Judgments

Cool Seas (Seafoods) Ltd v Interfish Ltd and another

[2018] EWHC 2038 (Ch)

Chancery Division

Rose J

31 July 2018

Judgment

Imran Benson (instructed by **Rosling King LLP**) for the Claimant and Third Party

James Potts QC and **Chantelle Staynings** (instructed by **TLT LLP**) for the Defendants

Hearing dates: 4, 8 – 11, 14 – 18, 21, 22, 23 May, 5 – 7 June 2018

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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.

Mrs Justice Rose :

I. INTRODUCTION

1. Northbay Pelagic Ltd (“Northbay”) is a pelagic fish producer located at a large factory site in Peterhead on the coast of Aberdeenshire, Scotland. Pelagic fish are fish which swim in the water column of the ocean (as opposed to living on the seafloor). Northbay's core business is purchasing pelagic fish sourced in the North East Atlantic from fishing vessels. When a vessel

lands at Northbay's quayside, the vessel's haul of fish is pumped directly from the vessel's holds into the fish processing factory. The fish are then processed through an automated factory by being gutted or filleted before being packed and frozen in blast freezers and stored in a cold store. The fish are then sold and distributed to customers. The business used to be run on the same site by a company called Fresh Catch Limited and was acquired by Northbay in January 2014. During the years when the business was operated by Fresh Catch there were about 30 to 40 landings of fish per year at the Peterhead site.

2. The petitioner ('Cool Seas') owns 40% of the voting rights in Northbay and the First Respondent and Second Respondent own the other 60% of the voting rights. I shall refer to the First and Second Respondents jointly as '**Interfish**' unless it is important to distinguish between them. The controlling shareholder of Cool Seas is Christopher Anderson, the third party in these proceedings. He and his family used to own the Fresh Catch business. The most senior person involved on behalf of **Interfish** in the events giving rise to these proceedings is Johannus Colam. Mr Colam was the founder and managing director of the **Interfish** group of companies which is based in Plymouth. **Interfish** was entitled under the Investment and Shareholder Agreement setting up Northbay to appoint three directors to the board of Northbay. Mr Colam was one of those directors. Cool Seas was entitled to appoint two directors to the board of Northbay and Mr Anderson and his son Colin Anderson were those directors. They were also both senior employees of Northbay.

3. By the end of 2015 relations between the Andersons and **Interfish** had broken down. In January 2016 Mr Anderson was dismissed by Northbay for gross misconduct and ceased to be a director of Northbay. Later in March 2016 Colin Anderson was similarly dismissed for gross misconduct and also ceased to be a director. Both sides in these proceedings are agreed that relations between them have deteriorated to such a degree that they cannot remain in business together any longer.

4. Cool Seas have issued a petition under section 994 of the Companies Act 2006, alleging that the affairs of Northbay have been conducted in a manner which is unfairly prejudicial to them. Their primary complaint is that Mr Anderson and Colin Anderson's exclusion from the management of Northbay in 2016 was unjustified and was contrary to their legitimate expectation of remaining involved in the management of Northbay which they characterise as a quasi-partnership. The primary relief sought is that **Interfish** be required to buy out Cool Seas' interest in Northbay.

5. **Interfish** contests that petition, arguing that the removal of Mr Anderson and Colin Anderson from their roles as directors and employees of Northbay was carried out in accordance with the terms of the constitution of the company and the arrangements between the shareholders. They assert that Northbay is not a quasi-partnership and that there was no legitimate expectation on the part of Cool Seas that Mr Anderson and Colin Anderson continue their involvement in the management of Northbay. They argue in the alternative that there was gross misconduct on the part of both men which justified their dismissal.

6. Further **Interfish** itself petitions by way of counterclaim under section 994 alleging that Mr Anderson's conduct, and hence Cool Seas' conduct, in the management of Northbay's affairs was unfairly prejudicial to **Interfish**'s interests as a member of the company. The primary relief they seek is that **Interfish** buy out Cool Seas' interest in Northbay. **Interfish** also alleges that Mr Anderson's conduct in many respects amounted to a breach of his fiduciary duties owed to Northbay. They submit that either the price to be paid to Cool Seas for its interest in Northbay should be adjusted to reflect the effect of those breaches on the company's business or that Mr

Anderson be required to account for those breaches and make appropriate payments over to Northbay before the shares are valued.

7. Both sides are agreed that the form of relief should not be determined by the trial before me. My task is to make findings on the issues of liability so that the parties can then work out how Cool Seas' shares in Northbay will be valued and then bought by **Interfish**.

II. THE FISHING INDUSTRY

8. Pelagic fish include mackerel, herring, capelin and sprats. During the course of a year the fishing seasons are as follows; January to March is the mackerel season, capelin and blue whiting are landed in about February to March. April and May are quiet and the herring season then runs from June to September. From September to the end of the year would be the start of the mackerel season. The seasons can vary by two to three weeks in either direction. However, in total there is an off-season of about six months each year when the fish processing plant is quiet.

9. Both EU and non-EU ships fish for pelagic fish in the waters north of Scotland. They can land their hauls for processing either at plants in Scotland or outside the EU in Norway. The vessels can catch hundreds of tonnes of fish in their nets and store them in large refrigerated seawater tanks on board. The fish processing plants have to compete with each other to attract the business of the trawlers and also to sell on the processed fish to downstream customers. Larger fish are generally more valuable per gramme than smaller fish. Payment by the processing plant to the vessel for the fish landed is therefore calculated on the basis of the overall tonnage of fish, the average grammage of each fish, and the price per gramme.

10. There are two aspects of the fishing industry which are particularly important to this case. Since 1970, fish quotas have been in place by the EU to ease the pressure on fish stocks and prevent unsustainable exploitation. UK boats are allocated a fishing quota limiting the number of fish of different species that they are entitled to catch in UK waters and land in a given season. The Scottish Government, via Marine Scotland, issues most of its quota allocations to Fish Producer Organisations which are made up of member fishing vessels and are responsible for quota management and marketing. The FPOs manage and control their members' quota on their behalf. Each UK vessel is allocated a portion of the UK's quota annually.

11. The factual witnesses described the regulatory and tax regime applicable broadly as follows. Some of the fish caught and landed by vessels unloading at Northbay are caught in waters outside the EU. Those fish do not count against the UK quota of the vessel. But when they are landed, the processing plant must declare the fish and account to HMRC for the relevant import duty and import VAT payable. The duty is calculated by reference to the value of the goods at import or the value of the goods after processing. If the fish that have been landed from non-EU waters are processed by the factory and then sold outside the EU the import duty paid on the landing can be reclaimed. It is possible for a processing plant to arrange with HMRC to avoid the inconvenience of having to pay and then reclaim the duty by being granted Inward Processing Relief ('IPR'). When IPR is granted, HMRC accepts that duty does not have to be paid on imported fish provided they are processed by the plant and resold outside the EU within the period specified in the IPR. Imported fish must be held in a bonded warehouse at the plant. When goods leave the warehouse, duty is payable unless the business is entitled to IPR and the goods are exported outside the EU.

12. The fish are weighed at various stages. When the vessel catches a haul, the fish are deposited from the nets into a tank in the vessel. The skipper can estimate the amount of fish in the tank by “dipping”. This involves lowering a stick into the tank, measuring the ullage of the tank and then converting that into an approximate tonnage of fish in the tank. This is an imperfect method of weighing the fish partly because the vessel may be travelling in rough waters and also because the fish may be sitting in a mound shape in the tank. But the skipper will know roughly how much fish he has on board; he knows the species of fish and he can sample the catch to give him an idea of the average grammage and quality. The skipper can then declare these values either to an online auction site offering his catch for sale to nearby plants or he can choose which plant to land at and negotiate the price for the fish on the basis of his estimate.

13. All vessels are required to give four hours' notice prior to arrival in port to land their catch. Once the vessel has landed at the processing plant the fish, mixed with water to enable them to flow freely, are pumped under pressure directly from the hold into the plant where they are deposited in hoppers. The hoppers are transported by a conveyor belt which passes over a set of scales to measure the overall weight of the catch. It is these scales which are intended to provide the accurate weight of the fish landed for the purposes of declaring the fish to the relevant authorities and calculating the payment due to the vessel. At various points samples are taken of the fish and individual fish are weighed and graded to ascertain the true grammage and quality representative of the entire catch. Sometimes a representative of the vessel will come onto the site to supervise the landing and processing of the fish.

14. Once the fish have been weighed they are transported to the processing machines which can process them in various ways. Some of the fish remain “whole round” fish with very little done to them, some are headed and gutted, some are processed into “flaps” where they are headed and gutted and cut open flat. Once the fish have been processed they are weighed again. This gives the “yield” of the plant's processing. The whole round fish will weigh almost the same after as before processing. But the flaps will be a lower weight because the weight of the head, guts etc have been removed. The processing plant hopes to lose as little of the weight of the fish as possible in the processing so that they have as much as possible of each fish to sell on to their customers. The yield figure of the plant is affected by how well the processing machinery is operated by the staff and more generally by the skill and efficiency of the plant. The processed fish are then frozen and packed to be sold on to customers.

15. The accurate and honest weighing of fish both in terms of the total tonnage and working out the average grammage of the fish in the catch is key to the enforcement of quota restrictions, the calculation of import duty due and the correct payment by the plant to the vessel. Scales are therefore regularly inspected and certified by Marine Scotland which has extensive powers to make unannounced visits to processing plants, to ask to see the records maintained by the plant relating to the landing and processing of fish, or the log books relating to the repair and maintenance of the scales and generally to investigate suspected under declarations of fish. It is a criminal offence for a master, the owner of the vessel and the processing plant to land fish that is undeclared. Skippers and factories who do so are liable to be prosecuted and subject to a fine or confiscation order, and the vessels may have their future quotas reduced.

16. Unfortunately the fishing industry has been prone in the past to substantial abuse by vessels and processing plants alike engaging in what is known in the industry as 'black fishing'. Black fishing is the term used to describe the under declaration of fish either for the purpose of

evading quota restrictions or for the purpose of evading the payment of import duty. Black fishing may be carried out either with or without the connivance of the vessel owner. If the fish landed are caught in EU waters, there is an advantage to the vessel owner in conniving with the processing plant in under declaring the catch and thereby preserving quota for future catches. If the fish landed are caught outside EU waters, there is an advantage to the processing plant in under-declaring the catch because less duty is payable to HMRC. The two practices may be combined when the vessel and the processing plant collude in under-declaring the amount of fish landed but the processing plant also misrepresents to the vessel the amount of fish actually received. In that way the vessel benefits by appearing to have used up less of its quota than it in fact has used and the processing plant benefits from landing free fish which it can then process and sell on to its customers. Black fishing carried out without the vessel's knowledge is known as “skimming”.

III. THE PARTIES AND WITNESSES

(a) The parties and other companies

17. Cool Seas is the vehicle set up to own the shares in Northbay by Mr Anderson who used to own the Fresh Catch business. It was a previously dormant company acquired by Mr Anderson in December 2013. The shareholdings in Cool Seas were in the same proportion as the shareholdings in Fresh Catch. Mr Anderson holds 51 ordinary shares of £1 each, and other members of his family own the rest. The directors of the company have always been either Mr Anderson or members of his family. Cool Seas and Mr Anderson accepted in their pleaded case that, as the controlling shareholder and a director of Cool Seas, at all material times Mr Anderson's knowledge is to be imputed to Cool Seas.

18. **Interfish** Limited was incorporated on 17 October 1977. It is a processor of mainly pelagic fish, exporting to over 30 countries and it also owns a large fishing fleet. There are currently 9 trading companies in the **Interfish** group, including the Second Respondent. The **Interfish** group had a turnover of more than £58 million and profit after tax of approximately £7.5 million for the year ended 31 January 2017. **Interfish** is managed from its offices in Plymouth. The Second Respondent is majority owned by **Interfish** and owns a fishing vessel called the Altaire which has landed fish at Northbay from October 2013 onwards.

19. Mr Anderson, Colin Anderson and/or Mr Anderson's daughter Lynsey Anderson have or had an interest in a number of other businesses which are relevant matters in these proceedings:

i) “Anderson Marine” is a boat building and repair business carried on by Anderson Marine LLP until it was transferred on 31 March 2014 to Anderson Marine (Scotland) Limited. Mr Anderson is (and was at all material times) a partner in Anderson Marine LLP along with his brother, James Anderson (“Jimmy”) and Colin Anderson. Anderson Marine is relevant to the proceedings because the business continued to occupy a building on the site referred to as the 1954 Boat Shed after Northbay took over the business and Northbay employees were used by Anderson Marine for its business.

ii) Anderson Construction & Insulation Limited (“ACIL”), which carries on business in construction was set up by Mr Anderson in August 1998. Mr Anderson and his former wife own ACIL. This company is relevant because, following a devastating fire at the site in January

2015, it was engaged by Northbay to demolish the ruined buildings and to rebuild the factory.

iii) E2 Partnership Limited ("E2") is a company jointly owned in equal shares by Mr Anderson and Mr James McConville who are both also directors of E2. E2 provided stands and promotional material for Fresh Catch and then for Northbay to use at the international expos and trade fairs attended by Fresh Catch and Northbay over the years.

(b) Witnesses for Cool Seas

20. **Christopher Anderson** was the driving force behind Fresh Catch at the Peterhead site. He was the main witness for Cool Seas. I have no doubt that some of Mr Anderson's evidence was deliberately untrue and that he has justified this to himself on the grounds of his strong feelings of grievance against Mr Colam and **Interfish** and his failure, despite the damage that his conduct has caused to Fresh Catch in the past, to accept that black fishing and tax evasion constitute serious wrongdoing. My finding that he was an unreliable witness is based on a number of factors. First there is no doubt that he has lied on many previous occasions about his involvement in black fishing. It is clear to me that the explanations he has given on previous occasions either to the police or during other legal proceedings were false. He has also been shown to have been dishonest and given untruthful evidence to a tribunal in the past. I refer later to the proceedings before the First-tier Tribunal (Tax Chamber) in which Fresh Catch challenged the imposition of a civil penalty for evasion of import duty on the basis that it was an honest error on his part because he thought that he would shortly benefit from the grant of a backdated IPR. The Tribunal rejected his explanation and found that he had known at the time of the need to make the customs declaration and pay import duty. Yet in the trial before me Mr Anderson still wrongly maintained that HMRC had told Fresh Catch that IPR would be granted, something that was entirely inconsistent with the contemporaneous documentary evidence.

21. Secondly I find some of his evidence given at the trial to be incredible. In particular, as I describe below, he maintained his evidence that the modification made to the water return pipe was not intended to be used to divert fish round the weighing scales but was to remedy the tendency of the pipe to fracture under the pressure of water. This was an implausible explanation since the evidence was that the problems with pipe weakness occurred along the whole length of the pipe, and yet the only modification made just happened to be to the length of pipe that started before and ended after the weighing scales.

22. Thirdly, he displayed behaviour typical of a dishonest witness in treating attack as the best form of defence. He was quick to blame his employees for the problems that the business encountered; he made increasingly wild allegations of dishonesty and conspiracy against other witnesses and his version of events changed frequently as he tried to side step inconvenient truths demonstrated by the evidence of others. He finally resorted to alleging widescale forgery of documents against those who had worked loyally for him and his company for many years, accusing them of deliberately fabricating evidence either at the instigation of Mr Colam or because of long held and entirely fictitious grudges that he claimed they bore against him.

23. That said, it is rare that a witness lies about everything in a case and there are some instances where I have accepted his evidence.

24. **Colin Anderson** worked informally in the Fresh Catch business whilst he was at school but joined the business as project manager in 2005 later becoming the business development

manager. He became a director of Fresh Catch in June 2013 when his sister Lynsey stepped down from that role. His role at Fresh Catch was mostly in sales though he also handled the company's IT. Much of his evidence comprises unattributed hearsay at best; unpleasant gossip and work place backbiting at worst. I reject some of his evidence as untruthful and intended simply to support his father in these proceedings.

25. **Lynsey Anderson** has also worked in what was the family business since her school days and became an employee after she graduated from university. Her evidence relates to the claim in **Interfish**'s cross-petition that Cool Seas acted in an unfairly prejudicial way because Mr Anderson continued to employ her and pay her salary throughout 2015 even though, according to their evidence, she did little work for the company over that time.

26. On 29 February 2016 Ms Anderson suffered a catastrophic accident whilst diving in Mexico and sustained what she described as life changing injuries. She came close to death and suffered a brain haemorrhage and other severe injuries with internal bleeding and many broken bones. She gave her evidence by video link from Peterhead as she was unable to make the journey to London and was due to have further surgery the day after her evidence. She is still clearly suffering from constant pain and ill-health. I find that Ms Anderson was a transparently honest and helpful witness although she accepted that her memory had been badly affected by her extensive injuries.

27. **David Brailey** is a retired project manager and former employee of ACIL. He had been involved in the initial refurbishment of the Fresh Catch factory when Mr Anderson bought it from the soup maker Cross & Blackwell 30 years ago. His evidence concerned the work that ACIL carried out to demolish the factory after the fire and to rebuild it. I find that Mr Brailey was clearly an honest witness doing his best to assist the court.

28. **Stephen Betts** is a factory manager and former employee of and fish buyer for Northbay having worked for the company for a number of years. On the acquisition of the business of Fresh Catch he remained a fish buyer at the Peterhead factory, leaving Northbay in June 2017. His job involved finding out what boats were nearby and negotiating with them to agree to land their catch with Northbay. He was responsible for all the landings between 2012 and when he left in 2017. I regard him as largely an honest witness when giving evidence about matters that were directly within his knowledge.

29. **James McConville** is a co-director of E2 Partnership Ltd which is an exhibition design company. E2 provides exhibition and event management services to its clients who have a stand at an exhibition or event anywhere in the world. It has a particular specialism in the seafood industry. Mr McConville has known Mr Anderson since about 1992 and began carrying out exhibition and graphic design work for Fresh Catch. His evidence relates to the allegation in **Interfish**'s cross petition that Mr Anderson managed the business of Northbay in an unfairly prejudicial manner by failing to ensure that E2 paid for the use it made of the company's storage and manpower resources at the site.

30. **David Good** worked for ACIL between September 1999 and around June 2016. He worked as a self-employed contractor and acted as a foreman on the site after the fire. I regard him broadly as an honest witness although much of his evidence goes to the reasons for the suspension of Colin Anderson which is not in the event something I need to resolve.

(c) Witnesses for Interfish

31. **Johannus Colam** has worked in the fishing industry for most of his working life. He set up **Interfish** in 1977 and has built it up to a substantial business over the years. The company has invested in fishing vessels and quota since 1978 and now operates a large and successful fishing fleet. I regard Mr Colam as an astute business man and I accept that integrity and fair dealing have been important principles by which he has sought to abide in building up his business. His experience in dealing with Mr Anderson was clearly a very frustrating and exasperating one and though he gave Mr Anderson and Colin Anderson many opportunities to put matters back on a proper footing as regards the rebuild, I am not surprised that he finally lost patience with them. However there is another side of him which, of course, was not apparent in his calm and measured evidence in the witness box but which comes out of his written evidence and was confirmed by some of his colleagues giving evidence for **Interfish**. I am sure he has a quick temper and that his anger at Mr Anderson has been greatly inflamed by the recent accusations of dishonesty and connivance in illegal activity that have been made against him.

32. Although therefore I accept Mr Colam as an honest witness I treat his evidence with some caution in so far as he draws inferences about Mr Anderson's motivations at the time. Later events have caused him to reassess his recollections of discussions which took place when relations between him and the Andersons were hopeful and harmonious and to attribute to Mr Anderson and Colin Anderson the worst and most devious motives.

33. **Andrew Pillar** is an employee of **Interfish** and a director of IF Ltd which is a corporate director of both Altaire Fishing Company Ltd and Northbay. He has worked at **Interfish** since July 2000 working directly with Mr Colam. He deals with the commercial side of the business relating to fishing, fish purchasing, sales and processing and fisheries management. His evidence mostly confirms that of Mr Colam. I regard him as an honest and straight forward witness so far as purely factual matters are concerned.

34. **Robert Sanders** has been employed by **Interfish** as an accountant since August 2000 and has been the head accountant for the **Interfish** Group since the summer of 2009. His evidence deals with work that was undertaken to analyse the accounts of Fresh Catch during the negotiations leading up to the purchase of the business by Northbay in January 2014 and with his involvement in chasing Mr Anderson for payments due to Northbay for the use by his other companies of Northbay resources. He was an honest witness and I accept his evidence when it relates to matters directly within his knowledge.

35. **Chris Ritchie** works for Northbay as the Factory Manager and has been employed in that role 18 years, previously working for Fresh Catch. Mr Ritchie's evidence covered the extent of black fishing by Fresh Catch and Northbay over a long period. Mr Anderson in his second witness statement made various accusations against Mr Ritchie for using these proceedings “as an opportunity for payback” from disagreements they had had in Fresh Catch days. I reject the suggestion that his evidence was affected by any such long held grudge or that he had been pressured by Mr Colam into giving untruthful evidence about what went on during the Fresh Catch years.

36. **Alistair Reid** was employed by Fresh Catch for about 24 years before his employment was transferred to Northbay in January 2014. His job title is Chief Engineer and he is responsible for all aspects of engineering at Northbay. This includes the maintenance and

replacement of machinery and ensuring the smooth running of the fish processing. He has been Chief Engineer since about 2010. As with Mr Ritchie, I reject the slurs that were cast on Mr Reid by Mr Anderson and find that he was a helpful and honest witness.

37. **Lisa Bettinson** has been employed by **Interfish** as Senior Accountant since 15 October 2013. She is a qualified auditor who joined the Plymouth team when the discussions for the purchase of the Fresh Catch business were already underway.

38. **Laura Musgrave** has been employed by **Interfish** since 5 January 2010. She is currently Sales and Export Manager and has overseen human resources for **Interfish** and Northbay since around November 2015. Her evidence largely supports that of Ms Bettinson.

39. My assessment of the witnesses for **Interfish** other than Mr Colam and Mr Pillar is that their evidence is largely accurate as regards matters within their direct knowledge. But their evidence is also coloured by hindsight which imputes a sinister motive to everything that happened, and perhaps also by their awareness of the anger that their employer, Mr Colam, feels towards the Anderson family. Two examples of this struck me during the course of the trial. First, the Plymouth team's inability to access the Northbay office's SAGE computer system during 2015 is now put down to a deliberate desire on the part of Mr Anderson to conceal from them the extent of the use of the computer for Mr Anderson's other businesses on the site. Similarly, on the issue of the ACIL cross charge Ms Bettinson's written evidence states that she made a list of the specific matters she was asked by Mr Colam to look at when she went up to the Peterhead site in November 2015. Her witness statement recalls this as including “The outstanding labour charges owed by ACIL to Northbay”. If that were indeed what the list had said that would support **Interfish**'s case that the agreement had been that ACIL would pay a cross charge for use of Northbay employees. In fact what the list says is simply “Labour charges to be made?” without making it clear whether this was for ACIL, Anderson Marine or any other Anderson companies.

40. **Belinda Newton** has worked in human resources for various organisations. She owns and operates a franchise of The HR Dept Limited in Exeter. The HR Dept offers human resources services for small and medium-sized enterprises who do not have an HR resource in-house. In particular they offer an independent investigatory service in situations where there have been allegations of misconduct by an employee and where the small size of the company means it is difficult to find someone independent to investigate it.

41. In February 2016 she was engaged to carry out the investigation into the allegations of misconduct by Mr Anderson. She also conducted the disciplinary meeting with Colin Anderson. When she was cross-examined her competence and good faith were challenged by Cool Seas. However I accept her evidence that she was not told by anybody at Northbay or **Interfish** that she needed to uphold the allegations against Mr Anderson or Colin Anderson and was not put under any pressure to do so. I accept that the matters she set out in her report and decision reflected her true and independent conclusions about the allegations that she was asked to consider.

IV. THE FACTS

(a) Fresh Catch and Operation Trawler

42. On 27 September 2005 the Fresh Catch site in Peterhead was raided by the Grampian police and officials from Marine Scotland over suspicions that it was involved in black fishing. The raid was part of a wider criminal investigation into illegal fishing known as “Operation Trawler”. Operation Trawler resulted in the prosecution of 27 vessel skippers and three factories. When the matter came to court in 2012 Fresh Catch pleaded guilty to landing approximately £10.5 million of undeclared fish. The conviction related to 223 instances of black fishing between October 2002 and September 2005. On 35 occasions the value of the undeclared fish exceeded £100,000. The skippers who had fished over their quotas also received fines and confiscation orders together with having their future quotas reduced.

43. Mr Ritchie described how the black fishing was carried out by Fresh Catch in the period before Operation Trawler. In around 2002 Fresh Catch had installed a 'T' piece section of pipe work off the main underground fish pipe with a valve system that enabled it to open and close that section of the fish pipe. When the valve operated, the main fish pipe was closed off and the fish were pumped via the 'T' piece section of pipe work into a separate pipe which fed directly into an underground fibreglass holding tank called Tank 9. This meant that the fish hopper which carried the fish onto the conveyor belt, the conveyor belt which runs over the scales and the weighing scales themselves were bypassed. The fish then rejoined the main pipe at a point after the scales and arrived at the processing plant with other fish which had been weighed. Mr Ritchie explained that in order to facilitate black fishing, the vessels' sales agents would issue two invoices to Fresh Catch, the first invoice showing the volume of declared fish and the second showing the undeclared fish, marked with the letter “B”. Only the first invoice would be sent to Marine Scotland. Very shortly after the raid in 2005, Fresh Catch was required by Marine Scotland to dig up and remove the 'T' piece section of the pipe to prevent future black fish landings.

44. For the prosecution of Fresh Catch in February 2012 there was an agreed Crown narrative. From this it is clear that Mr Anderson confirmed at the time that he had designed the pipe and stated that it cost about £100,000 to build. He had initially maintained falsely in interview by the police that the portion of the pipe that bypassed the weigh scales beside the storage tanks was only there as a means of clearing blockages caused by seals or sharks and was not used for any other reason.

(b) Fresh Catch's problems with HMRC

45. In addition to the problems arising out of Operation Trawler, Fresh Catch had serious disputes with HMRC over non-payment of tax. First, between March 2010 and October 2012 Fresh Catch failed to pay customs duties on sales of non-EU fish. This resulted in HMRC issuing post clearance demand notes totalling £1,505,790 for:

i) infringements between March and June 2010 in the sum of £337,802;

ii) infringements in April 2011 in the sum of £406,677;

iii) infringements between September and November 2011 in the sum of £266,282; and

iv) infringements between February and October 2012 in the sum of £495,030.

46. Fresh Catch appealed against the notes on the basis that it had believed until 12 December 2012 that all fish caught in EU waters by Norwegian vessels were of EU origin. However the appeals were ultimately withdrawn in December 2015. These liabilities to HMRC were not reflected in Fresh Catch's financial accounts.

47. Secondly, there was a dispute between Fresh Catch and HMRC over a failure by Fresh Catch to pay duty between September and December 2013 in respect of six mackerel landings from Norwegian vessels at a time when Fresh Catch did not have IPR authorisation from HMRC. Its application for an IPR processing period of 12 months had been refused on 18 December 2012. Although HMRC had indicated at that time that approval might be granted for a throughput period of 30 days there was in fact no approval in place during 2013. Fresh Catch should therefore have paid customs import duty calculated at 20% of the purchase price on these landings. HMRC had confirmed to Jackie Bruce at Fresh Catch on 27 September 2013 that in the absence of any IPR, Fresh Catch would have to pay import duty at the time of import.

48. In February 2014, post clearance demand notes were issued to Fresh Catch by HMRC in respect of the six landings. In addition to having to pay the tax, Fresh Catch was issued on 1 December 2014 with a civil evasion penalty of £59,862. Fresh Catch's appeal against the civil evasion penalty was later dismissed by the First-tier Tribunal (Tax Chamber): see [2016] UKFTT 0196 (TC). The Tribunal described the penalty as representing 20% of the relevant amount of duty after a 40% reduction in mitigation for an early and truthful explanation and a further 40% deduction for full cooperation and disclosure. However, the Tribunal records in its decision that Mr Anderson acknowledged during the course of HMRC's investigation in 2014 that the decision not to make the relevant import declaration was an error of judgement made on the basis that the IPR was pending and that the declaration could be made when it was approved. He acknowledged that the decision had been his, but he denied before the Tribunal that there had been any intention to evade duty. The Tribunal found that the necessary element of evasion was established. On the question of dishonesty, the Tribunal expressed “serious misgivings” about Mr Anderson's evidence. They found his account of the intention of the company in not declaring customs duty to be “entirely unsatisfactory and particularly so when viewed in the context of … the guidance in specific terms given by HMRC's officers”. They considered that the evidence in support of dishonesty was both cogent and compelling.

49. Thirdly, in the event, IPR was refused to Fresh Catch on 28 January 2014. Although this was shortly after the transfer of the business to Northbay, the email correspondence between Mr Bruce of Fresh Catch and HMRC in which HMRC made very clear that it was unacceptable for import declarations to be postponed. The letter sent by HMRC to Mr Anderson on 28 January 2014 informed him that the inward processing application had been refused because of repeated non-compliance by Fresh Catch demonstrating that Fresh Catch could not properly conduct operations within the inward processing procedure.

50. Fourthly, throughout 2013 Mr Anderson and Fresh Catch were also the subject of a separate “Code of Practice 9” investigation. COP9 investigations are carried out where there is a suspicion of fraud. They give the subject the opportunity to make complete and accurate disclosure of all deliberate and non-deliberate irregularities in tax affairs to avoid a criminal investigation. A COP9 meeting took place on 18 July 2013 attended by Mr McDermott of HMRC, Mr Anderson and others. Mr McDermott stressed that HMRC was looking into black fishing which might have led to an under declaration of company turnover in Fresh Catch's accounts but the enquiry was wider than that single issue. The meeting notes record that “Anderson said that the only stuff to disclose is what came out in the earlier enquiries and there is nothing else”.

(c) The sale of Fresh Catch to Northbay

(i) The negotiations leading up to the sale

51. By early 2013, Fresh Catch was in serious financial difficulties. Fresh Catch's filed annual accounts for the year ended 30 June 2012 showed a loss of £178,507. Its filed annual accounts for the year ended 30 June 2013 showed a loss of £3,947,350. Fresh Catch also had a significant overdraft and loans with Bank of Scotland. By 30 June 2013 it had loans falling due within one year or on demand of approximately £4.7 million and loans falling due after one year of approximately £1.5 million. The Bank of Scotland appointed its representative David Fleming as a director of Fresh Catch on 1 June 2013. Mr Neil Armour had been appointed a part-time Finance Director of Fresh Catch on 1 October 2012.

52. The possibility of **Interfish** entering into a deal with Fresh Catch was first raised in spring 2013. There were a number of meetings held in Scotland and Plymouth with Mr Anderson and Mr Armour acting for Fresh Catch and Mr Colam and Mr Pillar acting for **Interfish**. The logic of the transaction was that the team in Peterhead would look after sales with assistance from **Interfish** and the **Interfish** vessel, the Altaire, would commit to landing its catches at the Peterhead factory. From Mr Colam's point of view the transaction made sense because **Interfish** did not at that time have a large-scale fish processing and freezing operation in Scotland, particularly one so close to some of the pelagic fishing grounds.

53. During the negotiations Mr Anderson and Fresh Catch were advised by Masson Glennie, solicitors and Deloitte LLP. From around early October 2013, **Interfish** and Altaire were advised by TLT LLP, solicitors. In around June 2013, **Interfish** instructed Baker Tilly (now RSM) to provide accountancy advice on the proposed deal and to investigate the financial position of Fresh Catch.

54. There is a dispute between the parties as to whether Mr Anderson said anything during these negotiations to reassure Mr Colam that he had not engaged in black fishing since the raids in September 2005. Mr Anderson says that the matter was never raised since it was not strictly relevant. It was clear from an early stage that the transaction would be structured as a purchase of the business and assets of Fresh Catch rather than a purchase of shares, leaving any past liabilities of Fresh Catch with that company and not transferring them to the new entity. Mr Colam says that such discussions did take place and that it was important to him that Mr Anderson claimed that he was a reformed character and that he had learnt his lesson from the problems generated by Operation Trawler. On this point I prefer the evidence of Mr Colam. The prosecutions and penalties imposed on Fresh Catch and the other skippers and factories received a great deal of publicity in late 2012 and so would have been in everyone's mind in spring 2013. I am satisfied that Mr Colam would have wanted to impress upon Mr Anderson that no black fishing should take place when the business was transferred into the **Interfish** group and that Mr Anderson gave him that assurance.

55. **Interfish** began its analysis of the Fresh Catch business to see if it wanted to invest in it. In June 2013 Mr Sanders produced initial projections based on the recent trading figures provided by Fresh Catch in management forecasts from March 2013 to June 2014 and using the filed audited accounts at Companies House. From August 2013, Baker Tilly were instructed to prepare a business model that could be presented to Royal Bank of Scotland to

secure funding for the proposed purchase of Fresh Catch's assets and to provide the basis for Northbay's future trading. Mr Sanders says that the business model was crucial to securing the funding from the bank and also to demonstrate that the historical profit performance of Fresh Catch and the future projected profit performance of the new business were sufficient to justify the purchase price. Baker Tilly therefore analysed Fresh Catch's profitability between 2008 and 2012 and produced gross profit projections for 2014 to 2018.

56. Mr Sanders says that there was detailed analysis of historical information on trading particularly the volume of fish landings. Amongst the information provided by Fresh Catch were landing schedules from July 2011 to June 2014, sales analysis from July 2010 to March 2013 and sales by product types and historic monthly management accounts from 2009. Fish prices from February 2013 to August 2013 were also later supplied.

57. In October 2013 Baker Tilly and Mr Sanders visited the Peterhead site to gain a more detailed understanding of the Fresh Catch operation. They spent a considerable amount of time with Mr Anderson systematically going through sales volumes and values, markets, customers and yields. This, Mr Sanders says, was a crucial part of developing the business model because Baker Tilly incorporated a number of agreed assumptions, based on Mr Anderson's representations at the meeting and information supplied by Fresh Catch, into the business model to project forward trading from 2014 to 2018. Copies of the model and the assumptions were sent to Mr Anderson for review on numerous occasions between October and December 2013.

58. The final version of the model approved by Mr Anderson was sent to RBS on 23 December 2013. This showed that Fresh Catch had achieved an average gross profit margin of 10.4%. The financial projections indicated that the new business could expect to achieve a small increase resulting in a gross profit margin of 11.3%. This was based on expected improved efficiency and also the guaranteed landings from the Altaire. It was on the basis of this anticipated profitability that Mr Colam was prepared to pay the price ultimately agreed for the business.

59. Two meetings were held on 30 September 2013. The first was between Mr Colam and Mr Pillar in Edinburgh with Bank of Scotland. The Bank made it clear that it was considering winding up Fresh Catch unless the transaction could be completed quickly. Later that day there was a meeting between Mr Colam and Mr Anderson. One of the matters they discussed was the continued use by Anderson Marine of the 1954 Boat Shed on site and of the former Fresh Catch, now Northbay, employees. There is a dispute as to the level of detail which was agreed during this meeting about those matters. Although Mr Anderson accepts that he agreed that some payment would be made by Anderson Marine to Northbay for the business' use of Northbay facilities and employees, there is a dispute about the terms of any such agreement; as to whether Mr Anderson then concealed from Northbay the extent of the use during 2014 and 2015; and whether there is substantial money still owed from Anderson Marine. This dispute is referred to as the Anderson Marine Cross Charge.

60. Heads of Terms were signed by Mr Anderson and Mr Colam on 2 October 2013. These were expressed not to be legally binding but set out:

i) that the sale would exclude all of Fresh Catch's liabilities;

ii) the price payable for the assets would be £9.546 million subject to **Interfish**'s satisfaction with financial and legal due diligence;

iii) Anderson Marine would continue to operate from the site for a period of not less than 12 months at a rent to be agreed;

iv) Fresh Catch "does not intend or expect to be the subject of litigation".

61. As regards Mr Anderson's ongoing involvement with the business, the Heads of Terms said:

"CA will be very pleased to be involved with the Company going forward, as Newco would wish. Indeed, he looks forward to doing so. The exact terms for him doing so are still to be finalised – eg employee/consultant, terms and conditions, etc."

62. In October 2013 there were trial landings of fish by the Altaire and other vessels at the Peterhead plant. One of **Interfish**'s production quality managers Dennis Drew who was going to be based at the Peterhead factory went up there in the autumn of 2013 to monitor the landings. He was satisfied with the operations he saw there.

(ii) The transaction documents and the structure of the deal

63. On 11 December 2013, Northbay was incorporated under the Companies Act 2006. Mr Colam was appointed a director of Northbay on its incorporation. On around the same date, Mr Anderson acquired Cool Seas and on 23 December 2013, Mr Anderson and Colin Anderson were appointed directors of Northbay, along with **Interfish** and I.F. Limited (represented on the board by Mr Pillar).

64. In December 2013, formal disclosure in relation to the warranties given by the sellers was made by a "Disclosure Letter" and annexed documents. Disclosure was made of the fine and confiscation order arising from Operation Trawler.

65. On 3 January 2014 the agreements comprising the sale of the Fresh Catch business to Northbay were concluded. The main agreements for our purposes are as follows.

66. The **Investment and Shareholders Agreement ("ISA")** permitted **Interfish** to appoint three directors to the board of Northbay; two were to be appointed by Cool Seas, with the post of chairman being held by an **Interfish** director. **Interfish** agreed to pay £3,499,999 to Northbay and Altaire agreed to pay Northbay £2,500,000 in consideration for their shares in Northbay. Cool Seas was deemed to have paid £4 million to be satisfied by the transfer of assets. Thus Mr Anderson was notionally contributing £4 million to the business by providing the Fresh Catch assets.

67. The ISA provided for different classes of shares. The A and D shares were voting shares and the B and C shares were not. Cool Seas was allocated 3.8 million B shares and 200,000 D shares. **Interfish** held 3.2 million B shares and 300,000 A shares. Altaire held 1 million B

shares and 1.5 million C shares. The effect of the ISA was therefore that **Interfish** and Altaire together held a controlling interest at both shareholder level and board level. The ISA also provided:

i) that certain “Reserved Matters” require the approval of holders of the A and D shares and so require the consent of both **Interfish** and Cool Seas: clause 4. The Reserved Matters set out in Schedule 1 to the ISA included increasing the amount of issued share capital; passing any resolution for the winding up of the company; declaring a dividend save as permitted by the articles; and “instituting, settling or compromising any material legal proceedings (other than debt recovery proceedings in the ordinary course of business) instituted or threatened against Northbay or submitting to arbitration or alternative dispute resolution any dispute involving Northbay”;

ii) that the parties intend there to be a meeting of directors at least 10 times each year at intervals of not more than eight weeks. Each meeting of directors was to be preceded by a notice accompanied by an agenda and copies of any papers to be discussed: clause 5.7;

iii) That “Nothing in the agreement is intended to, or shall be deemed to, establish any partnership between the parties or constitute any part in the agent of another party”: clause 22.

68. The **Asset Purchase Agreement** ('APA') was entered into between Fresh Catch and Cool Seas (together referred to in the APA as the “Sellers”), Northbay and three guarantors who were the previous shareholders in Fresh Catch. Clause 5 of the APA provided that the buyer, that is Northbay, entered into the agreement on the basis of and in reliance on the warranties set out in schedule 12 to the agreement. The Sellers jointly and severally warranted to Northbay that each warranty was true, accurate and not misleading except as disclosed in a disclosure letter. Schedule 12 contained 19 pages of warranties covering a wide range of topics including intellectual property, environmental and health and safety matters and taxation. Relevant for our purposes were warranties that:

i) all financial and other records in respect of the business constitute an accurate record of all matters that ought to appear in them and do not contain any material inaccuracies or discrepancies: Part 1, clause 3.1;

ii) the company's accounts fully provide for liabilities of Fresh Catch incurred in relation to the business and fully provided for, or disclosed by way of note, all contingent liabilities of Fresh Catch in relation to the business: Part 1, clause 4.2;

iii) neither the Sellers nor any person for whose acts or defaults the Sellers may be vicariously liable have committed or omitted to do any act or thing in relation to the business which could give rise to any fine or penalty: Part 1 clause 13.1;

iv) neither the Sellers nor any of its officers, agents or employees has done or omitted to do any act or thing which is or could be in contravention or breach of or the subject of enquiry, investigation or proceedings under any law or regulation giving rise to any fine or penalty in relation to the business or any of the assets: Part 1, clause 13.5;

v) neither the Sellers nor any person for whose acts or omissions they may be vicariously liable subject to any investigation, enquiry or enforcement proceedings by any governmental, administrative or regulatory body: clause 15.1, and no such proceedings, investigation or enquiry have been threatened or are pending and there are no facts or circumstances likely to give rise to any such proceedings: Part 1, clause 15.2;

vi) the Sellers know of no reason why any licences, consents or permits that have been obtained to enable the Sellers to carry on the business effectively should be suspended, cancelled or revoked or why the benefit of them should not continue to be enjoyed by Northbay: Part 1, clause 17.2;

vii) the Sellers have complied in all material respects with all statutory provisions concerning VAT, PAYE and national insurance contributions and that the Sellers are not involved "in any dispute with HM Revenue & Customs which may materially affect the Business or any of the Assets": Part 6, clause 1.

69. A disclosure letter was sent by those acting for Fresh Catch to Northbay to make formal disclosures in relation to the warranties. The disclosures were set out in an eight page table. The matters disclosed included:

i) an ongoing tax investigation against Fresh Catch in respect of "historic PAYE and national insurance claims" and that Fresh Catch "may have a proposed guarantee to HMRC regarding a potential Inward processing relief";

ii) the fine of £160,000 and the penalty of £500,000 imposed in November and December 2012 in relation to the illegal landing of fish and that there was a current investigation underway in relation to a payroll fraud of which Fresh Catch was the victim where the employee involved had been prosecuted and imprisoned.

70. On 3 January 2014 Northbay adopted a bespoke set of **articles of association** negotiated between **Interfish**'s and Fresh Catch's legal advisers. The articles set out the dividend rights of various classes of shares. Article 11.2 provided that any director who is an employee of Northbay and who ceases to be an employee shall be removed from office as director from the date his employment ceases. Any replacement director must have the approval of both **Interfish** and Cool Seas.

71. In total about 113 employees were transferred from Fresh Catch to Northbay pursuant to TUPE, although about nine left almost immediately. Those transferred included Mr Anderson and Colin Anderson, Jimmy Anderson (Mr Anderson's brother who worked as the cold store manager), Mr Ritchie, Mr Reid and Mr Taylor who was the Financial Controller. Those transferred also included about 11 office staff, about 60 factory staff and 11 cold store staff. About six staff were transferred from Fresh Catch into Anderson Marine.

72. Fresh Catch continued in business after the completion of the sale. According to Mr Anderson's evidence some fish sales continued to go through Fresh Catch accounts until Northbay put in place the necessary licences, for example to export to China. However Fresh Catch was wound up in an insolvent liquidation in October 2017 following a winding up petition presented by HMRC.

(d) Northbay's business January 2014 – January 2016

73. Northbay started trading in January 2014. It is not disputed that Mr Anderson and Colin Anderson were based at the site in Peterhead and responsible for overseeing the day-to-day operations. There were no board meetings and no agendas were ever circulated but there were regular calls between Peterhead and the **Interfish** offices in Plymouth, usually fortnightly but sometimes more frequently depending on how busy the factory was. Mr Anderson recalls that during such conversations there were several people at the **Interfish** end of the call; Mr Colam, Mr Pillar, Dennis Drew, Ms Musgrave, Ms Bettinson, Rachel Colam and sometimes Wendy Goodrum. There were also several visits from **Interfish** senior staff to Peterhead in 2014.

74. Throughout 2014, **Interfish** purchased fish from Northbay and the Altaire landed fish regularly at Northbay. Other Shetland vessels also followed the Altaire's lead after Mr Colam provided a guarantee on behalf of **Interfish** that they would be paid. The sale or purchase price of fish from the Altaire was negotiated on an arms-length basis by Mr Pillar (on behalf of Altaire or **Interfish**) and authorised by Mr Anderson (on behalf of Northbay). Northbay made a profit of £1.1 million in the year to 31 December 2014. According to Mr Colam about 40% of the mackerel landed at Northbay in 2014 was landed by the Altaire and much of the rest of the mackerel was landed by Shetland vessels.

75. On 17 January 2015, there was a major fire at Northbay which destroyed parts of the factory, including most of the store rooms, the main offices, the processing area, the refrigeration system and the plate freezing area. This had a devastating effect on Northbay. It was unable to process fish or trade other than to sell the remaining stock in the cold store (which had not been damaged by the fire). It also risked having a devastating effect on the local community. If the factory shut down, there would be about 130 jobs lost at the factory alone. About 70 other jobs in the Peterhead community relied on Northbay and would also be lost.

76. Mr Ritchie's recollection is that no one was able to enter the factory until 19 January 2015. Mr Anderson called a meeting on site for all Northbay staff on that day and a short statement was read out by Mr McConville to say that the factory would be rebuilt and no one would lose their job. Shortly after the fire, Mr Pillar arranged for a taskforce to be set up, involving Scottish government agencies at a local level, to provide resources to assist with the rebuild of the factory. The taskforce included members of the planning team from Aberdeenshire Council (the “Council”).

77. At the date of the fire, Northbay was insured with Aviva. There was a concern that the business was under insured which meant that there was considerable uncertainty until June 2015 (when a final settlement was reached) about the amount that Aviva would pay out. Mr Colam and Mr Pillar appointed Harris Balcombe as loss adjusters on behalf of Northbay. Aviva's loss adjusters were Crawford & Co.

78. There was a conference call in early February 2015 with Mr Colam, Mr Pillar, Mr Sanders, Mr Anderson and Colin Anderson in which Mr Colam said that Northbay would need to consider laying off some of the factory workers because there would be no work for them. He was concerned about the monthly wage bill which stood at £160,000 and so would total £1

million during the six months when it was expected that the factory would be out of operation. Mr Sanders said that Northbay did not have the cash reserves to pay for it. Mr Anderson was reluctant to let the staff go because they would be needed when the factory was back up and running. He did not want to risk losing experienced staff to a competitor.

79. In around late January or early February 2015, Mr Colam agreed with Mr Anderson that ACIL could undertake the demolition and clearance works on the Site. ACIL quoted £365,000 for the demolition work and this quotation was accepted by Mr Colam and Mr Pillar in a phone call at the end of January following discussions. There was no written agreement; the matter was dealt with by an oral agreement reached during this phone call.

80. One of the complaints made by **Interfish** is that Mr Anderson concealed from his fellow directors the fact that a quotation had been received from David Smith Contractors for £62,000 for the demolition work. Mr Anderson's evidence is that this quotation was for only part of the work and that if the total area had been priced at the rate offered by David Smith Contractors, the quotation would have been for just under £1 million for demolishing the building to floor level even if the contractor was allowed to keep all scrap and all salvaged equipment. **Interfish** say that this quotation was for the whole of the demolition work and so was substantially cheaper than the ACIL quote. They say there was never any suggestion that only part of the building would be demolished so there would be no reason for David Smith Contractors not to quote for the whole job.

81. I prefer Mr Anderson's evidence on this point. I accept Mr Benson's submission that the fact that Aviva agreed that £365,000 could be recovered for the demolition work under the insurance contract indicates that this sum was not six times more than the job was reasonably worth. In my judgment Mr Colam's evidence that he would have seriously considered both quotes and might well have used David Smith Contractors has been affected in hindsight by his animosity towards Mr Anderson.

82. **Interfish** also complain that Mr Anderson failed to obtain other quotations either for the demolition work or for the subsequent rebuild work. But it must have been apparent to **Interfish** that no alternative companies were being asked to quote for the work. It would have been a simple matter for someone from Plymouth to contact local builders in Scotland and ask them to quote for the work or to insist on someone in the Peterhead office doing so. They accepted that ACIL should do the job without insisting on other quotations being obtained even though they were fully aware that ACIL was Mr Anderson's company. I do not accept that there was any unfairness arising from this point. Both sides could see the advantages of using ACIL. Mr Anderson's evidence which was not challenged was that as part of the demolition ACIL removed the rubble from the site without charge, saving Northbay transport and landfill costs. Using an external contractor would have substantially delayed the rebuild, jeopardising the recovery of the business.

83. The actual demolition work was carried out by ACIL largely using Northbay staff between February and April 2015. Mr Ritchie's evidence is that there were 30 to 40 Northbay staff working on the demolition because the only employees not involved in the task were the cold store staff who were working for Anderson Marine, two employees working in the cold store, one security guard and the office staff who were trying to gather together copy paperwork to replace all the records lost in the fire.

84. There was an important meeting on 11 March 2015 in Plymouth to discuss the proposed

rebuild. Prior to the meeting Mr Brailey, ACIL's project manager, had sent **Interfish** preliminary drawings and designs for the replacement factory and Mr Anderson had provided a total estimate of £5,992,100 for the rebuild (including demolition, site clearance and a contingency of £35,000). At the meeting on 11 March 2015, Mr Colam raised with Mr Anderson his concern that if ACIL were engaged to carry out the work there was a clear conflict of interest between Mr Anderson's position as a director of Northbay and his position as a director of ACIL. There are two issues in these proceedings that arise from this meeting. The first issue is what was agreed as regards the treatment of labour costs for Northbay employees working on the demolition and rebuild. It is common ground that it was agreed that Northbay employees would continue to be paid by Northbay but would be used by ACIL as labourers on the site. It is also clear that the arrangement was that ACIL would work on an 'open book' basis, that is to say that it would pay sub-contractors and suppliers directly, then send invoices to Northbay attaching evidence of these disbursements and Northbay would reimburse ACIL for what ACIL had paid out. Mr Colam says: “I laboured the point that Northbay would require sight of every single invoice and delivery note (including details of any trade discounts), no matter how small, because I would personally be checking these (particularly electrics)”. Mr Colam was also keen to make sure that Mr Anderson was not 'paid twice' for the work, once because he was continuing to draw his salary as a Northbay employee and once through a distribution of any profit made by ACIL on the rebuild. It was therefore agreed that during the course of the work ACIL would simply be reimbursed for its outgoings and the question of what profit over and above that would be paid was left to be discussed at the completion of the works.

85. What is not agreed is how the use of Northbay labour by ACIL fitted in to this arrangement. **Interfish** argue that the arrangement arrived at during the 11 March 2015 meeting was that ACIL would include in its invoices to Northbay all charges for labour used on site whether that labour was provided by Northbay, ACIL or third-party sub-contractors engaged by ACIL. There would then be a cross charge or credit given to ACIL to Northbay equivalent to the wages that Northbay had been paying its workforce whilst they were working for ACIL. Mr Anderson's evidence is that it was much simpler than that - the arrangement was that he would use Northbay labour free of charge and that would serve to reduce the amount that Northbay had to pay ACIL for ACIL's outgoings to independent suppliers and subcontractors. This issue was referred to at the trial as the “ACIL cross charge” and I consider the evidence further below.

86. The second issue arising from the meeting on 11 March 2015 was that Mr Pillar produced a “Gantt Chart” showing a construction timeline for the rebuild based on the information Mr Anderson had provided. This provided for a completion date of 10 August 2015. It is common ground that everyone at the meeting understood the importance of getting the factory up and running as soon as possible particularly to be able to land fish during the September mackerel season. There is a dispute about whether there was a binding commitment by Mr Anderson to ensure that ACIL would complete the project by that date.

87. On 27 March 2015 Mr Anderson sent through on behalf of ACIL an updated estimate which incorporated what he said were increased costs to be incurred in order to help ensure that the factory was up and running as soon as possible. This estimate set out a much more detailed costing of different items for the demolition and rebuild and arrived at a cost of £5,962,480. The estimate said:

“Please note: Within the above total figure is an amount of (£575,073) due to increased costs associated with working double shifts, plant hire increases and all other increased labour related items to ensure the main building can be erected and constructed within the strict timelines.

ALSO because the deadline to place orders for the steelwork and cladding has now passed we have subsequently been quoted additional costs over and above the total figure shown by our steel contractor as follows for increased accelerated working to pull back the programme"

88. The additional cost was shown as £94,550. **Interfish** rely on the terms of this estimate and its reference to completing the factory "within strict timelines" and increased costs. They also rely on the fact that the quote includes a cost for "all labour, travel and accommodation" which had not been included in the original quote as confirming the agreement to the ACIL cross charge.

89. Also in mid March 2015 Mr Anderson attended a trade show in Boston USA. Whilst there he placed an order for 17 fish processing machines from the manufacturer Baader at a cost of about £4 million. In his written evidence Mr Anderson said that **Interfish** gave him the go-ahead regarding ordering the Baader machines. In cross-examination Mr Anderson said that he did not remember whether he had been specifically instructed by Mr Colam at the meeting on 11 March 2015 to negotiate for the acquisition of machinery but not to make any contractual commitment. However his evidence was still that before he entered into the contract he had a conversation with Mr Pillar in which he told him that he had negotiated an excellent deal with Baader "with a very very good discount" and that they had authorised him to make the purchase. He said that Mr Colam's and Mr Pillar's denial that this conversation took place was "Absolute lies". Mr Anderson remains convinced that he had taken the right decision for the good of the business.

90. Mr Colam and Mr Pillar both deny that any such approval was given. Mr Colam's evidence is that during the Plymouth meeting on 11 March 2015 he, Mr Pillar and Mr Anderson discussed the purchase of replacement machinery including processing machines to fillet and gut the fish, automatic conveyors, hoppers and packing lines. Mr Anderson told them that he had already approached a number of suppliers including Baader and First Process (who produced packing lines). Every piece of machinery had been lost in the fire but many of them were old and inefficient and they were never all operational at the same time. Mr Colam says that he told Mr Anderson that he should be negotiating to replace the machinery with the same capacity as the machinery used before the fire rather than a like-for-like replacement of the same number of machines. Mr Colam thought that replacing 17 old Baader machines with eight or 10 new, more efficient ones would match the old capacity of the factory and might even increase it significantly because of improvements in the new machines. He says that given that they were still not sure what the final settlement would be from Aviva "it would have been madness to commit to any machinery purchases until the insurance payout had been finalised". Mr Colam's evidence is that Mr Anderson was expressly told to negotiate with suppliers but not to place any orders. He says that he was very nervous that they might not recover anything from insurers and did not want to be in a situation where Northbay had contracted to spend millions of pounds.

91. Mr Colam and Mr Pillar say they only found out about the order being placed in Boston when they were sent a press release from Baader and a news article the following day. There was, according to Mr Colam and Mr Pillar, an angry telephone call between Plymouth and Boston. Mr Anderson said it had been necessary for him to order 17 machines to get a more favourable delivery time so as to ensure that the September deadline was met. Mr Colam contacted Baader in early April 2015 and met their CEO and tried to reduce the number to 10. They compromised at 14. Mr Colam also says that the Baader CEO explained that they always had at least 10 machines on standby and ready to go out immediately, a contradicting Mr

Anderson's claim that it was necessary to order 17 machines to get more favourable lead time. Mr Pillar described this episode as “highly embarrassing” and despite the reduction negotiated with Baader, the factory still had more capacity than it needed. He and Mr Colam were deeply concerned by Mr Anderson's clear contravention of the instructions he had been given and his decision unilaterally to commit Northbay to spending such a large sum without consulting any other Northbay directors first.

92. In late March 2015 Mr Anderson was also in advanced negotiations to buy nine packing lines from First Process at a cost of 53,771,000 Norwegian kroner (about £4.6 million). Mr Colam negotiated a reduction to seven. Mr Colam says that the effect of the excessive orders for processing machines and packing lines meant that Northbay could not afford to purchase replacement plate freezers. Plate freezers enable fish to be frozen without having to be packaged in a cardboard box. This saves packaging costs and makes the delivered product more attractive to buyers because it is cheaper. About 10 plate freezers were destroyed in the fire but ultimately there was not enough money in the budget to purchase plate freezers for the business.

93. On this factual dispute I accept the evidence of Mr Colam and Mr Pillar and reject Mr Anderson's evidence that he was authorised by them to commit to buying 17 machines from Baader. I find that he was told to negotiate but not to enter into any binding commitment and that he deliberately disobeyed that instruction from his fellow Northbay board members. I accept that Mr Colam would be unwilling to commit to such a large outlay when the discussions with the insurers were still unresolved. It is indisputable that after the contract was concluded for the Baader machines, Mr Colam and Mr Pillar immediately contacted Baader to negotiate a reduction in the number of machines. They would hardly have done this if they had shortly before authorised the purchase of that many machines.

94. Their evidence is also supported by Mr Reid's evidence, which given that he is the Chief Engineer should be given particular weight. He says that before the fire Northbay had on average about 10 to 12 fully operational Baader machines working in the factory at any time due to some of them being very old. He also believes that the order for 17 new machines was “very excessive and unnecessary”. He says that he told Mr Anderson on numerous occasions that they should reduce the number of machines and invest in a computer system to optimise their performance but that Mr Anderson ignored his advice.

95. The rebuild work started in around June 2015. The course of the works did not run smoothly. The problems with the rebuild form the basis of one of the other allegations of unfairly prejudicial conduct brought by **Interfish** in the cross-petition.

96. On 18 June 2015, Northbay agreed a favourable insurance settlement with Aviva of £19.8 million to cover the demolition and rebuild of the factory, including replacing the plant and machinery, and compensation for business interruption.

97. During the second half of 2015, relations between the **Interfish** team and Mr Anderson and Colin Anderson started to become strained. The Plymouth management were frustrated at the lack of information coming from Peterhead on a variety of matters – on the use of Northbay labour by both Anderson Marine and by ACIL; on the progress of the rebuild works; what expenses were being incurred; how much more money would be needed to complete the project and what was a realistic time frame for completion when the factory might resume work. The **Interfish** team were also angry that Mr Anderson was absent from the site on several

occasions when he attended trade fairs and exhibitions overseas. They thought that this was largely a waste of time given that Northbay had no fish to sell and that Mr Anderson's time would be better spent staying at the site taking charge of the rebuild work. Mr Anderson however thought it was important to keep going to these trade fairs to make it clear to former customers that Northbay was soon going to be back in business. Mr Colam and Mr Pillar started pressing Northbay office staff other than Mr Anderson to provide them with the information they wanted. This in turn caused friction between the staff at Peterhead and Mr Anderson.

98. By September 2015, it was clear that the factory would not be completed in time to start processing fish in the new mackerel season. On 23 October 2015, Mr Betts circulated a progress report indicating that there was still a large amount of work outstanding. From 4 November 2015, Mr Pillar set up weekly progress meetings by conference call between members of the **Interfish** management team and key members of staff at Northbay (which included Mr Anderson, Colin Anderson, Mr Ritchie, Mr Taylor and Mr Reid on various calls). Mr Pillar and Mr Colam were disappointed that even when meetings were held, Mr Anderson was unable to provide the comprehensive details that Mr Pillar and Mr Colam were hoping to hear. Mr Colam and Mr Pillar became convinced that Mr Anderson was deliberately avoiding their phone calls and was constantly making promises to provide information which he then failed to keep. They formed the impression that the rebuild works were chaotic, costs were running out of control and were being wasted by inefficient work scheduling. It was still not clear how many more fishing seasons would be lost before the factory was in a state where landings could restart.

99. On 1 December 2015, there was a crunch point in the rebuild work when the Council emailed Mr Anderson and Mr Brailey to inform them that they would be serving an enforcement notice because ACIL had not been granted the necessary approvals for the work that was being carried out. On 3 December 2015, the Council sent a letter and accompanying enforcement notice to Mr Anderson by recorded delivery (the “Enforcement Notice”). The Enforcement Notice required a building warrant to be obtained for both stages by 2 February 2016 and all work to be suspended from 5 January 2016. **Interfish** contend that Mr Anderson deliberately concealed from the **Interfish** directors the service of the Enforcement Notice and the possible need to suspend work. On 7 January 2016, Mr Anderson authorised a concrete pour to proceed in breach of the Enforcement Notice. Mr Anderson asserts that he authorised the concrete pour as “the lesser of two evils”. He does not suggest that Mr Colam or Mr Pillar were aware of this.

(e) The breakdown of relations and the dismissal of Mr Anderson and Colin Anderson

100. By January 2016 Mr Colam was already consulting solicitors for some employment law advice. At an emergency board meeting held on 11 January 2016, he asked Mr Anderson to resign but Mr Anderson refused. By this stage Mr Colam says that he did not trust Mr Anderson to be acting honestly or in the best interests of the company. Mr Armour was brought in to try to act as honest broker to improve the relationship. But there was still no resolution of the issues that were causing the most friction namely the use of Northbay staff and resources for other Anderson companies and the failure to pay cross charges for that use.

101. On 18 February 2016, Mr Colam, Mr Pillar, Ms Musgrave, Mr Anderson and Colin attended a board meeting at a hotel in Peterhead. Mr Pillar informed Mr Anderson and Colin Anderson at the start of the meeting that auditors were attending at the site to gather and preserve information about Northbay. After an initial discussion about matters including the

building warrants and the rebuild, Colin Anderson took a telephone call and Mr Anderson and Colin left the meeting and went back to the Peterhead site. There were some angry confrontations and hot words exchanged when Mr Anderson and Colin arrived back at the site to find **Interfish** staff going through Northbay documents in their offices. At around this time, Mr Anderson was suspended from his employment with Northbay by Mr Colam and Mr Pillar.

102. On around 22 February 2016, the **Interfish** directors, through Northbay's solicitors Nash & Co LLP, appointed Ms Newton of The HR Dept Exeter to carry out Mr Anderson's disciplinary investigation on behalf of Northbay. Ms Newton was given delegated authority to make a decision whether to uphold the allegations of misconduct against Mr Anderson. On 29 March 2016, Ms Newton delivered a copy of her investigation report. She concluded that, based on her findings, there was enough evidence to consider seven allegations against Mr Anderson at a disciplinary hearing. On around 15 April 2016, Lisa Bailey of The HR Dept was instructed to conduct Mr Anderson's disciplinary meeting. She was also given delegated authority to make decisions about Mr Anderson. On 29 April 2016, Ms Bailey wrote to Mr Anderson to inform him that she had concluded that each of the seven allegations amounted to gross misconduct and she had taken the decision summarily to dismiss him from Northbay with effect from that date.

103. Mr Anderson appealed his dismissal. Debra Spurway of The HR Dept conducted a further investigation and a complete rehearing of his disciplinary hearing on 14 July 2016. She decided to uphold his dismissal.

104. As regards Colin Anderson, Mr Colam's evidence was that he hoped it would be possible for them to have a good working relationship in future even though Mr Anderson had been suspended. However he says that he then came to believe that Colin Anderson was "being a disruptive presence on Site". On 15 March 2016 Mr Colam learned that Colin Anderson had ignored instructions given to him not to contact HMRC regarding a shortfall in the amount of fish declared from a landing of capelin from the vessel the Haugagut in January 2016. I describe this incident further below in the discussion of black fishing. On 16 March 2016 Colin Anderson was suspended from his employment.

105. The HR Dept conducted an investigation into Colin Anderson's conduct. The principal investigator was Lisa Bailey who produced a report on 9 June 2016 recommending that five allegations be taken forward to a disciplinary hearing. Belinda Newton then carried out Colin's disciplinary hearing and on 30 June 2016, she wrote to Colin to inform him that she had taken the decision to dismiss him. Colin also appealed his dismissal. Olivia Flattery of The HR Dept upheld Colin's dismissal following an appeal hearing on 9 August 2016.

106. Mr Anderson and Colin Anderson subsequently brought unfair dismissal proceedings against Northbay in the Employment Tribunal (Scotland). In respect of these:

i) Mr Anderson applied for a stay of his proceedings pending the outcome of these proceedings. They were stayed on 2 March 2017 despite the opposition of Northbay to a stay; and

ii) Colin Anderson's claim was upheld by a judgment of 3 November 2017 which awarded him £50,748 in compensation. Northbay has appealed this decision. The appeal is pending at the date of this judgment.

(f) Events after the dismissal of Mr Anderson and Colin Anderson

107. Following their dismissals, Mr Anderson and Colin were automatically removed as directors of Northbay with effect from 29 April and 30 June 2016 respectively pursuant to Article 11.2 of the Northbay articles of association.

108. On 12 May 2016, Cool Seas' solicitors sought to give notice of the reappointment of Mr Anderson as a director on behalf of Cool Seas. TLT replied on behalf of Northbay stating that Cool Seas was not entitled to reappoint Mr Anderson and that, in any event, **Interfish** declined to approve Mr Anderson's appointment pursuant to its right of approval under Article 11.3. On 19 August 2016, Cool Seas nominated Mr Armour as a director of Northbay and his appointment was later approved by Northbay. Since his appointment, he has had access to information about Northbay and has been able to circulate this to Cool Seas.

109. From March 2016 **Interfish** instructed solicitors to send a number of letters of claim on behalf of Northbay to ACIL (alleging a failure to pay cross charges due to Northbay and failure to complete the rebuild at all or to a reasonable standard); to Anderson Marine (alleging a failure to pay cross charges); to Mr Anderson and Colin Anderson (alleging various breaches of fiduciary duty) and to Lynsey Anderson (reclaiming the money paid to her by Northbay). In response the solicitors acting for Cool Seas stated that they did not consent to Northbay issuing legal proceedings. They referred to the fact that under the ISA, instigating proceedings is a “reserved matter” which requires the permission of both the **Interfish** and the Cool Seas shareholders.

110. According to Mr Colam's evidence, in 2018 Northbay only employs about 70 people made up of 37 permanent staff and 33 seasonal staff. He says that there have been a significant number of redundancies. His evidence is that the business simply was not profitable enough to justify the previous level of employees and he asserts that this is because the historic reported levels of profitability for Fresh Catch were fraudulently inflated by the black fishing. This made the sales of processed fish appear more profitable because a proportion of the fish processed and sold had either been acquired free of charge (if skimmed from the vessel) or had been acquired without paying the import duty due. The witnesses on behalf of Cool Seas also give evidence that the business has declined since Mr Anderson and Colin Anderson left although they put this down to mismanagement on the part of **Interfish** and Mr Colam's failure to continue to nurture the important relationships between the business, the vessels and the purchasers of the processed fish across the world.

V. THE LAW ON UNFAIR PREJUDICE PETITIONS

111. Section 994 of the Companies Act 2006 ('section 994') provides that a member of a company may petition the court for an order on the grounds that:

“the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), ….”

112. If the court is satisfied that the petition is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of: section 996.

113. Each element in the test has been the subject of judicial discussion and the overarching principle that emerges is that all elements should be construed broadly and that the courts should firmly resist technical or legalistic limitations and restrictions. The principles that can be derived from the case law about the proper construction of section 994 can be summarised as follows:

(1) There is no overriding requirement that it should be just and equitable to grant relief or that the petitioner should come to court with clean hands. The conduct of the petitioner may be relevant in preventing any prejudicial conduct by the respondent from being unfair and it might affect the relief granted by the court: *Re London School of Electronics* [1985] BCLC 273.

(2) The words “company's affairs” are extremely wide and should be construed liberally: (a) in determining the ambit of the “affairs” of a parent company, the court looks at the business realities of a situation and does not confine them to a narrow legalistic view; (b) “affairs” of a company encompass all matters which are capable of coming before the board for its consideration and are not limited to those that actually come before the board: see *Re Neath Rugby Ltd* [2009] EWCA Civ 291, [2010] BCC 597 at [50] *per* Stanley Burnton LJ.

(3) “unfairly prejudicial” is deliberately imprecise language chosen by Parliament to ensure that it is not interpreted restrictively. The test is an objective one and unfairness must be judged in a commercial context. The starting point in any petition is to determine whether the alleged unfairly prejudicial conduct was in accordance with the articles of association. However there may be cases where the articles do not reflect the understandings on which the members were associated: *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14.

(4) a petitioner is entitled to complain not only about conduct which has a discriminatory effect on his own interests but also about conduct which has a uniformly adverse effect on the interests of all members of the company: *Atlasview Ltd v Brightview Ltd* [2004] EWHC 1056 (Ch) at [61].

(5) mismanagement relied on for the purposes of a petition must be serious; the court must be astute not to “second-guess” legitimate management decisions taken upon reasonable grounds at the time, albeit as events transpired they may not have been the best decisions in the interests of the company: *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354 at 404-406.

(6) section 994 is not directed to the activities of shareholders amongst themselves, unless those activities translate into acts or omissions of the company or the conduct of its affairs. The petitioner must show that it is the affairs of the company which are being or have been conducted in an unfairly prejudicial manner or that it is an act or omission of the company that is or would be so prejudicial. The conduct of a member of his own affairs, for example by requesting a general meeting of the company or seeking answers to an excessive number of questions is irrelevant. However the court will not adopt a technical or legalistic approach to what constitutes the affairs of the company but will look at the business realities: *McKillen v Misland (Cyprus) Investments Ltd and others (Re Coroin Ltd)* [2012] EWHC 2343 (Ch) at [626] – [628].

(7) “prejudice” encompasses damage to the financial position of a member. The prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is bound up with his position as a member. This is not to be strictly confined to damage to the value of his shareholding. Moreover, prejudice need not be financial in character. A disregard of the rights of a member as such, without any financial consequences, may amount to prejudice falling within the section: *McKillen v Misland (Cyprus) Investments Ltd and others (Re Coroin Ltd)* [2012] EWHC 2343 (Ch) at [630].

114. The courts have also considered the relationship between the jurisdiction under section 994 and the right of the company to sue its directors for breach of fiduciary duty. In *Atlasview Ltd v Brightview Ltd* [2004] EWHC 1056 (Ch) Jonathan Crow QC sitting as a Deputy High Court judge held that it was appropriate to join the directors as respondents to a petition and for the petition to seek the payment of damages by the directors to the company for breach of their fiduciary duties owed to the company. He held that the 'reflective loss argument' does not provide a bar to such relief. Subsequently in *Gamlestaden Fastigheter AB v Baltic Partners Ltd and others* [2007] UKPC 26 ('*Gamlestaden*'), Lord Scott of Foscote, giving the advice of the Privy Council, held that a cause of action allegedly vested in the company could be prosecuted to judgment in an unfair prejudice application: [27]. He referred to his earlier judgment given as a Non-Permanent Judge of the Court of Final Appeal of the Hong Kong Special Administrative Region in *Re Chime Corporation Ltd* [2004] HKCFA 73 ('*Re Chime*'). He held in *Re Chime* that under the Hong Kong provisions corresponding to section 994, the courts have jurisdiction to order payment to the company of the compensation to which the company would have been entitled in a derivative action. However, there was a further question that the court needed to address namely whether it was proper for the court, on the petition, to try in effect whatever cause of action the company might have against the directors alleged to have caused the company in that case to make a substantial loan.

115. I will consider the authorities relevant to the more specific legal submissions in the petition and cross petition further below.

VI. COOL SEAS' PETITION

116. Cool Seas' petition sets out the history of Northbay culminating in an allegation that the purported reasons for dismissing Mr Anderson were either false or were not serious enough to justify his suspension or dismissal. A similar averment is made as regards the suspension and dismissal of Colin Anderson. The main allegation of unfairly prejudicial conduct is therefore that Cool Seas had a legitimate expectation that it would be represented on the board of Northbay by its choice of directors namely Mr Anderson and Colin Anderson and that they would each participate in the management of Northbay. The suspensions and terminations of their employment and their exclusion as directors from the management of the company was a breach of that legitimate expectation and was unfairly prejudicial to Cool Seas. It was also alleged that their exclusion was likely to reduce the value of Cool Seas' shareholding in Northbay because, given their knowledge of Northbay's business and the business of Fresh Catch before that, they were best placed to make management decisions. The loss to Northbay of their strong personal links with suppliers and customers is likely to have caused substantial loss of goodwill, income and profit.

117. Allied to this unfairly prejudicial conduct is the alleged failure on the part of **Interfish** to provide financial information as to the performance of the business to Cool Seas. It was alleged that Cool Seas had a legitimate expectation of a reasonable flow of management information and to be consulted on broad strategic issues.

118. The second allegation of unfairly prejudicial conduct is the misappropriation of Northbay's money by **Interfish**. This is said to arise from **Interfish** having caused Northbay to pay to invoices submitted to it by **Interfish** for reimbursement of professional fees charged by Baker Tilly and TLT in respect of the incorporation and setting up of Northbay and its purchase of the business of Fresh Catch.

119. In addition to those two allegations there were a series of other averments in the petition relating to mismanagement of Northbay by Mr Colam. However by the end of the trial, Cool Seas did not pursue any of these and relief was sought on the basis only of the exclusion of Mr Anderson and Colin Anderson from the management of Northbay and the dispute relating to the professional fees.

120. The relief sought in the petition was that **Interfish** be ordered to purchase Cool Seas' shares in Northbay at a price to be determined by the court on the basis of (a) a sale between a willing seller and a willing purchaser acting at arms' length of the entire issued share capital of Northbay; (b) without any discount to reflect the fact that Cool Seas holds a minority shareholding in Northbay; (c) after taking account of and making allowance for the unfairly prejudicial conduct complained of.

(a) Exclusion of Cool Seas' chosen directors from the management of Northbay

121. It is accepted that Northbay's articles of association provide that if a director ceases for whatever reason to be an employee he automatically ceases to be a member of the company's board. In order to establish that despite that provision, Cool Seas had a legitimate expectation that Mr Anderson and Colin Anderson would continue to participate in the management of the company, Cool Seas must show that the legal position was overlaid by equitable considerations. Cool Seas accepts that if there was no such legitimate expectation, then this allegation of unfairly prejudicial conduct must fail. There are two sub-issues: is this a case where Cools Seas had a legitimate expectation that its chosen directors would continue to be involved in the management and secondly, if there was such a legitimate expectation, was it overridden because there were reasonable grounds for dismissing the two men.

(i) Was Northbay a quasi-partnership?

122. In *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 ('*Saul Harrison*') Hoffmann LJ stated that although the starting point in an unfair prejudice petition is the company's articles of association there are circumstances in which the personal relationship between a shareholder and those who control the company may entitle him to say that it would in certain circumstances be unfair for them to exercise the power conferred by the articles upon the board. Referring to the well-known case of *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492, Hoffmann LJ said that it often arises out of a fundamental understanding between the shareholders which formed the basis of their association but was not put into contractual form, such as an assumption that each of the parties who has ventured his capital will also participate in the management of the company and receive the return on his investment in the form of salary rather than dividend: see page 19 of *Saul D Harrison*. Lord Hoffmann went on subsequently in *O'Neill and another v Phillips & ors* [1999] 1 WLR 1092 to hold that in such a case it will usually be considered unjust, inequitable or unfair for a majority to use their voting power to exclude a member from participation in the management without giving him the

opportunity to remove his capital upon reasonable terms: see [6] of *O'Neill*.

123. In *O'Neill* Lord Hoffmann set out the characteristics commonly giving rise to equitable restraints upon the exercise of powers under the articles: (1) an association formed or continued on the basis of a personal relationship involving mutual confidence; (2) an understanding that all or some of the shareholders shall participate in the conduct of the business; and (3) restrictions on the transfer of shares, so that a member cannot take out his stake and go elsewhere. He agreed with the findings of the lower courts in that case that although those characteristics had not been present when the company was formed, they had developed over the years as the relationship between the two shareholders changed. He went on to reject the submission that the mere fact that trust and confidence had broken down between the parties meant that the petitioner was entitled to require the other shareholder to buy out his interest.

124. These principles were applied by Philip Sales QC (as he then was) in *Fisher v Cadman and others* [2005] EWHC 377 (Ch). In that case he found that the company's affairs were dealt with on a very informal basis, “indicating a common understanding on all sides that the articles of association did not represent the complete and exhaustive statement of how the relationship between the members and the members and management should be conducted”: [89]. There was no good reason, he held, why such equitable considerations should not qualify, as well as add to, the expectations about how the controllers of the company ought to behave to be derived from a simple reading of the articles of association. He also held that unfairly prejudicial conduct can include a failure on the part of a controller to provide information about the affairs of the company to which the member is entitled, where that disables the member from knowing what is going on in the company or being able to protect his interests: see [95].

125. The question when removal as a director can amount to unfairly prejudicial conduct was also considered in *Grace v Biagiolo and others* [2005] EWCA Civ 1222. The Court of Appeal reiterated the principle that ordinarily it was not unfair for the affairs of the company to be conducted in accordance with its articles or any other relevant and legally enforceable agreement unless it would be inequitable for such an agreement to be enforced. The petitioner Mr Grace had alleged that one element of unfairly prejudicial conduct was his removal as a director. The judge had held that this was prejudicial to his interest as a shareholder because his membership of the board entitled him to vote and to receive information on important matters. But the judge had taken the view that his removal was not unfairly prejudicial because the exercise by the majority shareholders of their power under the articles to vote him off the board did not contravene any prior agreement between them and was not contrary to any equitable principle of good faith. The judge based this conclusion on an examination of Mr Grace's conduct in the period leading up to his expulsion. He applied the dictum of Nourse J from *Re London School of Electronics Ltd* [1985] BCLC 273 to the effect that the petitioner's conduct may render fair conduct which is prejudicial. The Court of Appeal held that the judge had been entitled to have regard to Mr Grace's conduct in determining whether his removal as a director by the respondents “was a proportionate and justifiable response to what they had discovered.” The judge had held that his removal as a director “was brought about by his own conduct and cannot be stigmatised as unfair”. The question on appeal was whether the judge had been entitled to treat Mr Grace's conduct is justifying his removal as a director notwithstanding the history of relations between the parties and the effect which his absence from the board would have on his ability thereafter at least to scrutinise the decisions which were taken in relation to the company and its profits: [68]. They held that the judge had been entitled to form the view which he did.

126. Applying the principles from those authorities to the present case I am fully satisfied that

there was no legitimate expectation that Mr Anderson and Colin Anderson would continue as directors once they ceased to be employed by the company for whatever reason. The relationship between all the participants in the transaction in January 2014 and thereafter was as set out in the contractual documents and there are no overlying equitable considerations applicable here. The factors I have taken into account when arriving at that conclusion are as follows.

127. First, there was no previous personal relationship, such as a partnership or family connection, between these parties. Prior to 2013, the only business dealings between Fresh Catch (on the one hand) and **Interfish** and Altaire (on the other hand) had been a short business relationship for around a year in the 1990s when **Interfish** placed a large order with Fresh Catch for mackerel fillets. Mr Colam's evidence in his written statement, unchallenged in cross examination, was that **Interfish** received a smaller and cheaper grade of fish than had been contracted for. He chose not to buy from Fresh Catch again.

128. Mr Anderson accepted in cross examination that there was no significant prior relationship between the parties. However he says in his written evidence that the language used between him and Mr Colam during the negotiations in 2013 included that they were "going into partnership". Mr Colam continued to refer to the business in this way after completion of the sale, even when he was threatening "to pull out and close down the partnership". I do not accept that casual references of this kind to a "partnership" were understood by either party to detract from the formal nature of the business relationship between them as set out in the transaction documents. I accept Mr Colam's evidence was that he viewed the relationship between **Interfish** and Cool Seas as a commercial relationship on terms that had been negotiated and agreed between them in detailed contractual documents which were developed with the benefit of professional advice. I do not believe that Mr Anderson can have formed any different view.

129. Secondly, this is not a case where the constitution of the company is an off-the-shelf draft which is not revised to reflect the underlying agreement between the parties as to how the business would be run. On the contrary the agreements entered into on 2 January 2014 were bespoke agreements carefully drafted by each side's solicitors, going through several drafts following the signature of the initial Heads of Terms.

130. Thirdly, I do not accept Mr Anderson's evidence that he and his Peterhead team were left to run the business themselves and that the expectation was that the Northbay business would be run in exactly the same way as the previous Fresh Catch business. Cool Seas' assertion that the Andersons were left to run the business is contradicted by the evidence of the degree of control and supervision exercised by the **Interfish** management team. For example:

a. **Interfish**'s Plymouth management team instigated many changes and improvements in Northbay's reporting and the keeping of the accounts. Mr Sanders in Plymouth liaised with Mr Taylor in Peterhead in early January 2014 about the additional information that should be provided to Plymouth on a regular basis. This included information about the business' trading including weekly office reports, monthly management accounts, cash flow projections, creditor reports and a weekly report on movements of fish purchases and sales.

b. Mr Drew, the **Interfish** production quality manager, was seconded to the Peterhead site in January and February 2014. Mr Sanders, Ms Musgrave and Ms Bettinson visited the site on 16

January 2014 in order to make it clear to the staff that they now worked for Northbay rather than Fresh Catch, to learn about how the business operated and to emphasise that it was not going to be “business as usual” after the transfer from Fresh Catch;

c. Mr Pillar implemented changes in the paperwork generated by the factory when the fish were processed including the provision of Production Intake Sheets showing the gross scale weight and net scale weight (that is with and without a 2% allowance for water) and the total weight of fish through production;

d. throughout 2014 there were regular telephone calls between Mr Anderson, Colin Anderson and the **Interfish** management team in Plymouth. Although these meetings were relatively informal and there were no agendas or minutes for such meetings of the kind envisaged in clause 5.7 of the ISA. I find that it would have been clear to people in Peterhead that there was a new management in charge and that the Peterhead business was being closely overseen by the **Interfish** Plymouth team.

131. Mr Colam's evidence was that he did not intend this to be the continuation of the Anderson family business; rather he thought this would “mark a clean break and fresh start from the black fishing scandal of Operation Trawler”. He told Mr Anderson that he would be acting under the supervision and if necessary direction of **Interfish**. His assessment at the time was that he was happy for Mr Anderson to continue to act in the role of managing director because he appeared to have a good working knowledge of how to run the plant and it was important to maintain business continuity with customers and suppliers. However because of Mr Anderson's previous involvement in Operation Trawler and Fresh Catch's financial difficulties Mr Colam considered it was very important that, as he put it, “the **Interfish** philosophy and mind-set should be introduced into Northbay's operations”.

132. I accept this evidence particularly because, as Mr Colam points out, **Interfish** entered into a formal guarantee with Royal Bank of Scotland covering all of Northbay's liabilities to the bank in respect of Northbay's £5 million overdraft facility. He also provided the vessel agents with a guarantee on behalf of **Interfish** that vessels would be paid for their fish landed at Northbay during 2014. He would not have done this unless **Interfish** in fact exercised a significant degree of control over the way the business operated and particularly that it was not going to be “business as usual”. Again, Mr Anderson is an experienced businessman; he was well aware of the difficulties facing the Fresh Catch business and of his own tarnished reputation in the industry. He could not have expected tat level of investment from **Interfish** to be made without the relationship between him and the new majority owner of the business being anything other than what was set out in the carefully drafted formal agreements.

133. I therefore find that there was no quasi-partnership here and no legitimate expectation on the part of Cool Seas that if, for any reason, Mr Anderson and Colin Anderson ceased to be employees they would also cease to be directors of the company and that Cool Seas would have to choose different people to represent it on the Northbay board. In the event Cool Seas did appoint Mr Armour to be a director of Northbay and there is no real complaint about the lack of information flowing from Northbay to Cool Seas through Mr Armour. I therefore hold that the first two grounds on which the Cool Seas petition is based must fail.

134. In the light of those findings I do not need to address the second issue as to whether the dismissals of Mr Anderson and Colin Anderson were justified. On this question, Cool Seas accepted that misconduct which is not discovered until after dismissal can justify an earlier

dismissal decision: see the well-known principle in *Boston Deep Sea Fishing Co v Ansell* (1888) 39 Ch. D. 339 as explained in Chitty on Contracts (32nd Ed) para 40-189.

135. So far as Mr Anderson is concerned it will appear from my findings of fact on the unfair prejudice allegations in **Interfish**'s cross petition that his dismissal was fully justified. Any prejudice suffered by Cool Seas by reason of his exclusion from the management of Northbay was therefore not unfair for the purposes of section 994.

136. So far as Colin Anderson is concerned, I have formed a different conclusion as to what happened as regards the reporting of the landing from the Haugagut in January 2016 from the conclusion reached by the Employment Tribunal. This is discussed further below. I have therefore also concluded that any prejudice suffered by Cool Seas by reason of Colin Anderson's exclusion from the management of Northbay was not unfair for the purposes of section 994.

(b) Misappropriation of Northbay funds by Interfish: Baker Tilly and TLT fees

137. On 15 January 2014 **Interfish** cross-charged to Northbay the following professional fees which it had paid:

i) Baker Tilly fees of £107,581.06 (made up of £89,650.00 plus VAT of £17,930.18); and

ii) TLT fees of £84,447.04 (made up of £70,373.14 plus £14,073.90).

138. After this cross charge was queried in the Cool Seas petition, Mr Sanders asked TLT and Baker Tilly to separate any costs relating to the preparation of the ISA from their other costs. On 16 November 2016, after receiving their replies Mr Sanders raised a credit note relating to work undertaken on the ISA for £7,312.50 plus VAT (made up of £2,312.50 plus VAT for Baker Tilly's review of the ISA and £5,000 plus VAT by TLT in respect of the ISA). That credit note has been paid.

139. Cool Seas argues that the cross charge is contrary to clause 21 of the ISA which provides that:

“except as expressly provided in this agreement, each party shall pay its own costs and expenses incurred in connection with the negotiation, preparation, execution and performance of this agreement (and any documents referred to in it).”

140. The ISA expressly refers to (amongst many other things) the articles, the APA and the need to procure a bank finance facility for Northbay. Those are therefore documents referred to in the ISA and, since the contentious fees appear to include work on those documents, the cost should lie where it falls. Cool Seas also complain that no breakdown of time spent has ever been provided for the amounts charged. What this means, Cool Seas submit, is that the majority shareholder has unilaterally taken money from Northbay to meet its own expenses without evidencing why it was entitled to do so and without the consent of the minority shareholder.

141. I do not agree that the correct interpretation of clause 21 of the ISA means that the parties were expected to bear costs which they have paid out on behalf of Northbay in respect of its purchase of the business of Fresh Catch at a time before Northbay was up and running and able to pay the costs itself. The Baker Tilly fees related to work done to devise and set up the arrangements for the acquisition by Northbay of the goodwill and assets of Fresh Catch and the detailed investigation undertaken by Baker Tilly to create the model for forecasting future trading. That model was used to assess the appropriateness of the price to be paid for the business and also to secure bank funding for Northbay. The TLT fees relate to the formation and incorporation of Northbay, the preparation of the APA and the articles of association and the legal due diligence into the Fresh Business carried out on behalf of Northbay. These were properly costs and expenses of Northbay.

142. I therefore find that there was no unfairly prejudicial conduct on the part of **Interfish** in causing Northbay to reimburse it for these professional fees. In the light of my findings the Cool Seas petition fails in its entirety.

VII. INTERFISH'S CROSS-PETITION

(a) Summary of allegedly unfairly prejudicial conduct by Cool Seas

143. The main allegations on which **Interfish**'s cross petition is based are:

i) Mr Anderson failed to disclose important material about the business of Fresh Catch to his fellow directors of Northbay at the time when Northbay was deciding to buy the Fresh Catch business. He continued to fail to disclose it after the acquisition. In particular they rely on his failure to disclose that (a) Fresh Catch continued to engage in substantial black fishing from 2005 to 2013; and (b) Fresh Catch had very serious issues with HMRC arising from previous failures to comply with its obligation to declare landings of non-EU fish and pay the necessary import taxes.

ii) After Northbay acquired the Fresh Catch business, Mr Anderson continued to instigate or encourage black fishing whilst the director of Northbay in respect of a number of vessels thereby exposing Northbay to the risk of extensive liability, disruption of its business through regulatory enforcement and reputational damage.

iii) Mr Anderson acted in breach of his fiduciary duties as a director of Northbay in various respects during his time as director in that (a) he allowed the staff and other resources of Northbay to be used for his other businesses operating on the site without accounting to Northbay for those benefits; (b) he failed to comply with the arrangements that were put in place to mitigate the conflict of interest which arose when ACIL was engaged to carry out the demolition and rebuilding work following the fire in January 2015; (c) he arranged for Northbay to pay a salary to his daughter Lynsey Anderson during 2015 when in fact she did not carry out any significant work for the company in that year.

iv) Mr Anderson acted incompetently and in breach of his fiduciary duties when managing supposedly on behalf Northbay the carrying out of the work by ACIL on the site after the fire and failed to provide information appropriately to his fellow directors in particular about the problem that arose with the Council's Enforcement Notice.

144. The claim set out in the petition is expressed in a number of ways. It is alleged that Mr Anderson owed duties to Northbay under sections 171 to 182 of the Companies Act 2006, and that he breached those duties by engaging in the conduct that is also alleged to amount to unfairly prejudicial conduct of Northbay's affairs. It is also alleged that at least some of that conduct amounted to a breach by Mr Anderson of the articles of association in failing to manage the conflict of interest that arose between his position as a director of Northbay and his interest in other Anderson companies operating at the Peterhead site. There are breaches of the warranties given in the APA alleged. My understanding is that none of these different ways of putting the counterclaim raises different factual issues from the others or leads to a different form of relief. I therefore set out in the remainder of this judgment my findings of fact which are equally relevant to whichever way the petition is put.

(b) Legal issues raised by the cross-petition

145. Before turning to the factual disputes in these proceedings it is useful to consider some of the issues of law arising on **Interfish**'s cross-petition.

*(i) **Interfish**'s ability to bring a claim for breach of fiduciary duty*

146. **Interfish**'s pleaded case includes allegations of serious breaches of fiduciary duty by both Mr Anderson and by Mr Colin Anderson during the time they were directors of Northbay. Usually such allegations are pursued by the company itself bringing proceedings against errant directors. However it is clear on the authorities that such allegations can be pursued by a petitioner in the context of section 994 proceedings: see *Re Chime* and *Gamlestaden*.

147. Mr Benson accepted that section 994 proceedings can encompass claims that are more usually pursued by the company itself. However this was subject he said to the director being able to raise in defence of any such allegations, any matters that he could have relied upon in defending himself against a claim brought by the company. He relied on the decision of Briggs J in *Sikorski v Sikorski and Bolholt Residential Club Ltd* [2012] EWHC 1613 (Ch). In that case the minority shareholder complained that his brother who held the majority of the shares had acted in an unfairly prejudicial manner by failing to cause the company to collect rents from his new business which had leased hotel premises from the company. The judge found that the unfair prejudice had been established. He went on to consider whether he should order the majority shareholder brother to compensate the company for breach of fiduciary duty in causing it to under charge for rent. The respondent brother's defence was that if he had been sued by the company, he would have had a limitation defence to any breach of duty occurring more than six years before the institution of any such proceedings. The judge stated that “the court should be slow to deprive a respondent director of a limitation defence to a claim brought in the company's name by adopting the shortcut of ordering that relief in the petition itself”: [81]. The judge held that no limitation defence was available to the majority shareholder because the action fell within section 21(1)(b) of Limitation Act 1980.

148. Mr Benson argues that Mr Anderson and Colin Anderson would have had a defence to proceedings brought by Northbay because any such proceedings would most likely have been brought in contravention of the ISA. The instigation of proceedings is a Reserved Matter for the purposes of clause 4 of the ISA and therefore requires the approval of both Cool Seas and **Interfish**.

149. I reject that argument. It would not be right for the court to assume, as this argument appears to require the court to assume, that Cool Seas would have refused to bring such proceedings against Mr Anderson and Colin Anderson if Cool Seas were not controlled by them. Mr Benson argues that even if Cool Seas were not controlled by the Anderson family it might for legitimate reasons consider that such proceedings were an inappropriate use of Northbay's resources. Given my findings set out in the rest of this judgment, I do not accept that Cool Seas would have refused to consent to the bringing of proceedings by Northbay against Mr Anderson and Colin Anderson. I do not accept that they would have been able to raise a defence to any such a claim on the grounds that it would have been brought in contravention of that term of the ISA. I also consider that it is proper for the court in this case on **Interfish**'s petition to try in effect the causes of action which Northbay might have against its former directors for their misconduct.

*(ii) Can **Interfish** obtain relief even though it is a majority shareholder in Northbay?*

150. Cool Seas argue that the section 994 cross-petition should not succeed in the present case because **Interfish** holds the majority of the voting shares in Northbay. There is nothing in the wording of section 994 to limit the petitioner to a shareholder who holds only a minority interest - the wording refers only to a member of a company applying to the court on the ground that the company's affairs are being conducted in an unfairly prejudicial manner. But Cool Seas rely on *In Re Legal Costs Negotiators Ltd* [1999] BCC 547 where a company was formed to take over the business formerly operated by a partnership. Each of the four former partners held a quarter share of the issued share capital of the company and was also a director and employee of the company. One of them, H, was dismissed from his employment and resigned his directorship. The majority presented a petition under the predecessor to section 994 claiming that the company's affairs were being conducted in a manner unfairly prejudicial to the interests of the petitioners as members and that they had a legitimate expectation that each would be engaged full-time on its business. They sought an order that they be allowed to buy out H's minority shareholding. The question on appeal was whether the trial judge had been right to strike out the application on the grounds that the petitioners held the majority interest in the company and had adequate powers to bring about H's cooperation if they so chose.

151. The Court of Appeal agreed with the trial judge that the complaint there was not about the way the company's affairs were being conducted but that H was holding on to his investment in the company. There was nothing in the articles of the company that required him to sell his shares if the petitioners did not want him to continue as an employee or director. The petitioners had been able to remedy their concerns about H's conduct in the management of the company by bringing his employment to an end and producing his resignation as a director. Peter Gibson LJ noted at page 553C, that there was not one of the numerous reported decisions on unfair prejudice petitions in which a petition by controlling majority shareholders has proceeded. He recognised that a mere majority shareholding may not suffice its holder for example the voting rights may not accord with the shareholding as in *Re H R Harmer Ltd* [1959] 1 WLR 62. But in the ordinary case where the shares carry equal voting rights a majority shareholder will generally have the power to stop unfairly prejudicial conduct of the company's affairs or any unfairly prejudicial act or omission of the company. Roch LJ agreed that since H's departure from the company, the conduct of the company's affairs had been wholly in the hands of the petitioners. There was nothing remotely prejudicial in the way the company's affairs were being conducted.

152. Cool Seas therefore argue that insofar as **Interfish** manages to establish wrongful

conduct between 2014 and 2016, **Interfish** cannot now complain about that being unfair, since it had the power to do something about it and exercised that power by removing Mr Anderson and Colin Anderson from the management of the company.

153. In my judgment this is not a case in which any harm from unfairly prejudicial conduct by Mr Anderson and Colin Anderson could be adequately remedied by the exercise of majority voting rights by **Interfish**. Those rights do not extend to controlling the decisions of Northbay in respect of the reserved matters set out in Schedule 1 to the ISA, most importantly for our purposes the decision to bring proceedings against former directors for breach of their fiduciary duties. Peter Gibson LJ in *In Re Legal Costs Negotiators* recognised that the question of whether a majority shareholder could properly bring a petition depended on the constitution of the company. In *Re Baltic Estate Ltd* [1992] BCC 629, Knox J was considering a strikeout application seeking to dismiss a petition brought by a majority shareholder. He also recognised, at 632G, that if the minority shareholder had the ability to block a special resolution which the majority shareholder wished to have passed, that might mean that the majority shareholder was not effectively protected from unfair prejudice by its voting control. In the present case, there are a substantial number of matters reserved by Schedule 1 to the ISA which need the consent of Cool Seas. These include not only instigating legal proceedings but "entering into any arrangement, contract or transaction outside the normal course of its business", amalgamating or merging with any other company or business undertaking or altering the articles or the rights attaching to any of the shares. It is not difficult to see how the future management of Northbay could be seriously disrupted by the refusal of Cool Seas to consent to reasonable proposals put to them by the majority shareholder. I therefore hold that in the circumstances of this case the fact that **Interfish** hold the majority of voting rights in Northbay does not preclude them from bringing their petition under section 994.

(iii) Attribution of Mr Anderson's wrongdoing to Cool Seas

154. Although Cool Seas admitted in its Reply and Defence to Counterclaim that the knowledge of Mr Anderson is to be attributed to Cool Seas, it argues that the alleged misconduct of Mr Anderson in engaging in black fishing or in failing to comply with his fiduciary duties owed to Northbay cannot be attributed to Cool Seas so as to entitle **Interfish** to a remedy which requires Cool Seas to sell its minority interest in Northbay to **Interfish**.

155. Cools Seas argues that its only role was to nominate Mr Anderson as a director. After that Cool Seas had no ongoing role. It is not a trading company and it has its own shareholders (including Mr Anderson but also his ex-wife and daughter) and creditors. Mr Anderson's duties and responsibilities as director were owed to Northbay itself and not to Cool Seas. Mr Benson points to *Hawkes v Cuddy* [2009] EWCA Civ 291 as authority for the proposition that Mr Anderson owed no duty to his nominating shareholder as a result of the nomination: see *per* Stanley Burton LJ at [32]. He was not carrying out activities on behalf of or for the benefit of Cool Seas. The price that Cool Seas receives for its shares should not be reduced because of any wrongdoing on the part of Mr Anderson.

156. The question of when the misconduct of a director appointed to the board by a corporate shareholder pursuant to the company's constitution can be attributed to that shareholder was considered by Sales J in *F & C Alternative Investments (Holdings) Ltd v Barthelemy and another (no 2)* [2011] EWHC 1731 (Ch). The respondent to the unfair prejudice petition, Holdings, was a corporate member of a limited liability partnership and held the majority of the voting rights. The other two members were individuals and petitioned for relief under sections 994 to 996 alleging that Holdings and the ultimate parent of Holdings, F&C plc,

had engaged in unfairly prejudicial conduct in the operation of the LLP. They sought an order that Holdings and F&C plc buy out their interest. The question arose whether F&C plc could be required to buy out the individual members' shares. The judge recorded that it was common ground between the parties that in order to make out a claim under section 994 it is not necessary to show that the conduct was carried out by agents of the person or persons against who the claim is brought. It was also common ground that the court has jurisdiction in appropriate cases to grant a remedy under section 996 against non-members in a company or limited liability partnership. But the parties were not in agreement as to what the relevant test of attribution of unfairly prejudicial conduct to a defendant in a section 994 claim should be. Sales J held:

"1096 What is the relevant test of attribution of responsibility beyond the narrow class of case where an agency relationship exists? In my judgment, the test is whether the defendant in a section 994 claim is so connected to the unfairly prejudicial conduct in question that it would be just, in the context of the statutory regime contained in sections 994 to 996, to grant a remedy against that defendant in relation to that conduct. The standard of justice to be applied reflects the requirements of fair commercial dealing inherent in the statutory regime. This is to state the test at a high level of abstraction. In practice, everything will depend upon the facts of a particular case and the court's assessment whether what was done involved unfairness in which the relevant defendant was sufficiently implicated to warrant relief being granted against him."

157. Sales LJ noted that Holdings was in reality a cipher for F&C plc and that the individual representatives of the group who were appointed to the management of the LLP tended to think about the interests of the group and F&C plc rather of Holdings. Further he held: "The practical benefits for F&C [group] derived from the pattern of unfairly prejudicial conduct also flowed, in reality, to F&C plc, which (rather than Holdings) had the ultimate commercial interest in controlling the LLP's affairs." [1101].

158. I do not read Sales J's judgment as establishing that it is necessary that the respondent shareholder must be shown to have benefited from the wrongdoing by its nominee director before that wrongdoing can be attributed to it in order for the petition to succeed. That may be one factor to take into account when considering whether such attribution is just in the circumstances but it is not a precondition for attribution.

159. In my judgment it is clearly just to attribute Mr Anderson's conduct to Cool Seas. As I have described, Cool Seas is purely a vehicle through which Mr Anderson holds his interest in Northbay. I accept **Interfish**'s submission that to rule out attribution in this case would allow Mr Anderson to hide behind his corporate vehicle and protect himself from a section 994 petition by that mechanism. Cool Seas chose to appoint Mr Anderson as one of its nominated directors pursuant to the ISA. It should be treated, of course, as being fully aware of his previous chequered history as regards black fishing and the problems with HMRC. Further, Cool Seas was a party to the transaction documents concluded in January 2014, it was included in the definition of the Seller in the APA and itself gave the warranties that **Interfish** allege that Mr Anderson has breached through his misconduct. It is Cool Seas and not Mr Anderson which has the power to give or withhold consent in respect of Reserved Matters under the ISA and which has in fact consistently exercised that right to frustrate the ability of **Interfish** to bring proceedings against Mr Anderson. If **Interfish** can establish wrongdoing by Mr Anderson, I hold that that is capable of constituting unfairly prejudicial conduct on the part of Cool Seas.

(c) Black fishing by Fresh Catch in the Fresh Catch period

160. One of the most contentious issues in the proceedings was the extent to which Fresh Catch at the instigation or at least with the knowledge of Mr Anderson had been involved in black fishing in the period between Operation Trawler and the purchase of the business by Northbay. I will refer to that time between 2005 and the end of 2013 as 'the Fresh Catch period'.

161. The original cross petition set out in **Interfish**'s Counterclaim and served in November 2016 did not raise black fishing as an issue. In March 2017 these serious allegations were raised in a letter before claim sent by **Interfish** to Cool Seas. This led in August 2017 to amendment of the cross petition to allege breaches by Mr Anderson by wrongfully causing or allowing Northbay to buy the Fresh Business "despite his knowledge that the value of the assets and goodwill of [Fresh Catch] purchased by [Northbay] had been both fraudulently overstated under the terms of the APA, and that [Fresh Catch] and Cool Seas were in breach of various warranties under the APA at the time at which it was concluded".

162. Further, the cross petition then set out the liabilities to HMRC arising from the failures to pay import duty and import VAT which I have already described.

163. These amendments to the cross petition alleged that from around 2006 to 2013, Fresh Catch as authorised or instructed by Mr Anderson "was engaged in a systematic practice of deliberately and dishonestly under recording the weight of landed fish without the knowledge of the masters of vessels from whom the fish was purchased". The details referred to the practice of tampering with the scales and thereby obtaining fish without paying for it and avoiding duties and taxes.

164. In its Defence to the amended cross petition, Cool Seas pleaded that it "denied that Mr Anderson authorised, instructed or had any knowledge as to any practice by [Fresh Catch] (or any of its employees on their own volition, whether Christopher Ritchie, Ali Reid or Jackie Bruce or otherwise) of under recording the weight of landed fish. The allegations … are denied in their entirety and are embarrassing for lack of particulars."

165. The allegations in the amended cross petition asserted that all the black fishing had been done without the knowledge of the vessels' skippers. However, in March 2018 **Interfish** re-amended their cross petition to make clear that if, as then appeared, Cool Seas contended that the vessels had been aware of black fishing, Cool Seas was put to strict proof of that allegation. Even if the fish had been paid for, it would still constitute unlawful black fishing rendering Fresh Catch liable to fines and confiscation orders. Further, the business model created in 2013 on the basis of the financial data provided by Mr Anderson was still reliant on illegal fishing and under payment of duty. In response to that reamendment of the cross petition, Cool Seas re-amended their Defence to Counterclaim. For the first time it was admitted by Cool Seas - in effect by Mr Anderson - that he had been aware of black fishing on a few occasions in the Fresh Catch period and of the different methods that had been used by Mr Reid and Mr Ritchie to achieve this. It was alleged that some of the black fishing arose from the landings of the Altaire and that this had been done at the specific request of Mr Colam.

166. Mr Anderson's initial written evidence in his witness statement of 9 March 2018 was that the allegation of the under recording of fish landings was "contrived and false". He said:

"I have never stolen fish from vessels, and I have never instructed any of [Fresh Catch's] employees to steal fish. I have no knowledge as to whether any of Chris Ritchie, Ali Reid or Jackie Bruce were engaged in the practice alleged, but I do not believe that they were. There is also no evasion of duty: from the limited review of documents so far possible it seems that each landing they complain of relates to a UK vessel - so no duty is payable. **Interfish** should know this".

167. In April 2018, shortly before trial, Mr Anderson and Colin Anderson served supplemental witness statements in which they described the three forms of black fishing now admitted. They still asserted that these had been used on only a few occasions and that under declaration of fish from the Altaire was done on the instruction or at the instigation of Mr Colam.

(i) Different methods of black fishing

168. There are a number of methods by which black fishing could be achieved.

169. **The water return pipe.** I described earlier how the evidence from Operation Trawler showed that black fishing had been achieved by inserting a 'T' piece section of pipe which could carry fish around the weighing scales which were supposed to record accurately the weight of fish landed. It is common ground that the diversion pipe used for black fishing up to 2005 was removed following the raid at the Fresh Catch site.

170. Mr Ritchie's evidence was that shortly after the 2005 Operation Trawler raid, his colleague at Fresh Catch, Jackie Bruce, told him that he had just tested a new means of diverting fish past the weighing scales using the water return pipe. The water return pipe is part of the pumping system used to pump fish from the vessel's hold into the factory. It runs alongside the whole length of the fish pipe from the vessel to the factory. The fish pipe is a 14 inch pipe that carries the pressurised liquid mass of fish and water from the boats over the scales and on to the factory. The water return pipe is a smaller pipe about 6 inches in diameter intended to pump water in the opposite direction back into the boat from the factory. It is essential that the boat has enough water on board to continue pumping the fish and water through the fish pipe. If there is too little water, the fish become blocked in the fish pipe which delays production and damages those fish caught in the blockage. Mr Ritchie says that Mr Bruce told him that he had worked out a way to bypass the scales by diverting fish from the fish pipe into the water return pipe which would then deposit them into Tank 9. This was achieved by inserting a section of larger diameter pipe into the run of the water return pipe so that that section was big enough to carry fish and not just water. New and wider valves were also inserted into the water return pipe connecting it to the fish pipe before and after the scales. There were already small, one-way valves linking the fish pipe to the water return pipe. These enabled water from the water return pipe to be flushed into the fish pipe to keep the fish moving along. But the new valves fitted as part of this modification were not only larger to allow fish as well as water to pass but were two way valves so that fish could move from the fish pipe into the water return pipe rather than simply allowing water to flow from the water return pipe into the fish pipe.

171. Mr Reid confirmed that this modification was made to the water return pipe in late 2005. Part of that pipework remains although it is now defunct since the scales were moved up to a new location in the factory. Mr Reid's evidence is that "the upgraded return pipe was quite clever because it was simply not noticeable during a visual inspection". Although Marine Scotland frequently attended the site they did not raise any queries about the return pipe

because they would have incorrectly presumed that it was a standard water return pipe and not capable of pumping fish.

172. Mr Reid also said that this modification was carried out at the instigation of Mr Anderson as well as of Mr Bruce. He is sure that Mr Anderson knew about the scheme because he heard an initial discussion about it between Mr Anderson and Jackie Bruce. Mr Anderson would have had to approve the pipe being upgraded. Mr Reid said that it was obvious after the water return pipe diversion was used that more fish was being processed and frozen than had been declared by a vessel. However, “it was not really talked about openly in the factory and people just turned a blind eye”.

173. Mr Anderson's evidence on this was set out in his witness statement of 18 April 2018. He said that there were ongoing issues with the water return pipe fracturing and bursting because of the strength of the vibration from the force of the water returning to the boat in the harbour. He therefore decided to install a heavy duty section of PVC pipe in the area of the pipe that was prone to fracturing. Further the section of the fish pipe leading to the fish separator (which drains the water from the fish) was prone to blockages. They upgraded to an 8 inch pipe to alleviate these problems. He recalled that the work was carried out in 2011 and that the system was in place only for a few months. His evidence was that at that time the Norwegian factories had put into operation a system which meant that fish smaller than 250 grammes would not count towards the vessel's quota. This amounted to a significant incentive to vessels to land in Norway as whatever tonnage of fish they landed that was under 250 g would not count towards their quota. He said:

“Therefore, in an attempt to compete with Norway, on a couple of occasions, we would fish to just under 200g. Anything below 200g, we would accept and use the [water return pipe] so that it was not recorded on the scales. If we could use the fish, the vessels got paid for it, if not they got the fish meal price. … There was therefore no deception of the vessels in this practice and they got paid a fair price for their small fish. It was a means of helping out the vessels and giving them something akin to the Norwegian system. The vessel always got paid his tonnage. This system was only ever used for a couple of vessels”.

174. Mr Reid refutes the suggestion that the changes were made because of a problem with the water return pipe fracturing. He accepts that there was such a problem but this was dealt with by using a PVC pipe of the same diameter but with a thicker wall. The repairs to deal with that problem were, as one might expect, carried out along the length of the water return pipe and not just the area which incidentally begins before and ends after the weighing scales. He says that the practice of diverting fish to the water return pipe was carried out between 2005 and 2013. He says

“From at least 2010 onwards, the valve was operated by Chris, me and the nightshift operator. My impression was that Chris would divert fish past the scales whenever possible. Given my personal involvement in carrying out his instructions I know for a fact that the water pipe was used frequently over this period by Chris to divert fish past the scales so that the fish were not recorded. In fact, I believe that it occurred during the majority of the fish landings at Fresh Catch between 2008 and 2013. I would know when the valve had been operated because there would be footprints in the trench near to where the valve was located and there was no other reason why anyone should be in the trench. Chris would also tell me from time to time when he had operated it …”.

175. Mr Ritchie confirmed in his second witness statement his earlier evidence that the changes to the water return pipe had been made in 2005 and not in 2010

176. On this issue I am satisfied that Mr Ritchie and Mr Reid's evidence is accurate and I reject Mr Anderson's evidence. Even if there was a problem with the pipe fracturing under the pressure of the water coming through, it is an implausible coincidence to suppose that the only work that was put in place to remedy the problem of the fractured piping was work to exactly that small portion of the overall length of pipe which enabled fish to be diverted around the main scales. I accept their evidence that the modification to the water return pipe was made in 2005 and not much later as Mr Anderson said.

177. There was another dispute about whether the water return pipe method of black fishing was available throughout the whole of the Fresh Catch period or ceased to be available in early 2012. This depends on the resolution of the dispute about when the main scales were moved from an area on the site about halfway between the vessels and the factory ('the Tank 9 position') to an area within the factory itself ('the factory position'). Once the main scales were moved, the reconfiguration of the water return pipe would no longer divert the fish around the scales because any fish passing through the water return pipe would rejoin the main fish pipe at a point before the fish passed over the scales.

178. Mr Anderson's evidence was that the relocation of the scales had occurred in early 2012 and was carried out in two phases. The first set of scales were moved up in spring 2012 leaving the other set of scales not capable of being used still down by the harbour for a few months until they were moved up in about November 2012.

179. However, the evidence clearly establishes that the main scales were moved up to the factory position only in October 2013:

i) Mr Pillar's evidence is that it was **Interfish** which insisted on the relocation of the fish hopper and the main scales to the factory prior to completing the purchase of the business to improve the quality of fish produced in the factory. This is confirmed by an email he sent on 30 December 2013 in which he referred to Mr Anderson having made pipeline changes in time for the October 2013 season and that subsequently Marine Scotland attended the site, walked the length of the fish pipe and “confirmed the new location of the scale/intake belt”. Marine Scotland “witnessed the scale calibration and then sealed the scales with tamperproof seals”.

ii) Mr Ritchie and Mr Reid also confirmed in their second witness statements that the scales were moved only in Autumn 2013.

iii) In his third witness statement, Mr Pillar produces the maintenance logs kept for the scales. These are a record which Fresh Catch and then Northbay was required to keep by Marine Scotland in order to record any work carried out on the scales and to record instances when the seals may have been removed or replaced under their authority. The logbooks show that on 22 October 2013 the scales were disconnected from the electricity supply to allow them to be moved. The entry for 22 October 2013 reads:

“phoned Peterhead Fishery Marine Scotland 0800 for officers to be on site 0900 Peterhead Marine Electric to disconnect electric and open box so to move flow weight/Scanvagt

table/motor box to new area near factory new position".

180. The maintenance log also records that the electrics were disconnected and removed to the new area. On 25 October 2013 the makers of the scales, Marel, came to check and repair the electric circuit and confirm that the scales were now working. The seals were fitted by Marine Scotland. There is no equivalent entry in 2012 for any similar work.

181. I therefore find that the main scales were only moved in October 2013 and that the water return pipe method of diverting fish so that they entered the factory without passing over the scales was available from 2005 until October 2013.

182. **The pulse encoder method** A pulse encoder on the weighing scales flashes intermittently to record the speed of the conveyor belt which carries the hoppers filled with fish over the scales. The scales then use an algorithm to calculate the volume of fish and the weight from the flow rate readings. A genuine fault occurred in early 2013 which meant that the weight of the catch was being under-recorded. When the pulse encoder stopped working someone in production noticed that the fish were travelling over the scales as normal, but the fish were not registering, and the weight was not being recorded accurately. The pulse encoder was replaced. As a result of this Mr Anderson had unintentionally stumbled across a means of manipulating the scales. It was possible to tamper with the pulse encoder by altering its position so that its signal would not be detected and it would thus not register the speed of the conveyor belt. This resulted in the algorithm used to calculate the weight of fish over the scales being inaccurate.

183. Mr Reid's evidence is:

"23. I know that [Fresh Catch] frequently manipulated the scales to under-record the weight of fish, because Chris often instructed me to adjust the pulse encoder to manipulate the scales and I regret to say that I followed those instructions. Chris would usually contact me during the production to ask "have you had a break today" and I would say "no". Chris would then say "have a 15 minute break" which would mean that I should turn off the pulse encoder for 15 minutes. If Chris had said "have a 30 minute break", that was the code to turn off the pulse encoder for 30 minutes. During that time, the scales would not be recording the weight of fish accurately …. Part of the conditions imposed on [Fresh Catch] after Operation Trawler included a limit on the flowrate (i.e. the minimum or maximum we could pump in one hour). We pumped a maximum of around 30 to 35 tonnes per hour, so in a "15 minute break" around 7.5 tonnes could be pumped over the scales and in a "30 minute break" around 15 tonnes could be pumped over the scales".

184. Mr Reid expanded on this explanation in his evidence. He said that when the pulse encoder was not working properly an alarm would sound in the Portakabin outside the factory where the control panel was installed. Although this could not be heard from the factory it could certainly be heard by people walking around close to the Portakabin. Thus it was too risky to tamper with the pulse encoder for a long period at a stretch. The 15 or 30 minute "breaks" were therefore not achieved all in one go but were carried out for short intervals throughout the landing.

185. **The sprat room method** When the main scales had been located near Tank 9 the facilities available for processing the fish after they had passed over the scales included piping

leading to a sprat room. There was a sprat pipe which fed from the main fish pipe into a separate sprat processing area in the factory. Historically, Mr Ritchie says, the pipe was used to divert very small fish into the sprat room for grading through the sprat grader. When the scales were located in the Tank 9 position, the sprat pipe was situated after the weighing scales so that the sprats had been weighed before they were diverted into the sprat room. Once the main scales had been moved up to the factory that piping and the sprat room became redundant and were not generally used; sprats were just moved through the factory and processed in the same way as the other fish. However it was possible still to pump fish through the sprat pipe into the sprat room as a means of diverting fish from the boat to the factory without passing over the scales. The sprat pipe was wide enough to receive the ocean run from the 14 inch fish pipe.

(ii) The scale of black fishing during the Fresh Catch period

186. There was a stark clash of evidence between the parties as to the scale of black fishing during the Fresh Catch period. Mr Anderson's evidence was that the water return pipe method was only operated for a few months after the water return pipe was reconfigured, he says, in 2011. He says that not long after this system was installed "one vessel got greedy" and wanted to resurrect some form of undeclared landings which Mr Anderson says he "flat out refused". He therefore took out the adaptation to the pipe. Shortly afterwards a senior fisheries officer from Marine Scotland visited the factory and walked the whole tunnel with him so that Fresh Catch could demonstrate that there was no diversion of fish. Other fisheries officers inspected the system and were happy with the pipework over the summer or autumn of 2011.

187. So far as the pulse encoder method is concerned Mr Anderson's evidence in his second witness statement was that he knew nothing about it at the time but that he learned from his subsequent conversations with Mr Reid and Mr Ritchie that this method of tampering with the scales had been designed by Mr Reid and was only used for landings by the Altaire. He only found out about this in November 2014.

188. I have already described Mr Reid's and Mr Ritchie's evidence that black fishing through the water return pipe took place on a substantial scale from 2005 to October 2013. **Interfish** say that their evidence is supported by two sets of documentary records maintained by Fresh Catch from 2008 onwards. Fresh Catch was required to keep a number of official records and to produce these to (or make them available for inspection by) the relevant authorities. The official records showed the amount of fish declared to the vessels and the authorities. The official records included:

i) automated reports printed by the scales and showing the fish that had passed over them, including the "Trip Total Report" (for each individual landing) and the "Total Weight Report" (for a particular period); Both these reports recorded the weight of fish over the scales (including the water assumed to be 2% of the total weight) and were sent to Marine Scotland.

ii) a sales note produced by Fresh Catch showing the weight of the fish passing over the scales given to the vessels for their records. This showed the same weight as shown in the Trip Total Report but minus 2% of the weight assumed to be water. Fresh Catch was required to send a copy of the sales note to the authorities in accordance with the relevant regulations;

iii) a production sheet (for the internal use of Fresh Catch) maintained by Mr Ritchie

containing details of the species, grade and weight of fish that had been processed through the factory for each landing. The production sheet would record a lower weight than the Trip Total Report because some of the weight would have been lost in processing when the fish were filleted and gutted.

189. Fresh Catch also maintained what appeared to be a detailed summary of all boat landings in hardback red books called the Fish Analysis but referred to at the trial as the Red Books. These could be produced to Marine Scotland if there was an audit. They were also used for calculating the amount of IPR. Mr Ritchie was put in charge of maintaining these books in 2008.

190. **Interfish** say that separately, however, from at least 2008 Mr Anderson instructed Mr Ritchie to keep an accurate record of the actual amounts of fish landed and processed through the factory for each landing. Mr Ritchie's evidence is that in 2008 Mr Anderson asked him to keep these records because the huge volumes of fish that were not recorded in the official documents made it difficult to know what stock was in the cold store and whether any of the stock was being stolen. The accurate records were kept in a series of black-covered books, showing the boat name, the date of landing and the actual weight of fish landed per catch. These books were referred to during the trial as the Black Books.

191. The volume of fish that bypassed the scales can be calculated by subtracting the official figure recorded in the Red Books from the figure for the same landing recorded in the corresponding Black Book. Thus for example with a landing of mackerel from a vessel on 7 October 2010, the relevant Black Book shows that 889,046 kg of fish were landed. The actual amount of fish processed was 146,487 kg higher than that shown in the corresponding Fish Analysis Red Book and declared to Marine Scotland and HMRC and 140,240 kg higher than the amount shown in the sales note for that landing.

192. In relation to the Black Books, Cool Seas pleaded in its Defence to the amended cross-petition that it made no comment “as to the existence, date or provenance or their true purpose”. Disclosure was given of the original Black Books, Red Books, and other landing documents in February 2018. There was no challenge pursuant to CPR 32.19 to the authenticity of any documents.

193. In a witness statement made in March 2018, Mr Anderson said that he did not believe that the Black Books could date back to 2009 to 2011:

“I do not believe that these date back to 2009 to 2011 because documents of that age would have been stored in the archives that were destroyed in the fire. I understand that the supposed “Cold Store Records” are nearly entirely written in pencil; that was never a practice I permitted or was aware of at Fresh Catch in respect of any records”.

194. He described the disclosure given by **Interfish** as selective and incomplete. He also said that there were a large number of examples in the Red Books where the weight recorded as having passed over the scales in the landing documents is in fact higher than the weights recorded in the Black Books showing he said “the opposite of theft”. He also commented that the difference between the fish declared and the fish recorded as landed was sometimes very great and that this could not have been done without the vessel's knowledge because a vessel's captain will usually have a very close idea as to how much fish they are landing.

195. In response to a request for further information to which Cool Seas had been ordered by the court to respond, Cool Seas repeated its position that Mr Anderson had no knowledge of black fishing after 2005 and stated that it was “neither admitted nor denied” that two separate sets of documentation were maintained at the factory. **Interfish** were “put to proof of the creation, provenance and purpose of these documents”.

196. The skeleton argument served by Cool Seas shortly before the hearing described the Black Books and other records produced by Mr Ritchie and much of Mr Reid's and Mr Ritchie's evidence as “dishonest fabrication”. Cool Seas said that in the absence of expert forensic accounting and authentication evidence it was difficult to place much weight on the records. In opening the case, Mr Benson who had been instructed only shortly before the trial on behalf of Cool Seas maintained the unpleaded allegation that at least the Black Books had been forged but fairly accepted that the pleading needed to catch up with the evidence. I directed that the allegations of forgery and dishonesty should be properly pleaded rather than simply being contained in Mr Anderson's most recent witness statement. In the further amended Defence to Counterclaim it was alleged that the Black Books produced by Mr Ritchie were forgeries.

197. By the time that the witnesses gave evidence at the trial therefore it was accepted by Cool Seas that Mr Anderson and Colin Anderson had been aware of black fishing taking place both during the Fresh Catch period and during the Northbay period. But they contended that it had been on a very much smaller scale than **Interfish** alleged; that Mr Colam had asked for fish to be under declared during the landings of the Altaire in October 2013 and January 2014, that the evidence of Mr Ritchie and Mr Reid of Mr Anderson's knowledge over many years of very substantial illegal fishing was fabricated for dishonest motives and that one or both of them had forged a very significant amount of purported documentary evidence.

198. Unfortunately the Black Books were not available in court at the trial. This was explained in a witness statement from Ms Ashton of TLT produced during the trial. She explained how the documents had been produced for inspection by Cool Seas's solicitors in February 2018. All the documents were then seized by the police from the Northbay site at the end of March 2018 and could not be released for production in court. However there was one original black book showing mackerel landings from September 2013 to the end of January 2017 which was available.

199. I have no doubt that the Red Books and the Black Books and their accompanying supporting documents are genuine documents created at the time they say they were created and for the purposes that Mr Ritchie describes.

200. It is wholly implausible to suppose that Mr Ritchie would have either the time or inclination to carry out such a widescale and complex fabrication inventing hundreds of entries of weights from vessels. The grounds on which Mr Anderson based his suspicions that the documents were not genuine seemed flimsy at best. He said that the books would have been destroyed in the fire if they had existed by January 2015. This was countered by evidence that they were not kept in the part of the plant that was affected by the fire. He said that the entries would have recorded the yields as well as the weights of the fish. But there is no reason to include the yields in the Black Books since they could be checked from other documents.

201. Mr Anderson's evidence is also undermined by that of Mr Betts, giving evidence for

Cool Seas:

"I am aware that Mr Ritchie kept a series of small black books, usually A5 size, in the bottom drawer of his desk. He referred to them as his 'Bibles' and seemed very protective over them. I understand that he used these to record the yields of the fish landed, to keep a note of what different sizes and cuts of fish had come from each landing. I saw him use these books both during my time as night manager (2005-2010) and later when I was the fish buyer for [Northbay] (2012-2017). Mr Ritchie would refer back to these books if there were ever questions regarding the quality of the fish that had been landed. I never had any reason to believe that these books contained an "unofficial but correct" record of the fish landed."

202. I am therefore fully satisfied that black fishing took place on a substantial scale during the Fresh Catch period at the instigation of Mr Anderson and with his knowledge. It was not limited to the Altaire or to a few other vessels. Whether or not it was done with the connivance of the vessels' skippers is more difficult to ascertain. Where the discrepancy between the Black Book and the Red Book weights for a particular landing are very substantially different this indicates that the skipper must have known that there was at least some black fishing going on, unless there was a particular reason why he would not be alerted to something wrong when he was paid for only a proportion of the fish that he estimated was in his holds. But given the serious consequences of a finding that a particular skipper or vessel was engaged in this practice and the absence of any real evidence on the point, it would be wrong for me to make findings about particular landings. Clearly if the fish was skimmed and not paid for but included in the processed fish sold on by Fresh Catch that would exacerbate the distortion of the financial data more than if the fish were paid for but duty not accounted for to HMRC. The most likely position is that described by Mr Ritchie in his evidence, namely that the answer is a little of both – if the plant helped the vessel by hiding fish that would preserve the vessel's quota then the vessel could hardly complain if the factory got some benefit from the transaction in the form of a smaller amount of free fish.

203. In any event, the fundamental point made by **Interfish** is that Mr Anderson's knowledge that the business of Fresh Catch was based on this fraudulent business model and that is, I find, established on the facts.

(iii) Did Mr Colam know about black fishing?

204. Cool Seas' defence to the allegation that both Mr Anderson and Colin Anderson knew about the Fresh Catch black fishing and that they wrongfully failed to disclose this to their fellow Northbay directors is that Mr Colam knew about it. Mr Anderson's evidence was that at some point before the Altaire landed in October 2013, Mr Colam had told Fresh Catch to "do something to help the vessel" otherwise he would direct the boat to land its fish elsewhere. Mr Anderson said of Mr Colam:

"His words were "the vessel is a mixed fishery at the moment and you need to do something to help the vessel.". I took this to be a reference to diverting fish through the sprat pipe. Jan Colam told me that I had to come up with a method to do this. It was clear that he meant an illegal method. He said to me, "if you need to send trucks without paperwork, we can send the trucks up so that you don't have any paperwork".

205. Mr Anderson then described a complicated procedure whereby 180 tonnes of

undeclared fish from the October 2013 landing were diverted through the sprat room and then hidden by being trucked to **Interfish**'s site at Plymouth. Mr Anderson elaborated on this evidence in his third witness statement made on 3 May 2018. He said that the conversation between him and Mr Colam about the Altaire landing in October 2013 was a conference call in the boardroom and was overheard by Mr Ritchie. He now said that the small fish was kept in production at Fresh Catch and not transported down to Plymouth but he still maintained that the Altaire gained 180 tons of undeclared fish. He also referred to the landing of the Altaire in January 2014. He says there was a subsequent telephone conversation with Mr Colam in which Mr Colam said they should hide the undeclared fish by overfilling the loading bins. The bins could carry up to 550kg of fish but were declared as carrying only 425kg. Mr Anderson's evidence was supported by that of Colin Anderson who also claimed to have heard Mr Colam's instruction to hide fish from the Altaire landing.

206. Mr Colam's evidence is that he only found out in September 2016 from Mr Ritchie that Mr Anderson had continued to land blackfish at Fresh Catch from 2006 onwards. Mr Pillar's evidence was that when he and Mr Colam went up to the Peterhead site in early October 2016 Mr Ritchie took Mr Colam to one side and explained that he had many documents which showed that black fishing had continued from almost as soon as the Operation Trawler raids had occurred. Mr Pillar and Mr Colam then had a meeting with Mr Ritchie at which he explained that he had kept a log of all landings at the request of Mr Anderson. These logs were the Black Books. Mr Colam vehemently denied that he had ever made any request or given any instruction for black fishing to take place.

207. Having considered all this evidence I am fully satisfied that Mr Colam had no knowledge of any black fishing having been carried on during the Altaire landings in October 2013 and January 2014 or subsequently. Mr Colam's denial is supported by Mr Pillar's evidence in his second witness statement that the Altaire had sufficient quota available to her and fished in accordance with her production plans and quota management rules. There was therefore no incentive to engage in this kind of practice. I also consider it would have been counter-productive. The purpose of the October 2013 landing of the Altaire was as a trial landing to assess the competence of the Fresh Catch business as part of the investigation into whether **Interfish** should invest a substantial amount of money in buying that business. It would not make sense to skew the figures derived from the landing by black fishing.

*(iv) Relevance of black fishing during the Fresh Catch period to the **Interfish** cross-petition*

208. Does it matter whether Mr Anderson was engaged in black fishing during the Fresh Catch period? Cool Seas say that **Interfish** was investing in Northbay and that Northbay was not buying Fresh Catch as a company but only the physical assets and goodwill of Fresh Catch. **Interfish** was well aware of Fresh Catch's involvement in Operation Trawler in relation to black fishing prior to 2005. The transaction was structured as an asset purchase specifically to ensure that Northbay did not inherit any liabilities to which Fresh Catch might be subject arising from the business before the transfer to Northbay. There was no particular relevance to Northbay of any wrongful conduct on the part of Fresh Catch.

209. To meet this point it is important to understand why **Interfish** say that the black fishing by Fresh Catch is linked to unfairly prejudicial conduct on the part of Mr Anderson, Colin Anderson and hence Cool Seas. The pleaded case refers first to the warranties given by Fresh Catch and Cool Seas as sellers under the APA to Northbay as buyer. Mr Anderson signed the APA both on behalf of Fresh Catch and on behalf of Northbay in his capacity as director of both. Fresh Catch and Cool Seas acknowledged in clauses 2.1, 2.2 and 5.1 of the APA that the

assets and goodwill were purchased by Northbay on the basis of and in reliance on the warranties set out in clause 5 of and Schedule 12 to the APA. Those warranties included an express warranty pursuant to paragraph 3.1 of Part 1 of Schedule 12 that all financial and other records in respect of the business "have been fully, properly and accurately prepared"; that they "constitute an accurate record of all matters that ought to appear in them" and that they do not contain any material inaccuracies or discrepancies. Further there was a warranty in paragraph 3.1 that all statutory records required to be kept in respect of the business had been properly kept or filed; that the accounts were true and accurate in all respects and gave a true and fair view of the financial position of the business. There was a further warranty in paragraph 4.2 that the accounts fully provided for liabilities of Fresh Catch incurred in relation to the Business and fully provided for or disclosed by way of note all contingent liabilities of Fresh Catch in relation to the business. Further pursuant to paragraph 4.3 it was warranted that the management accounts had been properly prepared by Fresh Catch in accordance with good accounting practices, that they fairly represented the financial position of Fresh Catch as at 30 November 2013 and the 18 month period then ended and that there were no unusual exceptional or extraordinary items which materially affected such accounts and which had not been disclosed.

210. Since I have found that black fishing took place on a substantial scale, it must follow that, to the knowledge of Mr Anderson, Fresh Catch and Cool Seas had omitted disclosures from the disclosure letter and were in breach of the warranties. Fresh Catch's accounts significantly overstated the historic profitability of Fresh Catch in that the cost of sales was not accurately or properly recorded in respect of under recorded fish and unpaid duty and/or other taxes. Black fishing also rendered Fresh Catch at risk of having to pay substantial fines or having its registration as a buyer under the relevant regulations suspended or revoked. I accept **Interfish**'s contention that the evidence shows that Fresh Catch's business model was reliant upon landing unreported fish, with the effect that the price paid by Fresh Catch for its supply of fish was artificially depressed and its apparent profits were based to a significant extent upon processing and selling illegal fish.

211. Further it follows that Fresh Catch had failed to record the true costs of sales and unpaid duty thereby artificially increasing the value of Fresh Catch on the balance sheet, profit and loss account and cash flow statements. The cross petition alleged that Northbay suffered loss and damage, that being the difference between the value of the goodwill and assets of Fresh Catch as warranted and the true value of the assets and goodwill. It was pleaded that the true value was significantly less than the purchase price and was no more than £3.4 million.

212. In my judgment Mr Anderson at a time when he was already a director of Northbay knew full well that:

i) the warranties that were being given to Northbay by Fresh Catch and Cool Seas were completely untrue;

ii) the financial data he provided to Baker Tilly were misleading because the level of profitability that they showed was reliant on unlawful fishing which depressed the costs of sales, produced false yield figures purporting to show that less fish was used to achieve the given production figures than was in fact the case and inflated profits;

iii) the other directors of Northbay involved in the decision whether Northbay should buy the Fresh Catch business knew nothing of this;

iv) Northbay was paying too much for the business it was buying; and

v) the person who benefited from this overpayment for the business was Mr Anderson through his companies Fresh Catch and Cool Seas.

213. The effect of the omission of the costs of the black fish and the failure to pay duty on imported fish on the financial data used by Northbay when deciding what to pay for the Fresh Catch business was explained by Mr Sanders. He has adjusted the business model that Baker Tilly produced and on which the **Interfish** directors relied in deciding to cause Northbay to buy the Fresh Catch business to add back in £6,180,854 costs of sales. This figure assumes that all the black fish was acquired free of charge and also includes an allocation of the HMRC liabilities I have already described. He compares the model in fact sent to the bank on 23 December 2013 to secure the financing for the deal with an adjusted model incorporating the additional cost of sales. This shows:

i) that profits before tax are significantly reduced between 2009 and 2012 including a profit before tax of only £23,000 in 2009 and £253,000 in 2012 and losses in 2010 and 2011 of £169,000 and £730,000.

ii) the projections of gross profit margin between 1 January 2014 and 31 December 2018 are also significantly affected. The projected profits before tax shown in the model provided to the bank in December 2013 were £17,595,000 whereas the projected profits in the adjusted model including the additional costs of sales is only £7,678,000.

214. Mr Sanders concludes that had the truth been known at the time of the transaction **Interfish** would not have been interested in buying the Fresh Catch business and certainly would not have agreed to the purchase price of £9,546,000.

215. Mr Sanders' evidence may overstate the position if some of the fish were in fact paid for. But it still shows that Mr Anderson's ongoing failure to disclose the true position led to a substantial overpayment.

216. On this part of **Interfish**'s petition I therefore conclude that there was extensive black fishing during the Fresh Catch period, that Mr Anderson was fully aware of this and must have realised that he benefited personally from the overpayment by Northbay for the business resulting from the inflated profit figures in the Fresh Catch accounts. His failure to disclose this information to his fellow board members of Northbay either before or after the transaction took place in January 2014 amounts to unfairly prejudicial conduct on the part of Cool Seas.

(d) Non-disclosure of disputes with HMRC

217. I have described earlier the problems that Fresh Catch had with HMRC. There are two other issues between the parties that need to be resolved. The first is whether Mr Anderson told Mr Colam about the previous problems with HMRC and if he did not, the second issue is whether it would have made any difference to **Interfish**'s decision to enter into the joint venture if Mr Colam had been told about the problems.

218. Mr Anderson's evidence was that he did discuss the problems with Mr Colam prior to **Interfish**'s decision to go ahead with the deal. Mr Colam's evidence is that he only found out about these problems in May 2016 once the documents in Mr Anderson's office had been investigated following his suspension.

219. I prefer Mr Colam's evidence on this point. It is supported by the fact that no disclosure was made of these issues with HMRC in the Disclosure Letter. If Mr Anderson had explained to Mr Colam the full extent of the problems, he would have been keen to confirm this by qualifying the express warranties given by Fresh Catch and Cool Seas in the APA that the Seller was not involved in any dispute with HMRC that might materially affect the business or any of the assets and that it had complied in all material respects with all statutory tax provisions. Mr Anderson tries to blame his advisers for this failure to disclose. But they made it clear that it was his responsibility to ensure that full disclosure was made. I note also Mr Pillar's evidence that Mr Anderson did disclose a small historic issue about PAYE issues for which a provision of £50,000 had been made in the accounts. In fact on investigation this turned out not to be a PAYE issue but a dispute with HMRC about incorrectly claimed expenses on foreign trips. A number of emails passed between Mr Taylor and the tax advisers about how this should be resolved with HMRC. This should have brought home to Mr Anderson how seriously **Interfish** took disputes with HMRC even over relatively small sums. I accept Mr Pillar's evidence that when this issue came up he said to Mr Anderson that they needed to be aware of everything that had affected the business and asked him to make sure that everything was put down in the formal disclosure answers.

220. Cool Seas in its submissions sought to minimise the importance of these problems with HMRC. In respect of the failure to pay duty on the non-EU fish, it submitted that this arose from a generally held misconception in the industry about whether duty was payable on fish caught in EU waters by non-EU vessels and whether EU waters extended only to 12 nautical miles of an EU member state or encompassed the whole EU exclusive economic zone. Mr Anderson describes this liability as the result of an entirely innocent misunderstanding which was historic and would have made no difference to the deal. I do not accept that explanation of what happened. There is some correspondence between the Herring Buyers Association and HMRC raising this question but there is nothing to suggest that there is any link between this and the failure of Fresh Catch to pay duty. It is much more likely that the non- payment of duty arose from Mr Anderson's persistent failures to ensure that Fresh Catch complied with its legal obligations in many aspects of its business including tax.

221. As to the failures to pay duty in 2013 when there was no IPR arrangement in place I have already described the findings of dishonesty made by the First-tier Tribunal (Tax Chamber). Cool Seas point to the fact that the fine imposed was reduced on the grounds of full and early co-operation. If disclosure had been made to qualify the warranties, it is submitted this would not have put off any purchaser, not least because the liabilities were not being passed over and it was well known by all involved that this was a time of economic stress for Fresh Catch.

222. As regards these problems, and the COP9 investigation, Mr Anderson seeks to brush these off saying that Mr Colam “is a man of the world and would not have been troubled by further disclosure on this aspect and so it cannot be said that there is any causative consequence to any proven breach”.

223. I reject Cool Seas' submission that there was no deliberate concealment by Mr Anderson here. I recognise, as Mr Anderson says in his evidence, that one of the main reasons the transaction was structured as a sale of plant and assets rather than a sale of Fresh Catch's shares was to ensure that all liabilities and potential liabilities owed to HMRC would remain with Fresh Catch. But I reject his evidence that he thought that this meant that the problems he had with HMRC, despite their nature and scale, were not relevant to the decision by Northbay whether or not to go ahead with the purchase of the Fresh Catch business. He was aware that this had the potential to cause serious problems for Northbay given that he would continue to be closely involved in the management of the business in the future.

224. Further, I reject the submission that disclosure of the problems with HMRC would have made no difference to the **Interfish** directors' decision to cause Northbay to buy the Fresh Catch business. Mr Colam's evidence on this was very clear. He says that if **Interfish** had had any knowledge that Fresh Catch was in dispute with HMRC about recent payments of duty they would not have supported Northbay entering into the transaction. He would have realised that Mr Anderson was not the reformed character that he said he was and he would not have been interested in going into business with him.

225. As to Mr Colam's views as “a man of the world”, Mr Anderson referred to proceedings between **Interfish** and HMRC between 2010 and 2014 concerning whether payments made by **Interfish** to sponsor a local rugby club could properly be deducted from profits as advertising and marketing. The tribunal and subsequently the Court of Appeal held that the payments had not been made wholly and exclusively for the purpose of trade and were not deductible. That kind of dispute is many miles away from the kind of trouble that Fresh Catch was in with HMRC. It does not establish that Mr Colam was unconcerned by tax evasion.

226. The failure of Mr Anderson to disclose to **Interfish** and his fellow Northbay directors the extent of Fresh Catch's problems with HMRC did have a direct effect on the Northbay business in that HMRC were very reluctant to grant Northbay IPR relief despite **Interfish**'s good reputation in the industry. It was only when Mr Colam found out the truth about the problems that he understood why HMRC had questioned Mr Sanders closely about Mr Anderson's ongoing involvement in the business.

227. I therefore find that Mr Anderson's failure to disclose to his fellow Northbay directors either before the completion of the purchase of the Fresh Catch assets or thereafter amounts to unfairly prejudicial conduct of the affairs of Northbay by Mr Anderson and hence by Cool Seas.

(e) The landing of the Altaire in January 2014 and the Haugagut landing in February 2016

228. I have already considered the evidence of the black fishing from the Altaire shortly before the purchase by Northbay of the Fresh Catch business in October 2013. Evidence relating to the continuation of black fishing with the knowledge of Mr Anderson and Colin Anderson after Northbay took over the business focused on the landing of the Altaire in January 2014 and on the landing of the Haugagut in February 2016.

229. Mr Ritchie's evidence is that in January 2014 he received instructions from Mr Anderson to divert fish from a landing of the Altaire into the sprat room to bypass the scales. He says that he received his instructions on 9 January 2014 which was the final day of a three-day landing. He recalled this because it was the first landing after **Interfish** had taken over the business. Mr

Anderson asked him to calculate the percentage of small fish from the landing. Once he had worked this out and told Mr Anderson; Mr Anderson then instructed him to “hide the smalls”. He asked Mr Anderson how he could do this because he was not aware that it was possible after the scales had been relocated to the factory. Mr Anderson told him to use the sprat room. His evidence is that this caused him to panic because there was not much fish left from the landing still to pass into the factory. To divert enough fish to correspond to the weight of the small fish across the whole catch would mean diverting most if not all of the remaining fish coming in to the sprat pipe. But that would clearly raise suspicions in the factory if there was a pause in fish coming through for processing whilst the ship was still clearly off-loading:

“I recall asking Chris if 'Plymouth' (i.e. **Interfish**) and the 'boat' (i.e. the Altaire) were aware that fish was to be diverted into the sprat room and Chris's response was “yes”. I did not know otherwise. Chris had also told everybody after the takeover that everything would be the same as before and the only difference was that instead of “Fresh Catch”, it was now “Northbay”. I therefore followed Chris's instructions to divert fish into the sprat room in order to bypass the scales on the understanding that this is what everyone … had agreed.”

230. Mr Ritchie goes on to say that he instructed a colleague to operate the valve on the fish pipe to divert fish into the sprat room. Once the fish was diverted he loaded the fish into plastic skips with the help of three other men and moved them to the production conveyor belts where they manually emptied the skips into the production system with the fish that had been over the scales. His belief was that this was the only occasion on which method of bypassing scales was used. This was because it was difficult to calculate the weight of the diverted fish and the only way of getting the fish from the sprat room back to the conveyor belts was very labour-intensive and messy.

231. On around 9 February 2016, a new Norwegian vessel called the Haugagut made a landing of capelin at Northbay. Capelin is fished in non-EU waters off Iceland and is therefore subject to the payment of import duty. It should be stored in a bonded warehouse and kept separate from non-bonded fish. It is not in dispute that during the landing Northbay's scales were apparently misreading because of some legitimate defect. Marine Scotland had been informed of this and it had been agreed with Marine Scotland that until the problem with the scales was fixed, Northbay could provide postproduction weights to Marine Scotland rather than the weights of the unprocessed fish shown on scales. Marine Scotland said they would attend the site throughout the landing in order to confirm the count of the boxes with Northbay.

232. Mr Anderson's evidence was that the captain of the Haugagut had reported 650 or 670 tonnes on the Norwegian Internet Auction. Northbay bid for the catch and won so the Haugagut came to land its catch at Northbay. When the ship came in, Mr Betts reported the vessel to the fisheries and HMRC in accordance with the standard procedure. Mr Anderson's evidence is that the Captain of the vessel later said that this was a new boat and he was not yet completely familiar with how much it was holding whilst fishing. In fact he thought he had more than 650 tonnes. This created a problem for the skipper because he did not want to be over his declared weight and outside the permitted tolerance for his estimate in his skipper's logbook. He therefore asked Northbay to take the fish without declaring it. He said to Mr Anderson “if you pay me the 650 you can keep the rest”. Mr Anderson says that he told the captain that he was not prepared to do that and as far as he was aware the whole catch was landed, processed and produced.

233. Mr Ritchie's evidence is that he was the one whom the skipper of the Haugagut initially asked to “help” with the excess fish. He also understood this to be a request for Northbay to

take the fish without declaring it. But he says he then saw the skipper speaking to Mr Anderson and a short while later Mr Anderson came to see him (that is Mr Ritchie) and said they should store the excess fish in the cold store. Mr Ritchie says “I refused to do this but Chris kept saying “just take 6 racks of fish, it will be okay””. Mr Ritchie did that - his evidence is that Mr Anderson took the extra fish as a favour to the skipper in the hope that he would return to Northbay. Mr Anderson told him that the fault with the scales was lucky because Northbay could blame any discrepancy on the fault that had already been reported.

234. At about 3 pm before Marine Scotland arrived at the site, Mr Ritchie says that Mr Anderson instructed him to tell the cold store supervisor to take the extra fish from the blast freezers and to hide it in the cold store. This was in breach of the requirement that all non-EU fish be declared and stored in a bonded cold store warehouse. When Marine Scotland arrived (in response to the earlier notification about the fault with the scales) they carried out a stock count in the blast freezers to use as a proxy for the weight of the landed fish. The extra fish in the cold store was not included in the stock count.

235. Mr Ritchie says further that on either 10 or 11 February 2016 he told Colin Anderson about the extra fish and specifically told him that he did not want to lie to HMRC. But Mr Anderson later instructed Mr Betts and Mr Ritchie to submit figures to HMRC recording the weight as 771,491 kg (which was the figure declared to Marine Scotland) rather than the true weight which was 789,091 kg (a discrepancy of 17.6 tonnes). The false figures were thus reported to Marine Scotland and HMRC.

236. I accept Mr Ritchie's evidence on this point. I am sure that Mr Anderson told him to accept the black fish from the Haugagut and to hide the fish in the cold store so it would not be counted by Marine Scotland. I can see no reason why Mr Ritchie would take the enormous risk of hiding the fish if Mr Anderson had told him not to do so. I find that this is another significant instance of black fishing instigated by Mr Anderson and that it constitutes unfairly prejudicial conduct on the part of Mr Anderson, as a director of Northbay in putting the company's business at risk of considerable fines and the revocation of its licence.

237. On around 4 March 2016 after Mr Anderson had been suspended, Mr Colam told Mr Ritchie that auditors were coming to Northbay to carry out a full audit on the cold stores. Mr Ritchie realised that this would be problematic given the extra fish from the capelin landing were still there. He therefore telephoned Mr Pillar to tell him what had happened. Mr Pillar told Mr Ritchie that he would report the matter to Marine Scotland and HMRC and rectify the situation. There was a discussion over the phone on 11 March 2016 between Mr Pillar and Colin Anderson. Mr Pillar says that Colin Anderson suggested that they should say simply that they had found 16 extra pallets which had turned up in the stock take. Mr Pillar made it clear he was not prepared to take that course. He confirmed to Colin Anderson that he had taken legal advice on behalf of Northbay and would follow that advice to ensure the best protection of Northbay's position.

238. On 11 March 2016 Mr Pillar telephoned Allan Gibb the Head of Sea Fisheries Compliance at Marine Scotland and on the same day wrote to him giving notice of the under-declaration of fish. The letter said that the gross weight of the Haugagut's capelin landing was under-recorded and that Northbay was “concerned that this mis-recording may have been deliberate and resulted from the directions of a member of [Northbay's] management team, Chris Anderson.” The letter referred to the 17.6 tonnes of fish had been moved to the cold store “apparently at Mr Anderson's direction” and had not been accounted for in the Marine Scotland declaration or the HMRC bonded warehouse declaration.

239. Also on 11 March, Colin Anderson emailed Mr Colam and Mr Pillar saying that there had been extra pallets of fish undeclared because of the fault with the scales. He said that he had told Mr Ritchie to declare the full weight to HMRC but that this had not been done. He expressed his concern that HMRC would remove the bonded warehouse authorisation and that Mr Anderson's personal guarantee held as security by HMRC in respect of IPR relief for non-EU origin fish might be in jeopardy. He said that as a director of Northbay he intended to report this to HMRC himself to protect Northbay's interest. There was a further meeting on 14 March 2016 at which Mr Pillar again told Colin Anderson not to contact HMRC because Northbay's solicitors were already handling the matter with HMRC and Marine Scotland. They were explaining the misreporting of the catch in a way that minimised the risk to Northbay. Mr Ritchie was also at that meeting and confirmed in his evidence what Mr Pillar said.

240. However on 15 March 2016 Colin Anderson emailed HMRC stating that he needed to amend the import weight number to 789,091kg “due to miscount on production stock”. This was completely untrue and cut across the position that was put forward by Northbay solicitors on Mr Pillar's instructions a few days later, namely that additional fish had been unlawfully landed without declaring it but without the authority of Northbay. On 24 March 2016, Northbay's advisers RSM (formerly Baker Tilly) contacted HMRC to make a formal “voluntary disclosure” in relation to the fish not entered to customs warehousing following the Haugagut landing. HMRC confirmed on 29 March 2016 that there was a breach of legislation and that it would normally consider enforcement action. However, it did not propose to do so given that the discrepancy had only come to light as a result of Northbay's “openness and honesty”.

241. Colin Anderson's evidence was that he had concerns over Northbay losing its customs warehouse authorisation if HMRC had decided to investigate the under recorded landing. He says that although he was told that the matter was in the hands of the company solicitor, this was not enough to alleviate his concerns. He did not accept that Mr Pillar was entitled to give him an instruction not to contact HMRC. I reject this evidence as incorrect and self-serving. He must have realised that if the matter was being dealt with by the company's solicitors it was inappropriate for him to contact HMRC as well. Further he was fully aware that the explanation that he gave of an innocent miscount was untrue. He was certainly not acting in the best interests of Northbay when he took it upon himself to write to HMRC in those terms. It is not surprising in my judgment that this incident led to Colin Anderson's suspension. This is a further instance of unfairly prejudicial conduct by a director of Northbay nominated by Cool Seas.

(f) The Anderson Marine cross charge

242. It is common ground that during the negotiations leading up to the establishment of Northbay, Mr Colam and Mr Anderson agreed that the Anderson Marine boat building business could continue to occupy the 1954 Boat Shed on the Peterhead site and that Anderson Marine could use Northbay employees. Mr Anderson says in his written evidence that even before Northbay bought the business, Anderson Marine would pay an annual fee of about £50,000 to Fresh Catch to cover the staff use and the use of shared facilities. The advantage to Fresh Catch was that during periods without fish the business could retain staff and keep them busy.

243. There are three elements to be considered here:

i) payment by Anderson Marine of rent to Northbay for the occupation of the 1954 Boat

Shed;

ii) payment by Anderson Marine to Northbay of ancillary expenses such as a contribution to utilities charges and the use by employees of the subsidised canteen on the site;

iii) payment by Anderson Marine to Northbay for the use by Anderson Marine of Northbay employees.

244. So far as the rent and ancillary expenses are concerned this is relatively straightforward. In their negotiations in Autumn 2013, Mr Colam suggested a rent of £30,000 per year. Mr Anderson said he was unhappy with this amount and that he would come back with alternative figures but he never did so. Mr Anderson says that the level of monthly rent for the Boat Shed was never agreed. It does not seem to be in dispute that in fact no monthly rental has been paid. Northbay has issued an invoice to Anderson Marine for rental of £25,000 for each of 2014 and 2015 for the use of the Boat Shed. This figure was provided by Mr Colam and is supported by a letter sent to Jimmy Anderson on 24 July 2015 showing that the rent for a 10,000 ft.² warehouse in Peterhead would cost £50,000 per year. The reduction to £25,000 a year allowed by **Interfish** more than reflects the slightly smaller size of the Boat Shed.

245. I find that Mr Anderson has behaved in an unfairly prejudicial manner towards Northbay's other shareholders by failing to set a rental amount or to cause his other company to pay an appropriate rent for the use of this space.

246. Similarly as regards payment of utilities, since Anderson Marine paid a contribution to Fresh Catch's utilities before the transfer of the business in January 2014, Mr Anderson can have been under no misapprehension that the same would be expected by Northbay. There has never been any payment in respect of utilities and other ancillary matters. Again I find that Mr Anderson has acted in a manner which is unfairly prejudicial by failing to ensure that Anderson Marine accounted for the ancillary services it received from Northbay in its use of the site. This includes the use by employees working for Anderson Marine of the subsidised Northbay canteen at the Peterhead site. The fact that this was not discussed between Mr Anderson and Mr Colam in the negotiations for the sale of the Fresh Catch business does not relieve Mr Anderson, as a director of both companies, from ensuring that appropriate arrangements were put in place. However I accept the point that Colin Anderson makes in his statement that the provision of the subsidised canteen also worked to the benefit of Northbay because people tend to take shorter breaks if they do not have to leave the site to buy food and drink.

247. The position regarding the use of Northbay employees for Anderson Marine work is more complicated. There are two areas of dispute between the parties. The first relates to the terms of the agreement for the payment for Northbay employees and the second relates to how much work was in fact done by Northbay employees for Anderson Marine. The second issue as to how much use Anderson Marine made of Northbay employees is not something that the parties have asked me to resolve in this judgment. It should be capable of being resolved at the next stage of valuing any adjustment to the share price or assessing how much compensation Northbay should receive before the shares are valued.

248. Mr Colam's evidence is that his concerns about Anderson Marine's activities at the site arose very shortly after the completion of the purchase of the business. He was told by his

management team who had visited Peterhead that the site was still littered with Anderson Marine boats and other equipment. He realised that it was normal to retain a smaller number of full-time experienced staff during the off-season to work alongside less experienced seasonal staff recruited on a temporary basis during the busier fishing season. But by March 2014 which was six weeks after the end of Northbay's first fishing season there were still over 100 employees on Northbay's payroll and there had been no reduction in wage costs. He assumed that the high staffing figures were because Anderson Marine was using the labour during the off-season. He therefore expected to receive a substantial cross charge payment from Anderson Marine but no payment materialised.

249. Mr Colam and Mr Sanders monitored the situation and then raised it with Mr Anderson in late March or early April 2014. Mr Colam told Mr Anderson that there should be proper timesheets in place to work out which staff were working for Anderson Marine. Mr Anderson denied that Anderson Marine was using Northbay employees, saying that they were doing other jobs for Northbay including painting, cleaning rust off forklift trucks and gutting fish. In response to Mr Colam's questions about the payment of rent and utilities for use of the Boat Shed, Mr Anderson told Mr Colam that his brother Jimmy was working on the figures and would get back to him.

250. Nothing further was heard. Mr Colam arranged a meeting in Plymouth for 23 April 2014 to address his growing concerns about the costs of Northbay staff and the lack of any payments coming from Anderson Marine. Mr Pillar and Mr Colam attended along with Mr Anderson, Mr Taylor and Mr Ritchie. Mr Colam's aim at the meeting was to understand how many staff Northbay actually needed and so to work out whether they could reduce overheads during the non-fishing season. However Mr Anderson and Mr Taylor were unable to provide any figures or accounts or details and could not answer the questions that Mr Colam had. The meeting concluded with Mr Colam telling Mr Anderson that he wanted the outstanding cross charge payments to be brought up to date both as regards the rent for the Boat Shed and for the use of employees.

251. Mr Pillar's evidence is that during a break at that meeting Mr Ritchie spoke to him out of earshot of Mr Anderson to say that Jimmy Anderson had been working for Anderson Marine since mid February 2014. Mr Ritchie said that the use of Northbay employees was causing problems because other Northbay employees were not being paid overtime by Northbay because of the lack of fish to process whereas those that were used by Anderson Marine were able to earn overtime payments working in the Boat Shed. However Mr Anderson denied this when the meeting reconvened.

252. Mr Pillar asked Mr Ritchie to arrange for key Northbay employees to provide details of their role and their duties so that he and Mr Colam could understand the staffing position. Following the meeting, on 30 April 2014, Mr Ritchie sent emails to Mr Pillar enclosing job descriptions he had obtained from members of the office staff, and the cold store. None of them said that they had done any work for Anderson Marine. By late May 2014, Mr Colam had still not received the information he had asked for about how much time had been spent by Northbay employees working for Anderson Marine. He asked Ms Goodrum to implement departmental timesheets so that **Interfish** had more visibility as to where and when Northbay staff were working.

253. Ms Goodrum visited the Peterhead site on 20 May 2014. She discovered that between four and seven cold store staff were working for Anderson Marine. She visited the Peterhead site again in early June 2014 with Ms Musgrave. They produced a report dated 4 June 2014.

The report stated that Mr Anderson was using numerous Northbay employees to work for Anderson Marine and ACIL. Mr Colam's evidence is that since it was now June 2014 and there had still been no payments from Anderson Marine for rent, labour or overheads he was “pretty angry” and very disappointed that Mr Anderson had not honoured the terms of the agreement between them. He says:

“In circumstances where Chris knew that **Interfish** was concerned about Northbay staff costs, and he had an obvious conflict, I considered that it was totally inappropriate to permit Anderson Marine to be a further drain on Northbay finances”.

254. As a result of Ms Goodrum's report, Mr Colam emailed Mr Anderson on 4 June 2014 saying that he was not prepared to authorise any more wages without Mr Anderson sticking to the agreement that had been made the previous October and discussed in detail in April. Mr Anderson's response was to assert that the amount of money owed by Anderson Marine to Northbay was less than £8,000 and that he was owed about £33,000 by Northbay to reimburse him for expenses incurred that he had paid for with his personal credit card. Fresh Catch was also owed some money by Northbay. Mr Colam says, and I accept, that he thought it was “pretty outrageous” that Mr Anderson apparently wanted unilaterally to set off monies he claimed were owed to him personally or to Fresh Catch from Northbay against monies that he had agreed that Anderson Marine would pay to Northbay. He also points out that Mr Anderson had not invoiced any credit card expenses by that stage (although he later did so and these were paid in September 2014).

255. Mr Colam, not surprisingly, began to be concerned that Mr Anderson seemed to be ignoring the fact that he was no longer the sole owner of the business and that it was no longer appropriate for him to treat it as one of a number of businesses that were interchangeable in his eyes. Mr Colam therefore refused to allow any such set off. On 5 June 2014 Mr Colam spoke to Mr Anderson by telephone. They agreed that Anderson Marine would vacate the site and pay all outstanding cross charges.

256. On 12 June 2014 Anderson Marine raised a cross-charge invoice to Northbay for £783.29 plus VAT (an amount which was paid by Anderson Marine in August). Mr Colam regarded this as a derisory figure and was offended that Mr Anderson thought he could get away with impliedly asserting that by coincidence the only work that Northbay employees had done for Anderson Marine happened to be on the days when Ms Goodrum and Ms Musgrave visited the site and saw them working. It also did not include any payment for rent for the 1954 Boat Shed or utilities. There was a further conversation between Mr Colam and Mr Anderson in which Mr Anderson agreed that he would provide details of all the cross charges payable by 25 June 2014. Nothing was provided.

257. After dealing with some personal difficulties, Mr Colam returned to the issue of the cross charge in September 2014. Mr Sanders raised with him a suspicion that the timesheets that they were receiving for the staffing of the cold store were incorrect. The cold store staff were in fact working for Anderson Marine, even though this was now the fishing season and the agreement had been that staff would be used only during the off-season. Mr Colam spoke to Mr Ritchie who confirmed that this was the case. This meant that Northbay was incurring the cost of taking on seasonal staff while at the same time having experienced staff taken away from the cold store without any payment being made by Anderson Marine.

258. There was another phone call between Mr Colam and Mr Anderson in early October

2014. Mr Anderson again agreed to pay all the cross charges due and they agreed that Anderson Marine could remain on site until the end of the year to allow more time for an alternative site to be made ready. During that call the two men agreed that Anderson Marine could continue to use Northbay employees until the end of the year on the condition that all prior cross charges were paid in full and that appropriate cross charges would continue to be applied on a weekly basis until 31 December 2014. Despite the agreement no further payment was received from Anderson Marine. Everyone's attention was then distracted from this issue by the fire in January 2015.

259. There is still a great deal of uncertainty therefore as to how much work was done by Northbay staff for Anderson Marine throughout 2014. Anderson Marine has only ever paid the invoice for £783.29. Mr Colam is convinced that a great deal of work was done by Northbay employees, that Mr Anderson has consistently ignored or avoided all his questions and requests for information and that the job sheets that have been provided by Jimmy Anderson are false in so far as they show that the cold store staff did either no work or very little work for Anderson Marine over the period 2014 and 2015.

260. Moving forward to November 2015, Mr Colam told Ms Bettinson and Ms Musgrave that he wanted them to look into a number of issues when they visited the site including whether office staff and other Northbay resources were being used by Mr Anderson for his other companies. As Ms Musgrave put it in her written evidence, Northbay had not been processing fish for around 11 months and yet they had retained almost the entire workforce – Mr Colam wanted to know what they were doing.

261. On 19 November 2015, Ms Musgrave and Ms Bettinson visited the Site along with Rachel Colam (**Interfish**'s Company Secretary). During the visit, they obtained copies of a selection of the G4S security logs recording when people entered and exited the Site. The visit followed the receipt from Mr Ritchie of production registers for the period June to October 2015 which were supposed to show where Northbay employees had been working each day. These comprised a twice-daily record of Northbay employees' whereabouts on a day-to-day basis produced for health and safety reasons.

262. It was obvious from a limited review of the security logs during the visit, that Northbay employees were entering and exiting the site at various times during the day and it was generally the same members of staff. Ms Musgrave recognised some of the names as Northbay employees working in the cold store. She asked Mr Ritchie about this and he confirmed that they were all cold store staff who were leaving the site to work at the Anderson Marine boat shed located at Reid's Pend which was about 1 mile from the site. Mr Ritchie told her that the same staff members were returning to the site to use Northbay's canteen for the lunch and tea breaks and she saw that indeed the cold store staff members were in the canteen when she visited it.

263. On their return to Plymouth in November 2015, Ms Bettinson started to analyse the production registers and security logs in detail with Ms Musgrave and other colleagues. Ms Bettinson then started to compile invoices for Northbay to send Anderson Marine based on the information she obtained. On 9 December 2015, Ms Bettinson's work led her to conclude that six Northbay employees provided 579 days of labour for Anderson Marine during the period between 1 January 2015 and 31 December 2015.

264. The next day, 10 December 2015, Mr Anderson, Colin Anderson and Mr Ritchie

attended a Northbay board meeting in Plymouth. Mr Colam gave Mr Anderson a copy of the analysis by Ms Bettinson. The spreadsheets contained data from 70 Northbay employees over 40 weeks. They showed that since January 2015 some of the Northbay employees had only been working on average 14 hours on site. Mr Anderson requested 24 hours to review the spread sheets. Mr Pillar's evidence is that Mr Anderson was evasive at the meeting and had to be pressed very hard before he made a commitment to tackle his brother Jimmy about the figures. Despite his promise to deal with the matter within 24 hours, no further information was received from Mr Anderson. On 14 December 2015 Mr Anderson reported that Jimmy was going through the signing in and signing out sheets of Anderson Marine employees since the beginning of 2015. Once that task was completed the cross charges would be applied.

265. In mid December 2015 Mr Betts and Mr Ritchie spoke to three of the cold store staff who were employed and paid by Northbay but who confirmed that they had been working in the Anderson Marine Boat Shed for 40 hours per week for many months. The three also confirmed that their only pay was from Northbay.

266. On 18 December 2015, Colin Anderson emailed Mr Colam to concede that Northbay employees had provided at least 458 days of labour to Anderson Marine in 2015. This figure was 75 days less than the figure calculated by Ms Bettinson but Colin Anderson did not provide any explanation for the difference. As Colin Anderson failed to respond to Mr Colam's requests for more evidence to back up his figures, Mr Colam insisted that the whole amount that Ms Bettinson had calculated should be paid. Although Colin Anderson initially indicated that Anderson Marine would pay this, he then tried to set off against it sums which he said were due from Northbay to Anderson Marine for work that the Anderson Marine people had carried out on the rebuild in late 2015. Mr Colam rightly in my view denies that any such set off should be allowed since any monies owed to Anderson Marine for work on the rebuild would be owed by ACIL not by Northbay.

267. At a board meeting on 21 December 2015, Colin Anderson agreed that Anderson Marine would make an interim payment for sums accepted as owing and stated that this would be paid the following day. On 22 December 2015, Colin emailed Mr Sanders to confirm that Mr Anderson would “do the Anderson Marine re-charges for the work on the pits” that evening. However, he suggested that there would need to be a “contra” and that the balance would be paid the following day.

268. Further requests for payment were made to Mr Anderson and Colin Anderson at a management meeting on 29 December 2015. Still nothing was forthcoming. In January 2016, Colin Anderson issued a Northbay invoice to Anderson Marine (backdated to 31 December 2015) for £30,071.40 (plus VAT). No supporting narrative was provided for this invoice and it was not enough to cover the 458 days of labour that Colin Anderson had conceded had been provided to Anderson Marine in 2015. No payment was in fact made by Anderson Marine.

269. Between 1 July and 4 July 2016, TLT sent letters of claim on behalf of Northbay to Cool Seas' solicitors in respect of claims against Mr Anderson and Colin Anderson for breach of duty and claims (including the failure to pay agreed cross charges) against Anderson Marine. The Anderson Marine cross charge invoices were calculated as follows:

i) For the year 2014, Anderson Marine owed £176,437.70 plus VAT (comprising £79,002.94 for the labour of five named individuals, £25,000 for rent and £72,434.76 for utilities and canteen use);

ii) For the year 2015, Anderson Marine owed £202,797.25 plus VAT (comprising £93,290.03 labour for seven named individuals, £25,000 for rent and £84,507.22 for utilities and canteen use).

270. Mr Ritchie's evidence which I accept was that Anderson Marine's use of Northbay labour had a negative impact on Northbay. During most fishing seasons there were occasions when Northbay was left short of staff because people were working for Anderson Marine. He asked Mr Anderson on several occasions to let Northbay have some of the men back from the Boat Shed but he was always told to speak to Jimmy Anderson and Jimmy Anderson was never prepared to let Northbay have its employees back. Mr Ritchie says that when the herring season started on 23 July 2014 Mr Anderson told him to take on agency staff for the fishing seasons to help out in the factory and cold store, despite the fact that agency staff were more expensive and tended not to have enough experience or licences to operate forklift trucks. Northbay therefore ended up paying for the Northbay staff who were working for Anderson Marine as well as incurring the cost of additional agency staff without any compensation from Anderson Marine.

271. I have no doubt based on this evidence that Mr Anderson and Colin Anderson and hence Cool Seas behaved in an unfairly prejudicial way in their management of Northbay by failing to put in place a proper system for accounting for the time spent by Northbay paid employees working for Anderson Marine and in failing to pay for the time that was spent. They abused the concession that **Interfish** directors made in allowing the Anderson Marine business to remain on site and to use the Northbay labour. They failed to implement any steps to manage the clear conflict of interest that existed between them as directors of Northbay and as owners and directors of Anderson Marine. I accept Mr Ritchie's evidence that the Northbay business suffered because of the preference that Chris and Colin Anderson showed for the Anderson Marine business over the Northbay requirements and their failure to control how Jimmy Anderson used Northbay's assets for the other business.

272. Mr Anderson's evidence and that of Colin Anderson is that Anderson Marine could not have used staff to the extent shown in the spreadsheets during 2015 because the business only built two boats that year and Anderson Marine employees were working on the demolition and the rebuild on behalf of Northbay. But I do not see that they are entitled to the benefit of any doubt about the extent of the use of Northbay labour. In any event Ms Bettinson and Ms Musgrave's evidence is that they carefully distinguished between those Northbay employees whom they calculated as having worked for Anderson Marine and those whom they treated as having worked for ACIL as discussed below. Mr Anderson has wholly failed to keep his side of the bargain. If Anderson Marine is unable to show that the hours used were more limited than appears from the contemporaneous documents, then that is a matter for which they are to blame as they failed to put in place proper procedures for monitoring the work in fact done.

273. The second dispute is as to the terms of the cross charge. Mr Anderson says that it was initially agreed that staff would be paid for on a time spent basis. Mr Colam says that he specifically stated that if Anderson Marine did use Northbay employees then they must be accounted for on a daily basis but employed and paid for by Anderson Marine on a weekly basis. He says he expressly gave the example that they would not rent out employees to Anderson Marine for a day and a half because if they did so they would have to pay them for the other three and half days without having any work for them. He says that Mr Anderson seemed to accept this. Mr Anderson denies that there was such an agreement. He says that Mr Colam only started to insist on this in retaliation for Mr Anderson challenging the payment

that **Interfish** had required from Northbay for the Baker Tilly and TLT fees; the fees which form part of Cool Seas' petition in these proceedings. Even then, he says, the shift in Mr Colam's position was from Anderson Marine being entitled to cross charge only for each hour that it used the employee to being required to pay for the whole day; not that Anderson Marine would have to pay for the whole week.

274. Cool Seas submit that Mr Colam's version of the agreement is a very advantageous deal to have been struck between business partners with no meaningful prior dealings. Given that Mr Colam was an experienced business man, he was unlikely to have left such an advantageous deal undocumented. There is no contemporaneous evidence either supporting or undermining the existence of such an arrangement. Cool Seas say that Mr Anderson would never have agreed to enter into such an arrangement. There is no reason for it to pay a week's wages for a day's work (or less) for Northbay staff: it would have been better to take the worker full time or recruit on the open market.

275. There is no evidence before the court to allow a comparison between the cost to Anderson Marine of Northbay labour on the basis that Mr Colam contends was agreed and the cost of recruiting labour on the open market. I do not know whether it would have been possible at the time to engage sub-contracted labour on a daily basis rather than a weekly basis. The charges set by third party contractors may well have been higher than the reimbursement figure that Northbay was charging. I cannot conclude therefore that the arrangement for which Mr Colam contends would not have made commercial sense for Anderson Marine.

276. Conversely it is clear that Northbay would have been greatly disadvantaged if it retained an employee for a week but only received a cross-charge for part of that week from Anderson Marine. The intention was that the Northbay staff would only be used during the non-fishing season, although I accept Mr Ritchie's evidence that Anderson Marine also took employees away from Northbay work when they were in fact needed at Northbay. I do not see any reason why Mr Colam should have agreed to Northbay effectively subsidising the use of the work force by Anderson Marine to that extent. I am therefore satisfied on the balance of probabilities that the agreement was as Mr Colam recalls it, namely that if Anderson Marine used a Northbay employee in the Boat Shed or at Reid's Pend, they would reimburse Northbay for a week's wages for that employee.

(g) The ACIL cross charge

277. On 11 March 2015, Mr Colam, Mr Pillar and Mr Anderson discussed the instruction of ACIL on the rebuild of the factory after the fire at a meeting in Plymouth. Mr Anderson's clear potential conflict of interest relating to the instruction of ACIL was authorised on the following conditions. First, Mr Anderson would be required to represent the interests of Northbay and somebody else (suggested by Mr Anderson to be Mr Brailey) would manage the rebuild on behalf of ACIL. Secondly, the rebuild would be totally transparent and “open book”, with full documentation provided to Northbay to evidence the costs incurred. ACIL would undertake the rebuild at cost, net of all trade discounts. It would not be entitled to charge a profit margin on the rebuild and an uplift for profit would be agreed at completion. Mr Pillar described the agreement as being that ACIL would charge reasonable staged payments which they would support by providing the sub-contractor or supplier invoices.

278. There is a conflict of evidence regarding the terms on which it was agreed that ACIL

could use Northbay employees. Mr Anderson's evidence is that the agreement regarding the use of Northbay staff on the rebuild was “as simple as “we will use Northbay staff where possible to keep the cost down””, and that he made “one exception” to this in invoicing the staff training costs to Northbay. Mr Colin Anderson's evidence was that it was agreed at an early meeting that the use of Northbay employees as free labour would make the project cheaper. This clearly made sense as they would be idle otherwise while the factory was being rebuilt and if Northbay labour did not help out, ACIL would have to hire labour which would then be charged back to Northbay.

279. **Interfish**'s position is that it was agreed at the meeting on 11 March 2015 that Northbay employees could continue providing general labour to ACIL on the rebuild. ACIL was required to account for the time spent by Northbay employees on the rebuild. ACIL would be invoiced for its use of Northbay employees on the rebuild, with such sums either to be paid by ACIL or set off against the rebuild costs.

280. Mr Benson submitted that there was an inconsistency in **Interfish**'s case that on the one hand any payment from Northbay to ACIL would be limited to reimbursement of invoices paid by ACIL to third-party contractors and their contention that somehow ACIL would have to give Northbay credit or payment for its use of Northbay labour. As Northbay knew, ACIL does not have its own funds; if the only money it was getting in from Northbay was the money it had paid or was about to pay out for materials and subcontracted labour then it had no funds to either pay or give credit for the wages of Northbay employees.

281. The **Interfish** witnesses denied that there was any such inconsistency. They tried to explain to me in the witness box how all the elements in the arrangement that Mr Colam described was supposed to work. But I formed the impression that they really had no clear idea about how this payment or credit from ACIL to Northbay would actually work in practice. Mr Sanders' evidence is also that invoices would be based on cost only with an uplift applied on the successful completion of the rebuild. He says after the meeting on 11 March 2015 Mr Colam and Mr Pillar “made it clear to me that ACIL's invoices to Northbay would include labour supplied by Northbay and Northbay, in turn, would invoice ACIL for that labour”. But this is not consistent with his response in December 2015 when Mr Taylor chased him for payment of an ACIL invoice. He replied that although they were disappointed that they had not heard anything from Mr Anderson about projected costs to complete the work, “we do not want to hold up building works by having contractors unpaid.”. They therefore approved the payment of the invoice of £800,000 plus VAT to ACIL “on the basis that those funds will be used to pay the costs incurred by suppliers shown on the attached schedule”. This indicates to me that he accepted that the whole amount was to reimburse for third parties' fees. The comment does not make sense in the context of the amount including a charge for Northbay employees.

282. Some of the **Interfish** witnesses referred to other suppliers to the rebuild project who also operated on an “open book” basis in the sense that they provided Northbay with their own invoices supported by the invoices that they had received from and paid to their own subsuppliers or subcontractors. These companies, such as Andrew Cowie Construction, the witnesses said did what ACIL was supposed to do, namely give credit against their invoices to Northbay for the use that they had made of Northbay employees. But the arrangements with those other companies were different from the arrangement with ACIL in an important respect. They had agreed with Northbay a price for the work they were going to carry out which presumably included their own profit margin and their estimate for all the expenses that they would incur in doing the job including all labour costs. It was straightforward therefore for them to ask, for example, for stage payments which would aggregate to the agreed price for the job and against which they could give credit for costs they had saved by using Northbay

employees whose wages were being paid by Northbay. But with ACIL there was no fixed price for the job set at the outset of the work and no uplift or profit margin incorporated - that was going to be agreed at the completion of the works. It is true that ACIL provided Northbay with an estimate of the overall cost of the works on 26 March 2015. But no one treated that as a fixed price for the job and it certainly was not intended to include a profit. There were many unknown factors still at that stage.

283. The picture as to what the parties thought would happen is muddied by some additional factors. The first is a dispute as to what was included in that 26 March 2015 estimate of £5,962,480. Did it include the cost of all labour, including Northbay employees or only the labour which ACIL anticipated having to engage in addition to the Northbay employees? **Interfish** rely on the fact that it includes an item “all labour, travel and accommodation” which had not been included in the original estimate. Mr Brailey who drew up the estimate was asked about what was included. His evidence was as follows:

“Q. … There's a reference to labour? Do you see there is a reference in that to "labour-related items" in those three lines I just showed you?

A. Yes.

Q. So this is a quote including the costs of labour?

A. Yes. That would have been for the panelling labour, et cetera.

Q. Just the panelling or for the project as a whole?

A. I'm not 100 per cent sure, to be truthful, at this moment in time, because obviously three years has passed or so.

Q. Okay.

A. But normally the subcontractors used to work on what we used to call a nine/ten-day shift. They came up on the Monday, they worked Tuesday right through to the following Thursday and then went home for a long weekend. Now, to make sure that we could keep the project moving along, I got in extra labour so that one crew went home and the other crew stayed on site. So we always had subcontractors on site at all times.

Q. I mean, on a quote, would you expect labour to usually be included in a quote?

A. Absolutely.

Q. Sorry?

A. Yes.

Q. So you think it is likely that this does include labour, then?

A. Doesn't or does?

Q. Does. Does.

A. It does include labour, yes.

Q. That was my question. Let me put the question again. Do you believe that this quote includes labour or not?

A. I believe it does include labour.

Q. Thank you."

284. This passage is rather ambiguous but it seems to me that Mr Brailey was not there referring to having included the costs of Northbay employees available at the site but only the subcontractors' crews engaged to work on the rebuild. On balance I find that the notional cost to ACIL of using and paying for Northbay labour was not included in this estimate.

285. The second factor liable to cause confusion is that I am sure that it was agreed that the extent to which Northbay labour was used by ACIL should be recorded, whether or not there was going to be a cross-charge. This was for the purposes of the insurance claim arising from the fire that was being negotiated with Aviva. Clearly if Northbay was going to keep its labour force in place and pay them over the period when the factory was out of commission, they would want to be able to claim that cost from Aviva either as incorporated in the cost of the rebuilding work or as part of a business interruption claim. At the time that this decision to engage ACIL and use Northbay employees was arrived at in March 2015, the discussions with Aviva were at an early stage and it was not clear how this element of the claim was going to be dealt with.

286. But ACIL agreeing to record the hours spent by Northbay employees on the rebuild is not the same as agreeing to charge for them and then give a credit for them. **Interfish** rely on the evidence of Mr McConville that although he was not a party to the discussions about the arrangements, he believed that the cross charging of Northbay had been agreed. But it is not clear to me from his witness statement or from his evidence when he was asked about this in cross-examination whether he is saying anything more than he knew that ACIL would be using the Northbay staff. The fact that the use of Northbay labour was going to be recorded does not help in determining how the cost of that labour was going to be dealt with as between Northbay and ACIL.

287. The third confusing factor is that although Mr Anderson's evidence is that the agreement was that ACIL would seek payment from Northbay against its own suppliers' and subcontractors' invoices that is not in fact what happened. There were initially some sub-contractor invoices for major disbursements that were presented by ACIL to Northbay for

reimbursement. These were promptly paid by the **Interfish** management team. It seems clear from the documentation that these invoices simply passed through to Northbay the sums that ACIL had paid the contractor or supplier. There was nothing in the invoices which reflected either ACIL adding on some amount for its labour charges or giving credit to Northbay for use of Northbay employees.

288. But ACIL also submitted substantial round figure invoices that were paid by Northbay without any supporting documentation. In total ACIL produced round sum invoices totalling £3,530,000. These described the work being billed as follows:

i) invoices on 28 February, 15 April and 26 May 2015 totalling £380,000 for demolition work;

ii) six invoices over the period June to December 2015 totalling £3.15 million for items such as “interim payment to materials on site”, “cold store roof”, “stage payment for steelwork, cladding and electrical” or more simply just “to ongoing work”.

289. There were many attempts by **Interfish** between June and the end of 2015 to obtain more information from Northbay about what these sums were for. **Interfish** particularly wanted to know whether they included a charge by ACIL to Northbay for labour used, against which some credit needed to be given to the extent that the charge for labour related to use of Northbay employees. I accept Mr Colam's evidence that he found the lack of information and Mr Anderson's refusal to engage with the issue very frustrating. He now suspects that this “wall of silence” had a more sinister motive namely to conceal various problems that were being encountered with the rebuild on site.

290. It seems to me that the real issue in dispute here is not so much what was agreed at the March 2015 meeting but whether those round figure invoices included a charge for the use of labour including Northbay employees. If they did then there should be a credit given by ACIL to Northbay to set against those invoices. If, as Mr Anderson, contends those round sums do not include any charge for Northbay employee labour but were needed to pay a large number of smaller subcontractor and supplier invoices that ACIL incurred in the course of the works, then Northbay has not in fact double paid for the employees and there is no cross charge or credit to be given.

291. Mr Colam's evidence is that given the size of the round sum invoices and Mr Anderson's refusal to provide supporting information, he firmly believes that these included labour costs for work in fact carried out by Northbay employees so that a cross charge should have been documented and applied. In particular, ACIL invoiced £380,000 for demolition at the Northbay site and **Interfish**'s investigations have only been able to account for under £200,000 of third party costs. If the remaining amount is a labour cost, then there should be a substantial cross charge. What is clear is that a substantial amount of Northbay labour was used in the rebuild work. Mr Ritchie says that ACIL directly employed seven or eight workers on the rebuild who were responsible for panelling the blast freezers, factory walls and factory roof. He says that as far as he was aware Mr Anderson did not ask anyone to keep any records or timesheets of Northbay labour that was used on the rebuild. At the end of January 2015 Mr Ritchie started keeping the production registers which were initially sent to Mr Sanders and then sent to Plymouth after Ms Bettinson's visit in November 2015. **Interfish** has worked out using the security logs and these production registers that during 2015 ACIL used over £700,000 worth of Northbay labour.

292. In any event, because ACIL stopped work on the site before the building work was finished and before anything approaching the £6 million originally quoted had been paid to them there is a substantial reckoning exercise to be carried out. The parties were agreed that that was not one of my tasks. The next stage of these proceedings will need to focus on an analysis of what documentation ACIL can produce to show that the monies that it has received from Northbay were justified by other disbursements to suppliers and subcontractors and that it has not received any payment from Northbay in respect of use of Northbay labour.

293. I recognise that **Interfish** found the inefficiency, to put it at its lowest, of Mr Anderson and Mr Brailey in failing to provide backup documentation to justify the invoices he submitted to Northbay for payment. I also accept that **Interfish** were expecting to receive not only proper documentation showing the outgoings paid by ACIL to its own suppliers and subcontractors but also a record of the use that ACIL had made of Northbay employees. Although I have not made any finding as to whether Mr Anderson acted in breach of his duty to Northbay by causing ACIL to charge Northbay for use of Northbay labour without giving a corresponding credit, I am satisfied that more broadly Mr Anderson was in breach of his duty to Northbay by failing to ensure that the arrangements with ACIL was sufficiently clear and were properly implemented. It was never the intention of either party that ACIL would submit round sum invoices for such large amounts without any supporting documentation. It was certainly unfair of Mr Anderson to place Northbay and **Interfish** in a position where they had to pay out such large sums of money to keep the building works going without any clear idea of what the money had been or would be used for. To that extent at least Mr Anderson and hence Cool Seas have conducted the affairs of Northbay in a manner which is unfairly prejudicial to the other shareholders.

(h) Use of Northbay office staff for other Anderson businesses

294. A further allegation brought by **Interfish** against Mr Anderson and Cool Seas of unfairly prejudicial conduct is in the use of Northbay office staff carrying out work for other Anderson businesses, whether operating at the Peterhead site or elsewhere. Mr Colam accepts that in the early negotiations with Mr Anderson they discussed the possibility that office employees might be needed to help Fresh Catch with accounting and other matters for a short period after completion. This was referred to in the draft heads of terms. But Mr Colam says this was not included in the final agreement and was not agreed by him.

295. There were two separate occasions when the office staff were asked to provide details of their work. Soon after the acquisition of the business by Northbay, Mr Ritchie was asked to provide job descriptions for a number of key staff; some office workers and some factory workers. Mr Ritchie sent two emails on 30 April 2014 to Mr Pillar attaching the job duties for some of the office staff and some of the plant workers including all cold store employees. One of the office staff, Helen Brown, did refer to the fact that she was working for ACIL. As **Interfish** began to ask for more regular information about staff movements Mr Ritchie raised the issue with Mr Anderson at the end of May or early June 2014. Mr Anderson told him that he had reached an agreement with Mr Colam about this although Mr Ritchie's understanding was that the staff use by other Anderson companies needed to be paid for. When challenged, Mr Anderson there were monies owed in both directions and it would all be sorted out eventually.

296. The second occasion was much later, in January 2016 when Ms Bettinson and Ms Musgrave returned to Peterhead to continue their investigation into what was going on with progress of the rebuild and where Northbay employees were working and for whom. Ms Musgrave spoke to some of the office staff who told her that they were mostly working for E2 or

Anderson Marine. She also obtained from Mr Taylor timesheets for all the office-based staff at Northbay asking them to summarise who they worked for, their position and their daily duties. In her written evidence she describes what this disclosed:

i) Claire Wedderburn showed that she worked almost exclusively for Anderson Marine and E2. Her daily duties included dealing with Anderson Marine's finances and banking, producing contracts and records of boat sales and processing payments. Her summary made no specific reference to any duties or responsibilities carried out on behalf of Northbay - indeed Ms Musgrave formed the view that Ms Wedderburn did not appear to recognise that she was employed by Northbay. Mr Pillar also describes how he rang the main telephone number for the Northbay office for a telephone management meeting only to hear the office member answering the phone saying “Anderson Marine” rather than “Northbay”.

ii) Marion Thompson provided a list of work she had performed for Northbay and Mr Anderson's other businesses including a haulage company, ACIL and Fresh Catch. She had been preparing quarterly VAT returns and processing expenses for ACIL, dealing with sales invoicing and inputting payments and receipts for Fresh Catch and managing Fresh Catch's bank statements.

iii) Caroline Leiper was employed by Northbay as an accounts/clerical assistant. However her job summary showed that she worked almost exclusively for Anderson Haulage and ACIL save for a small amount of time preparing transport invoices and providing cover at the reception desk for Northbay.

iv) Helen Brown also recorded having spent a significant amount of time working for ACIL.

v) Anastasia Ragozina was employed by Northbay as a payroll administrator but also said that she had been involved in processing the payroll for ACIL as well as dealing with ACIL invoices, cheques and post.

vi) Lisa Marie Buchan was on maternity leave at the time of Ms Musgrave's visit to the site on 5 January 2016. However a later document review shows that from 3 February 2014 Ms Buchan sent almost 3000 emails on behalf of Anderson Marine indicating that she was being used by that company on a full time basis.

297. The accountant Mr Taylor drew up the accounts for other Anderson companies as well as Northbay. Ms Bettinson discovered when she visited the site on 19 November 2015 and logged on to the SAGE system using the login details of one of the office staff that about 13 different companies were using the same SAGE system set up for Northbay. This was also confirmed by the evidence of both Mr McConville and Mr Brailey.

298. Given the clear conflict of interest between Mr Anderson in his role as director of Northbay and as the director of or shareholder in these other companies benefiting from Northbay's resources, it was his responsibility to ensure that an appropriate account was made to Northbay of the use made by his other companies of Northbay's resources. In fact there were no attempts to account for their use of the staff. Mr Anderson's evidence is that Mr Colam said to him during the negotiations in 2013 that as far as his other companies' use of the premises “everything would run as normal” and “everything that you guys run will carry on as

previously". Mr Anderson accepts that this did not mean they could be used free of charge; there would need to be recharges for the continued use by the other companies of what was now Northbay's administration team and functions.

299. I do not believe that Mr Anderson deliberately concealed what was going on at the Northbay offices from **Interfish**. Mr Anderson is at fault in not putting proper arrangements in place for the staff's time to be accounted. But I reject the suggestion that he deliberately disguised what they were doing or took steps for example to exclude them from access to the SAGE software to prevent them from seeing what was happening as **Interfish** now alleges.

(i) Lynsey Anderson

300. **Interfish** complain that Mr Anderson also misused Northbay's resources by authorising the payment of sums in the form of remuneration to Lynsey Anderson despite the fact that they say she provided few or no valuable services to Northbay during 2014 or 2015.

301. Ms Anderson's employment was transferred across from Fresh Catch to Northbay under TUPE when Northbay acquired the business. Her evidence is that she continued doing her job in the way she had done before. She had no written contract and no set contractual hours. Her written evidence was that when she was employed by Fresh Catch and then by Northbay she would generally work varying hours depending on the work that she was required to do. This could include long or limited hours, day or night, weekdays and weekends. She was never told to keep a log of the hours she worked. The work would be carried out from the office or from her home and or abroad when travelling. In 2014 her salary was £34,500 and in 2015 this rose to £35,400. She had the benefit of a company pension scheme, a mobile phone and health insurance. Following the fire in January 2015 she generally worked from home and attended exhibitions in her role as Sales Manager. She no longer had a desk at the Peterhead plant and did not need to be there. Working space was limited because of the widescale destruction caused by the fire and there was not enough space to accommodate all the office staff on site. As there was nowhere for her to sit, she thought it was better for everyone that she continued to work from home. She was never told by anyone from **Interfish** to work in a different way. As to the nature of her work after the fire she says:

"14. The nature of my work after the fire mainly consisted of informing customers and suppliers in order to retain the relationships we had built up with them and keep the [Northbay] name in the market during this difficult period. We felt that we needed to keep customers informed as to the situation to keep ahead of the rumour mill. Firstly, we updated them with the exact news of the fire and the parts of the factory that had been lost, so they knew what we were able to do and what we were not able to do. For example, we could not do any form of processing, but we were able to provide cold storage for remaining products and for anyone that may require additional cold storage. This task was particularly tricky as we had lost a lot of paper documents, such as business cards and enquiry sheets in the fire.

15. Once the initial shock of the fire had subsided, and customers had, to the best of our ability, been informed about the situation, the next step was to update everyone and let them know that we would be rebuilding and back in the market as soon as possible. The feeling at this time was that sales and marketing was more important than ever, as we had to get the message out to customers that the company was still open for business. It was incredibly important to keep customers aware that we would be back as many thought we would not rebuild and no longer be a supplier. If we had not kept in touch, they would be talking to other suppliers and forming

relationships with them, rather than [Northbay]. This would have been devastating to [Northbay], given the amount of time and effort that had gone into nurturing relationships with good customers over the years. My long standing relationships with customers were therefore more important than ever. During this time, I would stay in contact with customers and stress that we were doing everything possible to get the [Northbay] factory operational as soon as possible. We wanted customers to know that we would get in contact with them as soon as we could process fish again."

302. Ms Anderson says no one from **Interfish** raised any concern about her work. Her evidence is that she had in the past sold millions of pounds worth of fish to the African market and could have sold a lot more if it had not been for the fire. She believes she was doing a good job in difficult circumstances achieving above market prices for the product. She attended exhibitions including Bremen, Boston, Moscow, Dubai, China, Japan and Hong Kong. As to her role at the exhibitions she says:

"21. At the exhibitions, I was in charge of making sure customers and suppliers were looked after, and that their enquiries for the future were noted and discussed. I also made sure that the staff we hired knew what was required of them, including translators in foreign countries. I would teach the basic questions to ask visitors to our stand and be there to answer any questions that arose. Although the larger stands are built by others, I would have helped to set up the stand and clean and stock the stand with food and drink. At the smaller exhibitions, you are required to do everything yourself, the stand is just a shell and must be built from scratch. There are lots of problems that can arise, such as missing furniture, missing fish samples, defrosting of the samples and issues with the freezers so I was always on the go at the exhibitions and they were very busy days."

303. She needed to go to the exhibition venue five or six days in advance to sort out the preparation and setup required. Even before the exhibition there were weeks of preparation to make sure all the food, drink and equipment was arranged, to ensure that the travel arrangements were correct and that they had all the stationery brochures and marketing materials required. She also arranged meetings with customers for while they were there. This required long hours in the lead up to the show. She describes the days spent working at the exhibition as long and exhausting. Even after the exhibition had ended she would continue to entertain customers and suppliers to forge crucial relationships. Her evidence which was not challenged was that at the exhibition in Bremen in 2014 Mr Colam praised her for her commitment to her work; he told her that she never stopped working and he was impressed by the amount of people she knew in the industry.

304. As regards her employment during 2015 again she says that neither Mr Colam nor anyone else at **Interfish** indicated that they were unhappy with her continued employment by Northbay. She had no indication or warning that they were unhappy. She was adamant that she had never "pretended to work" as was alleged.

305. There were a number of challenges to different aspects of Ms Anderson's evidence. The point which is relevant to the current dispute however is whether it was appropriate for Ms Anderson's salary to continue to be paid during 2015 when her work was as a sales person for Northbay fish and, because the factory was out of commission after the fire, there were no fish being produced and sold after the existing stock as at January 2015 had been disposed of.

306. Initially it appeared that **Interfish** was challenging the payment of Ms Anderson's salary

in both 2014 and 2015 on the grounds that even before the fire she was not actually doing any work for the company. But by the end of the trial the challenge to the payment in 2014 was not pursued. It was right, in my judgment, not to pursue this because I accept her evidence that she worked full-time for the company during 2014 and justified the salary she was paid.

307. So far as 2015 is concerned Mr Anderson's evidence that no one working in the office was laid off after the fire has not been challenged. I can see that it would not have made sense to dismiss all the staff since Northbay was hopeful that the insurance claim would cover such business interruption costs anyway and it was also thought that the factory would be up and running later in the year. It would be unwise to incur the expense of making staff members redundant when they would have to be re-employed a few months later. If the other salespeople were kept on in employment and paid their salary during the time when the factory was not operating then I do not see that Ms Anderson should be in any different position.

308. Further, **Interfish** accept that Ms Anderson should be paid for her work at the exhibitions during the months when the factory was not operating after the fire. She attended exhibitions in Brussels, Boston, Dubai, China and Hong Kong. **Interfish** estimate this at about five weeks work for which they are prepared to give credit. This does not appear to make any allowance for the substantial work that is required to organise Northbay's presence at these exhibitions or follow up with any customer enquiries afterwards. More importantly, it does not seem to me to represent how sales staff were being treated by Northbay and I do not see that the fact that she was Mr Anderson's daughter should operate to her disadvantage. I also accept Ms Anderson's evidence that it was important for her and the other sales staff to keep in touch with customers to make sure that they were reassured that the interruption in supplies from Northbay was temporary only, to keep them up-to-date with the rebuilding of the factory and to make sure that they would return to doing business with Northbay once the factory was rebuilt and processing restarted.

309. I therefore find that there was no unfairly prejudicial conduct in retaining Ms Anderson as an employee on the salaried she was paid during either 2014 or 2015.

(j) Use by E2 of Northbay storage facilities and labour

310. Another company present at the Peterhead site that Mr Anderson had an interest in was E2. There is a dispute as to whether Mr Anderson acted in breach of his fiduciary duties to Northbay by allowing E2 to store its equipment and materials free of charge on the Northbay site and to use Northbay employees in its business without charge. Mr McConville described the genesis of his relationship with Mr Anderson and Fresh Catch. Some years ago, Mr McConville operated his exhibition stand design business through a company called Cohesive Concepts Ltd. When that company became insolvent Mr Anderson bought the assets from the liquidator in December 2007. Mr McConville and Mr Anderson then agreed to set up E2 in February 2008 largely to ensure that Fresh Catch could continue to have the services of Mr McConville designing and organising their exhibitions and events. E2 started trading in March 2008. The ownership of E2 is split equally between Mr McConville and Mr Anderson with Mr McConville solely responsible for the day-to-day running of the business.

311. Initially Fresh Catch was E2's only client but then it took on work for Anderson Marine. E2 also does work for businesses which are not connected with the Anderson family although its clients are all within the seafood industry. Mr McConville's evidence was that his work was about 55 – 60% for other businesses and the remainder for Anderson companies.

312. Mr McConville says that at all times his main place of work was E2's Glasgow office. E2 never used any administrative or operational resources of Fresh Catch or Northbay although when he was working on material for stands at a forthcoming exhibition he would spend time in the Peterhead offices to liaise with Fresh Catch or Northbay about their requirements and prepare the exhibition materials.

313. He describes his working relationship with Mr Anderson and Fresh Catch as a good relationship built on trust; a mutually beneficial relationship. As part of his business he has to store a number of large items particularly exhibition stands and woodworking machinery including a significant amount of equipment used for Fresh Catch and later Northbay. In 2010/2011 Mr Anderson owned an old factory on the harbourside known as Seagate. There was an informal arrangement whereby E2's equipment was stored there rent-free. In return Mr McConville says he would provide various services to Fresh Catch without charge or at a significant discount "to reflect the mutually beneficial relationship". Later the Seagate space was rented out to a different company and Mr Anderson offered E2 some space in the basement of the main Fresh Catch facility in Peterhead to store his equipment. His evidence is that:

" … there was no formal agreement to pay rent for the space, as Fresh Catch had no particular need for the space and, in any event, some of the equipment stored was to the benefit of Fresh Catch (for instance their old exhibition stand, and various items which were at their disposal exhibitions). Instead, Chris and I agreed to a system of payment in kind in the same way as previously, whereby I would provide various services to Fresh Catch either without charge or at a significant discount, as a payment in kind, and in return I would be free to store my equipment in the basement area without the payment of rent."

314. Mr McConville also says that there were several items of large woodworking equipment stored on site to which he allowed free access for Fresh Catch and the other Anderson businesses. His evidence which I accept is that the equipment was not hidden in any way and was easily viewed and accessible by all staff. E2's equipment was stored alongside Fresh Catch equipment such as packing and grading machines - the space was "a bit of a 'dumping ground'".

315. Once the business had been transferred from Fresh Catch to Northbay Mr Anderson told Mr McConville to go ahead with the preparation for the stands for the Bremen and Boston shows in February and March 2014. Mr McConville says he got the impression that nothing would change as regards the relationship between the business and E2. A month or so later Mr McConville spoke by telephone to Mr Pillar who asked how the arrangement worked. He describes the call as having been perfectly pleasant. Mr Pillar did not raise any objection or concern with how this operated.

316. Throughout 2014 Mr McConville says that his relationship with Northbay continued exactly as his relationship had been with Fresh Catch. He did not have much direct contact with the **Interfish** directors. About 75% of the costs involved in attending an exhibition were paid directly by Northbay to the suppliers; only about a quarter of those costs would be paid through E2's books. Any costs paid through E2, such as services and utilities at the event venues and accommodation for the installation team would be recharged to Northbay together with a flat management fee each exhibition. Mr McConville's evidence was that this fee would vary depending on the size of the exhibition and the amount of work that was required for it. For the

smaller exhibitions the fee would be between £1,500 and £3,000 and for the big Brussels show it was £12,000. He says:

"The Brussels management fee had been fixed and remained unchanged for many years. It represents a significant discount on the sum that would be charged were I to take into account the actual hours spent on the project. For instance, I could spend at least 170 hours or so in Brussels alone, not taking into account the preparation time in the UK or the travel time involved. The level of discount applied reflects the relationship I had with Chris which had built up over a number of years, and the fact that the two businesses worked together for the benefit of each other. The fees charged were nowhere near commensurate to the time spent. Had [Northbay] employed another company to arrange these events, particularly the Brussels show, they would charge considerably more."

317. He notes further that Northbay continued to arrange the Brussels show on this basis after Mr Anderson's suspension as Northbay acknowledged, he says, that the arrangement with E2 was the most cost-effective way of achieving this. In addition to the exhibition work, other work completed by E2 such as work on the rebranding and preparing strategy documents was charged at a fixed rate of £50 per hour.

318. The invoices submitted by E2 for exhibitions in 2014 and 2015 were paid directly from Plymouth and no queries were raised.

319. Mr McConville's evidence, which was not challenged, was that after the disastrous fire in January 2015 he helped out with some mundane day-to-day tasks to leave Mr Anderson free to deal with the fire crews, investigators, Public Safety officers and so forth. He says that for the first 6 to 8 weeks after the fire he spent the whole working week at Peterhead. He recharged only a proportion of the expenses to Northbay and never invoiced for his own work since his priority was to help get Northbay operational again. Between 18 January 2015 and 1 May 2015 he spent a total of 639 hours working for Northbay which at the £50 discounted hourly rate would total £31,950. This would be in addition to the management fees of £20,000 builled for specific events and projects in 2015. He also accepts that E2 used a few Northbay staff in the very early days after the fire to attempt to salvage some of the damaged metalwork belonging to E2 in the basement area and to clear out the remaining materials which were loaded into trucks. He describes this as "all part of everyone pitching in to help after the fire" and set against a total of £31,950 (which was already a discounted rate) he believes that it was Northbay who were clearly ahead on the deal. Mr McConville also says that E2 helped out by paying for items that Northbay needed because much of Northbay's administration had been destroyed in the fire. As an example, E2 bought £2000 of tools which were used by Mr Reid and his team.

320. He sums up his attitude as follows:

"I remember that everyone involved at the Peterhead site was helping out wherever possible at that time. We were all very aware that [Northbay] had become a very fragile thing, and we were all doing whatever we could to help keep it alive, while at the same time dealing with all of the rumours that [Northbay] was going under. Chris had been a friend and business associate of mine for 20 years, and so I was not going to let him down at this difficult time."

321. On this point, I find that Mr Anderson was in breach of his duty to Northbay and did act

in a manner which was potentially unfairly prejudicial to Northbay by failing to inform his fellow directors of the arrangements in place with E2 for storing equipment on the site, by failing to put in place a more formal arrangement with E2 for its use of Northbay's facilities both before and after the fire to ensure that a proper account could be made between E2 in which he has an interest and Northbay. Whether or not Mr Colam or other members of the Plymouth management ever saw the E2 equipment being stored on site or realised what it was, I find that there was never any agreement or authorisation that equipment could be stored without Northbay being recompensed.

322. According to Mr Colam's evidence Northbay has raised three invoices to E2 totalling £21,000 for storage and use of Northbay employees. Mr McConville's evidence is that E2 is owed £28,174.90 by Northbay in relation to invoices for work done by the company for Northbay including a project E2 managed for Northbay in China in November 2015. I am not convinced on the evidence that any such sums are due or that the unfairly prejudicial conduct has in fact caused any detriment to Northbay. This would depend on ascertaining whether Northbay has been recompensed for storage and for any use of Northbay employees by E2 by services provided by E2 either free of charge or at a reduced price to reflect the symbiotic relationship between the two businesses. It will be for the second stage of these proceedings to investigate whether in fact Northbay was given an advantageous price for the services provided by E2 in 2014 and 2015 in return for the Northbay resources used and so whether Northbay has been disadvantaged in that way.

(k) Mismanagement of the rebuild and delays in completion

323. **Interfish** raise a large number of complaints about the way that Mr Anderson and ACIL dealt with the rebuild project. The first is an alleged failure to complete the rebuild by the end of September or start of October as allegedly agreed. The second comprises a series of criticisms about mismanagement of the rebuild work causing delay and additional expense. The third is a failure to provide information to his fellow Northbay directors about the progress of the works and the likely timeline for completion.

324. **Interfish** contend that during the March 2015 meeting when Mr Pillar produced the Gantt chart, ACIL committed to completing the build by the end of September or start of October 2015. Mr Pillar in his written evidence explains that he had experience of substantial construction projects from his previous work as a civil engineer for Taylor Woodrow and he was concerned at the March 2015 meeting that there was little detail provided by Mr Anderson as to how he was going to achieve the dates and prices he put forward on behalf of ACIL. He describes Mr Anderson as looking “rather confused” when Mr Pillar asked about a Gantt chart as he clearly was not familiar with this idea.

325. Mr Brailey who was to be the project manager of the job was not asked to provide and did not provide a time estimate for the works to completion of the factory He did not recall ever receiving a Gantt chart or any other document setting out any kind of programme for the works. He does not recall ever being told that the rebuild had to be completed within a specific timeframe although everyone knew that the aim was to get the factory back up and working as soon as possible so that Northbay did not miss the fishing season. His said and I accept:

“It would have been very difficult, at the start of the project, to agree a completion date with any certainty, given the unknowns that existed with the project. Any estimate of the time required to get the project to completion would necessarily have included a large margin for error, bearing

in mind we did not even know how much of the building had survived at the time we started working on the new design. We were all working on the assumption that it needed to be completed as quickly as possible so that the factory could start working again, but I was not aware of an agreed timescale. If the **Interfish** directors thought that they would get the building completely handed over in 7-8 months then they were pretty naïve. We got the factory to a point where it was able to produce fish in a matter of months, and as far as I am concerned that was really good going".

326. On this point I accept Cool Seas' submission that the Gantt chart did not form part of the agreement but was produced as an illustration or estimate of the likely timetable if there were no snags or unforeseen delays. At that time there was still too much uncertainty to expect any building company to commit to a timetable. The plans for the building were still at an early stage of development, discussions about planning permission were still going on with the Council and the negotiations with the insurers which might well have affected the scale and timing of the rebuild were not yet finalised.

327. Both sides blame the other for the delays in the completion of the project. Mr Anderson's evidence is that delays were caused by unexpected problems encountered on the site such as the discovery once the rebuild commenced that the drains for the factory had collapsed from the fire and had to be dug up and replaced. Further, they had hoped to be able to reuse the floor slab but this proved impossible so that at a relatively late stage of the works, the floor slab had to be dug up and replaced. Mr Brailey also said that problems arose from frequently changing requirements for the office accommodation emanating from the Plymouth management team.

328. There is plenty of evidence to establish that the management of the rebuild was chaotic. There was no structure to the works, no progress meetings, no timelines imposed and no adequate site management. There are numerous allegations of wrongdoing levelled by **Interfish** against Mr Anderson including poor health and safety provision at the site during the rebuild, mismanagement of the sequencing of the work done so that for example drainage channels had to be cut in the newly poured floor rather than forming the drainage channels in the foundations before the concrete floor is poured. This has fuelled the **Interfish** team's frustration and their suspicions – at least in retrospect - that Mr Anderson had something to hide.

329. Mr Anderson's evidence, which I accept, was that he worked very hard on the rebuild. He says that he worked without a break, very long hours going home only to shower and catch two or three hours sleep. **Interfish**'s complaints about lack of information being sent and management accounts not being produced need to be seen in this context:

"I had no sympathy or support from **Interfish** in this period during which, up in Peterhead, we were breaking our backs to both get the rebuild done and keep the profile of the business maintained - to keep customers on side and reassured that the factory was still in business".

330. On the issue of the alleged mismanagement of the building works I find that the problems that occurred were the result of two decisions made jointly by Mr Anderson and his fellow directors of Northbay. Their first decision was to start the demolition and rebuild works within weeks of the catastrophic fire rather than to take the time needed for a better assessment of the work that would be needed to be carried out by a team of independent professional surveyors or architects.

331. The second decision was that the advantages of using ACIL outweighed the disadvantages that it was a small company with little experience of such a complicated and substantial project. Everyone knew that the only real ACIL staff member was Mr Brailey, the Project Manager and there were only a handful of other labourers. Much of the rest of the work would be carried out by Northbay factory workers doubling as manual labourers on the building site. Prior to the demolition and rebuild after the fire at the Peterhead site, Mr Brailey's work had been mainly looking after maintenance and repairs including the installation of new equipment, cold rooms and blast freezers at the plant. ACIL had carried out work for other companies including some large projects for other firms in the area. In his written evidence Mr Brailey referred to a £500,000 project for one company and a £250,000 project for another company. Although these are large sums, they were much smaller projects than the £6 million project of the demolition and rebuild for Northbay. Prior to the fire Mr Brailey had never used any employees from other Anderson businesses.

332. In my judgment **Interfish**'s expectation that the very small managerial ACIL rebuild team could be expected to oversee and manage this large and complex project was unrealistic. Mr Colam thought that they could complete the rebuild in a matter of months, draw and redraw building plans on demand, produce technical drawings for him to consider and approve, liaise with the Council over obtaining the necessary permissions and warrants for the works, order and arrange for and supervise the installation of the factory equipment from a multiplicity of international suppliers, all whilst maintaining a constant flow of accurate and timely information in response to his requests and being ready at every progress meeting or emergency board meeting with facts and figures at their fingertips. This was unfair.

333. The decision to use ACIL for the rebuild had the great advantage of enabling the work to start immediately and providing employment for the Northbay factory labour whom Northbay did not want to lose. It is not clear whether in fact it turned out to be such a bad idea. If more time had been allowed for planning and assessment after the fire and a more substantial and experienced building contractor had been used then no doubt the building works once they got started might have gone smoothly. But the start of the works and hence the finish of them would have been greatly delayed. It is likely that the cost would have been much higher. Mr Brailey's evidence was that if Northbay had wanted the rebuild to be done differently they would have needed an architect, quantity surveyors and so on. He says:

“Anyone who has ever watched Grand Designs can tell you that building projects always go over time and over budget, because there are always issues that emerge later that we could not have anticipated that then have an impact on the build. … Given the scale of the works required, and the complexity of the rebuild, I would say that to get the project to 90% complete with in just 9 months was a miracle.”

334. I am sure that Mr Anderson felt harassed and overwhelmed by the constant demands emanating from the Plymouth office and matters were not, in my judgment managed fairly from that office. It was this constant pressure and competing demands on his time that led Mr Anderson to resist the requests from Mr Colam and Mr Pillar for update information and weekly progress calls. I find that he did deliberately avoid speaking to Mr Colam over this period because he was simply not in a position to give them the information that they wanted. He also made it clear to the others such as Mr Betts and Mr Reid that he did not want them to be more open with **Interfish** about the problems with the rebuild than he was prepared to be himself.

335. I have considered all these allegations relating to the building works including the service of the Enforcement Notice by the Council in January 2016. I have concluded that whatever the rights and wrongs they are not such as to affect the valuation of the shares or to amount to a breach of duty or unfairly prejudicial conduct by Mr Anderson.

VIII. CONCLUSION

336. My conclusions on the matters in dispute between the parties can be summarised as follows.

337. Cool Seas' section 994 petition is dismissed because:

i) Northbay was never a quasi-partnership and Cool Seas never had any expectation that equitable considerations inconsistent with the terms of Northbay's articles of association would operate to prevent the exclusion of Mr Anderson and Colin Anderson from the management of the company as directors once they had ceased to be employees of Northbay;

ii) in any event the dismissals of Mr Anderson and Colin Anderson were justified by their misconduct as directors of Northbay so that any prejudice to Cool Seas by their exclusion from the management was not unfair;

iii) There was no misappropriation of Northbay funds by **Interfish** in causing Northbay to pay legal fees incurred by **Interfish** with Baker Tilly and TLT.

338. **Interfish**'s cross petition under section 994 succeeds in part. As regards the legal issues raised:

i) **Interfish** is entitled to bring a claim for breach of statutory duty against Mr Anderson because Mr Anderson could not have raised a defence against a similar claim by Northbay itself by arguing that any proceedings brought against him contravened clause 4 of the ISA;

ii) **Interfish** is not precluded from obtaining relief even though it is a majority shareholder in Northbay given the scope of the Reserved Matters in Schedule 1 to the ISA for which consent is needed from Cool Seas;

iii) it is just in all the circumstances of the case to attribute Mr Anderson's wrongdoing to Cool Seas.

339. Cool Seas has managed the affairs of Northbay in a manner which is unfairly prejudicial to **Interfish** in the following ways:

i) by Mr Anderson's failure to disclose to his fellow Northbay directors the black fishing which had been carried out by Fresh Catch in the years leading up to the purchase by Northbay of the Fresh Catch business;

ii) by Mr Anderson's failure to disclose to his fellow Northbay directors the serious problems that existed between Fresh Catch and HMRC over non-payment of import duty and import VAT;

iii) by Mr Anderson's instigation and knowledge of black fishing by Northbay after the acquisition of the Fresh Catch business;

iv) by Mr Anderson failing to put in place appropriate mechanisms for recording the use of Northbay labour and other facilities by Anderson Marine; by his failure to account for such use and his failure to cause Anderson Marine to pay the agreed cross charge for that use;

v) by Mr Anderson failing to put in place appropriate mechanisms for recording the use of Northbay labour by ACIL; the question whether there has been a failure by ACIL properly to account to Northbay for the use of Northbay labour is yet to be resolved by the parties;

vi) by Mr Anderson failing to put in place appropriate mechanisms for ensuring that a proper account could be kept as between Northbay and E2 of E2's use of Northbay storage facilities and labour; however the question of whether any monies are in fact owed by E2 to Northbay is yet to be resolved by the parties.

340. There was no unfairly prejudicial conduct by Cool Seas in:

i) Mr Anderson causing Northbay to continue to pay the salary of Lynsey Anderson during 2014 and 2015;

ii) Mr Anderson's mismanagement of the rebuilding work at the Peterhead site.