Neutral Citation Number: [2021] EWHC 1595 (Ch)

Case No: CR-2020-004060

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

IN THE MATTER OF PREMIERE CARE HOLDINGS LIMITED (No. 00723564)
AND IN THE MATTER OF PREMIERE CARE (SOUTHERN) LIMITED (No. 03073816)
AND IN THE MATTER OF PENERLEY LODGE LIMITED (No. 11870873)

AND IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/06/2021

Before :

MR HUGH SIMS QC

(Sitting as a Deputy Judge in the High Court)

Between :

MR HENRY ALBERT COLE	**Petitioner/Applicant**
- and –	
(1) PREMIERE CARE HOLDINGS LIMITED **(2) PREMIERE CARE (SOUTHERN) LIMITED** **(3) PENERLEY LODGE LIMITED** **(4) MR SHAWN MICHAEL COLE** **(5) MRS CARA COLE**	**Respondents**

- -
- -

Mr Paul Strelitz (instructed by **Direct Access**) for the **Petitioner/Applicant**

Mr Peter Susman QC (instructed by **Direct Access**) for the **Fourth and Fifth Respondents and also as asserted representative for the First to Third Respondents**

Hearing dates: 8 June 2021

- -

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.

.....

MR HUGH SIMS QC:

Introduction

1. By the application of the Petitioner, Mr Henry Albert Cole ("Henry Cole"), dated 1 April and issued on 8 April 2021 ("the Application"), interim relief is sought in his favour against the Respondents pending the final hearing of his petition ("the Petition") for relief under s. 996 of the Companies Act 2006 ("CA") arising from unfairly prejudicial acts which he complains of in his capacity as a shareholder, under s. 994 CA 2006. There are two main categories of interim injunctive relief sought by Henry Cole, namely orders:

    a. that Mr Shawn Michael Cole ("Shawn Cole"), Henry Cole's son, and Mrs Cara Cole ("Cara Cole"), Shawn Cole's wife, be removed as directors of the First to Third Respondent companies (referred to collectively below as "the Companies"), in order that Henry Cole may have sole control of the Companies (this may be said to be relief targeted at removing or controlling the activities of Shawn and Cara Cole and I shall call it "Category 1 relief"); and

    b. requiring access to the Companies' information and records to enable Henry Cole to effectively discharge his responsibilities as a director of the Companies without being impeded in doing so by Shawn and Cara Cole (I shall call this "Category 2 relief", as it is focussed on what Henry Cole can do as director).

2. Both categories of relief sought may be said to form part of a wider jurisdiction which the court has, on a s. 994 petition, to regulate the conduct of the affairs of a company, under s. 996(2). Such orders may be made on an interim basis, if the court is satisfied it would be just and convenient to do so. An adapted form of *American Cyanamid* principles apply, since damages is not the remedy sought by a petitioner, albeit the court has the power to order various forms of financial compensation or adjust the relief granted to take financial consequences into account; see *Re Posgate & Denby (Agencies)* [1987] BCLC 8. In addition I have in mind that the relief sought, or aspects of it, are for mandatory orders. In those respects the court will need to have a high degree of assurance that the orders sought are or will be shown to be justified, albeit the ultimate test to have in mind is to identify which course is likely to involve the least risk of injustice (and I have regard to the principles helpfully discussed at page 2988-2989 of Vol 2 of The White Book in these respects).

3. Henry Cole and Shawn and Cara Cole are all directors of all the Companies. Shawn and Cara Cole currently have control of the boards: if they vote in the same way they will outvote Henry Cole. Henry Cole complains of, amongst other things, being excluded from being able to participate properly as a director due to the conduct of Shawn and Cara Cole. They deny those allegations, but in any event complain that

Henry Cole's complaints are motivated by spite, and also are believed to be generated by his daughter, Nicola Moon (formerly Cole), with whom Henry Cole now lives, for improper purposes. Nicola Moon was involved in managing the Companies until her resignation in 2015. Proceedings have since been brought against her by the Companies. Henry Cole is aged 85 years old and, whilst he has been actively involved in the management of the Companies in the past, he has not been as involved in recent years.

4. Henry Cole is a minority shareholder in the Companies (more precisely in two of the Companies, as one is a wholly owned subsidiary, though they can be viewed collectively for present purposes). But as matters currently stand he would hold the majority of votes at a general meeting of members due to the fact that some of the shares are held by the estate of Maureen Cole ("the Estate"), the late wife of Henry Cole, which has yet to be administered and in respect of which there is a disagreement. Henry Cole could therefore vote to remove Shawn and Cara Cole by an ordinary resolution passed at a duly convened and quorate meeting of members, under s. 168 CA 2006. However, Shawn and Cara Cole are unwilling to attend such a meeting, as they consider it would be inappropriate for Henry Cole to use that temporary position of power to remove them, and without their presence the meeting would not be quorate as only one member would be present. It is common ground before me that the Companies' Articles are such that s. 318 CA 2006 applies and a quorum of at least two is required. As a result, and whilst it does not feature in the Petition, the jurisdiction under s. 306 CA 2006 is now sought to be invoked on this Application, which enables the court to order a meeting to be called, and direct that one member present should be a sufficient quorum; see *Union Music Ltd v Watson* [2003] EWCA Civ 180, [2003] 1 BCLC 453, reviewed in *Alvona Developments Ltd v The Manhattan Loft Corporation (AC) Ltd* [2005] EWHC 1567 (Ch), [2006] BCC 199.

5. This is a company dispute, but it arises in a family run business and out of a family dispute, and must be understood in that context. Without intending any disrespect to any of them, I shall on occasion refer to members of the Cole family below simply by reference to their first names.

The background and the rival contentions

6. In this section of my judgment, unless stated otherwise, I shall draw on facts and matters set out in the parties' statements of case, and the evidence filed on the Application, which are either uncontroversial, or are supported by evidence which is not the subject of or capable of any substantial dispute. I shall also refer to the outline of the dispute between the parties, without going into the detail of every assertion and counter-assertion, since that is not necessary for me to explain the reasons for the interim relief I am prepared to grant.

7. The First Respondent company, Premiere Care Holdings Limited ("PCH") was incorporated on 9 May 1962. It is a company limited by shares, with registration number 00723564. The Second Respondent company, Premiere Care (Southern)

Limited ("PCS") was incorporated on 28 June 1995. It is a company limited by shares, with registration number 03073816. The Third Respondent company, Penerley Lodge Limited ("PLL") was incorporated on 8 March 2019. It is a company limited by shares, with registration number 11870873. The registered address of all three companies is Wellesley House, Duke of Wellington Avenue, London, SE18 655.

8. PCH was originally a cleaning business. It was initially incorporated and owned by Henry Cole and his late wife Maureen Cole, who were its only directors. In 1984 Henry and Maureen purchased a care home and PCH entered into the business of operating care homes.

9. PCS was also initially incorporated by Henry and Maureen, who were its only directors. It has always been wholly owned by PCH. It provides day to day operational services for the care home business of PCH.

10. In 1999 the couple's daughter, Nicola Moon (formerly Cole) was appointed director of PCH and PCS. In 2004 Maureen resigned as director from both PCH and PCS. On 4 February 2015 the Fourth Respondent, Shawn Cole, the son of Henry and Maureen, was appointed director of PCH and PCS. On 14 September 2015 Nicola resigned as secretary of PCH and PCS; she then resigned as director of those companies on 18 September 2015. Shawn and Cara Cole, in their Points of Defence, refer to the fact that this resignation was triggered by the discovery that Nicola had wrongly diverted £720,000 from PCH to the use and benefit of one of her companies', namely Heritage Homes (Southern) Limited, and in settlement of that Nicola agreed to repay £726,226 by the end of 2019. They go on to refer to her having failed to pay by that date as a result of which proceedings were issued (BL-2020-001487) to recover the sum. I was informed by Mr Susman QC, for Shawn and Cara Cole and asserted representative for the Companies (I shall hereafter refer to him as representative of the Respondents collectively without a repetition of that qualification, asserted by Henry Cole), that judgment was entered against Nicola last week. In his Reply Henry Cole alleges these facts are irrelevant to the Petition, and in any event does not admit the allegations relating to the events in 2017 on the basis they are outside his direct knowledge. I find that a surprising assertion given that he has been a director of PCH throughout and he has asserted in his evidence on this Application that he was the chief executive officer ("CEO") of the Companies (or at least one of them) in 2018.

11. On 3 October 2017 Shawn's wife, the Fifth Respondent, Cara Cole, was appointed director of PCH and PCS. As a result from that date the board of PCH and PCS comprised Henry, Shawn and Cara.

12. The business of PLL was originally a partnership created in approximately 1986 upon the acquisition of three further care homes. PLL was and is the operational vehicle for those businesses. Its original partners were Henry (35%), Maureen (35%) and Nicola (30%). It was incorporated as a company in March 2019 and its directors, appointed on incorporation, were and are Henry, Shawn and Cara.

13. As at the date of the PCH annual return to 14 March 2016, the authorised capital was £100,200 divided into 100,200 shares of f 1 each, all of which have been issued credited as fully paid. They were held as follows: 45,000 ordinary shares – Henry; 45,000 ordinary shares – Maureen; 100 class B shares – Nicola; 100 class C shares – Shawn; 10,000 class A shares - Settlement HA Cole & Mrs MP Cole ("the Cole Settlement").

14. Upon Maureen's death, on 8 January 2017, her shares vested in her estate ("the Estate"). The Estate had not been administered pending the outcome of a dispute. Henry is one executor of the Estate. The other is a solicitor, Mr. Christopher Stone, whose firm, Smith and Stone, were initially instructed by Shawn and Cara to represent them in this dispute, though they have now ceased to act due to a perceived conflict of interest. Mr Stone is hostile to Henry's interests with the result that Henry, as a minority shareholder, no longer has control over PCH. On 29 October 2019 the 10,000 class A shares held by the Cole Settlement were transferred to Shawn. On 11 November 2019 the 100 class B shares held by Nicola were transferred to Shawn. Otherwise the shareholding remains as described above, to date. The net result is that Henry, Maureen's Estate and Shawn all are members in PCH, but not one of them currently has a majority.

15. All shares in PCS have at all times been held by PCH. The authorised capital is £100, divided into 100 shares of £1 each, all of which have been issued credited as fully paid.

16. The authorised capital of PLL is £100, divided into 100 shares of £1 each, all of which have been issued credited as fully paid. As at the date of its last confirmation statement on 6 March 2020, and, to date, the shareholding of PLL is and has always been: 35 ordinary shares – Henry; 35 ordinary shares - Estate of Maureen; 30 ordinary shares – PCH (in place of Nicola). Again the net result is no overall control vests in any one of those shareholders.

17. Viewed collectively, the business of the Companies operates two care homes in Margate, Kent, and another one in Catford in London. They take care of residents suffering from dementia and other mental or physical health issues, mostly financed by local authorities. Those care homes can accommodate 120 residents at full capacity, and has about 155 staff in total. The annual turnover of business is £3 to £4 million. It is common ground between the parties that at present the business is barely profitable, though there is a dispute as to the reasons for that.

18. I shall now consider the events which are said to give rise to the Petition. Henry was born on 23 June 1935. He is presently 85 years old, soon to be 86, but he is said to be of full capacity, and to retain a lively and active interest in the Companies' businesses. His Petition has been presented on the basis that he wishes to fully engage with his role as a director and shareholder of the Companies.

19. In 2016 it is said by Henry that Maureen and Henry sold their home and applied the proceeds of sale to the purchase of a home for Shawn, Cara and themselves. That property was placed into the names of Shawn and Cara although Henry asserts he has

a beneficial interest in the new property. They were living there together from 2016 until 2020.

20. Henry complains that during that period he was subjected to oppressive conduct and undue influence by Shawn and Cara who, he says, restricted him to his bedroom, intercepted his correspondence and demanded his compliance with all requests relating to the businesses of the Companies. He asserts that he was taken advantage of by Shawn and Cara who he says used their ascendancy over him to misuse company funds. This is all denied by Shawn and Cara, though they note on this Application that this is not a particularly auspicious basis for a contention that Henry should be left in sole charge of the business, and they say this fuels their concern that it is Nicola who is behind these proceedings and that they are being brought for an improper purpose.

21. In June 2020 Henry left the home and moved to live with Nicola and her husband, David Moon. It is suggested by Shawn and Cara that this now explains the conduct of Henry in bringing these proceedings, the implication being that Henry is now under the influence of Nicola, which is denied by Henry. His case is that now he is free from the influence and pressure put on him by Shawn and Cara he has since sought to regain control over the affairs of the Companies and his own personal affairs.

22. It is further alleged that Henry was restricted in his freedom throughout the period he lived with Shawn and Cara, but in particular in respect of his ability to engage with the Companies as director and shareholder. Although he accepts he was taken to a few meetings they were said to be heavily restricted in content and did not, he says, touch on money, director and staff loans, salaries or any strategic decision making. He complains they amounted to a token effort to involve him without substance and without providing any insight into the true financial management of the business. The only real involvement he was allowed, was to sign documentation allegedly thrust upon him at inappropriate times without explanation of what it was, without time to consider it, and upon threats such as "If you do not sign this now, the business will go under". Again all of this is denied by Shawn and Cara.

23. On 19 June 2020 Henry instructed his then solicitors, Germain Kaile Law, to request, amongst other things, full access to the operational and financial documentation of the Companies. It is also apparent from this correspondence that by this time Henry Cole was asserting that Shawn and Cara Cole should be removed and he had begun to make allegations about their alleged mishandling of the Companies' affairs. It is alleged by Henry that this request was refused by Smith & Stone LLP, then acting for Shawn and Cara and the Companies, under their instruction, almost six weeks later, on 3 August 2020. However that letter does not contain any express rejection of access to documentation and instead sets out complaints as to Henry's lack of involvement and interest in the affairs of the Companies. Shawn and Cara explain that they offered for Henry to inspect the financial information requested, accompanied if he wished by an accountant and/or a solicitor, but declined to provide copies on the grounds of confidentiality. Henry would have it that this was mere window dressing on the part of Shawn and Cara, that there is no good reason not to give him full access. And he

contends that the complaints about his previous lack of interest are preparatory to Shawn and Cara seeking to oust him.

24. In response to this letter of 3 August 2020 Henry maintained his request for documentation, and requested access to documents going back some 6 years. His request was met by some disclosure of some company documents, many of which had been redacted for allegedly unexplained reasons. By 1 September 2020 Henry had engaged "Hylton-Potts Legal Consultants", a trading name for HPLC LLP, whose chief protagonist is a Mr Rodney Hylton-Potts, to write to the Respondents on his behalf, again repeating his request for documentation and setting out a range of claims he had against Shawn and Cara. That letter detailed the still missing information that was needed and made a request for access to the Companies' internet banking accounts. Mr Rodney Hylton-Potts was struck off the Roll of solicitors following findings made against him by the Solicitors' Disciplinary Tribunal following a hearing on 8 April 1997. He had previously been convicted of four offences of dishonesty, for mortgage fraud, and was then serving a term of imprisonment for those offences. That notwithstanding Mr Hylton-Potts now advertises his services online as a London based law firm helping people across the UK since 1999.

25. On 9 September 2020 Smith & Stone responded, and it is alleged they refused to send Henry the requested documentation, and refused to grant him access to internet accounts on the ground that "*a man of Mr. H. Cole's age struggles with working a mobile phone and he does not have access to either on-line or telephone banking for his personal accounts*". It is alleged this is indicative of the abusive conduct imposed on Henry by Shawn and Cara during the time they lived together. Nonetheless, a proposal was made that Henry would be granted access to all documentation upon appointment at the PCH offices.

26. A date for inspection was fixed for 14 September 2020 which was ineffective for reasons I do not need to go into here, and on 24 September 2020 Henry Cole attended the PCH offices with a chartered accountant instructed by him called Mr Christopher David Salmon, of Francis James & Partners, a firm of Chartered Accountants based in Leigh on Sea, Essex. Mr Salmon has recently been the subject of investigation and disciplinary action by the Institute of Chartered Accountants of England and Wales ("ICAEW"). The Tribunal of the ICAEW found serious misconduct on the part of Mr Salmon but noted that there had been no loss to the estate of the person in question, noted that Mr Salmon had expressed remorse for his conduct and had been a member for over 20 years. In the circumstances he was subject to a severe reprimand, ordered to pay a financial sanction of £4,000 and costs of £19,314.

27. Mr Salmon remains a Chartered Accountant and member of the firm referred to above and has produced reports and witness statements following his inspection of certain of the records of the Companies and which are said to identify problems and concerns with the conduct and internal affairs of the Companies and with the manner in which they are being run by Shawn and Cara. This included reference to certain reports issued by the Care Quality Commission ("CQC") following inspections made by them of the

care homes operated by the Companies as well as to statutory and/or financial information, or alleged missing statutory and/or financial information. So far as the most recent CQC reports are concerned these identify areas which requirement improvement on the part of the Companies and noted that in some respects problems previously identified had not been resolved. Shawn and Cara accept that some problems have been identified and there is a need for improvement in some areas, but they contend that the problems identified are not as significant as Henry seeks to portray them. They have adduced evidence from a Mr Anil Mittal, who operates a consultancy providing advice and support to the social care sector. He is a registered general and psychiatric nurse and has previously been an inspector for predecessor entity to the CQC. He has given evidence speaking in positive terms as to the management by Shawn, as now CEO of the Companies, and he refers to his continued provision of regulator audits. His evidence does not descend into detail as regards the recent CQC reports, however, and is relatively superficial in content.

28. Mr Salmon has also identified issues of concern arising from the disclosure provided so far, including alleged unexplained withdrawals from the 'residents' accounts' at the care homes. This is money that should be held on trust for residents and not used for any other purpose. Those transactions are said to call for an explanation. In the circumstances Henry seeks an inquiry into the Companies' accounts and reserves the right to plead further instances of unfair prejudice in the event that any such inquiry warrants such a further pleading. I should note here that the suggestion is not that the monies have been permanently deprived from the residents, but instead the allegation is of temporary mis-use. I also note that this is said to have occurred during a period when Henry claims he was the CEO (in 2018). The sums involved are relatively minor and mainly of a historic nature. That said the allegations remain substantially unanswered on the evidence before me. I should also make clear that it was confirmed before me that Mr Salmon's evidence was being relied on as fact, not as expert evidence.

29. Also at the meeting on 24 September 2020 were employees and/or agents of the Companies, though not Shawn and Cara Cole. In particular the Companies' accountants, Simpson Wreford LLP attended (by Kate Taylor, FCA and partner) and Nikki Hughes, the Accounts Manager, attended (remotely). There was an agreement that no papers would be physically handed around or given to Henry and Mr. Salmon, but instead a discussion took place in which the Companies' servants and agents were co-operative and are said to have promised to provide digital copies of relevant papers and to grant Mr. Salmon access to the accounting software.

30. Following the meeting it is said that Mr. Salmon made repeated follow up requests by email for the documentation and access that had been promised to him in the meeting. It is alleged that save for one brief reply from the company accountants stating that they were busy, there was no further response from PCH staff or Shawn or Cara to those requests, but later partial and incomplete documents and information were provided. Likewise it is complained that the disclosure requested from Simpson Wreford, the Companies' accountants has been materially inadequate. A schedule of outstanding

documentation was identified for me at the hearing of the Application and I shall return to consider the outstanding document requests further below. Shawn and Cara deny that Henry has ever been refused access to financial or other information and point to various communications by them confirming their acceptance of a continued right by him to inspect the records. They contend that Henry has persisted in demanding copies of detailed low-level records of the business, which the Respondents have declined to permit, fearing that Henry's true purposes are to assist Nicola in resisting re-payment of the monies referred to above. The Respondents maintain that they are content to offer Henry with an accountant or solicitor further inspection of basic financial records of the business (but not copies) subject to feasibility during pandemic lockdown. At the hearing before me they maintained the same stance, but also raised concerns and objection about Mr Salmon being the appointed agent of Henry. It was confirmed at the hearing before me that Mr Salmon had signed a requested confidentiality agreement and there is no indication, to date, that he has breached the same.

31. Henry further complains that he has requested a meeting of the board of directors for the purposes of passing a resolution that he be granted access to the necessary documentation. It is alleged that Shawn and Cara have refused and/or failed to agree to, fix a date for or attend any such meeting in respect of any of the Companies.

32. In parallel to these issues, and allegedly in response to his frustration at being excluded, and his concerns that highly important information was being concealed from him, Henry further sent notices calling a general meeting of the members of PCH, PCS and PLL to vote on resolutions that Shawn and Cara be removed as directors of those companies so that he could regain control and direct the staff to comply with his instructions. Notices pursuant to s.168 and 303 Companies Act 2006 were sent on 5 October 2020. In response to these notices Shawn and Cara directed their then solicitors Smith & Stone LLP to write to Henry on 19 October 2020 indicating that the meetings were futile and that an urgent interim application would be made in default of undertakings as to how Henry would conduct himself in those meetings.

33. Following a further round of correspondence, in which it was noted by Henry's agents that urgent injunctive relief was not required because if Shawn and Cara did not agree to the proposed action they could simply absent themselves from attending a meeting which would not then be effective, Shawn and Cara subsequently refused to attend, noting that in their absence the meetings would lack quorum. Henry complains that they thereby intentionally frustrated the business of the Companies, all the while continuing to fail to disclose company documentation or give access to internet facilities, and still without proper explanation for that conduct.

34. A further aspect of the complaint made by Henry is that Shawn and Cara have instructed Smith & Stone LLP to state, by letter of 9th September 2020, that PCH cannot repay Henry's director's loan, which he alleges stands at £249,748.88, despite a net balance sheet value showing £909,746 as at the most recent Companies House accounts to 31 March 2019. Shawn and Cara contend that the figure of £249,748.88 is incorrect and has been exaggerated, though they accept some monies are due to Henry. They have

not stated, to date, what they say that sum is. They deny that PCH currently has the funds necessary to repay Henry's loan account because of Nicola's mismanagement and the fact that the assets of the Companies are such that they cannot be readily or immediately realised to repay this sum.

35. Henry further complains that the true financial position of the Companies cannot be currently ascertained due to the failure to provide the accounts or financial statements to 31 March 2020. The position as the date of the hearing was that draft final accounts for the year end 31 March 2020 have been prepared to the satisfaction of the Companies' accountants but they are yet to be signed off. There is a dispute as to whose fault that is: Henry contends any delay is due to Shawn and Cara's failure to give him access, whereas they contend it is due to his failure to sign them off.

36. In summary, therefore, so far as the allegations of unfair prejudice are concerned, Henry contends that he has been and will continue to be intentionally and wholly excluded from the business of PCH, PCS and PLL by Shawn and Cara. That exclusion is complained to be both unfair and prejudicial to his interests as a member and prevents him from carrying out his fiduciary duties as a director.

37. In support of the contention of unfair exclusion from management Henry refers to the fact that the Companies have always been effectively a quasi-partnership - a family business. They were, he says, founded on a personal relationship of trust and confidence between Henry and Maureen, and that relationship was extended in time to Shawn and Cara as members of the family. There existed, he contends, at all material times, a fundamental understanding that each shareholder should be entitled to be, or to be represented on, the board of directors of each of the Companies, and to be involved in the making of major or strategic decisions affecting that company's affairs. The exclusion of him is said to amount to a serious breach of trust and confidence, and is in breach of the fundamental understanding he relies on. He complains that Shawn and Cara, instead of openly disclosing the Companies' affairs to Henry and seeking to consult and co-operate in their strategic operations with him, have instead sought to wrest control of the Companies from him. The conduct by Shawn and Cara is also said to amount to breaches by them of their statutory directors' duties.

38. That Henry has been excluded is denied by Shawn and Cara, though in their Defence they do not take issue with the notion that the Companies are quasi-partnerships in respect of which Henry has a legitimate entitlement to participate in their management, to the extent he is willing and able to do so. As already noted above they deny that he is truly interested and believe the Petition is a vehicle for Nicola. They pointed out during the course of the hearing, in support of this contention, that there are passages in the evidence of Henry which suggest that the evidence is not truly his. In particular they identify a passage in his latest and fourth statement, dated 15 May 2021, in paragraph 2, where a reference to Maureen's Estate is described as "my late mother's estate". They say this shows that the true draftsperson of this statement is Nicola, not Henry. Mr Strelitz, acting for Henry, indicated that this should have been a reference to "his" rather than "my" and was supposed to be referring to Shawn.

39. This may be an innocent mistake, and I form no concluded view on the issue, but it does lend some support to the concern of Shawn and Cara that Henry's evidence may have been drafted with assistance from others, including Nicola. Mr Strelitz confirmed that he had seen a capacity assessment of Henry, and I do not doubt that he has done so and satisfied himself on that issue and that Henry has capacity, but the question remains as to how able Henry is, and in particular to manage the Companies on his own. This issue is put to the fore by Henry's own Petition, which positively advances the case that he has been taken advantage of in the past.

40. I should make clear here that the relief sought on the Petition is, somewhat unusually for a minority shareholder, that he should buy out the other shareholders. It also includes various other pleas, including for the removal of Shawn and Cara and for otherwise investigating into the affairs of the Companies and for their conduct to be regulated.

41. Before turning to the relief sought on the Application I should mention three further points which have emerged since the Petition was drafted and which are captured, to some extent, in Henry's Points of Reply, dated 26 March 2021, which raise further allegations. These are relied on in this Application. I will also mention an overarching point of relevance, relating to the shares held in Maureen's Estate.

42. The first point relates to what are suggested as drawings or dividends made by Shawn and Cara as recorded in the draft accounts for the year ending 31 March 2020 for PCH. These suggest that during the year ending 31 March 2020 dividends were paid to the Settlement of £51,066 and £246,910 to Shawn Cole. It was not immediately clear to me why the sums in question, assuming there were sufficient distributable reserves for dividends to be paid, were shown in those amounts, since they did not seem to reflect the shareholding figures I have referred to above. Most notably they omit to mention any dividend being awarded to Henry Cole. No explanation could be provided to me in relation to this aspect of the accounts by Mr Susman at the hearing before me. Other items of concern in relation to the accounts have also been identified in the Reply, and which were referred to in support of the Application, substantially based on an updated report from Mr Salmon. In response to these alleged concerns Shawn and Cara have adduced evidence from Kate Taylor, the relevant partner in Simpson Wreford, who refers to having unrestricted access to staff employed in the business, including Nikki Hughes, the Accounts Manager. She has confirmed she has never been refused adequate explanations she has thought it appropriate to raise, though she also acknowledges she has not acted as an auditor. She also gives some evidence as to difficulties in providing access to the online accounting software, QuickBooks Online ("QBO"), which I shall return to consider below.

43. The second point which has recently emerged relates to the fact that it has recently come to the attention of Henry Cole that the Companies' bankers, Lloyds Bank, have served notice on 27 April 2021 that they require the Companies to find new bankers by 30 November 2021. So far as PCS is concerned the reason for this decision has been

identified by the Bank as due to the request for repayment of borrowing for PCH which currently provides security for PCS. So far as PCH is concerned the reasons why the existing interest only loans, totalling £1,436,881, are required to be repaid by the Bank by 30 November 2021 are stated in a letter from the Bank, also dated 27 April 2021, to be threefold: First, on their review of the draft 2020 annual accounts they noted a trading loss (the draft accounts I have seen indicate a trading loss of c. £15k for 2020). They have stated this does not indicate suitable debt servicing cover. Secondly they refer to a settlement agreement in respect of Penerley Lodge having not been fulfilled and the Bank's debt/security restructure remaining incomplete. Thirdly they noted their concern that the 2020 annual accounts had not been filed with Companies House and should have been filed by no later than 31 March 2021.

44. Henry would have it that this confirms his belief that the Companies affairs are being mismanaged by Shawn and Cara. They refer to the fact that the reason why the settlement agreement has not been completed is because Henry has not signed off the necessary transfer documentation. As I have noted above there is also a dispute as to whose fault it is that the accounts have yet to be signed off and filed. Mr Strelitz was unable to confirm to me why Henry had not signed off the transfer documentation and this was not addressed in his evidence.

45. The third point relied on relates to the failure to maintain appropriate board minutes, as required by s. 248 CA 2006 or call or give notice of general meetings to approve financial statements and dividend payments, or maintain records of resolutions passed, contrary to s.355 CA 2006. The position of Shawn and Cara in this respect is that these were small family run businesses and everyone operated on an informal basis. That may be so in relation to the past, and I express no final view on the matter, but in circumstances where allegations of exclusion from management are concerned any continuing failure to give notice of meetings and ensure that they are recorded is a matter of legitimate concern.

46. The fourth point concerns the destination of the shares held in Maureen's Estate. As noted above the Estate has yet to be administered. Shawn contends that his late mother bequeathed her shares to him under her last will and in his second statement he has referred to the fact that on 6 May 2021 a Deputy District Judge made an order for him to prove a copy of the will of his late mother. He considers this will open the pathway to him becoming the owner of all of her 45,000 shares in PCH. This would also result in having majority control of PCS, since PCS is a wholly owned subsidiary of PCH. He does not refer to the position in relation to PCL. In any event relying on this Mr Susman submits, on behalf of Shawn and Cara, that if Shawn has not already been confirmed as the beneficial owner of the shares held in the Estate then he will be. However the position is complicated by the fact that a number of caveats have been entered in different probate registries. I am invited to conclude that these are mere mischief making by Nicola. Certainly it is the case that the one communication I have been referred to does refer to a caveat entered by Nicola, and this does not sit easily with the fact that it is said by Henry that he is or will be the beneficial owner of these shares. In the circumstances I can do no more at this stage than conclude that the question of who

will have ownership of the shares formerly held by Maureen, and now held in her Estate, is an open one. It may be Shawn, delivering him overall majority control, or it may be Henry, delivering him majority control. Or the picture may be more complicated than that.

Relief sought on the Application – my reasoning and decision

47. As noted above, the relief sought on the Application may be said to fall into two categories: Category 1 relief, which is concerned with removing or controlling the activities of Shawn and Cara Cole pending trial, and Category 2 relief, which is concerned with ensuring Henry Cole can fully and effectively participate in the management of the Companies pending trial. In advancing the Application Mr Strelitz made his submissions in relation to Category 2 relief first, emphasising that this was the reason why, in substantial part, Henry has felt it necessary to invoke the more draconian relief sought, for removal, under Category 1. I shall follow that same course in this judgment, but before doing so I should briefly mention here that Mr Susman relied heavily on a lack of urgency in response to and militating against any relief being granted on the Application. The Application was originally listed in the interim applications list and was then stood over for hearing by an order made by Zacaroli J on 4 May 2021. I recognise it may be said that some aspects of the Application concern matters which are not urgent, but I reject the submission, if Mr Susman intended to persist with it, that none of the matters raised on the Application are of sufficient urgency and/or concern to justify them being raised on an interim application and to be addressed in advance of trial. I consider that they are, and I address them in this judgment.

Category 2 relief: facilitative relief to enable Henry to participate

48. The first question arises is whether or not there is an arguable case, or serious issue to be tried, that Henry is entitled to access to the Companies' information and records to enable him to discharge his responsibilities as a director of the Companies without being impeded in doing so by Shawn and Cara Cole. I accept the submissions made by Mr Strelitz that this threshold is readily crossed in this case, and indeed on the matters as they currently stand the point is unanswerable, and has not been effectively answered by Shawn and Cara. I have a high degree of assurance that Henry will establish the rights he contends for. I say so for the following three reasons.

49. First, the contention in the Petition that Henry is entitled to participate in the management of the Companies is not disputed in the Defence. The Defence is instead that Henry has not been excluded.

50. Secondly, a director has the right under the general law to inspect the books and records of the company unless he was shown to be invoking the right to inspect for an improper purpose. I also consider that, ordinarily, where a director seeks an order for interim access, and there is a potential dispute about it, it will be most practicable to allow a director to see all of the company's documents, subject to the control that, having seen

them, he can only use them, and make or cause copies to be made (assuming that can be carried out relatively economically), for the purpose of performing his duties as a director. See paragraphs [20]–[21] in the judgment of Morgan J in *Dilato Holdings Pty Ltd v Learning Possibilities Ltd* [2015] 2 BCLC 199, applying *Oxford Legal Group Ltd v Sibbasbridge Services plc* [2008] 2 BCLC 381, and *Conway v Petronius Clothing Co Ltd* [1978] 1 All ER 185 considered.

51. Thirdly, the concern expressed in relation to confidentiality in this case has involved two main concerns expressed by Shawn and Cara. The first is that the documents may be used by Nicola to evade her liabilities to PCH. I note however that it has now been confirmed by Shawn and Cara that judgment has been obtained by PCH against Nicola. It has not been explained to me why access to PCH's records or taking copies of, for example, invoices, would harm any efforts to recover monies from Nicola. I can see that there may be some concern in relation to communications with solicitors, but the information and access principally sought by Henry, and to date resisted in terms of full access, relates to electronic access to QBO (the accounting software) and access to the bank statements (including online access). It does not seem to me that either category of documents should cause concern in relation to the value of or recovery of the judgment debt owed by Nicola. In any event Henry has confirmed that he will undertake not to share the information he receives with Nicola and in my view that should assuage any general concerns there may have been on this front, especially when coupled with an undertaking by Henry, which he has confirmed he is willing to give, that he should only make use of the documents for the purposes of performing his duties as a director. The second concern relates to the fact that Henry has chosen unsuitable agents. So far as this concern, in relation to Mr Salmon, whilst I note the concerns raised, and the disciplinary findings made against him, he remains a member of the ICAEW and a Chartered Accountant. Moreover he is not being put forward in a custodian role, but simply an information gathering role and in order to assist Henry in formulating any concerns he may have. He has also signed a confidentiality agreement confirming the documents will only be used for the purposes of review and reporting to Henry. This may require revisiting and some further tightening, and to be applied to Henry's chosen agents more generally, who would need to be named and identified before information was shared with them.

52. On the handing down of this judgment I will invite submissions or consideration as to whether it may be appropriate to require the proposed agents to be limited to accountants or solicitors who are a member of and the subject of a duly recognised professional regulatory body. This may have the consequence that Henry will be required to instruct an agent other than Mr Hylton-Potts, or the LLP he provides his services under. It may also be appropriate to require the agents to sign an agreement or undertaking in terms which mirrors that which Henry has indicated he is willing to give before they are permitted access, on his instruction. But overall it does not seem to me that these concerns should prevent Henry from having the access he is concerned to have, including via remote access given the current and likely ongoing difficulties caused by the COVID-19 pandemic and noting his potential vulnerability in this respect. I encourage the parties to see if they can agree a suitable order reflecting my

conclusions in this respect failing which I can make further directions and rulings following the hand down of this judgment.

Category 1 relief: removal or control of Shawn and Cara

53. There are two routes by which it is contended it is appropriate or possible to remove Shawn and Cara as directors, pending trial. The first is as an adjunct to the matters pleaded in the Petition and in particular focus on the combination of (i) Henry's unjustified exclusion from management; (ii) the internal failings in relation to the conduct of the Companies' affairs; and (iii) unanswered questions and concerns about the Companies' financial affairs. The second is on the basis of Henry's rights as shareholder and via a meeting of members ordered under s.306 CA 2006. I shall deal with them in that order.

(i) Adjunct to Petition

54. So far as interim relief as an adjunct to the Petition is concerned, whilst it is possible that the court may consider it appropriate to remove directors in advance of a final hearing of an unfair prejudice petition, and indeed the court may appoint a receiver where the court considers there is jeopardy to the company's financial position and affairs, it may be said to be the case that it is most desirable to not alter or disturb the management of the company in question more than is "essential"; see ***Re A Company*** [1985] BCLC 80, per Harman J at 82-83. It may also be this is putting the matter too high, given that ultimately the question is whether or not it is just and convenient to grant an order, but it is salutary reminder that it is ordinarily the case that intrusion in the internal affairs of companies, by order of the court, should be kept to what the minimum of what the court considers necessary and appropriate. I have reached the conclusion that it would not be appropriate, as an adjunct to the Petition and by way of interim relief, to grant an order that Shawn and Cara be removed as directors pending trial. I arrive at that conclusion for the following reasons.

55. First, I note that there is a substantial dispute as to whether or not it would be appropriate to grant an order at trial that Henry be given the right to buy out Shawn and Cara, and take over control of the Companies. Moreover there is uncertainty as to who may end up with overall control of the Companies in view of pending uncertainty in relation to the destination of shares held by Maureen's Estate. And I have only been provided with very limited information in relation to this which would enable me to assess the position more thoroughly. It would take a strong case and evidence, in the circumstances, to be willing to make such an order on an interim basis. I do not have any high degree of assurance in this respect.

56. Secondly, there is some inconsistency with the contention in the Petition, admitted in the Defence, that there is a legitimate expectation of participation in management by all family members, yet an attempt to pre-emptively exclude one or other member of the family in advance of trial. Ultimately, coupled with a share buy out order, that may be

the consequence of the Petition. Indeed Shawn and Cara have indicated a willingness, subject to raising funds, to buy out Henry.

57. Thirdly, the court is cautious to appoint a receiver for reason of concerns as to the slur or harm this may cause a company over which a receiver has been appointed. Whilst the application is not to appoint a receiver, it has some parallels with such an application, and it is likely to be destabilising, to say the least, to remove the two most active current directors, whatever the rights and wrongs of why they are currently the two most active directors. Moreover, it would require cogent evidence to show that it would be prudent to leave Henry as the sole director, given his age, the admission he is not capable of managing the businesses on his own, and the fact that on his own case he has not been involved for some time due to the fact that he has been unduly influenced by other family members. The immediate concern arising is whether or not Henry would be influenced by other family members, such as Nicola. No matter how many undertakings are given in this respect would not assist Henry in circumstances where he requires others to assist him.

58. Fourthly, I recognise that Henry proposes that Mr Spriggett assist as a manager, and be the person responsible to the CQC for the care homes, not Henry, as required by regulation 6 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. However this suggestion raises three further concerns. First, this underlines a weakness in the Application since it recognises that Henry is not able to manage matters on his own. Secondly, no costing has been identified as to what the cost to the Companies would be in relation to Mr Spriggett's proposed appointment and role, or details provided as to what this would involve in terms of his time and commitment. Thirdly, whilst Mr Spriggett is a surveyor with particular expertise in property matters, he does not have particular experience in the care home industry. It may well be that this is not the most important factor, as there are managers involved in running each of the care homes, but it does remain a factor when it forms part of the concerns expressed by Henry that the CQC reports identify ongoing significant concerns. The solution proposed is not an immediately obvious one to cure the ill complained of, if I can put it that way.

59. Fifthly, I recognise that there are some legitimate and currently unanswered questions concerning how the Companies are currently operating and being conducted by Shawn and Cara. However in my judgment these can be substantially addressed by requiring undertakings to be given by Shawn and Cara regulating the conduct of the Companies, which they have indicated they may be willing to give, subject to the terms being considered more precisely following hand down of this judgment. The undertakings, or directions if undertakings are not forthcoming, which I consider are appropriate pending trial may be summarised as follows, subject to further discussion and consideration following hand down:

    a. First, that recorded and minuted board meetings of the Companies should take place at a frequency of no less than 3 months, and the first one of which must take place within 1 month;

b. Second, that a liability should not be incurred in excess of £25,000 or more, other than for the purposes of securing a refinance of the existing Lloyds Bank facilities or in relation to employment of staff in the ordinary course of business;
c. Thirdly, the Companies should not enter into any commitments for more than one year other than for the purposes of securing a refinance of the existing Lloyds Bank facilities or in relation to employment of staff in the ordinary course of business;
d. Fourthly, the Companies shall cease to declare or pay any further dividend payments;
e. Fifthly, Shawn and Cara be required to report to the board on progress they have made in relation to any negotiations or refinancing in relation to Lloyds Bank and to consult with Henry in relation to this in order that he may assist, if so advised, in putting forward any proposals of his own to assist with refinancing;
f. Sixthly, Shawn and Cara shall cause management accounts to be prepared at a frequency of no less than 3 months which shall be circulated to the board and which shall disclose the costs and expenses of the Companies including the remuneration and expenses of all the directors;
g. Seventhly, Shawn and Cara shall cause a report to be prepared to the next board meeting in relation to the recent reports of the CQC, including with input from Mr Mittal as appropriate, which shall record the steps being taken to address the concerns identified in the CQC reports.

60. I should add these directions or undertakings should be subject to variation by a resolution of the board which involves a board meeting at which Henry has been given 7 days' notice, and given the opportunity to attend either in person or remotely and accompanied, if so advised, by an accountant and/or solicitor (duly regulated under a recognised professional body).

61. It may well be those directions, or undertakings, prove to be inadequate. It may also be the case that the access to the information which I have ordered throws up further concerns. But I remind myself that orders can be made on an unfair prejudice petition to provide for indirect financial compensation for any breaches of duties, in relation to adjustments as to the share price (whether or not an order is made in favour of Henry, as a buy in, or a buy out). Shawn and Henry own a property together in Spain. They also own shares in the Companies. This is not one of those cases therefore where some financial adjustment should not provide some remedy, even if it might fall short of providing a complete remedy. In addition if some further urgent matter of fresh concern arises, or if it proves that the directions or undertakings are unnecessary, there should be liberty to apply.

(ii) via a meeting of members ordered under s.306 CA 2006

62. As a fall-back argument, or alternative argument, Henry seeks to invoke the jurisdiction under s.306 CA 2006. He seeks an order that that there be a meeting of the Companies, and that one member present shall be deemed to constitute a quorum. The purpose of that meeting would be to remove Shawn and Cara as directors of the Companies. It

was not in issue before me that I had jurisdiction to make an order under s.306 CA 2006 since it is recognised that a decision by a member to deliberately not attend a meeting of members so as to prevent quoracy may be said to result in it being "impracticable" to conduct a meeting in the manner prescribed by the company's articles or under the CA 2006; see *Re Opera Photographic Ltd* [1989] WLR 634, in which a similar problem in respect of alleged deliberate abuse of quorum requirements arose. The court noted that it was improper for a majority shareholder to treat quorum as a form of veto to create deadlock at shareholder level.

63. It is now well established that where there is a majority shareholder and no class rights attaching to a particular class of shares which the convening of a general meeting is designed to override, the court in exercising its discretion under s.306 (or what was s.371 Companies Act 1985), will consider whether the company is in a position to manage its affairs properly and will take into account the ordinary right of the majority shareholder to remove or appoint a director in the exercise of his statutory voting power; see the decision of the Court of Appeal in *Union Music Ltd v Watson*, referred to above, and see also the summary of the jurisdiction in *Vectone Entertainment Holding Ltd v South Entertainment Ltd* [2004] EWHC 744 (Ch), [2004] 2 BCLC 224 at [32]. What is novel about the proposed use of the section in this case however is that Henry is not a majority shareholder. Instead he is a minority. This is why he has pursued an unfair prejudice petition. It is not a bar to the grant of relief under s.306 that a petition has been brought or could be brought under s. 994 CA 2006 (or what was s.459 Companies Act 195), but equally this is a factor which may be taken into account in my judgment. I have concluded that it would not be appropriate, in the exercise of my discretion, to grant relief under s. 306 in the terms contended for, namely in order to facilitate the removal of Shawn and Cara. I have reached that conclusion for the following reasons.

64. First, I recognise that there is a statutory right conferred on shareholders, under s.168 CA 2006, that they may remove directors by an ordinary resolution passed at a duly convened and quorate meeting of members. That is not restricted to a majority of shareholders, but restricted by reference to the shareholders who are entitled to vote and do vote at such a duly convened meeting. As such it is important to recognise that Henry is seeking to invoke a statutory right which prima facie he is entitled to exercise.

65. Secondly, however, he does so in the context of a Petition where he positively asserts an equal legitimate interest or understanding that he, Shawn and Cara are entitled to participate in management. His attempt to use s. 306 has the appearance of taking advantage of a temporary inability on the part of Maureen's Estate for the votes associated with her shareholdings to be cast. Mr Strelitz rightly anticipated this might be a concern of the court and sought to address it by repeating the concerns Henry has expressed in relation to the current conduct and management of the Companies. However this only serves to demonstrate the weakness in relying on this as an alternative argument or fall-back argument, since it takes us back to the justification or otherwise for making the order as an adjunct or as interim relief on the Petition. I have already set out above why I am not satisfied that those grounds justify making an interim order for removal as an adjunct to the Petition and on an interim basis.

66. Thirdly, it may well be that the court could be persuaded in the future, or in a future case, that there was meritless opposition to the Estate's shares being vested or recognised as being beneficially owned by Shawn, or Henry, that this could have an impact on the willingness of the court to make an order under s.306. But the information provided to the court on the Application does not come close to enabling the court to weigh up the evidence and merits in that respect and to that degree.

67. Fourthly, in the exercise of my discretion I refer to the other factors I have mentioned in paragraph 59 above when concluding that relief falling short of removal would be appropriate. Having done so it does not seem to me to be appropriate to grant an order which would facilitate removal under s.168 via a direction made under s.306. I am not suggesting that it would never be the case that the court would not be willing to do so, but on the facts of this case it is not, in my judgment, appropriate to do so in order to secure sole control of the Companies to Henry in advance of trial.

Conclusion

68. I am satisfied that interim injunctive relief is justified on the Application. I am not persuaded that it would be appropriate to grant an order for the removal of Shawn and Cara Cole, or that it would be appropriate to order a meeting of members should take place on terms which would facilitate that outcome. That is subject to suitable undertakings being offered, and given that I can, and will, grant interim relief of a less drastic nature which meets much, if not all, of the present complaints made by Henry Cole, if suitable undertakings are not proffered. I am however persuaded that, absent suitable undertakings being offered, some form of relief regulating the affairs of the Companies, and regulating the conduct of Shawn and Cara Cole as directors, is appropriate, and to that extent some relief is justified under Category 1 (as I have defined it in paragraph 1). I am also satisfied that it is appropriate to grant relief under Category 2 (as defined in paragraph 1), ensuring that Henry Cole has full and unimpeded access to information of the Companies to enable him to participate effectively as a director of the Companies pending trial. That is subject to suitable undertakings being offered by Henry Cole to protect the concerns expressed by Shawn and Cara Cole as regards the use to which that information may be put. I invite the parties to discuss the terms of a suitable order to reflect this judgment. Any final order and consequential or further orders will be addressed following or at the hand down hearing.