Neutral Citation Number: [2020] EWHC 2624 (Ch)

Case No: CR-2019-CDF-000012

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

**IN THE MATTER OF RHYS WILLIAMS (BANGOR) LIMITED**
**AND IN THE MATTER OF THE COMPANIES ACT 2006**

The Law Courts
Bodhyfryd, Wrexham, LL12 7BP

Date: 8 October 2020

**Before**:

**HIS HONOUR JUDGE KEYSER Q.C.**
**SITTING AS A JUDGE OF THE HIGH COURT**

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**Between:**

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| **IFAN RHYS WILLIAMS** | **Petitioner** |
| **- and -** | |
| **(1) EMRYS RHYS WILLIAMS** | |
| **(2) DEWI RHYS WILLIAMS** | |
| **(3) RHYS WILLIAMS (BANGOR) LIMITED** | **Respondents** |

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**Christopher McNall** (instructed by **Guthrie Jones & Jones**) for the **Petitioner**
**Lawrence McDonald** (instructed by **Aaron & Partners LLP**) for the **First and Second Respondents**

Hearing dates: 29, 30 June, 1, 2, 3 July, 21 August 2020
Written submissions: 11 and 18 September 2020

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# Approved Judgment

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

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HIS HONOUR JUDGE KEYSER Q.C.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 am on Thursday 8 October 2020.

## JUDGE KEYSER QC:

## Introduction

1. The petitioner, Ifan Rhys Williams, and the first and second respondents, Emrys Rhys Williams and Dewi Rhys Williams, are brothers. For convenience, I shall refer to them respectively as Ifan, Emrys and Dewi, and collectively as "the parties". The parties are the members and directors of the third respondent, Rhys Williams (Bangor) Limited (hereafter, "the Company"). In these proceedings by petition under section 994 of the Companies Act 2006, Ifan complains that Emrys and Dewi (whom together I shall call "the respondents") have conducted the affairs of the Company in a manner that is unfairly prejudicial to his interests as a member. In particular, Ifan complains that Emrys and Dewi, without his knowledge or permission or other lawful authority, effected the transfer of two valuable pieces of farming land and a substantial amount of money from the Company to another company, Williams Caernarfon Limited ("NewCo"), of which they are the sole members and directors.

2. By an order dated 25 October 2019, I directed that there be a trial of the issue whether Emrys and Dewi had conducted the affairs of the Company in a manner unfairly prejudicial to Ifan's interests as a member. This is my judgment upon the trial of the issue. The trial took place by means of the Cloud Video Platform over six days, with written submissions thereafter. I am particularly grateful for the assistance of the Welsh language interpreters, who provided translations of the evidence of two witnesses in what were unusual circumstances, and to the Court Clerk for her management of the technical aspects of the hearing. I am also grateful to Mr McNall, counsel for Ifan, and Mr McDonald, counsel for Emrys and Dewi, for their assistance throughout the hearing and for their helpful written and oral submissions.

3. The rest of this judgment will be structured as follows. First, I shall set out a narrative of the facts, taken, so far as possible, directly from the documents; they emerge more clearly that way. The narrative will be fairly lengthy, because in my view this case turns on the facts. Second, I shall mention the main points of the relevant law. Third, I shall set out and explain my conclusions.

## Facts

*The Company and the family*

4. The Company was incorporated in 1952 for the purpose of carrying on the farming business of the parties' grandfather, Rhys Williams ("Rhys"). Rhys was the managing director and the chairman of the board, but other members of the family were also directors, among them the parties' father, Gwilym Rhys Williams ("Gwilym"). In due course, Gwilym took over the farm and the Company.

5. Ifan was born in December 1950; he is now nearly 70 years old. Emrys was born in 1956 and is now 64 years old. Dewi was born in 1960 and is now aged 60 years. There is also a sister, Mrs Margaret Owen; she gave evidence at the trial but was not directly concerned in the matters giving rise to these proceedings.

6. By the early 1980s, the three brothers were taken into the farming business and became members and directors of the Company. The Company was run informally, as a family business; there were no formal board or members' meetings and no formal resolutions. It certainly began as a quasi-partnership. The parties are not agreed as to whether it remained one, but the dispute in that regard is perhaps academic. The entire proceedings arise from the problems that the parties have had in trying to work out what to do with a quasi-partnership company when those involved have fallen out and cannot work together or even speak to each other.

7. The issued share capital of the Company comprises 12,000 ordinary shares of £1 each. Immediately before Gwilym's death on 16 April 2013, he and the parties were the members (each held 3,000 shares) and directors of the Company. Gwilym's will gave his shareholding to the parties as tenants in common in equal shares, with the result that Ifan, Emrys and Dewi ought each to own 4,000 shares. In fact, on or about 1 March 2014 Gwilym's shares were registered in Ifan's name; therefore he is registered as the holder of 6,000 shares and Emrys and Dewi are each registered as the holder of 3,000 shares. Ifan accepts that the shareholdings ought to be equal and need to be corrected, and I shall proceed on that basis.

*The landholdings*

8. Until 1982, the Company's principal farming activity was at a lowland farm with mountain grazing (comprising 384 acres) called Tai'r Meibion. An agreement dated 25 January 1973 granted Rhys and Gwilym an agricultural tenancy of Tai'r Meibion from 12 November 1972. However, the documents relating to the incorporation of the Company give Tai'r Meibion as Rhys's home address, and it appears that he had farmed there as tenant since 1932.

9. On 27 October 1982 the Company purchased the freehold farmhouse and land called Plas Llanfaglan (comprising about 220 acres) for £341,000. The Company's title to Plas Llanfaglan was registered on 28 January 2010; the register records that the value of the land on that date was stated to be over £1,000,000.

10. Also on 27 October 1982, Gwilym and the Company purchased freehold land known as Ddrainias, also at Llanfaglan, (comprising about 73 acres), for £116,000. Gwilym provided 60% of the purchase price (£69,600) and the Company provided 40% (£46,400), and the land was conveyed to them as beneficial tenants in common in shares proportionate to their respective contributions.

11. On 31 July 1989 the Company purchased a further holding at Llanfaglan, known as Tyddyn Alys (also sometimes called Tyddyn Alice), for about £115,000.

12. Plas Llanfaglan, Ddrainias and Tyddyn Alys were farmed by the Company as a single unit. The name "Plas Llanfaglan" was variously used to refer just to Plas Llanfaglan or to include also Ddrainias or Tyddyn Alys or both Ddrainias and Tyddyn Alys. The referent must be inferred from the context.

13. By a tenancy agreement dated 10 January 2008, expressed to be the first statutory succession to the tenancy under the agreement dated 25 January 1973, Ifan was granted an agricultural tenancy of Tai'r Meibion from 12 November 2006. The parties disagree as to why it was Ifan who took the statutory succession. Ifan says that Gwilym wanted

him to succeed to it because he was more involved with the sheep than were his brothers and because he would be able to live in the farmhouse at Tai'r Meibion; Emrys had already built a house for himself elsewhere, and Dewi lived in the farmhouse at Plas Llanfaglan. Emrys and Dewi contend that the tenancy is held on trust for the Company. There is an issue as to whether Emrys and Dewi were consulted about the succession: their Points of Defence say that it took place without their knowledge, but Ifan's Reply says that it had been discussed with them. What is clear, as I find, is that they were unhappy about it when they learned of it. At all events, although Ifan had the tenancy of Tai'r Meibion from 2008 and lived in the farmhouse there with Gwilym, the farm continued to be farmed by the Company.

14. The Company has another holding, purchased in 1969, comprising approximately 40 acres in the Conwy Valley. This land is variously referred to as Groes Ynydd, or Groes Ddôl, or Tal y Cefn, or variants of these names.

15. A further piece of land was farmed by the Company but owned by Gwilym personally. This is Ty'n y Caeau, Menai Bridge, comprising about 15 acres.

*Discussions among the parties*

16. Relations among the parties were strained over many years and were held together by Gwilym as head of the family. It is no part of this judgment to delve into the various grievances, still less to fathom their rights and wrongs. It is, though, fair to say that the main, though not the only, focus of the strain was the clash of personalities between Ifan and Emrys, both of whom might reasonably be described as difficult characters. By contrast, Dewi appears to be a relatively quiet, placid and pacific man.

17. By 2010 the parties could no longer work together, and from no later than 2011 they kept their farming activities separate, with Ifan farming at Tai'r Meibion and Emrys and Dewi farming at Llanfaglan, though all under the umbrella of the Company.

18. In 2010, two meetings were held to discuss the way forward, one on 12 August and the other on 4 October. Both meetings were chaired by Mr Richard Williams, an accountant who had long been retained by the Company in respect of its financial affairs. The parties were present at both meetings. Gwilym was present at the second meeting but not at the first. Proceedings at both meetings were recorded, and transcripts were put in evidence. It is unnecessary to set out the various things that were said. I shall pick out some of the main points, because they form the background for what followed.

    - The parties all agreed that the time had come to split the business.

    - At both meetings, Richard Williams raised the possibility that, instead of there being a formal split, the matter could be dealt with within the existing structure by separating the business of the Company into divisions, giving each brother control over one division, and apportioning the income fairly among them. However, this did not find favour with the parties; they felt that a formal separation was required. In the second meeting, there was the first express mention of the possibility that there could be two companies: Ifan would take over the Company, and Emrys and Dewi would set up a new company (or vice versa).

- The practical difficulty with a formal split of the business of the Company was identified by Richard Williams in the first meeting and discussed at length in the second meeting. In short, it was the balance between land and income. The really profitable part of the business was carried on at Tai'r Meibion and generated by the single farm payments referable to that holding. But the land at Tai'r Meibion was held by Ifan, not by the Company. And it was held under an agricultural tenancy, to which there remained a right to only one statutory succession, and then only if the statutory conditions were satisfied. In the second meeting, Emrys observed that the two things that were "given" were that Tai'r Meibion would go with Ifan and that Llanfaglan would go with Dewi. No one dissented from that. The discussion indicated that the single farm payments attributable to Tai'r Meibion amounted to about £86,000, while those attributable to the rest of the holdings amounted to about £36,000. Without Tai'r Meibion, the farm would barely provide a living for Emrys and Dewi. However, Tai'r Meibion had either no or very little capital value to Ifan as land, whereas the remainder of the holdings had a very substantial capital value; though, as Emrys and Gwilym remarked, a farming business was "finished" when it sold off its land.

- In the second meeting, Gwilym asked Richard Williams directly about the tax implications of splitting the business. Richard Williams' answer was to the effect that the availability of roll-over relief would mean that there were no tax implications, except in respect of benefits in kind. The tax consequences for benefits in kind would fall mainly on Dewi, because he lived in a house owned by the Company. Dewi, who said relatively little at the meetings, made clear that he understood his position and resented it:

> "At the moment, I don't see that I have anything in the Company. Ifan Rhys has. … I don't have anything in the Company. Ifan Rhys has 90% of the Company. I don't even own my own house. Ifan Rhys has the tenancy of Tai'r Meibion plus shares in the Company, and I have no right at Tai'r Meibion at all. … We don't have any say at Tai'r Meibion."

19. A third meeting was held on 9 March 2011. As well as the parties and Richard Williams, there was present Mr Philip Meade, a valuer who had been instructed by Ifan. Emrys and Dewi had not instructed their own valuer; they were waiting to see what Ifan's approach was. Mr Meade said that the question was as to the best way to divide the land-holdings. It made sense, he said, for Tai'r Meibion to go to Ifan and for the rest of the land to go to Dewi and Emrys "and then equal the values up in some way, with land or stock or something like that, I don't know. We need to do some valuations really, to make sure that it's all fair." Emrys then remarked, "Ifan is the tenant of Tai'r Meibion already, so that makes sense. So that's already settled, even though Dewi and I didn't know that he was getting the tenancy. It is already settled in a way, that point." Emrys went on to say that the difficult question of valuation was the tenancy of Tai'r Meibion. This shows that he regarded Tai'r Meibion as being (so to speak) in the pot. That was also the approach taken by Mr Meade, who expressed the view that a court would be likely to consider that the tenancy of Tai'r Meibion was held on trust for the Company. He did not offer anything in the nature of a formal valuation of the tenancy of Tai'r Meibion, but he suggested that a reasonable approach might be to value it at

25% of the freehold value. It was agreed that the matter would be discussed in more detail at a further meeting, at which Gwilym would be present.

20. By a letter dated 16 March 2011, Richard Williams sought from HMRC statutory clearance and tax advice in respect of what he calls in his witness statement a "de-merger" of the business of the Company. The letter has not been produced in evidence and had not received any substantive reply by the time a fourth meeting was held on 23 March 2011. At the trial, Richard Williams gave evidence concerning the letter, to the following effect. In March 2011 consideration was being given to the possibility that Emrys would sell his shareholding in the Company to his brothers. Because he and his firm lacked sufficient expertise in corporate tax matters, Richard Williams wrote to Nichola Ross Martin of Ross Martin Tax Consultancy and subsequently spoke to her by telephone. She had advised that the sale of shares would give rise to a liability for capital gains tax and that the preferable course would be a de-merger of the Company. He had accordingly written to HMRC for clearance (for the reply, see below). He did not have any further contact with Ross Martin Tax Consultancy in respect of these matters until November 2015 because "no one was pressing us to go ahead with the de-merger".

21. At the fourth meeting, on 23 March 2011, those present were the parties, Richard Williams, Philip Meade, and Gwilym. In the course of the meeting, Gwilym again raised the possibility that a formal split could be avoided by some form of division within the existing Company, but this did not find favour with the parties. Mr Meade set out his approach to the problem. His starting point was that Ifan would be giving up his quarter share in Plas Llanfaglan and "would take your three-quarters share in Tai'r Meibion". There was extensive discussion of the problem, including the suggestion that Groes Ddôl could be brought into the equation and, if going to Ifan with Tai'r Meibion, would equalise the land values. However, no solution was arrived at. A further meeting was envisaged, after Emrys and Dewi had taken professional advice.

22. On 29 March 2011, HMRC sent a reply to Richard Williams:

> "I am unable to give tax advice regarding the situation described in your letter, and considering the information provided I am unable to give a statutory clearance without full details of the proposed transactions that are going to take place and the persons concerned with them."

23. Emrys and Dewi instructed their own valuer, John Lloyd Williams. In June 2011 Mr Lloyd Williams sent to Mr Meade a proposal for division of the assets of the Company's business. Mr Meade replied in August 2011, confirming that Ifan was willing "in principle" to use the proposed basis as "a starting point", but he said that there might be a need for certain adjustments and that Ifan wanted a further £50,000 to reflect a diminution of the land he was to receive. John Lloyd Williams made a further proposal in November 2011; after dealing with the division of land, the letter said: "A formula needs to be agreed upon to redress the vast imbalance of income generated under the SFP [Single Farm Payment] Scheme." In December 2011 Mr Meade replied, suggesting that a further meeting might be held in the new year.

24. In early 2012 there was "a fairly detailed meeting" between Mr Meade, Richard Williams and John Lloyd Williams, at which they "worked out a fairly detailed

solution" (Mr Meade's letter of 7 February 2012 to Ifan). On 27 February 2012 Mr Meade wrote to John Lloyd Williams, expressing cautious optimism but saying, "I do not therefore have instructions to agree to any heads of terms at this stage as [Ifan] does not wish to be committed in any way until he has a better appreciation of the numbers involved."

25. In July 2012 John Lloyd Williams and his firm produced valuations, first of the livestock and machinery at Plas Llanfaglan and Tai'r Meibion, and second of Plas Llanfaglan (including Ddrainias and Tyddyn Alys), Tai'r Meibion and Groes Ddôl. The land-holdings were valued on a freehold basis: Plas Llanfaglan at £2,339,200 (a valuation that reflected Gwilym's part-ownership of Ddrainias); Tai'r Meibion at £3,036,000; Groes Ddôl at £400,000 to £450,000.

26. On 10 September 2012 NewCo was incorporated. Emrys and Dewi were and are the two members and directors of NewCo; each has a 50% shareholding. Although Ifan may not have known of the incorporation of NewCo at the time, he accepts that he knew at a relatively early stage that there was a new company; it was not kept from him.

27. A fifth formal meeting of the parties (shown in the transcript as "I", "E" and "D" respectively) took place on 19 March 2013. Also present were Gwilym, Richard Williams ("R"), John Lloyd Williams ("J"), and Philip Meade ("P"). This was a lengthy meeting; the transcript extends to 27 pages. Again, I shall pick out just some of the main points.

- Mr Meade said that the parties were not far apart on valuations of stock; the critical issue concerned the tenancy at Tai'r Meibion. Ifan observed that the tenancy would last only as long as he continued to farm the holding, as he had no qualifying relative for the purpose of a further succession. He said that at the age of 62 he was beginning to find the work physically demanding. Mr Meade reiterated his acceptance that the tenancy had a value.

- Richard Williams again discussed the possibility that the split of the business could be dealt with as a matter purely internal to the Company, with apportionment of assets used and income received by the parties being dealt with privately. This appears to have been intended as a method of avoiding complications both in respect of tax and regarding capital inequalities among the parties.

- There was agreement that new valuations would be taken of all assets as at 1 April 2013. Emrys confirmed that NewCo had a bank account that could be activated "overnight".

- As the meeting moved towards an agreed way forward, the following are among the relevant passages of the discussion (punctuation of the transcript is a matter of interpretation at some points):

  "R You've got a bank account for the new company, haven't you? And that's been activated?

  E Not yet; overnight.

…

P So, we'll have 2 new accounts. Keep old account basically for the single farm payments, and rent can go to that one.

R Obviously we'll have to distribute working capital from the main account.

P Yes.

R What are you going to do, Ifan?

I So basically, 1st April salaries would be … good, is it the salary that go on 1st April really from the previous month?

P Yes, paid in arrears. So everything will go out on 31st March, yes, salaries, when you start afresh.

I So 1st May my salary will come from my own business.

P From your own business, that's right, that's right.

R So, in terms of good housekeeping, what we need to do … is get all the cheques and everything up to 31st March. Then we know that this X amount of balance; then we can do an interim distribution … For example, you could have, say, £50,000 each into your individual accounts, so you could get started.

…

P So you would like to have these valuations more or less by 1st April? So, whatever, no arguments about the dates, so we can finalise the rest then …

J Well, if we do this valuation that has to be signed off, hasn't it, land or no land, so that they can farm separately. That's right, yeah. Otherwise, if we end up haggling for a month down, that valuation becomes obsolete again. …

…

P So in terms of your valuation, John, is it easier for us to do as you suggest: just base it on August and just add and subtract what's changed?

J So was instructions of you know [?]. You three have got to agree. If we don't get stock and machinery done, it gets very complicated for all three, doesn't it? You are farming separately; this needs to be done very quickly. And, see, on what we did on having spoken with Eifion [Bibby, an associate of Mr Meade] and spoken with Ifan now,

> everyone seems fairly happy with the original valuations value, subject to some omissions.
>
> …
>
> D I know it's nothing. What about the insurance of the business: is that having to change?
>
> E Yes, we'll have to change as well, so both businesses are separate units.
>
> D So we would have to change insurances by 1st April?
>
> E No.
>
> D There will be two different businesses, won't there?
>
> E There's only two months' overlap, so that is not a problem.
>
> …
>
> P You'll both have to be VAT registered. Ifan, you'll have to open a separate bank account.
>
> I Yeah.
>
> …
>
> J We need to agree what both parties are going to take out of the main business for working capital.
>
> P Yes.
>
> J [And] what surpluses there is.
>
> R Hopefully, if we can do the accounts, what the tax liability and everything and know as well where the directors' current account stands, we can discuss those as well."

28. On 21 March 2013 Emrys and Dewi began the process of arranging a new holding number for Plas Llanfaglan with the Welsh Office Animal Health Department. Emrys says that on the same day he met with Mr Glyn Rhys Davies, a bank manager at HSBC Bank, and that Mr Davies told him that NewCo could only open a bank account if it had assets. I reject that evidence. First, the transcript of the meeting on 19 March 2013 shows that a bank account had already been opened for NewCo. Second, Mr Davies, who gave evidence but could not remember the conversation with Emrys, said that he would not have given advice that an account could not be opened before NewCo had assets. Third, I think it inherently probable that Mr Davies would indeed not have given such advice. It is possible that there was, nonetheless, a meeting between Emrys and Mr Davies on 21 March; if there was, it is likely that Mr Davies said that the bank would not be prepared to lend any money to NewCo unless there were assets over which it could take security.

29. Emrys also gave evidence that on 21 March 2013 he met with Richard Williams, who agreed that, as completion of the split was imminent, it would be appropriate to transfer land from the Company to NewCo. There may have been a meeting on or around that date, and it is possible that Richard Williams said something concerning the future transfer of land. I consider it very improbable, however, that Richard Williams said anything at this point to suggest that it would be appropriate simply to go ahead and effect immediate transfers of land. His own evidence was that he knew that everybody understood that there would be a split of the business, he thought it natural that legal advice be taken concerning any transfers of land, and he gave Emrys the name of a suitable solicitor, but he did not advise as to whether or not a transfer ought to take place. I accept that evidence and shall say more about it later in this judgment.

30. I do, however, accept that on or about 21 March 2013 Emrys spoke to Gwilym, who agreed to transfer Ddrainias, of which he and the Company were co-owners, or at least his interest in it, to Emrys and Dewi or to NewCo; it is impossible to be confident what precise transaction Gwilym intended. It was his intention to leave his own interest in Ddrainias to Emrys and Dewi, and he may have had in mind no more than a lifetime disposition to that effect. He may, however, have envisaged a transfer to NewCo as the first stage of a de-merger of the Company. I do not find it necessary to make a speculative finding on this point.

31. Richard Williams prepared a document dated 28 March 2013 and titled "Heads of Agreement—Relating to the Reconstruction between Rhys Williams Bangor Limited and Williams Caernarfon Limited". The document ("the Heads of Agreement") was prepared for signature by Gwilym and the parties, but in fact it was never signed by anybody. The main body of the document read as follows:

> "It is hereby agreed that as from 1st April 2013 the business of Rhys Williams Bangor Limited is to be segregated into separately identifiable parts known as
>
> Part A—Farming Business at Tai'r Meibion, Aber Road, Bangor, Gwynedd
>
> Part B—Farming Business at Plas Llanfaglan, Caernarfon, Gwynedd
>
> It is also agreed that the two directors and shareholders, Mr Emrys Rhys Williams and Mr Dewi Rhys Williams, will resign as directors and allow their shareholding in Rhys Williams Bangor Limited to be cancelled simultaneously, when they receive new shares in Williams Caernarfon Limited.
>
> It is agreed that both the transfer and transferee companies are UK resident.
>
> It is also agreed that the assets representing and maintaining the business in Part B will be transferred to Williams Caernarfon Limited for no consideration other than the assumption of its liabilities (upon the creation of new shares).

> It is also agreed that trading stock is distributed in specie (i.e. not for valuable consideration) and will deem to pass at market value for tax purposes.
>
> It is hereby agreed that the reconstruction is effected for bona fide commercial reasons and not for the avoidance of tax.
>
> We the undersigned show our agreement to the conditions of this reconstruction and approve the process by signing below."

*Transfers etc*

32. On 3 April 2013 Emrys instructed solicitors, R. Gordon Roberts Laurie & Co ("RGRL"). The File Opening Form records the clients' name as both the Company and NewCo. Emrys was the only contact recorded. On 11 April 2013 RGRL wrote to Emrys, thanking him for his instructions "to act on your behalf" in connection with the transfers of Plas Llanfaglan and Tyddyn Alys. The letter enquired whether the companies had a company seal. (Emrys says that Gwilym had given him the seal of the Company on 21 March.)

33. On 12 April 2013 Emrys and Dewi caused a payment of £95,000 to be made out of the bank account of the Company into NewCo's bank account. The payment is shown on the Company's bank statement for April 2013, which was sent to Tai'r Meibion. Ifan says that the payment was made without his knowledge, agreement or authority.

34. Richard Williams sent out the Heads of Agreement on 16 April 2013. For reasons that I shall explain later, I find that he sent at least two copies: one to Emrys and one to Tai'r Meibion. The copy sent to Emrys came with a compliment slip, on which the manuscript text, written in Welsh, translates as: "Here are Heads of Agreement. It needs to be signed by everybody for tax [or, the tax]. Regards, Richard".

35. On that same day, 16 April 2013, Gwilym died. He had been in hospital for some days before his death.

36. Gwilym's will, dated 13 July 2011, appointed Richard Williams and Mr Robert Laing, a solicitor, as the executors and trustees. Gwilym's shareholding in the Company and the funds in his director's loan account were given to Ifan, Emrys and Dewi as tenants in common in equal shares. Gwilym's personal interest in Ddrainias was given to Emrys and Dewi as tenants in common in equal shares. Ty'n y Caeau was given on trust for Ifan, Emrys and Dewi for their joint lives and, subject to that life interest, to their sister Margaret Owen absolutely. Margaret Owen also received a legacy of £35,000. The rest of Gwilym's property was left on trust for the four children.

37. On 9 May Mr Laing met with the parties and Mrs Owen to discuss the will and the estate. His file note records that he advised them that the provisions of the will might not be entirely workable "in view of the fact that the brothers are splitting their business" and that the property valuations they had already obtained would not be suitable for probate purposes. At the date of this meeting, no transfers of land from the Company had been made, and there was certainly no discussion of the fact of such transfers having been made nor (as I find) of Emrys's and Dewi's intention to make such transfers.

38. On 14 May Emrys and Dewi, acting as directors of the Company, transferred Plas Llanfaglan and Tyddyn Alys from the Company to NewCo. They executed the transfer forms also as directors of NewCo. The applications to HM Land Registry showed the value of Plas Llanfaglan as £12,000,000 and the value of Tyddyn Alys as £800,000. The latter figure might be correct, but the former is clearly a mistake. Each transfer form stated that the transfer was not for money or anything that had a monetary value. Confirmation of completion of the registration of both properties was sent to Emrys by RGRL on 24 May 2013.

39. Ifan's evidence was that he was not consulted about the transfers before they were made. Although the respondents' case before trial was that Ifan had been well aware that the transfers were being made, the evidence given by Emrys and Dewi at trial confirms that they did not tell him they were making the transfers and deliberately kept the fact from him at that stage. Ifan also claims that he did not learn that the transfers had taken place until August 2016, when he learned of them from his own solicitors, Guthrie Jones and Jones ("GJJ"). That claim is disputed by the respondents, but I accept it.

40. On 21 May 2013, Mr Laing, whose investigations as executor had discovered that Plas Llanfaglan and Tyddyn Alys had been transferred to NewCo, wrote to Richard Williams expressing surprise and concern:

> "To your knowledge has there been a transfer between Rhys Williams (Bangor) Limited to Williams Caernarfon Limited to which the deceased was a party? Did the deceased own any shares in Williams Caernarfon Limited at the date of his death?
>
> I have written to Mr Emrys Williams who appears to have had dealings with these properties for clarification.
>
> I am aware that the brothers were splitting the farming business but obviously received no instructions from the deceased in relation to any proposed partition of properties."

41. On the same day, Mr Laing wrote to Emrys: "Perhaps you would care to let me have an explanation for the apparent change of ownership." On 23 May Emrys contacted Mr Laing by telephone; the latter's file note contains the following passages:

> "[Emrys] stated that Williams Caernarfon Limited had been incorporated in September 2012 and that the transfer of properties between Rhys Williams (Bangor) Limited had taken place after his father's death. I said that I was somewhat perplexed at this because his father having died would not be in a position to sign any transfers of shares in the company in relation to that property and although he might have signed the transfers it was quite inappropriate for the transfers to have taken place when they did. He explained that he and his brother could not borrow from the Bank without having assets to provide as security and this was the reason the transfers went through. He said that the Accountant was fully aware of what had happened.
> …

> I said it was unfortunate that we had not been informed of what was going on. Emrys Williams stated that his father had prevaricated and that he and his brother felt they had to make some positive moves. He said that they did not get on with their older brother …"

In the light of all the other evidence in the case, I see no reason to doubt that this attendance note, by a highly experienced solicitor who had had dealings with Gwilym for many years, is an accurate record of what Emrys said. It shows that Emrys did not claim that the transfers were made with Ifan's agreement or knowledge.

42. Mr Laing obtained valuations for probate purposes and thereafter on 8 July 2013 he wrote to Richard Williams. The penultimate paragraph of the letter said:

> "I have attached to this letter a schedule of the various properties giving details of ownership. You will note in particular that Tyddyn Alis, Llanfaglan and Plas Llanfaglan were transferred to Williams Caernarfon Ltd which is a new company set up by two of the deceased's sons. These transfers were made after the date of the death on the 14 May 2013. One assumes that they were made with the consent of the deceased and the other shareholders in the company although it is our view that it was imprudent to make the transfers some one month after the date of the death as there may at some later date be tax implications and upon which you will no doubt advise."

On his copy of the letter, Richard Williams placed a manuscript against the second sentence of the letter, which, translated from the Welsh, reads something like, "That's the first I've heard of it. Has there been a 75% shareholders' agreement?" His annotation against the sentence beginning "One assumes …" was a manuscript note: "??? Legal transfer?" Richard Williams placed similar notes against Plas Llanfaglan and Tyddyn Alys on the schedule of properties, where he also wrote: "Don't adjust financial statements." These annotations would by themselves make it improbable that Richard Williams had prior knowledge of the transfers, and in his second witness statement in these proceedings he confirms that he did not. The annotations also indicate that he had misgivings about the way the transfers had been effected. In his second witness statement he confirms this, though he says that he had no concerns about the fact of the transfers having occurred, only about the manner in which they had occurred. In his first witness statement in these proceedings, Richard Williams said that the reason why Plas Llanfaglan and Tyddyn Alys had always continued to be included in the financial statements for the Company and never been shown in those for NewCo was simply that he had never received the necessary instructions from the directors. That is an inadequate explanation, because it avoids the questions of what advice was given as to the correct entries for the financial statements and what reasons were given by the directors for not regularising the position.

*Subsequent events*

43. Mr Meade and John Lloyd Williams clearly did not know anything about the transfers. On 12 July 2013 Mr Meade wrote to his counterpart, expressing his assumption that Gwilym's death would "have an impact on the situation and negotiations" and asking

where John Lloyd Williams had got to with regard to the valuations. John Lloyd Williams replied on 6 August:

> "Further to our last meeting held on the 18th March 2013 it was agreed that 1st April 2013 would be the valuation/dissolution date.
>
> It was also agreed that we should discuss with Emrys, Dewi and Ifan Rhys as to the adoption of the original valuation of live and dead stock dated 17th July 2012 and amended on 7th August 2012.
>
> Whilst Emrys and Dewi were prepared to proceed on the basis of the original, Ifan Rhys wanted further clarification on various issues.
>
> We have since met up with Ifan Rhys and the following proposal has now been put forward:-
>
> 1. Original valuation to be adopted and the figures in our letter dated 7th August 2012 used.
>
> 2. Ifan Rhys Williams would be entitled to the £100,739 adjustment as calculated.
>
> 3. The expenditure of £87,000 on erecting a new shed at Plas Llanfaglan to be added to the value of the property when assets are dealt with.
>
> 4. Mr Richard Williams of J Emyr Thomas & Co to audit expenditure of Rhys Williams Bangor Ltd between 1st April and dissolution date and apportion to either farm for adjustment purposes.
>
> During our original meeting in March you may recall that whilst 87k had been spent on the shed at Plas Llanfaglan, 17k had been spent on a trailer and mini digger at Tai'r Meibion.
>
> Ifan Rhys is somewhat unsure of the process but we have assured him that all that is being dealt with is the partnership and not the property.
>
> No doubt you will discuss this with your client."

That letter is significant, in particular, because point 3 of the proposal and the penultimate paragraph make clear (as is indeed the tenor of the letter) that the matter being addressed was the division of the farming business and that the question of property transfer was one to which it was intended to turn again afterwards.

44. Emrys's evidence was that a meeting of the parties, Mrs Owen and Mr Laing took place in June or July 2013, when the transfers to NewCo were "specifically discussed", and that "Ifan made no objection whatsoever." No such meeting is documented, and the

run of correspondence between Mr Laing and Richard Williams in July and August 2013 makes it unlikely that any such discussion could have occurred before the autumn of 2013 at the earliest. There is no file note of *any* date recording a conversation such as Emrys mentions. Mrs Owen's witness statement also refers to an early meeting with Mr Laing, but she says only that the splitting of the business was discussed as something that "certainly was happening" and that Ifan "said nothing to indicate otherwise". That such a discussion took place at some meeting is quite likely—it appears, indeed, to have been mentioned at the very first meeting—but it stops well short of a reference to transfers having already taken place.

45. In August 2013 Richard Williams queried the level of costs being estimated by Mr Laing in respect of dealing with the estate, and Mr Laing explained that various complications were anticipated. Richard Williams responded on 22 August, expressing the hope that the complications would not arise "because we are glad to be able to inform you that the division of the business including the split of assets and livestock has already been agreed and resolved. This was done with the assistance of two professional firms of qualified Chartered Surveyors." That implies a greater degree of agreement than is reflected in John Lloyd Williams' letter of 6 August.

46. On 13 November 2013 Mr Laing met with the parties and with Mrs Owen to discuss Gwilym's estate. Much of the discussion concerned the provisions of Gwilym's will relating to Ty'n y Caeau especially as they concerned Mrs Owen. The only part of the file note dealing with the companies and the shareholdings reads as follows:

> "In so far as the transfer of shares in Rhys Williams (Bangor) Ltd is concerned, the deceased held a 25% shareholding i.e. 3,000 shares. As the splitting of the current business has not finally taken place it was agreed that it would not prejudice the position to transfer the deceased's shareholdings to his three sons so that they each increase their own shareholding by the sum of 1,000 shares meaning that they will each then have a shareholding of 4,000 shares in Rhys Williams (Bangor) Ltd. I said that we would write to the Accountant to arrange for this to be done. I said that we would also be able to proceed transferring the deceased's interest in the freehold property at Ddrainast, Llanfaglan to Emrys Rhys Williams and Dewi Rhys Williams and said that we would be in contact with them very shortly on this."

There is no mention in the file note, or in the letter that Mr Laing sent later that day to Richard Williams, of the transfers of Tyddyn Alys and Plas Llanfaglan, and it is expressly recorded that the split of the business has not finally taken place; that is why the equality of the parties' shareholdings in the Company did not cause a problem. The transfer of Gwilym's personal interest in Ddrainias to Emrys and Dewi (but not Ifan) was provided for in the will, which was written before the agreement in principle for division of the farming business; it seems to me to reflect, first, the fact that Emrys and Dewi farmed at Llanfaglan, whereas Ifan did not, and, second, the fact that Ifan had already received the tenancy of Tai'r Meibion.

47. Mr Laing met again with the parties and Mrs Owen on 4 December 2013, when the discussion was concerned only with the issues concerning Ty'n y Caeau.

48. On 10 December 2013 Ifan met with Mr Eifion Bibby, and they spoke further on 18 December. Mr Bibby recorded in a letter to Ifan that Ifan was in agreement with points 1, 2 and 3 in the proposal in John Lloyd Williams' letter of 6 August, and that he was agreeable in principle to point 4, subject to approval of the calculations. There was to be a meeting on 21 January 2014 between Ifan, Mr Bibby and Mr Meade "with regard to advancing matters for the proposed dissolution of the company, upon establishment of the basic payment entitlements in 2015."

49. On 8 January 2014 Mrs Owen informed Mr Laing that Ifan wanted to settle the dispute with his brothers regarding the Company before he agreed what should happen to Ty'n y Caeau, because only then would he know his financial position.

50. On 21 January 2014 Ifan duly met with Mr Bibby and Mr Meade. Ifan outlined the terms on which he might reach agreement regarding the Company, but he did not give firm instructions as to the terms of any offer to be put forward. Mr Bibby's letter of 7 February 2014 to Ifan set out in six points the terms being tentatively proposed. Points 4 (single farm payment), 5 (livestock and deadstock) and 6 (Dairy Crest shares) need not be set out; however, the first three points related to the landholdings:

> "1. Plas Llanfaglan (farmstead & land in 320 acres, or thereabouts)—that subsequent to your late father's death you would be relinquishing a 1/3 share interest.
>
> 2. Y Ddôl Land—that Messrs Emrys and Dewi Williams would convey their shares for you to become the outright owner of this land parcel, which I understand extends to 39.70 acres, or thereabouts.
>
> 3. Tai Meibion—on the basis previously discussed, although the 1986 Agricultural Holdings Act Tenancy for Tai Meibion is solely in your name, I am given to understand that as part of former negotiations your brothers consider the Tenancy to be held on trust on behalf of the farming company and that, accordingly, a value should be attributable to the same. As formerly explained, this is not entirely definitive. However, evidence in the accounts of associated rent/expenses that have been paid by the trading company will, I suspect, benefit such an assertion. As previously advised, ultimately, however, one would need to seek detailed legal opinion if you wanted to consider challenging such a perception.
>
> I understand that you are to give consideration to a proposal involving a 'cash adjustment' to reflect a lesser interest that would be attributable to you in relinquishing your ownership share in Plas Llanfaglan freehold property against you being left with the Tenancy of Tai Meibion (together with freehold ownership of Y Ddol). Such payment would be to acknowledge the potential risk in you, for instance, needing to relinquish the tenancy for nil payment consideration (excepting possibly for Fixtures or improvements (as

> appropriate) and subject to the Landlord's right to claim dilapidations). Moreover, I reaffirm, in order to protect your tenancy, it is advisable that the farming company has no association whatsoever with the holding (and that the rent and livestock are in your name—i.e. that you are farming Tai Meibion and not the Company)."

51. On or about 1 March 2014 all of Gwilym's shares in the Company were registered in Ifan's name.

52. On 1 April 2014 John Lloyd Williams sent an email to Mr Bibby, enquiring what instructions he had from his client "to proceed with the process of splitting the partnership assets between the 3 brothers." The following day Mr Bibby replied that he would contact Ifan and seek further instructions.

53. Ifan met with Mr Bibby on 18 June 2014, and Mr Bibby wrote to him that day, stating his intention to contact John Lloyd Williams "to resume negotiations on your behalf, with the aim of achieving dissolution settlement" on the basis set out in the letter. That basis included a cash adjustment of £175,000 in respect of the unequal landholdings.

54. The parties and Mrs Owen also met with Mr Laing on 18 June, but there was no substantive discussion of the affairs of the Company or the division of its landholdings.

55. In July 2014 Ifan consulted solicitors, GJJ, but in connection with a deed of variation that Mr Laing had prepared with a view to resolving the position regarding Ty'n y Caeau. As a result, GJJ entered into correspondence with Mr Laing.

56. On 10 October 2014 Mr Laing met with Emrys, Dewi and Mrs Owen and her husband. Ifan was not present. The meeting concerned Ifan's refusal to join in the deed of variation concerning Ty'n y Caeau; it did not concern the Company's affairs, but Mr Laing's file note records:

> "They asked me what the options were. They stated that their brother could be very awkward and indeed it is almost 5 years now since they had decided to split the farming partnership and no settlement had yet been reached. I said that they must bear this in mind when thinking ahead as to how to proceed."

57. By October 2014, discussions between the parties' respective valuers had not progressed beyond tentative arrangements for a meeting. On 24 October Mr Bibby wrote to Ifan, recording that Ifan now wanted him to seek a higher figure than £175,000 in respect of the cash adjustment.

58. In December 2014 Emrys and Dewi consulted solicitors, Parry Davies Clwyd-Jones & Lloyd ("PDC") "regarding the proposed partition of the farms and farming business carried on by them and their brother, Mr Ifan Rhys Williams, trading under the Company of Rhys Williams (Bangor) Limited" (letter dated 10 December 2014 to Mr Laing).

59. On 19 December 2014 PDC wrote to GJJ, explaining that Emrys and Dewi had attempted to withdraw from the Company's Number 1 bank account £55,000,

representing two-thirds of the single farm payment, but had been unable to do so because, unbeknown to them, Ifan had procured an alteration of the mandate so as to require the signature of all three directors of the Company. Part of the letter read:

> "Our clients accept that there was a meeting held in March 2013 when it was agreed between our respective clients in the presence of their Accountant and Valuers that account number 1 could be closed as soon as a final agreement was reached regarding the partition of the live and dead stock. It was never anticipated that the negotiations involving live and dead stock would become so protracted and of course since March 2013 your client has been afforded full access to the account. Whilst it is acknowledged by our clients that in March 2013 it was agreed that as the Agreement on the partition of the live and dead stock was fairly imminent, our clients' share of the rent due in respect of Tai'r Meibion could be deducted from the Single Farm Payment, it was never envisaged that the agreement in relation to the live and dead stock should remain outstanding almost 21 months thereafter.
>
> Our clients consider therefore that they are fully entitled to the withdrawal of the two thirds share of the Single Farm Payment at this stage having regard to the fact that your client has also enjoyed the full benefit of the account since March 2013.
>
> Clearly in the final settlement regarding the partition of the live and dead stock and the eventual partition of the farms any adjustment that is due to your client in respect of rent can be brought to account at that stage."

60. It is unnecessary to refer to the details of the issue concerning the single farm payment. Two points may, however, be noted. First, the letter of 19 December 2014 proceeds on the basis that there had been no final settlement among the parties regarding the partition of the landholdings, nor even the livestock and deadstock. The same appreciation is reflected in the letter dated 14 January 2015 from PDC to GJJ, which suggested a round-table meeting involving the valuers and solicitors. Second, if Ifan already knew of the withdrawal of £95,000 from the Company's bank account in April 2013, he did not mention it in connection with the issue over access to the single farm payment.

61. In February 2015 NewCo obtained a customer reference number from the Welsh Office, enabling it to receive its own single farm payments, which it did from December 2015.

62. No material progress appears to have been made by 3 June 2015, when GJJ wrote to a valuer, Mr John Jones, with instructions on behalf of Ifan to value the various landholdings. Remarkably, the letter said that Gwilym had been the owner of the properties at Llanfaglan, Conwy and Menai Bridge; the author of the letter did not advert to the Company's ownership other than when noting that there was an issue whether the tenancy of Tai'r Meibion was held on trust for the Company.

63. On 15 June 2015 PDC wrote to GJJ, proposing mutual exchange of the valuations of the various holdings that had been obtained from Lloyd Williams for Emrys and Dewi and from John Jones for Ifan. The letter said: "It is our intention thereafter to seek Counsel's Opinion before we arrange a roundtable meeting with you in the hope that some progress can be made to reach a negotiated settlement between the parties."

64. Pursuant to his instructions, Mr John Jones produced a valuation report dated 6 July 2015 for Ifan. It said that the tenancy of Tai'r Meibion had no market value, as it was incapable of assignment and sub-letting and parting with possession were prohibited. Groes Ddôl was valued at £429,000. The land at Llanfaglan (Plas Llanfaglan, Tyddyn Alys and Ddrainias) was valued at £3,289,000.

65. On behalf of Emrys and Dewi, PDC obtained a valuation report from John Lloyd Williams. I have not seen that report, but it appears that he attributed a significant value to the tenancy of Tai'r Meibion. The reports were exchanged on 21 August 2015.

66. On 25 September 2015 the parties held a joint meeting; it has been referred to as a round-table meeting, but each side was in its own room. The respondents were accompanied by John Lloyd Williams, a barrister (Mr Nicholas Jackson), and a representative of PDC. Ifan was accompanied by John Jones, a barrister (Mr Trefor Lloyd), and a representative of GJJ. Also present was Richard Williams, who went between the two sides.

67. On 1 October 2015 GJJ wrote to Richard Williams:

> "Further to our previous correspondence and meeting at Parc Menai last week, you outlined during that meeting that if the company assets were split, it would be better from a tax point of view for that split to be effected by way of de-merger rather than dissolution with the former not giving rise to any taxation.
>
> Can you please confirm this to us in writing.
>
> We were also told by Mr Nicholas Jackson, Barrister for our client's two brothers, that there were adjustments that needed to be made to the accounts and, in this context, he referred to the goodwill. However, when we raised with (sic) the matter with you, you appeared unaware of these matters.
>
> Can you please confirm the position to us also in relation to any adjustments."

Having received no reply to this or two subsequent letters, probably because Richard Williams had changed his address and had not received them, GJJ wrote to him again on 26 October, sending him another copy of the first letter.

68. As a result, on 18 November 2015 Richard Williams wrote to Ross Martin Tax Consultancy regarding the splitting of the Company. He set out the bare facts, noting that Emrys and Dewi were "farming at Plas, a 360 acre farm owned by the company, valued at around £3.25m" (the letter said nothing about the transfers to NewCo) and that Ifan was farming at Tai'r Meibion. It said that the livestock and machinery had

been divided between the two farms, and that Emrys and Dewi were trading with a new bank account while Ifan used the Company's bank account. The letter continued:

> "In order to gain separation, it was initially thought that a 'de-merger' route could be followed.
>
> Ifan had agreed the 'Economic Value' of Tai'r Meibion (tenanted) was similar to that of Plas (company owned asset) and initially the split and projected income that could be generated from both farms was similar.
>
> However, Ifan has now re-considered his position and requires a cash adjustment, due to the difference between the Freehold Value of Plas Farm and the tenanted value of Tai'r Meibion Farm.
>
> We would appreciate your advice concerning:
>
> a) Is it still possible to follow a De-Merger route realising that a cash adjustment (circa £350,000) would be required? Would you recommend another method of separation, or 'pulling out' of the company for Emrys and Dewi.
>
> b) What would the Capital Gains Position be in general?
>
> c) Would Stamp-duty land tax be an issue if a cash adjustment/consideration arises, or would the separation matter be viewed on similar grounds to that of a divorce?
>
> d) If a re-merger [scil. de-merger] route is possible, would HMRC clearance be required first?"

69. Ross Martin Tax Consultancy replied to Richard Williams' letter on 10 December 2015. The advice given was to the following effect:

a) De-merger should be possible, either indirectly (by the distribution of one of the two farms to the appropriate shareholder or shareholders via a new company) or directly (by the transfer of the two farms to new subsidiaries). "Provided that all relevant conditions are met it should be possible to achieve the above with no capital gains tax, income tax or corporation tax consequences for the shareholders or for the company."

b) Provided the de-merger route were followed, there should be no realisation of capital gains, as each shareholder would be acquiring new shares that stood in place of his original shares. By contrast, a buy-out of one or other side would result in a capital gains tax liability.

c) Similarly, there should be no liability to Stamp Duty Land Tax. "However, there is likely to be a stamp duty charge at 0.5% of part of the value of the company on a transfer of shares."

d) It would be advisable to obtain HMRC clearance in respect of such a transaction.

70. On 1 June 2016 NewCo gave a charge over Tyddyn Alys and a debenture to Santander UK Plc. Emrys has explained that this was to secure borrowing by NewCo of £140,000. Why Santander should have been willing, as several other banks were not, to lend money to NewCo on the security of assets that were not included in its financial statements is something of a mystery. But it did so. Another unresolved question concerns what happened to the moneys advanced to NewCo. More important than either of these mysteries, however, is the fact that, although the respondents were apparently able to raise money on the security of Tyddyn Alys, none of that money was paid to Ifan. The parties have always proceeded on the basis that some balancing payment would be made to Ifan upon the de-merger, but the respondents have never paid any amount.

71. The next significant record in the documents is a letter dated 24 August 2016 from GJJ to PDC:

> "Further to previous correspondence and whilst obtaining taxation advice on the proposed dissolution of the companies and demerger, it has come to our attention that the property, Plas Llanfaglan, was transferred from Rhys Williams Bangor Limited to Williams Caernarfon Limited on the 14th May 2013. …
>
> Significantly, our client was not a party to the Transfer and it was made unbeknown to him. It is also significant that your clients have hitherto and despite ourselves and yourselves having been involved in this matter for over two years not volunteered the information about the existence of the transfer at all. This is quite serious.
>
> …
>
> We require a full explanation from your clients as to why the Transfer was undertaken, why our client was not consulted and, further, a full copy of the solicitor's file of papers when the transfer was undertaken …"

72. No reply to that letter was received. Emrys and Dewi instructed Aaron & Partners to act as solicitors for NewCo. On 21 October 2016 GJJ wrote to Aaron & Partners, and on 25 October they wrote again by email, asking for confirmation that Emrys and Dewi would agree to the setting aside of the transfer of Plas Llanfaglan. The email quoted advice received from a tax consultant:

> "A taxable chargeable gain arising in RWB [i.e. the Company] on the market value of the land transferred (or the consideration paid, if more) less the original cost of the land to RWB (or March 1982 value if then held) indexed for inflation. There may also be rolled-over gains in relation to the land, but assuming there are none, this will be roughly the calculation of the gain. Corporation tax will be payable on the gain. Interest and

> penalties could also be due on RWB if the disposal was not correctly dealt with in the returns. If the land was transferred at below market value then there could be an income tax charge on the shareholders in RWC [i.e. NewCo]."

73. Aaron & Partners replied on 27 October. On behalf of Emrys and Dewi, the letter challenged Ifan's claim that he had not known of the land transfers. It set out the brief history of the matter and said that the Heads of Agreement reflected the agreement made at the meeting on 19 March 2013 and, though it had not been signed because of Gwilym's death, it evidenced that agreement. Two further matters were relied on as showing that Ifan had known of the transfers: first, the fact that the shareholding in the Company had not been divided equally after Gwilym's death but that all his shares had been registered in Ifan's name; second, that at a meeting "later in 2013, possibly after July" between Mr Laing, the parties and Mrs Owen "[i]t was discussed … that the transfer of Plas Llanfaglan had taken place from Rhys Williams (Bangor) Limited to Williams Caernarfon Limited and your client made no objection to it." As regards tax consequences of the transfers, the letter said:

> "14. We note your client has raised concerns regarding potential tax liabilities. It is significant from your email dated 25 October 2016 that all of the tax liabilities fall upon your client's company and not our client. It may be that your client now regrets the decision that he made although undoubtedly he was advised at the time. It is further significant that you will not disclose to us your expert advice in this regard save for the paragraph that suits your client's case. Our client's position is that there are no significant tax consequences.
>
> 15. We note the reference to the possibility of an income tax charge to the shareholders of Williams Caernarfon Limited. Your client is not a shareholder in Williams Caernarfon Limited and so any such charge to income tax is not his concern."

74. GJJ replied to that letter on 25 November 2016. Among the points made in the reply were the following: that the transfers had never previously been mentioned in correspondence by PDC; that they had not been mentioned at the round-table meeting on 25 September 2015, attended by counsel, which had proceeded on the basis that Ifan remained interested in Plas Llanfaglan through the Company; that the very existence of Heads of Agreement shows that any arrangement or agreement was intended to be documented; that Ifan had never previously seen the Heads of Agreement; that Ifan had not been privy to the execution of the transfers; and that Emrys and Dewi had never resigned as directors of the Company, or given up their shareholdings, although those were requirements of the agreement they alleged.

75. These letters set out the essential battle-lines for what followed. There is no need to recite the further correspondence between the solicitors. However, regardless of the rights and wrongs of the case, the wisdom of the following paragraph in Aaron & Partners' letter of 1 December 2016 seems incontestable:

> "This matter is plainly a mess. Your client says there was no agreement and wants the transfer set aside. Our client says there was agreement and that it is simply to be carried out. It seems to us that if this matter proceeds to Court there will be a number of procedural skirmishes prior to a final determination and the costs will become greatly disproportionate to the facts in issue. We understand that there is potentially a large sum of money at stake but nevertheless we feel all parties would be best served by a formal mediation taking place in the near future before any formal legal proceedings are commenced."

Perhaps the one comment I would add is that this paragraph is overly sanguine about the simplicity of carrying out the agreement alleged by Emrys and Dewi, because, as I pointed out in the course of the hearing, the evidence made it very clear that on any possible view of the matter there was a great deal that was never agreed by the parties.

76. In November 2016 GJJ wrote to Richard Williams to enquire concerning his understanding of the position. His reply, in Welsh, has been translated as follows:

> "My understanding of the situation in March 2013 was that the company was to be divided fairly, so that each one of the three brothers was to get an equal living.
>
> Moreover, when Mr Gwilym Rhys (the Father) was in touch with us a short time before his death, he emphasised the following four points:
>
> 1. On the basis that the tenancy of Tai'r Meibion had been transferred to Ifan, then it would only be fair for Plas Llanfaglan to pass to Emrys and Dewi
>
> 2. If Plas Llanfaglan happened to be sold, then Ifan was to get his 'share' of the money whilst he was still alive
>
> 3. The single payment was to be divided fairly, between the three sons. The rent (Tai'r Meibion) was to be subtracted first and the remainder divided equally between the three. This was to happen, when the payment was about £100,000, and the rent about £21,000 a year.
>
> 4. Any difference in values of the two farms (Tai'r Meibion and Plas), to be kept low, so there was no necessity for any one of the brothers to borrow money in order to pay the other. The equality here in values was necessary in order to have the seal of approval of the 'taxman' with the 'de-merger' and only a difference in values to be shown between the stock and machinery."

77. On 9 December 2016 NewCo transferred a small part of Plas Llanfaglan to Emrys and his wife, apparently so that they could build a house for themselves on it.

78. A mediation took place in March 2017 but did not result in agreement.

79. There had been no further developments, save for some "without prejudice" correspondence, when in May 2019 Ifan commenced two proceedings: the present petition, and a derivative claim on behalf of the Company. The matters relied on in the two claims were identical, namely what were said to be the misappropriations from the Company of £95,000 in April 2014 and of Plas Llanfaglan and Tyddyn Alys in May 2014. In September 2019 I refused permission for the continuation of the derivative claim. I shall not recite in this judgment the procedural history of the petition.

## Law

80. Section 994(1) of the Companies Act 2006 provides:

> "A member of a company may apply to the court by petition for an order under this Part on the ground—
>
> (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
>
> (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."

81. In *O'Neill v Phillips* [1999] 1 WLR 1092, decided under the corresponding provisions of the Companies Act 1985, Lord Hoffmann said at 1098-9:

> "In section 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history (which I discussed in *In re Saul D. Harrison & Sons Plc* [1995] 1 BCLC 14, 17–20) that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. As Warner J. said in *In re J.E. Cade & Son Ltd* [1992] BCLC 213, 227: 'The court … has a very wide discretion, but it does not sit under a palm tree.'
>
> Although fairness is a notion which can be applied to all kinds of activities its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a

> family. In some sports it may require, at best, observance of the rules, in others ('it's not cricket') it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important.
>
> In the case of section 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carries over into company law.
>
> The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith."

82. For the purposes of this case, it is unnecessary to explore in detail the ways in which the basic principles have been applied in various cases. Misappropriation by directors of a company's assets may be unfairly prejudicial to members (for example, *Re London School of Electronics Ltd* [1986] Ch 211), as may their breach of fiduciary duties (for example, *Estera Trust (Jersey) Ltd v Singh* [2018] EWHC 1715 (Ch) at [264]). However, wrongful conduct by directors in a quasi-partnership will not be "unfairly" prejudicial if the other quasi-partners have behaved in the same way on the understanding that there will later be a process of accounting and equalisation (for example, *Re Jayflex Construction Ltd* [2003] EWHC 2008 (Ch), [2004] BCLC 145). The test of unfair prejudice—in both its parts: prejudice and unfairness—is objective: *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354.

83. The court has wide powers if it finds that there was been unfairly prejudicial conduct. Section 996(1) provides:

> "If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of."

Examples of the kind of relief that may be given are set out in section 996(2), but they do not limit the generality of subsection (1).

84. However, the grant of relief is discretionary. In particular, the court may refuse to grant relief if the petitioner's delay in seeking a remedy renders it inequitable for him to be given relief: *Re DR Chemicals* (1989) 5 BCC 39.

85. As directors of the Company, Emrys and Dewi owed to the Company a number of general duties. The facts of the case make it unnecessary to refer to these in detail or to analyse them. The following duties, now set out in Part 10 of the Companies Act 2006, may be mentioned: the duty to act in accordance with the company's constitution and to exercise powers only for the purposes for which they are conferred (section 171); the duty to act in the way the director considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole (section 172); the duty to exercise reasonable care, skill and diligence (section 173); the duty to avoid a situation in which the director has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company (section 174).

## Discussion

86. In my judgment, the conduct of Emrys and Dewi in transferring Plas Llanfaglan and Tyddyn Alys from the Company to NewCo was unfairly prejudicial to the interests of Ifan as a member of the Company. I do not consider that the transfer of £95,000 from the Company to NewCo was unfairly prejudicial to his interests.

*The transfers of land*

87. I find that Ifan did not agree to the transfers of Tyddyn Alys and Plas Llanfaglan to NewCo and did not know of them until long after they had happened. The transfers were unilateral actions of Emrys and Dewi, carried out without lawful authority, in breach of duty to the Company, and behind Ifan's back. The evidence in support of this conclusion seems to me to be overwhelming.

88. First, it is clear that there was nothing that amounted to a relevant resolution of the directors or the members for the transfer of the properties, and that there was no concluded agreement, whether formal or informal, between the parties when the transfers were made. There was certainly agreement that the farming business would be divided, with Emrys and Dewi at Llanfaglan and Ifan at Tai'r Meibion, and everyone envisaged that this would in time be formalised by some form of de-merger of the Company. But there was no agreement on how the roadmap for de-merger was to be implemented, far less that Emrys and Dewi could just proceed with transfers of land out of the Company without further reference to Ifan. That was well understood by Emrys and Dewi; Mr Laing's file note dated 10 October 2014 succinctly set out their position. That is why they did not, at the same time as making the transfers or indeed at any time thereafter, resign as directors of the Company, transfer their shares to Ifan, conclude an agreement as to valuations and as to the balancing payment to be made to Ifan, or make any such balancing payment. It is also why in December 2014 they consulted PDC "regarding the proposed partition of the farms and farming business".

89. Second, the preparation of the Heads of Agreement serves only to reinforce the point that there was at best only an incomplete agreement in principle but nothing that envisaged or authorised the immediate transfer of land out of the Company. I accept the evidence of Richard Williams that he sent a copy of the Heads of Agreement to Tai'r Meibion as well as to Emrys. Ifan accepted that a copy had been in a drawer at the farmhouse, but he said that Gwilym must have put it there and that he himself had never seen it. I do not accept that Gwilym put the copy in the drawer: the Heads of Agreement were not sent out at all until the very day that Gwilym died; he would have been dead before they could have arrived at Tai'r Meibion, and anyway he had been in hospital in the days preceding his death. So it is probable that Ifan received the Heads of Agreement and that he read them. However: (1) no one ever signed the Heads of Agreement; (2) the document makes only the most general reference to the transfer of assets and, even if signed, would not authorise what Emrys and Dewi did; (3) as is obvious from the form of the document and its terms, and as Richard Williams stated in cross-examination, the Heads of Agreement were not intended to be "the last word" but only guidance for further discussion with a view to eventual agreement.

90. Third, Emrys and Dewi did not involve Ifan in the transfers. If the matter had been agreed, it would have been natural to include him, as the person who was intended to become the sole director and member of the transferor, in the instructions to the solicitor and the execution of the transfers. However, he was excluded and the paperwork relating to the transfers was not sent to him. That was clearly deliberate.

91. Fourth, in this regard, the explanation given by Emrys to Mr Laing on 23 May 2013 is relevant. He did not say that the transfers had been agreed among all relevant parties. He said that the transfers were made because he and Dewi could not obtain finance for NewCo unless it had assets to stand as security and that, in circumstances where Gwilym had delayed and they did not get on with Ifan, he and Dewi felt they had to make "some positive moves".

92. Fifth, although Emrys told Mr Laing that Richard Williams "was fully aware of what had happened", I am satisfied that Richard Williams was taken aback when he learned of the transfers in July 2013. His annotations on the letter dated 8 July from Mr Laing and on the accompanying schedule show that he doubted the legality of the transfers. They also appear to indicate that he decided not to show the effect of the transfers in the financial statements either of the Company or of NewCo, both of which he has continued to prepare; and, indeed, the Company's accounts still show Tyddyn Alys and Plas Llanfaglan as assets of the Company, and the accounts of NewCo have never shown the properties as assets of NewCo. The correspondence between GJJ and Richard Williams in October 2015 and again in November 2016 is further evidence that Richard Williams did not mention the transfers to Ifan or GJJ at the meeting on 25 September 2015 or at any time prior to August 2016. I am also satisfied that Richard Williams did not mention them to PDC or Mr Jackson. Further, Richard Williams' letter of 18 November 2015 makes no mention of the transfers and proceeds on the basis that the Company retained its assets.

93. In this respect, the oral evidence of Richard Williams is both relevant and consistent with the documents. The reason why he contacted Ross Martin Tax Consultancy in March 2011 and again in November 2015 was that he and his firm lacked sufficient expertise to deal with the de-merger without the assistance of specialist advice. Because the parties had agreed that the business would be split and had also agreed which

brothers would farm the particular landholdings, he expected that there would be transfers of land. However, he did not advise Emrys in respect of the transfers; he would not have done so without taking further advice from Ross Martin Tax Consultancy. Rather, he told him to take advice from a solicitor. When he learned that the transfers had actually taken place, he was concerned whether the technical requirements of company law and of statutory de-merger had been complied with. I have no doubt that Richard Williams thought that Emrys and Dewi had (so to speak) jumped the gun and hoped that the transfers could be brushed under the carpet until a proper de-merger were effected.

94. Sixth, there is no record in correspondence or file notes that Ifan was told of the transfers before 2016. The respondents did not speak to him. Mr Laing's file notes contain no mention of the transfers, and the file note of the meeting on 13 November 2013 recorded that "the splitting of the current business ha[d] not finally taken place".

95. Seventh, neither Mr Meade or Mr Bibby nor John Lloyd Williams was aware of the transfers. This is clear from their correspondence, which shows that they proceeded on the basis that division of the Company's assets would be dealt with later. Most striking in that regard is John Lloyd Williams' letter of 6 August 2013, but the other communications proceed on the same basis, namely that division of the property was yet to take place. Mr Bibby made a witness statement, in which he stated that neither he nor anyone in his firm knew of the transfers and that John Lloyd Williams did not mention them. Mr Bibby was not cross-examined on his statement.

96. Eighth, PDC did not know of the transfers. It did not mention them in correspondence and it did not mention them at the meeting on 25 September 2015. The correspondence from December 2014, when PDC had first been instructed, makes clear that PDC understood that there had been no final settlement among the parties regarding the partition of the landholdings.

97. Ninth, in cross-examination Emrys accepted that he did not tell Ifan that the transfers were going to take place and that Ifan did not know of them before they occurred. (Dewi's evidence was to similar effect.) Emrys said: "I did not want him to find out about the transfer before it took place. I assumed there would be fine-tuning of the valuations in April/May 2013. He would find out then."

98. Emrys was unable to give any answer to the question why in his witness statement he had described Ifan's claim not to have known of the transfers as "nonsense". The relevant passage of the statement (paragraph 53) continues:

> "Why did he think that we had not been to Tai'r Meibion since 2011? What did he think was happening to the income that arises from Plas Llanfaglan and Tyddyn Alice? What did he think had happened to us? He had come to Plas Llanfaglan regularly to collect straw until around 2012 and after that stopped. What did he think had been going on? He is choosing to entirely ignore this period of time and the significant events that took place and it is ridiculous to suggest that he had no idea about the transfers"

Quite apart from the fact that this sort of comment is not evidence and ought not to be in a witness statement, this passage is little more than bluster. Everyone acknowledges

that the intention was ultimately to create two distinct entities, one for Ifan based at Tai'r Meibion and one for Emrys and Dewi based at Llanfaglan. That reflected the realities of the farming operations since 2010, though the Company had continued to be the single legal entity through which business was carried on. The events of 2011 and 2012 pre-date even the agreement alleged by the respondents and do not indicate knowledge, far less authorisation, of transfers in May 2013. It is not in doubt but that the farming activities at Llanfaglan and at Tai'r Meibion were carried on separately after March 2013. The question, put bluntly, is whether Emrys and Dewi jumped the gun by transferring land. The answer, in my judgment, is that they did.

99. Three specific matters have been raised in support of the contention that Ifan knew about the transfers and that they were not unfairly prejudicial to his interests: first, the position relating to Tai'r Meibion; second, the treatment of Gwilym's shares; third, evidence given by Ifan relating to proposed changes to Gwilym's will.

100. As to Tai'r Meibion: I have reminded myself that the trial upon which this judgment is given was limited to the issue whether the respondents have conducted the affairs of the Company in a manner unfairly prejudicial to the petitioner. Although it is very tempting, in the interests of avoiding future strife, to give a ruling on the question whether the tenancy of Tai'r Meibion is held on trust for the Company, I shall not do so now. First, as that question is not integral to the issue at this trial, the failure of the respondents to explain with any clarity or rigour why there should be found to exist a trust ought not to prejudice them. Second, I ought only to give a ruling on the question if such a ruling is necessary to the determination of the specific issue with which the trial was concerned, namely unfairly prejudicial conduct. It is not so necessary. The conduct relied on by Ifan relates to transfers of Plas Llanfaglan, Tyddyn Alys, and moneys in the Company's bank account. I do not consider that it is necessary to determine the beneficial ownership of Tai'r Meibion before it can be decided whether or not the transfers were (a) prejudicial and (b) *unfairly* prejudicial to the interests of Ifan as a member of the Company. I need go no further than to record what I find to have been in the parties' minds at the time. Emrys and Dewi combined, not entirely logically, an obvious sense of grievance that the tenancy of Tai'r Meibion had been given to Ifan with the contention that Tai'r Meibion ought to be taken into the reckoning on the division of the assets. Mr Meade expressed the opinion (which, whether right or wrong, is not binding on this court) that Tai'r Meibion was held on trust for the Company and that its value ought to be taken into account. Ifan did not expressly accept that opinion, but he appears to have been willing to proceed on the basis that it was right. The point with which he was more concerned was the question whether the tenancy had any value at all as a capital asset; he was unwilling to accept that a non-assignable tenancy that would not outlast him had substantial value. No doubt, as time has gone by, any value it might have possessed has reduced.

101. In his closing submissions, Mr McDonald submitted that the "very foundation of the discussions between the parties" was that they were starting from a position where Ifan had "weakened the Company's financial position" by "procur[ing] that the tenancy of Tai'r Meibion be transferred to him from Gwilym", which was "likely to constitute a breach of directors' duties by both Gwilym and Ifan." I am afraid that I have difficulty making good sense of this submission. First, if the transfers effected by Emrys and Dewi were unauthorised and wrongful, the point seems to go nowhere. Second, as I understand it, the point being made is that, although Ifan held the tenancy of Tai'r

Meibion on trust for the Company, the fact that the tenancy had been vested in him rather than in someone else was disadvantageous to the Company. That has in no way been established: it might be that, because Ifan has no children, the future use of Tai'r Meibion by the Company would necessarily be more limited than it would be if he had children, because there can be no further statutory succession; however, that does not show that any better alternative was in fact available. Third, it has not been shown that Ifan "procured" anything, far less that he or Gwilym acted in breach of duty to the Company. Fourth, even if Ifan were to have acted in breach of duty to the Company in taking the tenancy of Tai'r Meibion, that would not justify the wrongful removal of assets from the Company by Emrys and Dewi or have the effect of rendering any prejudice thereby suffered by Ifan "not unfair". Fifth, any supposed misconduct by Ifan would have taken place no later than January 2008; it is far too late to be raising it in these proceedings, especially in such an indirect manner. Sixth, I regard it as simply false to say that the "very foundation of the discussions between the parties" was as Mr McDonald describes. All that can be said is that the parties conducted their discussions in the knowledge, and therefore on the basis, that the tenancy of Tai'r Meibion was held by Ifan and that therefore any de-merger would have to be effected on the basis that Tai'r Meibion went with Ifan.

102. If the parties remain unable to sort out their own affairs sensibly, it may be necessary at some future date for this court to determine the issues (1) whether Tai'r Meibion has any, and if so what, capital value and (2) whether any such value is an asset of the Company or an asset of Ifan personally.

103. As to Gwilym's shares: There is very little evidence as to how the Company's returns came to show all of these as now being held by Ifan. As Ifan was the only person acting as a director of the Company in 2014 and as Richard Williams prepared the Company's returns and financial statements, it must be that Richard Williams prepared and Ifan approved the paperwork on the basis that the shares had all gone to Ifan. However, the evidence is insufficient to establish how that came about. And the silence of Mr Laing's file, combined with Mr Laing's obvious experience and rigour in dealing with estates, makes it very unlikely that the matter was formally dealt with as a matter of the administration of Gwilym's estate. For Emrys and Dewi, it is suggested that the treatment of the shares in the returns was at Ifan's bidding, because he knew that they were leaving the Company and that he was to be the sole shareholder. That might be right, though Ifan denies it and says that he simply signed the paperwork prepared for him by Richard Williams and did not realise how the shareholdings had been shown. However, even if it is right it does not advance matters greatly, because everyone was agreed on the nature of the split towards which all were working and it is common ground that the financial arrangements for that split had not been agreed. At most, Ifan's conduct might show that he too, with Richard Williams' connivance, was anticipating the final outcome of the intended de-merger. It does not lead me to the conclusion that he knew or approved the transfers of the landholdings, either before they occurred or at any time in 2014. The books of the Company will have to be corrected to show that the parties have equal shareholdings.

104. As to Ifan's evidence concerning Gwilym's will: This concerns a passage in Ifan's cross-examination. Ifan said, "The will was supposed to have been changed, but it wasn't changed." He was asked why the will was supposed to have been changed, and he replied, "Because three-quarters of the value of the assets were in another company."

In answer to further questions, Ifan insisted that he did not know at the time that any transfer had taken place. I asked why Gwilym should change his will, when there had been no transfer of assets from the Company, and Ifan answered, "I shouldn't have said that. I didn't know. [I think this meant "I didn't know the will was going to be changed."] I was going on common sense." For the respondents, Mr McDonald submits that this evidence shows that both Gwilym and Ifan "knew that the land was to be transferred from the company into [NewCo] in accordance with the agreed split date of 1 April 2013. There is no other reason why Gwilym should change his will in that way."

105. The relevant part of Ifan's evidence is not easy to interpret and I have given much thought to it. However, in the light of all the evidence I am not persuaded that it shows that Ifan knew that the land was to be transferred straight away. Mr McDonald's submission would perhaps be a little more attractive, were it not that Emrys admitted in the course of his own evidence that he hoped to keep the transfers secret from Ifan until further agreement was reached. Further, as Gwilym had actually died before the transfers were made, Ifan's evidence can hardly show that either of them had knowledge that any transfers had taken place as at 1 April 2013 or shortly after. What the evidence might indicate is that Ifan understood that implementation of the de-merger would be accompanied by a change of Gwilym's will and that, as there would now be no such change of the will, he was less enamoured of the proposed terms of the de-merger. That, however, would not take matters any further, in circumstances where there was never a binding agreement or resolution for de-merger. Further, the only one of the siblings who actually expressed unhappiness with the will in the meetings with Mr Laing was Mrs Owen; Ifan did not do so.

106. In my judgment, it is beyond argument that the transfer out of the Company of its major capital assets at Plas Llanfaglan and Tyddyn Alys was *in itself* prejudicial both to the Company and to Ifan as being a one-third shareholder in the Company.

107. For Emrys and Dewi, Mr McDonald submits that the transfers were not prejudicial to Ifan, because he formerly held only a one-third interest in the entire enterprise of the Company, whereas he now holds the sole interest in the enterprise at Tai'r Meibion. That is a wholly specious argument, even leaving aside the assumption that the tenancy of Tai'r Meibion is an asset of the Company. It simply assumes as a given the de-merger that has never been finally agreed or formally implemented and was subject of ongoing negotiations in 2013, 2014, 2015 and 2016, well after the transfers. As Mr McNall submitted, there was never a de-merger: "This was simply a 'carve-out' of the Company's valuable assets, by the respondents, behind the petitioner's back." To put the matter shortly: Ifan is a one-third shareholder in the Company and is prejudiced by the removal from the Company of its major capital assets.

108. I am satisfied, further, that the transfers are prejudicial to the Company because they potentially result in adverse tax consequences, namely a liability for capital gains tax. Mr McDonald has two responses to that. First, he says that the complaint of prejudice is premature: the prejudice is indeed potential, and it will not necessarily result. Second, he says that the complaint is another example of Ifan repenting belatedly of a course he agreed to: he now finds that the transfers of the Llanfaglan properties might impose a tax liability on the Company, in which he will be the sole shareholder, and is trying to get out of the agreement. Neither of these responses is correct. As to the first point, that any tax-based prejudice is potential but not yet actual, it is right to observe that the

consequences have been avoided hitherto only because no one has reported the transfers to HM Revenue and Customs: they have been brushed under the carpet in the hope that they can be rolled up in a final de-merger agreement; only so will the adverse consequences be averted. As such a de-merger has not finally been agreed, the potential liability constitutes a gun against Ifan's head. It is currently unclear, indeed, whether the liability can be avoided, though I shall assume that it might be possible to avoid it by setting aside the transfers and thereafter effecting a de-merger. As to the second point, that Ifan is repenting of a bad bargain, the matter was always to be dealt with by a tax-efficient de-merger, not by a unilateral frolic of Emrys and Dewi. Again, the argument advanced for the respondents has an unsavoury tang of seeking to use the tax consequences of their conduct as a stick with which to beat Ifan into reaching an agreement.

109. The prejudice was caused by the breach of duty of the respondents as directors of the Company. First, there was a simple breach of duty by reason of the respondents' misappropriation of the Company's assets. I do not think that Emrys and Dewi have set out to defraud or cheat their brother; they are not dishonest or fraudulent in that sense. However, through a combination of frustration with him and a disinclination to talk to him, they have deliberately done, behind his back and without any lawful authority, what could only properly have been done as a matter of agreement when the de-merger (as distinct from the splitting of the business activities) had been worked through and formalised. The documents indicate that they did this, at least in part, because they wanted to be able to use the Company's assets to assist in raising finance for their own business. In the sense in which the expression is used in the context of equity and the duties of directors, Mr McNall is correct to submit that Emrys and Dewi have acted fraudulently. Second, as Mr McNall submits, even if it were possible to say that the respondents could lawfully have effected the transfers, the respondents were at the least in breach of their duty of care to the Company, because they failed to take or act upon professional advice as to the way in which the Company's assets ought to be divided.

110. In short, I fully agree with Mr McNall's robust way of putting the matter in his skeleton argument:

> "Handing over £2m+ of assets to NewCo on a wing and a prayer and trusting that HMRC would fail to spot the acquisition of £2m+ of tax-free assets is directorial misconduct of a plain and fairly breathtaking nature."

111. Mr McDonald submits that any prejudice to Ifan was not "unfair" to him, for the purposes of section 994. It clearly was unfair. Mr McDonald's submission again seems to rest on the premise that Emrys and Dewi acted in a manner that had been agreed to by Ifan. However, it had not been agreed to. The de-merger that all parties saw as the end goal would involve transfers of the Llanfaglan properties, but that is not the same thing as an agreement that the transfers would be effected as they were.

112. Mr McDonald further submits that relief ought to be denied and the petition dismissed on grounds of delay in commencing the proceedings. He relies primarily on what he says is delay from May 2013, but in any event he says that the proceedings ought to have been brought much earlier than they were, as Ifan admits that he knew of all matters he relies on no later than August 2016. On the facts, reliance on delay cannot

avail the respondents. The transfers of land in 2013 are not merely an historic matter. They are steps in a de-merger that must either be halted and reversed or, as the respondents themselves say, completed by agreement. I do not find it the least bit attractive to say that the court ought to refuse relief and leave matters as they have fallen.

*The transfer of money*

113. In my judgment, the case is rather different as regards the transfer of money, because some such transfer was necessary for the purposes of the practical division of the Company's farming business in April 2013, on which all were agreed. The meeting on 19 March 2013 had not reached a concluded agreement for de-merger of the Company and had not authorised any transfer of the Company's land: the formal splitting of the Company was agreed in principle as the way forward, but it could not be implemented until the terms and method on which the assets would be divided were agreed; they never have been agreed. However, that did not prevent an arrangement whereby, pending de-merger, Emrys and Dewi carried on the farming business at Llanfaglan and Ifan carried on the farming business at Tai'r Meibion. This required that moneys be made available to Emrys and Dewi out of the Company, as well as that they use the Company's livestock and deadstock at Llanfaglan. That money would be transferred to Emrys and Dewi out of the Company's bank account as working capital was expressly discussed at the meeting and was clearly a matter of agreement. I find that Ifan knew perfectly well that this was going to happen. It is correct, however, that there was no agreement at the meeting or before 12 April 2013 as to the amount to be transferred from the Company: the amount was not agreed at the meeting, and Emrys and Dewi did not discuss it further with Ifan.

114. However, I find that Ifan did know, very promptly, that £95,000 had been transferred from the Company's bank account; and it is likely that he knew the transfer had been made to NewCo, as he knew that there was a new company and there had been discussion on 19 March 2013 concerning activation of the bank account. The transfer cannot have been a secret from him, because the transfer of money is shown on the bank statement for April 2013, which was sent to his home. No one can have expected that he would fail to notice the removal of £95,000 from the Company, and I find that he did not fail to notice it.

115. Ifan did not complain about the amount when he learned about it. Even if complaint might in principle be made about the transfer of an amount that had not been agreed, it has not been shown that the amount was inappropriate to enable the practical division of farming operations to take place, and I regard it as unjustified for Ifan to present the transfer as though it were tantamount to an act of theft. He knew that money was to be transferred and he made no objection to the amount so transferred. I do not consider that Ifan can now complain that the transfer was unfair.

116. This conclusion has only limited benefit for Emrys and Dewi. It means that I shall not order the money to be restored to the Company, but it does not mean that the money will simply be ignored in the final reckoning. The Company's money that was used by Emrys and Dewi for carrying on the Llanfaglan business will have to be counted as applied to their personal use, just as the Company's money that was used by Ifan for the Tai'r Meibion business will have to be counted as applied to his personal use. All will have to be included in the final accounting for the purpose of what Mr McNall

called "the carving up" of the Company's assets—a process that, without expert professional advice and a willingness by the parties to be schooled, is liable to prove very messy.

*Conclusion*

117. For the reasons set out above, I hold that the respondents have conducted the affairs of the Company in a manner unfairly prejudicial to the interests of the petitioner as a member.

118. The consequences of that conclusion will remain to be worked out in practical terms. It seems likely that, in the first instance, it will be necessary that the transfers of Plas Llanfaglan and Tyddyn Alys to NewCo be set aside. However, part of the land has been transferred to Emrys and his wife, and part has been charged to a bank. There remains the wider question of how the affairs of the Company are to be regularised, by de-merger or winding up.

119. In inviting me to dismiss the petition, Mr McDonald acknowledged that this would leave things "in something of a mess". As I pointed out to the parties at the conclusion of the evidence at trial, things were a mess whatever became of the petition. Richard Williams, whose position as accountant to both sides of this dispute, is unenviable (though in large measure self-induced), summed the matter up well in evidence that he gave during his cross-examination, to this effect:

> "The answer is to come back around the table with Ross Martin and work out a plan for de-merger. My position is that the de-merger route worked out by Ross Martin has not been followed but ought to be. I am not perfectly sure how the transfers in May 2013 marry up with the de-merger route. It might be a case of the cart having been put in front of the horse. It ought to have been dealt with differently—as part of the de-merger. Instead, everyone has gone all over the place. It would be ideal if everyone could come around the table and agree on the way forward."

120. All parties—Ifan, just as much as Emrys and Dewi—need to focus on sorting out the mess. The dilatory approach to addressing issues, evident in the narrative I have set out, is no longer acceptable, if it ever was. Family antagonisms must not stand in the way of commercial common sense.

121. I shall hear counsel as to the form of the order I should make.