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Case No: CR-2020-BRS-000017

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 26/03/2021

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

Sir Henry Royce Memorial Foundation	**Claimant**
- and -	
Mark Gregory Hardy	**Defendant**

- -
- -

Charlie Newington-Bridges (instructed by **Willans LLP**) for the **Claimant**
The Defendant appeared in person

Hearing dates: 19 January 2021

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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.

.....

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 10:30 am.

HHJ Paul Matthews :

Introduction

1. This is my judgment on the trial of a claim under CPR Part 8 between a company limited by guarantee and registered charity (the claimant) and one of its members (the defendant), for orders under section 117 of the Companies Act 2006, relating to a request made by the defendant of the claimant under section 116 of that Act for access to the register of members. The claim was tried before me remotely during the coronavirus pandemic, using the MS Teams videoconferencing platform, when Mr Charlie Newington Bridges of counsel represented the claimant and the defendant appeared in person.

Procedure

Witness statements

2. The claim form was issued on 18 February 2020, and the defendant acknowledged service on 29 February 2020, indicating an intention to contest the claim. The claim form was accompanied by a witness statement made by Jane Elizabeth Pedler also on 18 February 2020, and an exhibit of 103 pages. Ms Pedler was then a director of the claimant. The defendant made a first witness statement in these proceedings on 13 March 2020, with an exhibit of some 213 pages, although the defendant had already made what he called a "witness statement" (but not in any existing legal proceedings) on 4 February 2020, and Ms Pedler referred to this in her first witness statement. She made a second witness statement in these proceedings on 26 March 2020, by which time she had ceased to be a director of the claimant, but was still authorised on its behalf to make the statement.

3. In accordance with the procedure set out in CPR rule 8.5, that would normally be the end of the evidence. The defendant, however, purported to make a further witness statement, which he called his second, on 21 April 2020. Of course, since it did not comply with rule 8.5, and no permission had been given to him by the court, it was not evidence upon which he could rely on these proceedings. This statement exhibited, amongst other documents, a transcript running to some 500 pages of a meeting of a different company, the Rolls-Royce Enthusiasts Club ("the Club"), which features at various points in the story of this case.

4. On 31 July 2020 District Judge Watson gave directions for the trial of this claim. In relation to the transcript of the meeting of the Club, he directed that the defendant made a further witness statement, not exceeding five pages in length, identifying the passages in the transcript on which he wished to rely and explaining why he wished to rely on them. On 20 August 2020 the defendant made a further witness statement (of five pages), which he originally called his third, exhibiting another 527 pages, including the *whole* of the witness statement of 21 April 2020 and the *whole* of the transcript of the Club meeting. The statement of 20 August 2020 refers to some 117 pages in the transcript, but does not identify particular passages in it. In accordance with the directions given by District Judge Watson, on 2 September 2020 Ms Pedler

(by then once more a director) made a third witness statement, responding to the defendant's statement of 20 August 2020.

Listing

5. In *Burry & Knight Ltd v Knight* [2014] EWCA Civ 604, all three members of the Court of Appeal (Arden, Briggs, Christopher Clarke LJJ) agreed that applications under section 117 should normally be dealt with summarily, on witness statement evidence alone, rather than at trial after cross-examination: see at [28], [113], [117]. For whatever reason, that did not happen here, and the matter was listed for trial in the usual way. That has caused some potential difficulty, which I will come back to. I did not deal with this matter at the interlocutory stage but, certainly with the benefit of hindsight, I do not think that this was a case which called for a full trial. Nevertheless, we are where we are.

Publicity

6. After the trial had been listed, there were discussions between the parties as to the manner in which it should be tried and in particular how the proceedings were to be accessible to the public. The defendant insisted that there were very many members of the public who would wish to participate in the trial and therefore proposed that the trial be web cast on Youtube or a similar system. By the time of the pre-trial review, on 6 January 2021, however, the defendant was content for members of the public to make themselves known to the court and to receive a link that would enable them to join the hearing. At the trial itself, apart from the parties and their representatives, there were about 14 members of the public who attended from time to time during the day.

Witnesses

7. At the trial both Ms Pedler and the defendant were cross-examined on their witness evidence. I record here my impressions of both of them. Ms Pedler was a clear and businesslike witness, both knowledgeable about the affairs of the claimant (and the Club) and also very fair in the approach that she took to giving her evidence. I am satisfied that she was telling me the substantive and not just the literal truth. The defendant was a more complex witness. He was not only highly intelligent but also on top of all the details of the case, and ready with answers to almost any question. On the other hand, he was inclined to split hairs, which meant that (so far as I could tell) he did not say anything which was strictly untrue, but made his evidence more tricky to follow and to rely on. I found him to be a much less satisfactory witness than Ms Pedler. Where their evidence conflicted, I generally preferred that of Ms Pedler.

Burden of proof

8. Before turning to consider what facts I find, I remind myself that this is the claimant's claim, and the claimant accordingly bears the burden of proof, on the usual civil standard of balance of probabilities. In addition to the written and oral evidence of the witnesses who gave evidence before me, I am also able to take into account, as admissible evidence, the documents which are found in the bundle prepared for the trial: see CPR PD 32, paragraph 27.2. But I bear in mind that, for the most part, I have not seen the makers of these documents give evidence before me, so that I could not

observe their demeanour, and they could not be cross-examined. Nor were they on oath when they made them. It is a matter for me what weight to give to these documents.

Facts found

9. On the basis of the material before me, I find the following facts. The organisation which became the claimant was founded in 1977, but the claimant in its current form was incorporated on 13 February 2009 as a company limited by guarantee. It is also registered as a charity with the Charity Commission. The aim of the claimant (as set out on the website of the Charity Commission) is

> "Cherishing the Legacy Providing a safe and accessible home at the Hunt House for the archives, memorabilia and artefacts from the life and history of Sir Henry Royce and the old Rolls-Royce company. Promoting the Ideals To support excellence in engineering by a programme of awards, lectures, exhibitions and events to stimulate interest in engineering issues."

10. The claimant is run by a board of directors elected by the guaranteeing members. They are all unpaid volunteers. Most of its income comes from the 250 voting members of the Club, although with additional support from the wider public. Gross income for the year ended June 2018 was £101,893, all of which was spent. Gross income for the year ended June 2019 was £194,434, of which £127,599 was spent. The claimant owns a property known as Hunt House, 70 High Street, Paulerspury, Towcester NN12 7NA, which is its headquarters, and where the archives memorabilia and artefacts from the life and history of Sir Henry Royce are kept.

11. The defendant is a businessman who appears to have been involved in many different companies and businesses in his career. He is clearly very experienced in litigation, as will appear later. On 19 December 2019 he became the finance director of the Club, although he ceased to be a director on 9 April 2020. He is also a member of the claimant, by virtue of having paid a subscription to become one. He first became a member of the claimant in late November 2019, after the date on which the annual general meeting for that year would ordinarily have been held (although in fact it was not).

12. Although the Club and the claimant have been described as "sister companies", this is inaccurate. They do not have a common membership, and, although the board of each company nominates directors to the board of the other, there is no necessary identity between the directors of one and the directors of the other. The current position is that there are no persons who are directors of both companies, although there have been in the past. As with the defendant himself, there are members of one who are members of the other. Moreover, the claimant has granted the Club a lease to use its property as its headquarters as well, for which a rent is paid.

13. The defendant claims to have discovered serious wrongdoing in the affairs of the Club after he was appointed finance director of it. These included allegations of fraud, theft and false accounting against some of the existing directors of the Club, who were also directors of the claimant. There was a board meeting of the Club on 17 January 2020 which discussed these allegations. The defendant made the request referred to below of the claimant on 10 February 2020, and a similar request of the Club on 12 February

2020. It appears that the directors of the Club agreed to supply the defendant with a copy of the list of members of the Club. However, the directors of the claimant took a different course, as set out below.

14. The claimant's articles of association provide in part that:

> "5.2. An annual general meeting must be held in each subsequent year in November or such other time as the Directors may decide, not more than 15 months may elapse between successive annual general meetings which must be held within six months of the end of the Company's Financial Year."

However, in 2019 the annual general meeting was not held in November, as usual. On 27 January 2020, the claimant wrote to all except six of its members about the arrangements for its 2019 annual general meeting.

15. In part the letter of 27 January said this:

> "This mailing is the first of two that you will receive over the next three weeks concerning our forthcoming Annual General Meeting and voting to elect members to the Board of Trustees/Directors for the [claimant]. Included with this letter is the notice of the forthcoming Annual General Meeting to be held at the Hunt House on 11 March 2020 at 5.00pm, which is being sent to all those who have signed members' guarantee form and have supported the work of the [claimant] through donation.
>
> The Trustees regret that the original AGM date scheduled in November last had to be postponed because of the difficulties being experienced in getting final figures and supporting paperwork for certain fairly major expenditure. As the treatment of this affected the final figures it was impossible to get the accounts examined in time for the printing deadline so advice was sought and a decision made to cancel. The examined and approved accounts will be filed well within the timescale demanded by the Charity Commission and Companies House and your personal copy will arrive in the second mailing with a voting form.…"

16. The six members who did not receive the letter of 27 January 2020 included the defendant. The directors considered that these six members were ineligible to take part in the 2019 annual general meeting, because they had joined as members after the end of the previous financial year, on 30 June 2019, the accounts for which year would be considered at that meeting. As I say below, they subsequently revised their opinion on this matter.

17. On 10 February 2020, the defendant wrote to the claimant by first class post and by email indicating that he wished to exercise the rights given to members under section 116 of the Companies Act 2006 to inspect and take a copy of the register of members of the claimant. He indicated that he would be present at the claimant's premises on 12 February 2020. At that time, five of the directors of the Club were also directors of the claimant. The letter stated the defendant's name and address and stated the purpose of the request as follows:

> "TO ASK THE MEMBERS TO JOIN IN A REQUEST FOR THE CONVENING OF A SPECIAL MEETING OF THE MEMBERS for the following purposes:
>
> 1. For the Directors to explain why they failed to convene an Annual General Meeting of the company in 2019 contrary to Article 5.2 which requires it to be convened within six months of the end of the Company's financial year end which was 30th June 2019.
>
> 2. To produce to the meeting a copy of the audited accounts for the year ended 30th June 2019 and to answer questions on matters included in those accounts.
>
> 3. To remove from office the five following five directors [sic] of the company on the grounds of their gross negligence as Directors of [the claimant] arising from their misconduct and/or misfeasance as directors of [the Club] that has caused irreparable harm to [the claimant] as more fully set out in my attached Witness Statement prepared for [club] reasons but is hereby incorporated by reference.
>
> - The names of those directors are:
>
> - IAN HICK
>
> - LESLEY [sic] ROBOTHAM
>
> - WILLIAM DUNCAN FEETHAM
>
> - ALLAN EDWARD FOGG
>
> - JANE ELIZABETH PEDLAR [sic]".

18. The letter of 10 February 2020 did not however state whether the information would be disclosed to any other person and (if so) the name and address of that other person and the purpose for which the information was to be used by that person. As will be seen, it is a requirement of section 116 of the 2006 Act that the request contain that further statement.

19. Nonetheless, the business manager of the claimant, Mr John Baker, at 08:27 on 12 February 2020 sent an email to the defendant containing within its body, and apparently passing on, a further email from the Company Secretary, Mark Griffiths. This internal message confirmed that the information contained in the list of members would be available for the defendant on 17 February 2020. It also said that the accounts for the year ended 30 June 2019 would accompany the notice of the annual general meeting to be held on 11 March 2020. Curiously, Mr Baker's email (enveloping that of Mr Griffiths) ends in midsentence. I return to this later. However, just over an hour later, at 09:47, Mr Griffiths sent a further email directly to the defendant which made clear that the directors were taking legal advice, and the information sought would therefore not be available that day (*ie* 12 February).

20. Also on 12 February 2020, the claimant sent out copies of a further letter to members. This letter was headed "Rescheduled Annual General Meeting 2019 – Notice and Voting Form". The first paragraph read as follows:

> "Included with this mailing, concerning the rescheduled Annual General Meeting to be held at the Hunt House on 11 March 2020 before the evening lecture, are the AGM notice; a voting form for the election of Trustee Directors (only enclosed for those eligible to vote) and a copy of the Annual Accounts and Report."

On the evidence before me, I am satisfied that this letter enclosed a notice of the annual general meeting for 11 March 2020, a letter relating to the nomination of director trustees and a board nomination form, together with a copy of the financial statements (accounts and report) for the year ended 30 June 2019.

21. On 13 February 2020 the claimant's solicitors wrote to the defendant by email at 16:14, and by post, refusing him access to the register, and informing him that the claimant would be applying by email and post to the court under section 117 of the 2006 Act for an order that it was not required to comply with the request by the defendant. The defendant replied by email at 16:32, about 15 minutes later, to say that he had noticed that he had

> "inadvertently omitted from my request the statement that I would not be making the information available to any other person. I confirm that this was an oversight on my part and that I have no intention of making the information available to any other person. Please ensure that the Court is aware of this and the prior email from your client.
>
> I think I made that clear to your clients Mr Baker when I met him yesterday and explained matters in more detail that then led to my email to the Company Secretary to offer further clarification of where I thought there might be an overall solution to the various conflicts of interest."

22. Just over an hour later, at 17:46, the defendant sent a further email to the claimant's solicitors, in connection with the claimant's proposed application to the court. This email confirmed (amongst other things) that the defendant was "registered on the High Court electronic filing system and will have access to documents in that system", and was "content to be served by email". It also suggested that the claimant "agree to service of [its] intended application upon the Charity Commission as they have a clear interest in its outcome, and may wish to be joined as an interested party".

23. On 14 February 2020, at 16:54, the claimant's solicitors replied by email to the defendant. Amongst other things, they said that the first email sent on 12 February 2020 had been sent in error, being merely a draft. They also said that Mr John Baker had said that he had been called into the meeting between the defendant and Mr Ian Dorward of the Club, "who requested he act as a witness to matters between [the defendant] and Mr Dorward". Mr Baker had confirmed that the defendant did *not* mention to him any oversight in the notice.

24. In an email reply a few minutes later, at 17:08, the defendant denied that Mr Baker was called in to be a witness to what Mr Dorward had to say. However he also added:

> "I accept his [Mr Baker's] recollection and that is why I used the word 'think'."

On the evidence I am satisfied that the defendant did not tell Mr Baker at their meeting on 12 February 2020 that by an oversight he had omitted a necessary statement in his letter of request. I am also satisfied that the first email of 12 February 2020 had indeed been sent in error. On 18 February 2020, as I have mentioned, the claimant issued the claim form in this case.

The law

Relevant statutory provisions

25. Section 116 of the 2006 Act provides as follows:

> "116. Rights to inspect and require copies
>
> (1) The register and the index of members' names must be open to the inspection—
>
> (a) of any member of the company without charge, and
>
> (b) of any other person on payment of such fee as may be prescribed.
>
> (2) Any person may require a copy of a company's register of members, or of any part of it, on payment of such fee as may be prescribed.
>
> (3) A person seeking to exercise either of the rights conferred by this section must make a request to the company to that effect.
>
> (4) The request must contain the following information—
>
> (a) in the case of an individual, his name and address;
>
> (b) in the case of an organisation, the name and address of an individual responsible for making the request on behalf of the organisation;
>
> (c) the purpose for which the information is to be used; and
>
> (d) whether the information will be disclosed to any other person, and if so—
>
> (i) where that person is an individual, his name and address,
>
> (ii) where that person is an organisation, the name and address of an individual responsible for receiving the information on its behalf, and
>
> (iii) the purpose for which the information is to be used by that person."

26. Section 117 of the 2006 Act provides as follows:

> "117. Register of members: response to request for inspection or copy

> (1) Where a company receives a request under section 116 (register of members: right to inspect and require copy), it must within five working days either—
>
> (a) comply with the request, or
>
> (b) apply to the court.
>
> (2) If it applies to the court it must notify the person making the request.
>
> (3) If on an application under this section the court is satisfied that the inspection or copy is not sought for a proper purpose—
>
> (a) it shall direct the company not to comply with the request, and
>
> (b) it may further order that the company's costs (in Scotland, expenses) on the application be paid in whole or in part by the person who made the request, even if he is not a party to the application.
>
> (4) If the court makes such a direction and it appears to the court that the company is or may be subject to other requests made for a similar purpose (whether made by the same person or different persons), it may direct that the company is not to comply with any such request.
>
> The order must contain such provision as appears to the court appropriate to identify the requests to which it applies.
>
> (5) If on an application under this section the court does not direct the company not to comply with the request, the company must comply with the request immediately upon the court giving its decision or, as the case may be, the proceedings being discontinued."

27. Section 118 of the 2006 Act provides as follows:

> "118. Register of members: refusal of inspection or default in providing copy
>
> (1) If an inspection required under section 116 (register of members: right to inspect and require copy) is refused or default is made in providing a copy required under that section, otherwise than in accordance with an order of the court, an offence is committed by—
>
> (a) the company, and
>
> (b) every officer of the company who is in default.
>
> (2) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale.

> (3) In the case of any such refusal or default the court may by order compel an immediate inspection or, as the case may be, direct that the copy required be sent to the person requesting it."

28. Section 119 of the 2006 Act provides as follows:

> "119. Register of members: offences in connection with request for or disclosure of information
>
> (1) It is an offence for a person knowingly or recklessly to make in a request under section 116 (register of members: right to inspect or require copy) a statement that is misleading, false or deceptive in a material particular.
>
> (2) It is an offence for a person in possession of information obtained by exercise of either of the rights conferred by that section—
>
> (a) to do anything that results in the information being disclosed to another person, or
>
> (b) to fail to do anything with the result that the information is disclosed to another person,
>
> knowing, or having reason to suspect, that person may use the information for a purpose that is not a proper purpose.
>
> (3) A person guilty of an offence under this section is liable—
>
> (a) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine (or both);
>
> (b) on summary conviction—
>
> (i) in England and Wales, to imprisonment for a term not exceeding twelve months or to a fine not exceeding the statutory maximum (or both);
>
> (ii) in Scotland or Northern Ireland, to imprisonment for a term not exceeding six months, or to a fine not exceeding the statutory maximum (or both)."

Relevant caselaw

29. In *Burry & Knight Ltd v Knight* [2014] EWCA Civ 604, the Court of Appeal considered these provisions. Arden LJ (who gave the principal judgment, and with whom Briggs and Christopher Clarke LJJ agreed in certain aspects, including in the result) said:

> "6. The statutory provisions dealing with inspection of share registers are now to be found in sections 113 to 120 of the Companies Act 2006 ("CA 2006"). Sections 116, 117, 119 and 120 are new. The other sections are derived from previous statutory provisions, some of which date from the Companies Act 1862.

> 7. The Companies Act 2006 ('the CA 2006') in general requires every company to keep a register of its members, showing (in the case of a company having a share capital) for each member his name and address, the date he was registered as a member or ceased to be a member and the number and class of his shares and the amount paid up on those shares.
>
> 8. Persons other than the company may have a legitimate interest in accessing the information in the register. A member may, for instance, need the information in the register because he wants to obtain support from other members to requisition a general meeting of the company. A member of the public may need the information in order to investigate whether the board has issued shares improperly, for example by issuing them to their associates.
>
> 9. Accordingly, statute confers rights to inspect and take copies of the information in the register of members. Under the Companies Act 1985, section 356, anyone could obtain access to the register and a copy of it. However, there was evidence that some people were abusing this right and seeking the information in order to harass the members.
>
> 10. So since 2006 these rights have been qualified. In the CA 2006, Parliament has sought to provide some protection for members against improper requests by enabling the company to obtain a court order preventing access if the request fails a 'proper purpose' test. Accordingly under the CA 2006:
>
> - the person who wants access to the register must make a request for access which states the purpose of the request (section 116);
> - the company may within 5 days apply to the court for an order relieving it from any obligation to comply with the request, and
> - the court has no option: it must make this order if it is satisfied that the request is not made for a proper purpose (section 118).
>
> 11. This is a major change in the law. Formerly, the law regarded the right of a shareholder to access the share register as an incident of his property right in his share, and did not inquire into his motives for wanting access: see *Davies v Gas Light and Coke Co* [1909] 1 Ch 248."

30. Arden LJ then went on to say this:

> "15. I start with the mischief to which section 117(3) of the CA 2006 was directed. Ms Lexa Hilliard QC, for Dr Knight, pointed out that Margaret Hodge MP, Minister in charge of the Bill at that stage, spoke during the committee stage of the Companies Bill leading to the CA 2006 of abuse of the right to inspect the share register.
>
> 16. These abuses were the subject of recommendations by the Steering Group of the Department of Trade and Industry's Company Law Review ('the CLRSG'), of which I was a member. Section 117 was enacted following acceptance by the Department of those recommendations. In its *Modern Company Law For A Competitive Economy: Final Report* (www.dti.gov.uk/cld/review.htm), the

> CLRSG pointed out that the right of access to share registers was abused by, for instance, bounty hunters or people who sought to use the names and addresses for advertising purposes.
>
> 17. The principal recommendation made by the CLRSG on this point was that the Companies Act should restrict access to the share register. The CLRSG went on to recommend an approach not wholly dissimilar to the approach in the Australian Corporations Law. Under that Law, the applicant has to make his application in a prescribed form, and must set out in it each of the purposes for which he seeks access (section 117(3A) (c)). None of the purposes must be a proscribed purpose, and the proscribed purposes include such matters as requesting a donation from a member. The CLRSG recommended that purposes of access be limited to some (different) prescribed purposes (see *Final Report*, paragraph 11.44). However, Parliament has not identified any purposes as improper. Thus it has left the words 'proper purpose' at large for the courts to work out in the conventional way, using the context and on a case by case basis. I therefore agree with the Registrar that Parliament intended to leave the meaning of 'proper purpose' open for the courts to determine, and not to limit or define it."

31. I shall return to this case later. I shall also refer to other decisions which are relevant to particular points of discussion.

Invalid request

32. The first point taken by the claimant is that the request purportedly made under s 116 was invalid, because it did not include all the information required by that section. It is not disputed that, when the request was originally delivered to the claimant on 10 February 2020, it did not contain the statement required by s 116(4)(d), *ie* whether the information would be disclosed to anyone else (and, if so, to whom and for what purpose). But the defendant says that this was an inadvertent error, corrected by his email of 13 February 2020, and that I should read both documents together. The claimant says that the email does not in fact correct the omission, because it says "I have no intention of making the information available to any other person", whereas the statutory provision refers to "the following information… (d) whether the information will be disclosed to any other person…"

33. There is some authority (to which I will return) on the point whether the failure to contain the statement at all makes the statement invalid, but there appears to be none on the point whether any omission to make that statement can be corrected in a later document, nor on the point whether "I have no intention of making the information available" satisfies the requirement to state "whether the information will be disclosed to any other person".

34. To take the last point first, the claimant says that the phrase "whether the information will be disclosed to any other person" imports an element of future control of the information (like a promise), whereas "I have no intention of making the information available" is merely a statement of present intention. I reject this submission. The statute does not require the requesting party to make a promise. It requires him to make a statement which will assist the company to make up its mind how to react to the request, and in particular whether to apply to the court for a no-access order.

35. If the statement is misleading, false, or deceptive in a material particular, the requesting party commits a criminal offence under section 119(1). And future control of the information is obtained by the creation of the offence under section 119(2), in acting or omitting to act so that the information is disclosed to another person "knowing, or having reason to suspect, that person may use the information for a purpose that is not a proper purpose". These are serious offences, being punishable with up to 2 years' imprisonment. In my judgment it is not necessary for the requesting party to say explicitly "the information will not be disclosed to any other person". The phrase "I have no intention of making the information available to any other person" is sufficient compliance with section 116(4)(d).

36. I turn back to the point whether the failure to contain the statement at all makes the statement invalid. In *Fox-Davies v Burberry plc* [2017] EWCA Civ 1129, David Richards LJ summarised the facts of that case in this way:

> "2. The appellant carries on the business of tracing lost members of companies and, for a fee or commission, reuniting them with their shares. In furtherance of this business, he requested a copy of the register of members of the respondent company Burberry PLC (Burberry), under section 116 of the Companies Act 2006. Burberry refused to supply it and applied under section 117 for a direction that it should not comply with the request. After a contested hearing, Registrar Briggs made the direction sought by Burberry. The appellant appeals with permission granted by the Registrar."

37. The appellant was a director and shareholder of a Gibraltar company called Interum Ltd, and he stated in the request that information provided pursuant to the request would be disclosed to that company. What he did not say was that that company would make the information available to independent specialist researchers in the relevant countries, who would assist in tracing the lost members, and with whom he would share his fee. All three members of the Court of Appeal (Longmore, David Richards LJJ and Sir Patrick Elias) held that this failure to mention disclosure to the specialist researchers amounted to non-compliance with section 116(4)(d) and invalidated the request. Hence, the appeal was dismissed.

38. David Richards LJ (with whom the other members of the court agreed on this point) said this:

> "31. … Section 116(4) is clear that the request 'must contain' the information specified in the sub-section, and section 117(1) requires a company to comply with 'a request under section 116'. The statutory scheme strongly suggests that this is a mandatory requirement and that a company is not obliged to comply with a request that does not contain the necessary information. It is hard to see that paragraphs (a) and (b) could be anything other than mandatory. Paragraph (c) is essential to enable the company to form a view whether the requester's purpose is proper and so decide how to proceed under section 117. As to paragraph (d), the appellant's own submission is that it is directed at enabling the company to assess the purpose. In any event, it would be very odd if compliance was mandatory as regards paragraphs (a) to (c) but not paragraph (d). Substantial compliance with section 116(4) might suffice, but in this case there was a wholesale failure to comply with paragraph (d)."

39. This was a case where the requesting party *did* intend to disclose the information to others, but only mentioned one of them and not all of them. It was held to amount to "a wholesale failure to comply" with the requirement. The present case is factually different, of course, because in the defendant's request there was simply no statement one way or the other. However, in my judgment this is not a legally significant difference. As David Richards LJ said, the request "must contain the information specified in the sub-section", and this is a mandatory requirement. Instead of containing incomplete information under point (d) (as in *Fox-Davies*), the request in the present case contained no information at all. I hold therefore that the request as made in the email on 10 February 2020 was not a valid request under section 116.

40. The question therefore arises whether the invalid notice could be corrected and made whole by the additional information being provided in the email from the defendant of 13 February 2020. There are three ways in which this might be explained juridically. The first would be to say that the original request was invalid at the time, but was later validated by the supply of the additional information, so that either (i) it becomes retrospectively valid, or at least (ii) it is valid from the date of later supply. The second would be to say that the original request was always invalid, but that the supply of the further information creates a new and valid request as from the date of later supply. The third would be to say that the request is contained in *both* documents read together.

41. I do not think that the first of these can be right. The company needs to know where it is at the date of the request, especially given the criminal sanctions on the company and its officers contained in section 118. There are, after all, only five days in which to issue proceedings if a valid request is made but the company wishes to challenge it. In the *Fox-Davies* case, David Richards LJ briefly considered the problem that might arise if after the date of the request it became necessary to disclose the information to someone else who had not been mentioned in the request. He said this:

> "29. … As to the possibility that it may later become unexpectedly necessary to disclose the information to some other person, the requirement speaks as at the time the request is made."

On this basis, a request is either valid or invalid at the time it is made. Its status ought not to change depending on what happens later.

42. As to the second possibility, there can be no doubt that it would be open to the requesting party, discovering an omission to supply information necessary for a valid request, to make a further request containing the original information and the previously omitted information. There are no restrictions in the statute on the number of requests that may be made. It must therefore be a matter of construction as to whether the second communication amounts to a second request, or merely to an attempt to correct the first request. In my judgment the whole tenor of the defendant's email of 13 February 2020, supplying the missing information, was to correct the original request, and not to make a fresh one. It refers to omitting information "from my request" and "For the avoidance of doubt, my request was…" It does not refer to a further or fresh request.

43. As to the third possibility, the statute refers to "a request" or "the request", which suggests a single event, rather than two separate events combined together. (I accept,

of course, that in the case of a written request, it might extend over two or more pieces of paper, but they amount to a single document, and therefore a single event.) A request which is made and considered to be complete is a separate event from any subsequent communication seeking to add or subtract from the original request. If it were otherwise, it would create the same difficulty for the company in knowing where it stands after receiving a request, and having to decide within the five days allowed whether to challenge it or not, or face possible criminal sanctions. In my judgment it is not permissible to aggregate separate matters into one in this way.

44. Accordingly, I hold that the request made by the defendant in his email of 10 February 2020 was invalid, and the company is not required to comply with it. That is sufficient to dispose of this claim, but in case the matter should go further, I will deal briefly with the other matters that were argued before me.

Not a proper purpose

45. The first of these matters is whether, if the request made by the defendant of the claimant had been a valid request, the court would have been satisfied that inspection and copying was not sought for a "proper purpose" within section 117(3). In this connection, it is for the claimant to satisfy the court on the balance of probabilities that the request is improper: see *Burry & Knight*, [27], [131]. The court first establishes what was the purpose, and then evaluates whether it was "proper". The letter from the defendants set out three purposes for which the information was sought. In summary form, these were to call a special meeting of the claimant (i) for an explanation to be given as to why the annual general meeting for 2019 was held late, (ii) to produce to the meeting the audited accounts for the year ended 30 June 2019, and (iii) to remove five directors of the claimant who were accused of misconduct or misfeasance.

46. In *Burry & Knight*, Arden LJ considered the words 'proper purpose', and said:

> "18. The Registrar held, and I agree, that the words "proper purpose" should be given their 'ordinary, natural meaning'. He held that a proper purpose ought generally, in the case of a member, to relate to the member's interest in that capacity and to the exercise of shareholder rights. I agree with this approach, provided the last 'and' is read as 'and/or', (as is clear from a later reference in the Registrar's judgment).
>
> 19. It is not possible to provide an exhaustive definition of what is a proper purpose. The Registrar held that a court might have regard to a guidance note, issued by the Institute of Chartered Secretaries and Administrators ('ICSA'), when deciding what constitutes a proper purpose but that such guidance is non-binding and non-exhaustive. I agree: the ICSA guidance might well provide useful guidance in a particular case since it distills the experience of its members. It gives as one example of a purpose that, in the view of the working group responsible for the guidance note ought to be regarded as proper, 'shareholders ... wanting to contact other shareholders about matters relating to the company, their shareholding or a related exercise of rights…'. The examples of improper purpose include: 'any representation or communication to members that the company considers would threaten, harass or intimidate members or would otherwise be an unwarranted misuse of the member's personal information…'.

> 20. Where there were multiple purposes - some proper and some not - the Registrar held that 'a proper purpose is not necessarily tainted by being coupled to an improper purpose'. I agree. As I explain in Part A, section 3 below, in these circumstances, the court may, as the Registrar did, make an order on terms."

47. Arden LJ also considered the possibility that some purposes might be proper and yet one or more may be improper. She said:

> "82. I do not consider that the court can be satisfied that the purpose of the request is a proper one simply because it is satisfied that one of several purposes is a proper purpose (leaving aside *de minimis* purposes). The contrary conclusion would undermine the protection which the no-access provision was intended to give. In my judgment, the right approach is to read the words 'a proper purpose' in section 117(3) as including 'proper purposes' where there is more than one of them. Thus the court would have to make a no-access provision order if any one of the purposes was improper."

48. In the later case of *Fox-Davies*, David Richards LJ said:

> "47. First, the test of whether a purpose is improper is objective, in the sense that it is made by the court on the basis of its evaluation of the purpose. The ICSA guidance is correct that the company must form its own view about the propriety of the requester's purpose if it is to decide under section 117(1) to refuse a request, but on the ensuing application to the court, it is for the court to reach its own view. The court's decision does not depend on the company's subjective view nor is the court reviewing the company's decision. […]
>
> 48. Second, I agree that the test as to whether a purpose is proper does not depend on whether it is in the interests of shareholders. It is not mentioned in the Act as a determining factor, and I see no reason to imply it. It is not difficult to think of several examples of requests that have nothing to do with the interests of shareholders individually or as a class. Indeed, the ICSA guidance gives examples: requests for the purposes of credit or identity checks or general statistical research or enforcing judgments. In appropriate cases, investigative journalism might be another example."

49. I should also bear in mind that, in *Houldsworth Village Management Co Ltd v Barton* [2020] EWCA Civ 980, Floyd LJ (with whom Asplin and Coulson LJJ agreed) said:

> "18. The court in *Burry* and in *Fox-Davies* gave some examples of purposes which would normally be proper. One example of a proper purpose given by Arden LJ in *Burry* at [8] was if a member needed the information in the register because he or she wanted to obtain support from fellow members to requisition a general meeting of the company. Likewise in *Fox-Davies* at [36] David Richards LJ said that a member who wanted to obtain support to requisition a general meeting 'will generally have a proper purpose, except on unusual facts such as those in [*Burry*] itself'. In *Burry* the court was able to conclude that the request was made to pursue stale and unsubstantiated allegations against the directors which it was 'very difficult to conceive' that he could ever prove, and accordingly it was right to refuse access."

50. One problem in the present case is that, as I have already observed, this claim was not dealt with summarily, but tried. And the trial of this Part 8 Claim has taken place a long time after the request was made. In fact, it is just under a year at the time of the hearing, and just over a year at the time of judgment. Inevitably, circumstances have significantly altered since the time that the request was made. In particular, the delayed AGM has taken place, the accounts have been disclosed to the members and they have been approved and indeed published on the Companies House website. Moreover, of the five directors of the claimant that were sought to be removed by the defendant, all except one had left office by the time of the hearing, and the other was expected to do so imminently. However, in my judgment, I must judge the propriety of the request at the time that it was made, and not as at the time of the hearing at which that propriety is actually argued and thereafter considered: *Fox-Davies*, [37]. In so considering, I do of course take into account the Guidance of the Institute of Chartered Secretaries and Administrators (November 2018), referred to in the caselaw.

51. Accordingly, if I consider the position as at the time that the request was made, in February 2020, the position was as follows. At that stage, the AGM had not been held, and, although a newsletter had been sent out to members of the claimant on 27 January 2020 to inform them that the AGM would be late, giving reasons, it appears to be accepted by the claimant that the defendant, along with a (small) number of other members, did not receive a copy of that letter. On that basis, by the time that the request was made, the defendant had not had an explanation for the late holding of the AGM. Similarly, I find that the accounts were distributed to the members before the late AGM on 11 March 2020. Nevertheless, at the time of the request in February, those accounts had not yet been distributed to the members. In principle, therefore, I cannot regard the purpose of calling of a meeting of the members of the claimant in order to have an explanation for the lack of an AGM and for the distribution of annual accounts as improper. They seem to me on their face to be proper reasons for seeking to call a meeting.

52. In relation to the third aspect of the calling of the meeting, namely, to seek the removal of five directors, the matter is a little more difficult. The only allegations which at the time of the request in February 2020 were made against the directors of the claimant were not made against them in *that* capacity, but instead in their capacity as directors of *the Club*. It must be borne in mind that the memberships of these two companies are not the same. Some members of the claimant may have no interest in the Club, and vice versa.

53. I do not say that it can never be a proper purpose to seek to remove from office the director of a company who is alleged to have committed some serious misconduct in *another* capacity. General conduct by a person can sometimes reflect on particular institutions with which that person is connected. But I do say that it is necessary to go beyond making an allegation against the director in his or her capacity as a director of another company which on its face does not directly concern the activities of the subject company.

54. Here the claimant has satisfied me that there is nothing alleged against the five directors in their capacity as directors *of the claimant* which would justify the request for details of the members to call a meeting for the purpose of removing them from office as *directors of the claimant*. That is not a proper purpose. On that basis, and in

accordance with the dictum of Arden LJ referred to above, the court would have had to make a no-access provision order because at least one of the stated purposes was improper.

Fear of misuse by the defendant

55. The other point that was argued before me was that, even if the court could not be satisfied that any of the purposes for which the request was made was improper, nevertheless the court could not be satisfied that the defendant would use the information supplied only for the stated purposes, and for no other. A considerable amount of evidence was put before the court in order to show that the defendant was a serial, and indeed (it was submitted) vexatious, litigant, and intended to use the information supplied for the purpose of threatening, harassing or intimidating members. That would no doubt amount to an improper purpose.

56. I am not going to set this evidence out in detail, but I accept that it (some of which was accepted by the defendant, or accepted with amendments or qualifications) shows that the defendant is willing to employ all means, including civil litigation, criminal prosecutions, regulatory and disciplinary jurisdictions, in order to attack those with whom he is in dispute, and also those who advise and represent them. I do not know if any of these complaints is justified. I will only observe that, if they are, then the defendant is a singularly unfortunate person to have come into contact, in his business life, with so many persons committing criminal, regulatory and disciplinary wrongs in matters in which he has interested himself.

57. In addition, allegations are made that the defendant has been bankrupted in a very significant claim against him and has been a director and company secretary of at least 46 companies that have been dissolved since 1990. It certainly appears from the advice of the Judicial Committee of the Privy Council in *Hardy v Focus Insurance Company* (1995) 47 WIR 116, an appeal from Bermuda, that litigation was brought against him there for US$19.7m arising out of the insolvency of an insurance company of which he was a director. It further appears that he was found to have breached a worldwide freezing injunction, and a default judgment for the sum claimed was obtained, which was then used to make him bankrupt in this country (see *Re Focus Insurance Co Ltd* [1996] BCC 659). Further allegations are made that he was found in contempt of court in litigation in the county court, and that he has been involved in various other litigation, where he has been described as "a serial litigator".

58. None of this amounts to a badge of honour for the defendant. But neither does this background mean that someone who says that information disclosed will not be passed on to third parties is automatically to be disbelieved. Even if a person is found to have lied or behaved dishonestly on one occasion, it does not mean that that person always lies or behaves dishonestly. I am not satisfied on this evidence that the defendant's unstated purpose of the request was to threaten, harass or intimidate members of the claimant.

59. I accept that there may be cases where, even though a *prima facie* case is made for ordering information to be supplied by the company, the court is nevertheless satisfied on the balance of probabilities that the person to whom it is supplied intends to or will supply that information to third parties or otherwise misuse it. In that case there would be an improper purpose (albeit undeclared) and the court would make a no-access

order: *Burry*, [33]. But, short of that, in my judgment, there is no discretion given to the court to direct that the company not comply with the request. Instead, it is the criminal offences created by section 119 of the 2006 Act which operate to sanction the possible misuse of information thereafter. Accordingly, if I had held that the request had been a valid request, and that all of the purposes for which it was sought were proper, I would not have directed the company not to comply with the request, merely because I *suspected* (without being *satisfied*) that the defendant would not comply with the requirements of the legislation.

Conclusion

60. For the reasons set out above, the claimant succeeds in its claim. I will therefore make the appropriate no access order. I ask counsel to submit a draft memorandum of order (copying it to the defendant his comments) for my approval.