain his own password from the bank. Mr D'Angelo retained the company's chequebook and paying-in book but Mr DiGrado was able to obtain new ones from the bank. In November 2006 Mr DiGrado changed the password on the company's Excel spreadsheets containing its financial records.

In February 2007 Mr DiGrado caused the bank to freeze its account and instead used a dormant joint account in the names of his wife and himself for all company transactions. Mr DiGrado ignored Mr D'Angelo's requests to be supplied with statements for this account or other information about the financial position of the company. Mr D'Angelo had continued to attend the hotel two or three times a week to go through bookings, invoices and so on. Mr DiGrado avoided contact with him on these visits. In March 2007, Mr DiGrado changed the locks to the office to deny Mr D'Angelo access. When Mr D'Angelo attended on 25 March 2007 and found the office door open, he went in and looked at papers, which led to a very unpleasant scene with Mrs DiGrado.

92. In the meantime, Mr DiGrado was running the business and causing the company to incur expenditure on refurbishment of the hotel, without consultation with Mr D'Angelo.

93. Mr DiGrado accepts that the original arrangement was that he and Mr D'Angelo would be entitled to equal participation in the business of the company. His view was that by his conduct in August and September 2006 and by his cash withdrawals in November 2006 and March 2007, Mr D'Angelo had terminated the arrangement with the result that he, Mr DiGrado, was entitled to run the company as in effect the only director. Mr D'Angelo had "permanently shattered my trust and confidence in him as both a director and shareholder of the Company and as my friend".

94. By reason of the admitted breakdown in the relationship between Mr D'Angelo and Mr DiGrado and their agreement that a means should be found to bring it to an end, as well as Mr DiGrado's belief that Mr D'Angelo could not be trusted, Mr DiGrado's position as pleaded in his defence to Mr D'Angelo's petition was a denial:

> "*that on and after 4 April 2007, alternatively 21 June 2007, Mr D'Angelo intended or was entitled, legitimately or otherwise, to exercise the powers and duties as director for and on behalf of the Company or intended or was entitled to exercise any powers of management for and on behalf of the Company.*"

95. Mr DiGrado expanded on this in his witness statement filed in Mr D'Angelo's petition:

> "*Following the presentation of my Petition in 2007, I refused to allow Mr D'Angelo and Mr Hjertzen and Mrs Urso unlimited access and disclosure of the Company's books and records. As well as my not trusting Mr D'Angelo he had, by this time, also indicated to me that he was prepared to sell his shares to me. As a result of this, there was no need for Mr D'Angelo to see the Company's books and records to enable him to discharge his duties as a director, as he had no duties as a director to discharge. Given his actions I considered that he had no duties left to the Company.*"

96. Mr DiGrado made his position clear in his oral evidence, in somewhat startling terms. He agreed that since March 2007 Mr D'Angelo had been totally excluded from the company, that salaries paid in the three years to 31 March 2010 had not been agreed

with Mr D'Angelo ("Of course not") and he had signed the accounts and directors' reports for those years on behalf of the board without any notice to Mr D'Angelo or his agreement, adding "I am the board of directors, OK". Mr DiGrado did not even send the accounts to Mr and Mrs D'Angelo. He knew that shareholders were entitled to be sent copies of the accounts but said "I do not consider them as directors or shareholders".

97. No doubt allowance has to be made for answers given under pressure of cross-examination, and Mr DiGrado showed that he could be excitable and prone sometimes to exaggeration. Nonetheless, I am in no doubt that from March 2007 he considered that Mr D'Angelo had forfeited any right to be treated as a director of the company, and acted on that view.

Summary of findings of fact

98. By way of summary, my findings of fact on relevant issues are as follows:

1. The basis on which Mr D'Angelo and Mr DiGrado agreed to purchase the hotel through the company was that they would run it as a going concern, refurbish and improve its facilities and develop the business, with a view ultimately to its sale. I reject Mr D'Angelo's case that it was purchased with a view to a sale at a profit for development as quickly as possible.

2. It was agreed that both Mr D'Angelo and Mr DiGrado would undertake duties in the hotel, with Mr DiGrado being in charge of its day to day running. While Mr D'Angelo would not work full-time for the hotel, at least in the first instance, it was envisaged that he would provide significant support.

3. It was understood that Mr D'Angelo and Mr DiGrado would receive remuneration from the company. This was particularly important for Mr DiGrado who would not have any other paid work and who needed to show an income if he was to obtain a mortgage loan to purchase a house.

4. By July 2006 Mr D'Angelo had decided to seek a sale of the hotel for development. He regarded a price of £1.2m, subject to planning permission, as satisfactory. He saw a sale as a solution to growing difficulties with Mr DiGrado. Both contributed to the difficulties, but a very significant factor was Mr D'Angelo's refusal to provide support in the hotel or to agree to the payment of a salary to Mr DiGrado.

5. At the meeting at the Three Moorhens on 13 July 2006, there was no agreement to sell the hotel for £1.2m or for any other price, as Mr D'Angelo knew.

6. Mr D'Angelo acted knowingly in breach of the understanding on which the hotel had been purchased and without authority when he sought to agree a sale with Wheatley Homes and instruct solicitors to progress the sale on behalf of the company. As part of that process he completed and signed the false minute of 17 August 2006, knowing both that the minute was false and that it did not reflect any agreement with Mr and Mrs DiGrado. Its purpose was to lead Mr

Hicks, the company's solicitor, into believing that the sale was duly authorised and that he could therefore properly act for the company.

7. Mr D'Angelo's conduct in relation to a sale destroyed the trust and confidence between him and Mr DiGrado which underpinned their original arrangement and without which the company could not function as had been intended. Although Mr D'Angelo professed that he was then committed to running the business as a going concern, this was not in truth his intention, as demonstrated by his opposition to expenditure on the hotel and to the payment of an income to Mr DiGrado.

8. Mr DiGrado paid himself £7,000 in November 2006, believing that he ought to be paid a salary but knowing that he did not have authority to draw it. Mr D'Angelo's payment of the same sum to himself was motivated by a desire to balance the payments, but equally, as he knew, was unauthorised.

9. Mr DiGrado was accommodating members of his own and his wife's families at the hotel for no payment and was consuming at least some food and drink paid for by the company. This was not agreed with Mr D'Angelo.

10. Mr D'Angelo's payment of £8,860 to himself in March 2007 was, as he knew, unauthorised. His motive was to balance benefits which he believed Mr DiGrado was taking.

11. Mr DiGrado excluded Mr D'Angelo from any involvement in the company from March 2007, having taken some steps in that direction since September 2006.

12. Since late 2006 the company has been deadlocked, although Mr DiGrado has in fact run the hotel, and since then there has been no prospect of Mr D'Angelo and Mr DiGrado working together.

Grounds of unfair prejudice

(1) Original purpose and the events of August 2006

99. It will be convenient to take together the various grounds of unfair prejudice relied on in both petitions, in chronological order. As regards the period up to September 2006, Mr DiGrado relies on two grounds, which are closely linked. First, Mr D'Angelo acted in breach of the agreement or arrangement with Mr DiGrado that the hotel would be bought and run as a hotel business. Secondly, Mr D'Angelo created the resolution of 17 August 2006, knowing that it falsely represented the consent of the shareholders to a sale of the hotel.

100. Mr D'Angelo's case is that they agreed to purchase the hotel so as to sell it to developers and only run it as a hotel in the meantime and that Mr DiGrado has conducted the affairs of the company in an unfairly prejudicial manner by failing and refusing to co-operate with Mr D'Angelo in the sale of the hotel to a developer. As to the facts, I have found Mr DiGrado's case on these issues to be well-founded and I have found against Mr D'Angelo.

101. Both parties asserted that the conduct of the other had destroyed the relationship of trust and confidence on which their relationship as members and directors of the company was based and constituted unfairly prejudicial conduct of the affairs of the company. The former is expressly pleaded by Mr and Mrs D'Angelo in their petition but, while not spelt out in those terms in Mr DiGrado's petition, it is implicit in it and clearly formed part of his case as presented at trial.

102. The leading authority on these issues in the context of petitions under s.994 is, of course, the decision of the House of Lords in *O'Neill v Phillips* [1999] 1 WLR 1092. In his speech, Lord Hoffmann analysed the circumstances in which the exercise by members of their legal rights in the conduct of the company's affairs could be unfair so as to bring the court's jurisdiction under s.459 of the Companies Act 1986, the forerunner of s.994, into play. After referring to Lord Wilberforce's analysis in *Re Westbourne Galleries Ltd* [1973] AC 360 of the analogous jurisdiction to wind up a company on grounds that it is just and equitable to do so, he cited with approval what Jonathan Parker J said in *Re Astec (BSR) Ltd*:

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

103. Lord Hoffmann continued at p. 1101:

> "*This is putting the matter in very traditional language, reflecting in the word 'conscience' the ecclesiastical origins of the long-departed Court of Chancery. As I have said, I have no difficulty with this formulation. But I think that one useful cross-check in a case like this is to ask whether the exercise of the power in question would be contrary to what the parties, by words or conduct, have actually agreed. Would it conflict with the promises which they appear to have exchanged? In* ***Blisset v Daniel*** *the limits were found in the 'general meaning' of the partnership articles themselves. In a quasi-partnership company, they will usually be found in the understandings between the members at the time they entered into association. But there may be later promises, by words or conduct, which it would be unfair to allow a member to ignore. Nor is it necessary that such promises should be independently enforceable as a matter of contract. A promise may be binding as a matter of justice and equity although for one reason or another (for example, because in favour of a third party) it would not be enforceable in law.*
>
> *I do not suggest that exercising rights in breach of some promise or undertaking is the only form of conduct which will be regarded as unfair for the purposes of s.459. For example, there may be some event which puts an end to the basis upon which the parties entered into association with each other,*

making it unfair that one shareholder should insist upon the continuance of the association. The analogy of contractual frustration suggests itself. The unfairness may arise not from what the parties have positively agreed but from a majority using its legal powers to maintain the association in circumstances to which the minority can reasonably say it did not agree: non haec in foedera veni. It is well recognised that in such a case there would be power to wind up the company on the just and equitable ground (see ***Virdi v Abbey Leisure Ltd [1990] BCLC 342)*** *and it seems to me that, in the absence of a winding up, it could equally be said to come within s.459. But this form of unfairness is also based upon established equitable principles and it does not arise in this case.*"

104. It is useful in the context of this case to cite a further passage from Lord Hoffmann's speech:

> "*Mr Hollington, who appeared for Mr O'Neill, said that it did not matter whether Mr Phillips had done anything unfair. The fact was that trust and confidence between the parties had broken down. In those circumstances it was obvious that there ought to be a parting of the ways and the unfairness lay in Mr Phillips, who accepted this to be the case, not being willing to allow Mr O'Neill to recover his stake in the company. Even if Mr Phillips was not at fault in causing the breakdown, it would be unfair to leave Mr O'Neill locked into the company as a minority shareholder.*
>
> *Mr Hollington's submission comes to saying that, in a 'quasi-partnership' company, one partner ought to be entitled at will to require the other partner or partners to buy his shares at a fair value. All he need do is to declare that trust and confidence has broken down. In the present case, trust and confidence broke down, first, because Mr Phillips failed to do certain things which, on the judge's findings, he had never promised to do; secondly, because Mr O'Neill wrongly thought that Mr Phillips had committed various improprieties; and finally because, as the judge said, he was 'inclined to see base motives in everything that Mr Phillips did'. Nevertheless it is submitted that fairness requires that Mr Phillips or the company ought to raise the necessary liquid capital to pay Mr O'Neill a fair price for his shares.*
>
> *I do not think that there is any support in the authorities for such a stark right of unilateral withdrawal. There are cases, such as* ***Re a company (No 006834 of 1988), ex p Kremer [1989] BCLC 365,*** *in which it has been said that if a breakdown in relations has caused the majority to remove a shareholder from participation in the management, it is usually a waste of time to try to investigate who caused the breakdown. Such breakdowns often occur (as in this case) without either*

> *side having done anything seriously wrong or unfair. It is not fair to the excluded member, who will usually have lost his employment, to keep his assets locked in the company. But that does not mean that a member who has not been dismissed or excluded can demand that his shares be purchased simply because he feels that he has lost trust and confidence in the others. I rather doubt whether even in partnership law a dissolution would be granted on this ground in a case in which it was still possible under the articles for the business of the partnership to be continued. And as Lord Wilberforce observed in* ***Ebrahimi v Westbourne Galleries Ltd*** *[1972] 2 All ER 492 at 500 [1973] AC 360 at 380, one should not press the quasi-partnership analogy too far: 'A company, however small, however domestic, is a company not a partnership or even a quasi-partnership.' "*

105. In the present case, whichever party had succeeded on the facts as to the basis on which the hotel was purchased would be entitled to invoke the jurisdiction under s.994. One party or the other conducted itself entirely contrary to the agreed basis and, in so doing, caused the other justifiably to lose the trust and confidence which was fundamental to their relationship as members of the company. I have found in favour of Mr DiGrado's version of the facts, so I can confine my comments to that. Mr D'Angelo's conduct in August 2006, in seeking on behalf of the company to sell the hotel and knowingly creating and putting forward a false minute for that purpose, was wholly at odds with the agreed basis. His conduct destroyed the essential relationship of trust and confidence. In contrast with the last passage cited from *O'Neill v Phillips,* this is not a case where the relationship had broken down without fault on the part of Mr D'Angelo.

106. Mr Griffiths for Mr D'Angelo submitted that, in the events which have happened, it was neither necessary nor appropriate to make any order arising out of this part of Mr DiGrado's case. There was, he pointed out, now no question of the hotel being sold and Mr D'Angelo was no longer as a matter of fact in a position to cause a sale to be pursued or concluded or otherwise to participate in the management of the company's affairs.

107. Mr Griffiths submitted that the court should not grant relief if there is no need to remedy any prejudice or to protect a member from unfair prejudice in the future.

108. Mr Griffiths relied on the decision of the Court of Appeal in *Re Legal Costs Negotiators Ltd* [1999] 2 BCLC 171. The decision at first instance to strike out the petition as having no prospects of success was upheld. It was an unusual case for a claim under s.459 The company had four equal shareholders who had previously carried on the business in partnership and all worked full-time in the business. The respondent was, according to the petitioners, guilty of serious lapses in his duties as a director and employee. The petitioners took steps to dismiss him as an employee and, in the face of a threat to remove him as a director, he resigned. He retained his 25% shareholding, but had no influence or control over the conduct of the company's affairs. The principal basis of the petition, presented by the other three members together holding 75% of the shares, was that the mutual expectation on which the company had been formed, that each would contribute to the company and be

engaged full-time in its business had been broken. The unfairly prejudicial conduct relied was (a) current, in that the three petitioners were working in the business for the benefit of all four members and (b) past, in that reliance was placed on the conduct which had led to the respondent's dismissal.

109. Peter Gibson LJ, who gave the principal judgment in the Court of Appeal, laid emphasis on the need to show that it is the affairs of the company which are being or have been conducted in an unfairly prejudicial manner, rather than conduct by a member of his own affairs. He also emphasised the limit imposed by the Act on the relief which may be given, an order "giving relief in respect of the matters complained of", and continued, "If the matters complained of have been put right and cured and cannot recur, it is hard to see how the court could properly give relief" (p.196). The respondent's breaches of duty as a director and employee had been remedied by his dismissal and resignation, so that there was no prospect of any recurrence.

110. The appellant petitioners submitted that the prejudicial state of affairs had not been brought to an end. The respondent's removal as an employee and director had not remedied the situation created by his conduct, because he retained his shares in circumstances where there had been a quasi-partnership. This submission was rejected, both because the retention by the respondent of his shares was not an act of the company or the conduct of its affairs, and because the majority had remedied the situation created by his breaches of duty through the exercise of their powers to dismiss him. Peter Gibson LJ said at p.199:

> "*If the Company through its directors or in general meeting exercised its powers to conduct the affairs of the Company in an unfairly prejudicial manner which failed to give effect to the legitimate expectations of its contributories and that state of affairs could not be cured by the petitioners through the exercise of powers available to them, then a petition, I accept, would lie. But that is not this case. Mr. Collings submitted that just as a minority shareholder, whose legitimate expectation to share in the management of a company is defeated by the majority shareholders excluding him from that management, can bring a s.459 petition for the sale of their shares, so majority shareholders, whose legitimate expectation that the minority shareholder would contribute to that management is defeated by his misconduct necessitating his dismissal, can bring a petition for the sale of his shares. I do not accept that the two situations are at all comparable. In the first there is continuing unfairly prejudicial conduct of the affairs of the company by the majority shareholders, relief in respect of which may be given by ordering a sale of the shares. In the second the majority shareholders had a choice between dismissing the minority shareholder from working for the company or allowing their legitimate expectation to be fulfilled by letting the minority shareholder continue to contribute to the management of the company in some way. In the present case they chose the former, thereby putting an end both to their*

> *legitimate expectation and to the prejudicial conduct of the affairs of the Company by Mr. Hateley. No relief under s.461 could properly be given by the court in respect of that conduct which the majority shareholders have remedied and there is no continuing unfairly prejudicial conduct of the affairs of the Company when that conduct is in their hands alone."*

111. The decision in *Re Legal Costs Negotiators Ltd* does not provide a basis for Mr Griffiths' submission on the different facts of the present case. The destruction of the relationship on which the company was based by Mr D'Angelo's conduct in relation to his attempt to sell the hotel has not been remedied or cured. Because there are equal shareholdings between the two sides, it is not open to either side to remove the other. The prejudice was remedied in *Re Legal Costs Negotiators Ltd* by the lawful exercise by the majority of their power to dismiss the respondent.

112. Mr D'Angelo has not been removed as a director nor has he resigned. He has as a matter of fact been excluded from participation in management, but Mr DiGrado has no right or power to do so and it is of course a principal ground of Mr D'Angelo's own petition. When Peter Gibson LJ spoke of curing or remedying the position, he was referring to proper and lawful means.

113. Mr Griffiths submitted as regards the minute of 17 August 2006 that it did not involve the conduct of the company's affairs: a piece of paper came into existence and no one acted on it. He relied on the example given by Harman J in *Re A Company* [1987] BCLC 141 at 148 of a director who uses his key to the company's safe to steal £5,000. That example is not in my judgment analogous to the present case. Mr D'Angelo completed the false minute as part of his conduct as a director of the company to seek to agree a sale of the company. He used the minute, on behalf of the company, to persuade Mr Hicks that he was acting with authority. It occurred in the course of Mr D'Angelo's conduct, albeit wrongful, of the affairs of the company.

114. The remaining grounds relied on in both petitions either occurred between September 2006 and March 2007 or started in that period.

(2) Payments and benefits

115. Mr DiGrado relies on the payments of £7,000 and £8,860 procured by Mr D'Angelo to himself. The payment of £7,000 was made by Mr D'Angelo in response to a payment of the same amount by Mr DiGrado to himself. Neither of these payments was authorised. Equally, Mr D'Angelo had no authority to pay himself £8,860 in March 2007. This was taken, he says, in response to the benefits which he perceived Mr DiGrado to be taking from the business. Mr DiGrado likewise had no authority to confer on himself benefits such as putting up his relatives and his wife's relatives at the hotel for no payment. This appears to have been more than occasional.

116. I regard these matters more as symptomatic of the complete breakdown between Mr D'Angelo and Mr DiGrado than as adding much substance to either party's case, both of which are grounded in more significant allegations. I can mention to dismiss Mr DiGrado's complaint about monthly payments totalling £2,463 to Mrs D'Angelo. These were monthly payment of £351 made in accordance with what was agreed on 13 July 2006. It was never intended that Mrs D'Angelo should do any work to earn

these payments, which along with those to Mrs DiGrado were probably seen as a tax-efficient means of benefitting both families. Likewise, I do not regard as significant Mr D'Angelo's complaint that Mr DiGrado and his wife and son have stayed longer at the hotel than originally intended. It ignores that Mr DiGrado was working at the hotel without remuneration for that work, and that it was necessary for someone to be in residence. Mr D'Angelo complains also that Mrs DiGrado is involved in the management of the company, in breach of what was originally agreed. In the context of other allegations, this too is insignificant but in any event I accept that she only started to assist her husband at the hotel when she found that he did not have the level of support from Mr D'Angelo which Mr and Mrs DiGrado had expected.

117. Mr DiGrado's refusal to procure the company to pay rent on 28 Essex Road since February 2007 is a legitimate ground of complaint by Mr D'Angelo.

(3) Exclusion of Mr D'Angelo

118. The principal matter relied on by Mr D'Angelo in the period following September 2006 is his exclusion from participation in the management of the company and its business. The facts speak for themselves. With effect from March 2007 Mr DiGrado has ensured that he is effectively in sole control of the company. He denied Mr D'Angelo access to the banking arrangements for the company, its computer records and, with the changing of the locks, to its office and paper records. While Mr DiGrado believed that Mr D'Angelo had forfeited any right to participate as a director or member, his actions in excluding Mr and Mrs D'Angelo were without legal justification. This exclusion was the perhaps inevitable result of the total breakdown in relations which was itself, as I have found, principally the result of Mr D'Angelo's own actions, but this does not render the exclusion lawful or justifiable.

119. The change in the company's accountants made by Mr DiGrado in February 2007, on which Mr and Mrs D'Angelo rely in their petition, can be dealt with in the context of exclusion. Although Mr DiGrado terminated the retainer of Mr Hjertzen's firm, Mr Hjertzen told me in evidence that, in view of the complete breakdown between Mr DiGrado and Mr D'Angelo and his separate position as Mr D'Angelo's personal accountant, he was himself on the point of terminating it. No prejudice was therefore suffered as a result of Mr DiGrado's action in this respect. Although Mr Hjertzen denied that before then he was impartial, I do not accept that and in any event Mr DiGrado was reasonably entitled to consider that Mr Hjertzen was not impartial. Mr DiGrado had no authority to appoint a new accountant and was not justified in appointing Della Alim. She had no relevant qualifications or capacity for the job, and in due course Mr DiGrado dispensed with her services. Her appointment by Mr DiGrado without consultation with Mr D'Angelo was an example of Mr DiGrado's exclusion of Mr D'Angelo.

Conclusion on unfair prejudice

120. I am satisfied that both petitions establish a case of unfairly prejudicial conduct of the company's affairs by Mr D'Angelo and Mr DiGrado respectively. In the case of Mr D'Angelo, it is his conduct, in breach of the understanding on which the hotel was purchased, in seeking to negotiate and progress a sale of the hotel and, in so doing, producing the false minute, and thereby destroying the relationship on which the company was based.

121. In the case of Mr DiGrado, it was in excluding Mr and Mrs D'Angelo from any participation as directors and members of the company. I do not consider that this conduct on Mr DiGrado's part, following Mr D'Angelo's own conduct up to August 2006, deprives Mr DiGrado of any right to relief on his petition, any more than Mr D'Angelo's own conduct provides a defence to his petition.

122. I am accordingly satisfied that the court has jurisdiction to grant relief under s.996 of the Companies Act 2006. There is no dispute that the appropriate order is that Mr and Mrs DiGrado should purchase the shares of Mr and Mrs D'Angelo. There should be no discount on account of the shares being only a 50% holding. The real dispute is as to the date as at which the shares should be valued and any other terms as to the basis on which the shares should be valued.

Date of valuation of shares

123. The starting point for the date of valuation of shares for a buy-out order under s.996 is the date of judgment, but the court is free to choose such date as is most appropriate and just in the circumstances of the case. In particular, the date should be that which best remedies the unfair prejudice held to be established.

124. Neither side in this case puts forward the date of judgment as a first choice or, in Mr D'Angelo's case, as a choice at all. Mr Reza for Mr DiGrado submits that the appropriate date is 9 May 2009, failing which the date of judgment. Mr Griffiths for Mr D'Angelo submits that it should be 31 July 2007.

125. Mr Reza's suggestion of 9 May 2009 is based on the procedural history and preparation of expert evidence, to which it is necessary to refer in some detail. Mr DiGrado's petition, seeking an order that Mr D'Angelo sell his shares to him, was presented on 4 April 2007. At the first directions hearing before Registrar Rawson on 21 June 2007, it was apparent to the Registrar that the real issue was not whether there was to be a sale of either Mr DiGrado's or Mr D'Angelo's shares but the price. Counsel appearing for Mr D'Angelo accepted that this was so. He also stated that Mr and Mrs D'Angelo were prepared to sell their shares. In these circumstances, the Registrar very sensibly made the valuation of the shares the priority. He refused Mr D'Angelo's application for wide-ranging disclosure, instead confining it to documents relevant to value and directing the exchange of expert valuation reports by 17 August 2007 and a joint statement by 14 September 2007.

126. In correspondence, Mr D'Angelo's solicitors confirmed that valuation was the only real issue. In a letter dated 14 August 2007, they wrote:

> "*As a result, it is clear that the only issue between the parties that could be the subject of a trial are issues of valuation.*"

127. There was slippage in the timetable for expert evidence but by late November 2007 both sides had produced share and property valuation reports, with the share valuation experts producing a joint statement on 12 December 2007.

128. In January 2008 Mr D'Angelo complained that there had been non-compliance with the disclosure order made on 21 June 2007 and that he and his share valuation expert had not had access to the documents and information necessary for the expert's report.

Mr D'Angelo issued an application for specific disclosure on 12 February 2008 which became the focus of extensive activity leading to a hearing on 28 April 2008 and a reserved judgment handed down by Deputy Registrar Middleton on 27 May 2008. He rejected the bulk of Mr D'Angelo's application, and limited further disclosure to invoices for certain legal, professional and accountancy fees. On Mr DiGrado's application, to which there was no objection, the Deputy Registrar directed the service of points of defence by Mr D'Angelo. With the agreement of the parties, he directed a single trial on liability and quantum with an estimate of 3 days.

129. On 10 March 2009 Mr D'Angelo issued an application for further disclosure, for an order that the experts' reports be updated and for other orders. By then the trial had been fixed for a window commencing on 11 May 2009. As Norris J recorded in his judgment on this application given on 3 April 2009, Mr DiGrado was willing to concede substantial parts of what was sought for the sake of keeping the trial date. The solicitor appearing for Mr D'Angelo likewise specifically told Norris J that he was anxious that there should not be an adjournment and that the petition should be disposed of. They agreed that the updated reports should be exchanged by 21 April 2009.

130. In the course of the hearing the solicitor appearing for Mr D'Angelo said Mr D'Angelo would prefer to buy out Mr DiGrado, although as the judge observed there was no claim for such an order. He added:

> "*The alternative which formed the basis of the case originally, that the site be sold for redevelopment for housing, has suffered with the housing crisis and is no longer a viable option and therefore the only option, apart from the sale of the business, is for one of the two parties to carry on on a going concern basis.*"

131. As regards the date of valuation, Mr D'Angelo's solicitor said:

> "*The position is the petition was presented relatively early on in the life of the company. It only began trading I think barely a year beforehand – perhaps a little over a year – and therefore it will be said, certainly the first respondent, that it is appropriate for the court to have regard to a longer period of trading and effectively the established business as opposed to the newly born business that otherwise would be before the basis of the valuations.*"

132. Mr D'Angelo's solicitor also told Norris J that careful consideration had been given to a cross-petition but it was decided that it would not add anything because the court was able to deal with the issues on the basis of Mr DiGrado's petition.

133. Updated reports were prepared by the share valuation experts and by Mr DiGrado's property expert. The case was ready for trial starting on 11 May 2009. On 10 May 2009 Mr D'Angelo's solicitors informed Mr DiGrado's solicitors that their counsel was most unwell and unlikely to be fit to appear that week. The case was listed for trial before Nicholas Strauss QC, sitting as a deputy High Court Judge. On Mr D'Angelo's application for an adjournment, the judge directed that the trial of the

petition be re-fixed for hearing not before 13 July 2009 with an estimate of 3 to 4 days. He also ordered a stay for two months for the parties to consider mediation or some other process of alternative dispute resolution.

134. On 21 May 2009 a new trial of 7 December 2009 was fixed. On 16 October 2009 Mr and Mrs D'Angelo presented their cross-petition, seeking as their primary relief an order that Mr and Mrs DiGrado sell their shares to Mr and Mrs D'Angelo "at their actual value" or, at the option of Mr and Mrs D'Angelo, that Mr and Mrs DiGrado purchase their shares "at the value which their shares in the Company would have had if the affairs of the Company had not been conducted in a manner which was unfairly prejudicial to them."

135. On 16 November 2009 Proudman J directed that both petitions be tried together on condition that Mr and Mrs D'Angelo pay Mr DiGrado the costs incurred in preparing for the trial of his petition thrown away by reason of the cross-petition, to be assessed on the indemnity basis. She limited the extent to which Mr and Mrs D'Angelo could rely on any further evidence or documents. At a further directions hearing on 28 April 2010, Arnold J directed that the trial of the two petitions be limited to liability.

136. It is unnecessary to go further, indeed I may already have gone too far, into the tortuous procedural history, save to note that at the start of the trial Mr and Mrs D'Angelo, through their counsel, renounced any attempt to obtain an order for the purchase of Mr and Mrs DiGrado's shares.

137. Against this background, Mr Reza's straightforward submission is that in May 2009 the parties were ready for trial on the basis of expert evidence which, on Mr D'Angelo's application but with Mr DiGrado's agreement, had been updated to May 2009 and that therefore the date of valuation should be May 2009 which is the date to which the updated evidence relates.

138. Mr Griffiths' submission is that the shares should be valued as at 31 July 2007. He submits that the shares should be valued on the assumptions that (i) the property would have been sold to Wheatley Homes at a price of £1.21m and (ii) Mr and Mrs DiGrado had not moved into the hotel and enjoyed benefits there, and had not injected money into the company for the refurbishment of the hotel. I will deal later with the first assumption. Mr Griffiths submits that an early valuation date remedies the prejudice identified in the second assumption. Mr D'Angelo was excluded from late March 2007 and has had no control over the way in which the business has since been run. Without either consultation with him or his agreement, Mr and Mrs DiGrado have injected £242,000 into the company, which has been spent on repairs and renewals with a view to improving the business. This may prove to have been money well spent, but whether or not that is so, submits Mr Griffiths, should be for the account of Mr and Mrs DiGrado. By fixing an early valuation date, they will reap the profit or the loss which results. Relevant also to this issue is the fact that the company incurred losses of some £70,000 in the two years to 31 March 2009, after Mr DiGrado took control of the company.

139. While 31 March 2007 is a date which would meet Mr Griffiths' point, he suggests that 31 July 2007 be chosen because the first round of expert evidence was prepared as at that date.

140. Leaving aside the very important issue of the basis on which the property should be valued, I consider Mr Griffiths' approach is to be preferred. Mr Reza makes a strong case, in the light of the procedural history, for May 2009. However, it is not a date which has any obvious connection with the prejudice to be remedied, nor can it be said that Mr and Mrs D'Angelo are estopped from advancing a different date. It is certainly true that the costs of updating the experts' reports to May 2009, undertaken on Mr D'Angelo's application, have been wasted, and the choice of a different date must be on terms that he pays those wasted costs. I am inclined to think that they fall within the order for costs in paragraph 1 of the order dated 16 November 2009 of Proudman J.

141. By contrast, the date proposed by Mr Griffiths does meet and provide a remedy for the exclusion of Mr D'Angelo from the company.

Basis of valuation of the property

142. Perhaps the most important issue in the valuation exercise is the basis on which the property should be valued. Should it be on the basis that it was to be used at least for an appreciable period as a hotel on a going concern basis or on the basis that it could be sold for residential development? Mr Griffiths submitted that it should be the latter, and that the relevant value can be fixed at £1.21m, being the price offered in March 2007 by Wheatley Homes. The primary basis for that approach was Mr D'Angelo's case that a re-sale as a development property was the agreed basis on which the property had been purchased. I have found against that case, which itself cannot therefore stand as justification for this basis of valuation.

143. It could nonetheless be said on behalf of Mr D'Angelo that following a purchase of his shares, Mr DiGrado would be able to procure a sale of the property for redevelopment and keep the profit for himself. My present inclination is to think that this is not the correct approach. The issue is the basis on which the property should be valued as at 31 July 2007. It was not Mr DiGrado's intention to sell the property. His intention was to develop the hotel business as a going concern, in accordance with what I have found was the agreed basis of purchase. Moreover, hindsight shows that he has in fact caused the company to retain the property and to run the hotel as a going concern, expending considerable sums on it as has been pointed out and relied on by Mr Griffiths.

144. I did not hear full argument on this issue. It is not, in my judgment, a matter which should be left at large for the valuation experts and for the court determining the value of the shares, but should be decided at this stage.

145. I will therefore invite counsel to make submissions on this issue.

Purchase of Mrs D'Angelo's shares

146. Mrs D'Angelo is not a respondent to Mr DiGrado's petition. His petition seeks an order for the sale to him of Mr D'Angelo's shares, and states that he would be prepared to buy Mrs D'Angelo's shares if she should so wish. Mr Griffiths makes the point that no order can therefore be made against her on Mr DiGrado's petition. By contrast, both Mr and Mrs D'Angelo are the cross-petitioners and they seek an order for the purchase of their shares. In my view, the cross-petition reflects the reality of

the position that there were essentially two blocks of shares, each split between Mr and Mrs D'Angelo on the one hand and Mr and Mrs DiGrado on the other. Except for the period when Mr and Mrs D'Angelo were asserting that they wished to buy Mr and Mrs DiGrado's shares, they have always made clear that they both wished to sell their shares. I consider it appropriate to make the order for the purchase of shares on Mr DiGrado's petition not only because it was by a wide margin the first in time, but also, more importantly, it is based on unfairly prejudicial conduct which, as I have found, occurred before any such conduct on Mr DiGrado's part.

147. It would be a nonsensical result if Mrs D'Angelo were to retain her shares. I would consider an application to join her as a respondent to Mr DiGrado's petition for the purpose only of making an order for the purchase of her shares. Alternatively, if need be, an order could be made on the cross-petition.

Conclusion

148. I therefore find the cases of unfair prejudice made out on both petitions and I shall order the purchase of Mr and Mrs D'Angelo's shares by Mr and Mrs DiGrado at a price to be determined by the court by reference to their value as at 31 July 2007. I shall invite counsel to make submissions on the form of order, including provisions to be made for the repayment of Mr and Mrs D'Angelo's loan and the purchase of their interest in 28 Essex Road, as well as such submissions as they wish to make as to the basis of valuation of the hotel property.